

ILLINOIS POLLUTION CONTROL BOARD

OCTOBER 10, 2017

IN THE MATTER OF: )  
REGULATORY RELIEF MECHANISMS: ) R18-18  
PROPOSED NEW 35 ILL. ADM. CODE )  
PART 104, SUBPART 3 )

REPORT OF THE PROCEEDINGS held in the  
above-entitled matter before HEARING OFFICER  
MARIE TIPSORD, called by the Illinois Pollution  
Control Board, at the James R. Thompson Center,  
100 West Randolph Street, Room 9-040, Chicago,  
Illinois, on the 10th day of October, 2017,  
commencing at 9:07 a.m.

REPORTED BY: Jamye Giamarusti, CSR

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A P P E A R A N C E S

Ms. Marie Tipsord, Hearing Officer  
Mr. Anand Rao, Board Member, Technical Unit  
Ms. Brenda Carter Board Member  
Ms. Carrie Zalewski, Presiding Board Member  
Ms. Alisa Liu, Board Member  
Ms. Katie Papadimitriu, Chairman  
Ms. Tanya Rabczak, Attorney/Advisor for the Chairman  
Mr. Jerry Keenan, Board Member (in audience)

ALSO PRESENT:

Ms. Sara Terranova, IEPA Attorney  
Ms. Stefanie Diers, IEPA Attorney  
Mr. Sanjay Sofat, Witness  
Mr. Scott Twait, Witness

ALSO PRESENT:

Ms. Kathryn Pamenter, Attorney General  
Ms. Antonette Palumbo, IERG  
Ms. Susan Franzetti, Midwest Generation  
Mr. Albert Ettinger, Sierra Club  
Mr. Eric Boyd, Morton Salt  
Mr. Fred Andes, Metropolitan Water District for  
the Greater Chicago  
Mr. Josh Houser, Exxon Mobil, Flint Hills  
Resources, and the Sanitary  
District of Decatur

1 HEARING OFFICER TIPSORD: Good  
2 morning, Everyone. It's fun to see some very  
3 familiar faces and some new faces as well. My  
4 name is Marie Tipsord. I've been appointed by  
5 the Board to serve as Hearing Officer in this  
6 proceeding entitled Regulatory Relief  
7 Mechanisms, Proposed New 35 Ill. Adm. Code Part  
8 104 Subpart E.

9 With me today who will be joining us  
10 shortly is Carrie Zalewski, the presiding board  
11 member. As I said, Ms. Zalewski is currently  
12 stuck on the Blue Line. But I do have other  
13 board members present, and we will go ahead and  
14 start the hearing today.

15 To my far right is Board Member  
16 Brenda Carter. In the audience today is Board  
17 Member Jerry Keenan. And next to the end on my  
18 left, is Chairman Katie Papadimitriou and to her  
19 left is her attorney/advisor Tanya Rabczak. To  
20 my immediate left, from our Technical Unit,  
21 Anand Rao, and to his left Alisa Liu.

22 The purpose of today's hearing is to  
23 have witnesses from the Illinois Environmental  
24 Protection Agency to respond to pre-filed

1 questions in this matter. Anyone else may also  
2 be sworn in to respond to these questions after  
3 the IEPA has completed its answers. And as many  
4 of you know, I'm notorious for swearing in  
5 people who start testifying when they ask  
6 questions, so seem keep that in mind.

7 I know that we received no other --  
8 we received no pre-filed testimony, but if time  
9 permits, we will allow for testimony today. We  
10 will not continue the hearing to allow time for  
11 testimony tomorrow since none was pre-filed. If  
12 we get through with all the questions today, we  
13 will end at the end of the day.

14 We will begin our questions with the  
15 Board's questions at the request of the  
16 participants. We will allow follow up of the  
17 Board's questions and hopefully, we can take  
18 care of the other pre-filed questions from the  
19 Attorney General, the Illinois Environmental  
20 Regulatory Group, and Midwest Generation.

21 Anyone else may ask a question;  
22 however, I do ask that you raise your hand, wait  
23 for me to acknowledge you. After I have  
24 acknowledged you, please state your name and who

1 you represent before your questions.

2 Please speak one at a time. If  
3 you're speaking over each other, the court  
4 reporter will not be able to get your questions  
5 on the record. Please note that any questions  
6 asked by a board member or staff are intended to  
7 help build a complete record for the Board's  
8 decision and not to express any preconceived  
9 notion or bias.

10 I will not be entering the questions  
11 in as an exhibit today. I think they've already  
12 all been pre-filed for a matter of the record,  
13 and I don't see any need to build the record  
14 further by adding another copy of what's already  
15 in the record. So, unless someone has an  
16 objection, we'll just have the pre-filed --  
17 we'll refer to them as pre-filed questions from  
18 the Board, IERG, Midwest Gen, and AG, and that  
19 way we'll all know where to go look if we need  
20 to read them later.

21 Are there any questions? Seeing  
22 none, let's begin with the Agency.

23 Would you like to make an opening  
24 statement?

1 MS. TERRANOVA: Hello. I'm Sara  
2 Terranova, T-E-R-R-A-N-O-V-A, attorney with  
3 Illinois EPA. With me we've got Sanjay Sofat,  
4 Scott Twait, and Stefanie Diers.

5 The only comment really I want to  
6 make at this point is that for most, if not all,  
7 of what we are considering legal questions, the  
8 Agency will be submitting answers to those in  
9 writing following the hearing. And that's all I  
10 have.

11 HEARING OFFICER TIPSORD: All right.  
12 Do you want to introduce your witnesses so we  
13 can have them sworn in?

14 MS. TERRANOVA: Sure. Scott Twait.  
15 Do you want to spell your name?

16 MR. TWAIT: T-W-A-I-T.

17 MS. TERRANOVA: Sanjay Sofat.

18 MR. SOFAT: S-A-N-J-A-Y, last name  
19 S-O-F, as in Frank, A-T as in Tom.

20 HEARING OFFICER TIPSORD: Can we have  
21 the witnesses sworn in then.

22 (Witnesses sworn.)

23 HEARING OFFICER TIPSORD: And  
24 remember to project. We're talking to the back

1 of the room.

2 Do either of you want to make an  
3 opening statement, or go right to questions?

4 MR. SOFAT: Right to the questions,  
5 please.

6 HEARING OFFICER TIPSORD: Okay. With  
7 that, then I will turn it to over to the  
8 Technical Unit from the Board to start  
9 questions.

10 MR. RAO: Good morning. We'll start  
11 with Section 104.500, Purpose.

12 Question No. 1, addressing 40 CFR,  
13 Section 132.

14 Please comment on addressing 40 CRF,  
15 Section 132 in the proposed rule and whether  
16 time-limited water quality standard, TLWQS, for  
17 the Lake Michigan Basin should be included or  
18 excluded.

19 MR. TWAIT: This was an oversight on  
20 the Agency's part. The Agency supports applying  
21 the time-limited water quality standard to Lake  
22 Michigan Basin, and we note that it could be  
23 fixed by either adding a section or just a note  
24 in 500.

1 MR. RAO: When you say a note, would  
2 that be a board note?

3 MR. TWAIT: It could be. The note  
4 I'm talking about would be that there are  
5 additional requirements in 132 for the Great  
6 Lakes Basin.

7 MR. RAO: We prefer if the Agency  
8 proposed -- changed it to the rule instead of  
9 board note.

10 MR. SOFAT: Agency can do that.

11 MR. RAO: Thank you.

12 HEARING OFFICER TIPSORD: Does  
13 anybody have any follow ups to that?

14 Okay. Go ahead.

15 MR. ETTINGER: When do they intend to  
16 do this is, I guess, is a question? Is that  
17 going to happen and then we're going to see  
18 another draft? How would that happen?

19 MR. SOFAT: In the next 14 or 21 days  
20 we'll file with the Board.

21 HEARING OFFICER TIPSORD: And I would  
22 note that one of the questions I have at the end  
23 is whether or not we need to have comments,  
24 responses, and then replies to the comments.

1 So, I was going to ask if we needed to build  
2 that into a closing comment period. So, I think  
3 we're of the same mind, Albert, if they're going  
4 to make changes, then they need to allow for  
5 responses and replies.

6 Mr. ETTINGER: I should identify  
7 myself. I'm Albert Ettinger. I'm here for the  
8 Sierra Club.

9 MS. LIU: Good morning. Pertaining  
10 to Section 104.505, Applicability and Use.

11 Question No. 2, Applicability to a  
12 Watershed.

13 Would you please comment on which  
14 provisions of the Clean Water Act or USEPA rules  
15 author issuing a watershed based time-limited  
16 water quality standard.

17 Question A: Rather than using  
18 proposed Subpart E to adopt a time-limited water  
19 quality standard for a watershed itself, is  
20 IEPA's intent that the proposed rule would apply  
21 to a group of dischargers within the watershed  
22 or to certain water body or water body segments  
23 within the watershed?

24 MR. TWAIT: IEP intends for the

1 time-limited water quality standard to apply to  
2 the watershed as a whole and all of the  
3 dischargers and all of the non point sources in  
4 that watershed.

5 MS. LIU: Question B: If IEPA's  
6 intent is to adopt it to all waters within a  
7 watershed, could you please cite the basis in  
8 the federal rules for applying a blanket water  
9 quality standard variance to all waters within a  
10 watershed rather than specifically identifying  
11 each water body or water body segment or a  
12 specific dischargers.

13 MR. TWAIT: I'll note that the Clean  
14 Water Act and the federal regulations don't  
15 prohibit using water sheds in variances. We've  
16 developed this approach from talks with the  
17 USEPA and from 75 FR 75762 in response to -- and  
18 this is federal regulation.

19 In response to comments, EPA agrees  
20 that variances could be adopted on a multiple  
21 discharger basis and can be renewed so long as  
22 the state and EPA conclude that such variances  
23 are consistent with the Clean Water Act in  
24 implementing regulations.

1           In this regard, EPA allows grouping  
2 waters together in a watershed in a single  
3 variance application provided that there is a  
4 site-specific information to show how each  
5 individual water fits into the group in the  
6 context of any single variance and how each  
7 individual water meets applicable requirements  
8 at 40 CFR 13110G.

9           Unlike individual variances,  
10 downstream impacts would not be an issue under a  
11 watershed variance because they would be taking  
12 care of the whole issue. And we think this  
13 would be a streamlined, less burdensome,  
14 cost-effective process for sources to seek  
15 relief.

16           HEARING OFFICER TIPSORD:

17           MR. ETTINGER: What do you mean by  
18 downstream impacts? You mean downstream within  
19 the watershed or downstream from the watershed?

20           MR. TWAIT: Downstream from the  
21 watershed.

22           MR. SOFAT: In absence of a watershed  
23 variance, whether it's a water body or MDVs,  
24 there could be an issue of downstream impact.

1 So when you define a watershed, such that you  
2 can remove the downstream impact issue, then you  
3 can be consistent with 122.44D1.

4 MR. ETTINGER: Okay. Let me take an  
5 example. Let's say, for example, that I want a  
6 variance for the Spoon River Watershed. You're  
7 not suggesting that I could get a variance for  
8 the Spoon River Watershed that would allow me to  
9 put pollutants into the Spoon River that would  
10 violate water quality standards for the Illinois  
11 River, are you?

12 MR. SOFAT: No, we are not.

13 MR. ETTINGER: So, that's what I'm  
14 confused by, by the downstream doesn't need to  
15 be considered.

16 MR. SOFAT: I see your point. It's  
17 within the watershed. As I said, let's say  
18 there's Spoon River. There are five dischargers  
19 on it. So options are they could ask for MDV,  
20 they could ask for a water body segment or water  
21 body variance.

22 However, if their situation is such  
23 that -- and, again, let me clarify. Watershed  
24 variances are not fit for every scenario.

1 Watershed variances are fit for scenarios where  
2 you have point sources, non point sources type  
3 of pollution. Perfect example is chloride issue  
4 that we have in Chicago area during winter  
5 months.

6 The sources are both point sources  
7 and non point sources. To have a water body or  
8 water body segment or even MDV variance for that  
9 will create downstream impact issues. So, in  
10 situation like that, you create a watershed that  
11 allows you to eliminate that downstream impact  
12 issue.

13 Also, in order for you to have  
14 extension in the future, you need to show a  
15 progress, a good progress over time which you  
16 cannot make if both sources, point and non point  
17 sources are contributing to it.

18 So those are the limited scenarios  
19 where you use watershed variance. And watershed  
20 variance, we are not saying that it should be  
21 used to eliminate the downstream impact. We are  
22 saying it's just a benefit that it provides.

23 MR. ETTINGER: Okay, to use your  
24 example then, in designing a chloride variance

1 for, say, the Chicago River, I would have to  
2 take into account that any variance I would  
3 grant for chloride in the Chicago River would  
4 not cause an impact in the Des Plaines or  
5 Illinois River.

6 MR. SOFAT: Right.

7 MR. ETTINGER: Thank you.

8 MR. RAO. Just to follow up, Sanjay.  
9 You mentioned in your example for chloride that  
10 you create a watershed for that particular  
11 pollutant. So, in a chloride proceeding will  
12 the Agency delineate what is a watershed?

13 MR. SOFAT: Yes. We will be  
14 delineating that. And we saw from the questions  
15 that we need to do that and all the water bodies  
16 within that watershed, therefore, will be  
17 considered as, you know -- well, those water  
18 bodies will receive the variance.

19 Because the objective is to make  
20 progress. And unless every source -- not every.  
21 All sources are involved, both types, progress  
22 cannot be shown. And, therefore, extension and  
23 other things are not going to happen in the  
24 future.

1 HEARING OFFICER TIPSORD: Mr. Andes.

2 MR. ANDES: Fred Andes, Barnes &  
3 Thornburg for the Metropolitan Water Reclamation  
4 District of greater Chicago.

5 Let me try to clarify on the question  
6 of impact on downstream waters. If, say,  
7 there's a variance being considered for the  
8 Chicago River and because dischargers cannot  
9 meet the chloride standard, and those  
10 dischargers have some impact on the low  
11 Des Plaines River, when they apply for the  
12 variance and they say they cannot comply with  
13 the standards, they would still be eligible,  
14 correct, even though there is some impact on the  
15 downstream water?

16 MR. SOFAT: You will have to consider  
17 in that case then impact on the downstream  
18 dischargers. So that issue needs to be  
19 considered by the upstream dischargers.

20 MR. ANDES: So they will be  
21 considered in the variance process?

22 MR. SOFAT: In the variance process,  
23 yeah, in the demonstration. Because we don't  
24 want to create situations where upstream

1 dischargers are getting variances and causing or  
2 contributing to violation of the water quality  
3 standard at the downstream dischargers.

4           So, those are, and again, as I said,  
5 watershed variances are not specifically for  
6 that issue. It's just that, first, you have to  
7 decide, is this issue, that means it's a  
8 widespread pollution and coming from point and  
9 non point sources, and to make meaningful  
10 improvements, you need both sources to work on  
11 that. That's when you know this is a watershed  
12 setting, and I think chloride during winter  
13 months, that's a perfect setting.

14           MR. ANDES: So analysis of the  
15 downstream impact for a watershed variance is  
16 basically the same analysis, correct, as in any  
17 other variance context?

18           MR. SOFAT: Yes.

19           MS. FRANZETTI: It would be helpful  
20 if you could explain the difference between a  
21 water body TLWQS versus a watershed TLWQS.

22           Because when Albert, for example, was  
23 asking the question about the Chicago River, to  
24 me, that could be a water body TLWQS for the

1 Chicago River, not really a watershed.

2 So I'm struggling a little bit as to  
3 when in the Agency's evaluations of these  
4 proposed rules a watershed variance is  
5 appropriate versus a water body variance.

6 Susan Franzetti, F-R-A-N-Z-E-T-T-I,  
7 representing Midwest Generation.

8 MR. SOFAT: So let's also talk about  
9 which pollutant are we talking about?

10 MS. FRANZETTI: Which -- excuse me?

11 MR. SOFAT: Which pollutant.

12 MS. FRANZETTI: Pollutant. Okay.

13 MR. SOFAT: So, in your hypothetical,  
14 what pollutant are we trying to address?

15 MS. FRANZETTI: If you can choose one  
16 for purposes, I'm just really trying to get a  
17 little better understanding and clarity as to  
18 when dischargers should be thinking a watershed  
19 TLWQS may be appropriate versus a water body  
20 TLWQS.

21 MR. SOFAT: The only two examples  
22 that come in my mind is the chloride during  
23 winter months and nutrients.

24 MS. FRANZETTI: Nutrients. Okay.

1 MR. SOFAT: Those are the two ways I  
2 can see watershed variances helping a lot, doing  
3 what we know -- what variances stand for.

4 Water body, that means, the problem  
5 is limited to that water body, or the  
6 dischargers into that water body. So, it's not,  
7 like, blanket, let's have the whole watershed,  
8 you know, under a variance. That is not why we  
9 are doing it.

10 It's the nature of the pollution that  
11 we are dealing with. It's so widespread and  
12 coming from all type of sources that if -- let's  
13 say, we just say, oh, why not? Let's just do  
14 one water body.

15 Okay. So five years go by, 10 years  
16 go by, let's say that's the duration of the  
17 variance. Now, at that point, water body still  
18 are not in compliance. So, let's say then we  
19 want extension. Now, extension depends on  
20 whether or not you made a meaningful progress.

21 So what can a point source do if they  
22 are not adding chloride to their mainstream.  
23 That's the scenario. So it really depends on  
24 the pollution, the extent of the pollution, and

1 the sources involved.

2 And as I said, this is not -- like,  
3 it's not like a desire to have all water bodies,  
4 you know, covered. It's really to help make the  
5 progress. Those are the circumstances where we  
6 are thinking about using watershed.

7 MR. TWAIT: And a water quality or  
8 water body segment, you might have the receiving  
9 stream have an issue with copper. And let's say  
10 you've got an industrial facility that's  
11 discharging copper and there's a couple  
12 municipal facilities discharging copper.

13 That would be a good -- and if  
14 they're all going to the same stream segment,  
15 that would be a good example of having a water  
16 body segment time-limited water quality  
17 standard.

18 MS. RABCZAK: It sounds like this  
19 might be appropriate if you submit an  
20 explanation to maybe those examples in writing  
21 so that it's part of the record.

22 MR. SOFAT: Okay. We can do that.

23 MS. PALUMBO: My name is Antonette  
24 Palmubo, A-N-T-O-N-E-T-T-E, P-A-L-U-M-B-O. I'm

1 with the Illinois Environmental Regulatory  
2 Group.

3 So my first question, what if a  
4 watershed that you delineated overlaps with  
5 multiple water quality standards? We are  
6 talking about the chloride example. So, what  
7 about the general use and the cause in the  
8 Chicago area? Would that require multiple  
9 proceedings?

10 MR. TWAIT: I don't think so. Each  
11 of those uses would have to be defined in the  
12 proposal. But in the example for chloride, the  
13 water quality standard is the same for each of  
14 them. So, regardless of the use, you know, I  
15 think we can take care of that.

16 MS. PALUMBO: In the IERG's pre-filed  
17 Question No. 9 fits in with this line of  
18 questioning, so I'm going to go ahead and raise  
19 that now, if that's okay.

20 For the watershed time-limited water  
21 quality standard, is the protection afforded  
22 from the time-limited water quality standard for  
23 all dischargers within that watershed or only  
24 those that were active in the proceeding?

1 MR. TWAIT: You don't necessarily  
2 need to be part of the proceeding to receive the  
3 afforded protection under the time-limited water  
4 quality standard. If the Board makes a coverage  
5 for classes of dischargers, then you may  
6 participate in that way through the Agency.

7 MS. PALUMBO: What factors will the  
8 Agency consider when it makes its recommendation  
9 for what type of time-limited water quality  
10 standard should be granted?

11 MR. TWAIT: We'll look at the source  
12 of pollution and the sources of -- or the type  
13 of pollution that we're talking about and the  
14 different sources involved.

15 If it is something that has a lot of  
16 non point issues, that would be a good candidate  
17 for a watershed variance. If it's only one  
18 discharger, then that would be a good case for  
19 an individual time-limited water quality  
20 standard. And if there was several groups, it  
21 would be good for a MDV. And what I mean by  
22 groups is with an MDV they have to be --

23 HEARING OFFICER TIPSORD: What is an  
24 MDV?

1 MR. TWAIT: Multi-discharger  
2 variance. And they have been to be grouped in  
3 such a way as you're not mixing municipal  
4 facilities with industrial dischargers, but if  
5 you had a common issue with a certain type of  
6 industry that was similar in size, they could be  
7 grouped in a multi-discharger variance.

8 MS. PALUMBO: What if there is a  
9 petition for a watershed time-limited water  
10 quality standard and a discharger within that  
11 watershed is not active within the proceeding  
12 and they don't seek coverage under the proposed  
13 coverage for -- under your NPDES permit, how is  
14 that discharger covered then? What prevents  
15 them from being enforced on?

16 MR. TWAIT: If they don't participate  
17 in the Board proceeding, and they don't ask the  
18 Agency for coverage, there NPDES permit will  
19 have the water quality standard placed in it,  
20 the underlying water quality standard.

21 MS. PALUMBO: Thank you.

22 HEARING OFFICER TIPSORD: Yes.

23 MR. BOYD: Eric Boyd, Thompson  
24 Coburn, on behalf of Morton Salt.

1 I want to go to back to a second ago,  
2 we're talking about chlorides and the watershed  
3 variances. The process it outlines allows for  
4 petitioners to petition for watersheds or water  
5 body or individual discharge variances.

6 My question is: Who decides and what  
7 criteria is used by the Agency and the Board as  
8 to which standard will be -- which variance will  
9 be granted? If someone wants a water body  
10 variance and someone else wants a watershed  
11 variance, who makes that decision? What  
12 criteria is used?

13 MR. SOFAT: So the primary  
14 responsibility is on the petitioner. All we are  
15 doing is we are helping out the process. We're  
16 talking to USEPA to make sure if somebody  
17 chooses to do single discharger, then they know  
18 what the burden of proof is.

19 If they decide to do MDV, then they  
20 know what the burden of proof is. But if the  
21 primary responsibility falls on the petitioner  
22 to decide, we cannot force somebody to, hey, you  
23 need to do MDV versus watershed.

24 We'll tell you the advantages, but

1 that's ultimately on the petitioner to decide  
2 what they really want.

3 Now, our concern has been, and that's  
4 why you will see the concept, like, substantial  
5 compliance and other things in here, that by the  
6 time this variance package gets to USEPA, it  
7 must be such that it can be approved by USEPA,  
8 that it is consistent with 131.14.

9 MR. BOYD: Sorry. Just another  
10 follow-up. Has the chloride water quality  
11 standard for the cause of the low Des Plaines  
12 River, has that been approved by the USEPA yet?

13 MR. SOFAT: Can you repeat your  
14 question, please?

15 MR. BOYD: Sure. Is the  
16 500-milligram per liter chloride standard for  
17 cause of the low Des Plaines River that the  
18 Board adopted in July of 2015 been approved by  
19 the USEPA?

20 MR. SOFAT: Not yet.

21 MR. BOYD: When do you expect that to  
22 happen?

23 MR. SOFAT: We have certain issues  
24 that we are talking to the USEPA about. Once we

1 know which way they want to go, we'll file a  
2 package, ask for approval.

3 MR. BOYD: Will that be done before  
4 July of 2018 when --

5 MR. SOFAT: That's our intention,  
6 yes.

7 MR. BOYD: Thank you.

8 HEARING OFFICER TIPSORD: All right.  
9 I think we're ready to then move on to a couple  
10 of simpler questions I suspect.

11 Question No. 3 deals with 101.510.  
12 And it asks about clarifying Section 104.510 by  
13 changing some words so the provision would be --  
14 if any provision of this subpart or its  
15 application to any person is judged invalid, the  
16 adjudication will not affect the validity of any  
17 other provisions of this part or the validity of  
18 this subpart as a whole.

19 Would the Agency be okay with that  
20 change?

21 MR. TWAIT: The Agency supports that  
22 change.

23 HEARING OFFICER TIPSORD: Okay.  
24 Question No. 4 is for Definitions. And this is

1 just one where we would combine the first two  
2 sections to read, unless defined in subsection  
3 B, words have the definitions provided in the  
4 Act and 35 Ill. Adm. Code 101, subpart B.

5 Is the Agency okay with that?

6 MR. TWAIT: The Agency supports that.

7 HEARING OFFICER TIPSORD: And just  
8 for the record, I would note that that change  
9 was one that JCAR had made before it went to  
10 first notice, so we want to be sure that we have  
11 the support to change it back.

12 MR. RAO: Moving on to I think it's  
13 under the same Section 104.515, Highest  
14 Attainable Use.

15 Please comment on providing a  
16 definition of highest attainable use in the  
17 proposed rule like the one in the federal  
18 regulations.

19 MR. TWAIT: The Agency supports the  
20 definition of HAC, highest attainable use.

21 MS. LIU: Question No. 6 --

22 MR. SOFAT: Sorry. If I could add to  
23 the previous response.

24 As we all know, this is an evolving

1 issue HAC/HAU, so our intention is to help the  
2 petitioners with whatever guidance document and  
3 other things that USEPA comes out with. Because  
4 our intention is to closely follow what USEPA  
5 comes out on this one.

6 MR. RAO: Thank you.

7 MS. LIU: Question No. 6, Non-101  
8 (a) (2) uses.

9 Would you please comment on including  
10 a definition similar to 40 CFR 131.3(q).

11 MR. TWAIT: The Agency supports the  
12 definition that they have in their pre-filed  
13 questions.

14 MR. RAO: Continuing under the same  
15 section, Question No. 7, Best Management  
16 Practices.

17 Please comment on including a  
18 definition for best management practices in the  
19 proposed rules.

20 MR. TWAIT: The Agency supports the  
21 definition of BMP being included.

22 MS. LIU: Under Section 104.520,  
23 General Procedures. Question No. 8 refers to  
24 the Applicability to Persons.

1           Question A, please comment on whether  
2 the proposed rule should be revised and  
3 applicable to NPDES permittees, not simply  
4 persons, for consistency with the federal rule.

5           MR. TWAIT: The Agency disagrees with  
6 this particular change. The intent is to allow  
7 watershed groups to file a petition. And in  
8 addition, if we have non point source pollution,  
9 401 dischargers could apply also. We support  
10 the definition that is in 35 Illinois  
11 Administration Code 101 for persons.

12           HEARING OFFICER TIPSORD: Yes.

13           MS. FRANZETTI: Have you thought  
14 through whether or not you do have jurisdiction  
15 over the non NPDES permittees that you were  
16 mentioning there as potentially included?

17           MR. TWAIT: If we --

18           MR. SOFAT: We don't have the  
19 jurisdiction on them, non point sources.

20           MS. FRANZETTI: And that's just a  
21 legal concern I have is I'm not sure you can  
22 regulate them by a time-limited water quality  
23 standard if the clean water doesn't regulate  
24 them. I don't know for a fact the answer. I'm

1 just raising the concern.

2 MR. SOFAT: It's not about --  
3 variance doesn't mean your are regulating them.  
4 It simply says that they are covered. And let's  
5 say there's, in the future, some control  
6 mechanisms or even trading or some other  
7 concepts that we are not envisioning, that comes  
8 into play, and, therefore, variance is necessary  
9 for non point.

10 That's where we are coming from.  
11 That there's no harm in when they are causing  
12 the -- part of the problem having that variance  
13 is maybe useful to them. Maybe not today; maybe  
14 in the future.

15 But we are not saying we have  
16 jurisdiction on them. We are not saying that  
17 because water quality standard variance for a  
18 water body or watershed somehow gives us  
19 authority to regulate them. That's not where we  
20 are going.

21 MS. FRANZETTI: So you're  
22 contemplating that it's almost a voluntary act  
23 on the part of the non point source discharger  
24 that they may wish to be covered, and so you're

1 providing the opportunity to be covered?

2 MR. SOFAT: That's definitely one  
3 scenario. And any other future scenarios that I  
4 can't envision. So, point is, that we don't see  
5 any disadvantage to having that when the Clean  
6 Water Act allows that. Why now create  
7 situation? I'm not sure how trading might work  
8 out or some other control that they may decide,  
9 because there are some states where they have  
10 some non point source controls.

11 So, it's just going back and then  
12 updating our variance. Why not adopt as it's  
13 intended at the federal level. The worst part  
14 is that it will never be used for non point  
15 sources.

16 HEARING OFFICER TIPSORD: Yes, Ms.  
17 Palumbo.

18 MS. PALUMBO: Wouldn't the coverage  
19 under the time-limited water quality standard  
20 bring terms and conditions that have to be met,  
21 if you're covered?

22 So, if there's a jurisdictional  
23 question as to whether the watershed groups or a  
24 non point source can be regulated by Illinois

1 EPA, isn't there still a requirement that the  
2 person that is covered follow through with the  
3 requirements and the regulations to do, for  
4 example, the best management practices or meet  
5 the HAC.

6 MR. TWAIT: Yes. If they're covered  
7 under the variance, they would be required to  
8 the BMP and any other requirements that the  
9 Board --

10 MS. PALUMBO: So if there's no  
11 jurisdiction over, for example, a non point  
12 source discharger and they don't do the best  
13 management practices, what resource does  
14 Illinois EPA have over that non point source  
15 discharger?

16 MR. SOFAT: As I said earlier, the  
17 objective is not to get non point sources to use  
18 those BMPs. However, when you calculate HAC,  
19 you are supposed to consider what could be done  
20 by them in deciding the HAC. So, HAC won't be  
21 just what point sources can do. It's also what  
22 non point sources could do. So that decides the  
23 HAC. So that's why you need that element.

24 HEARING OFFICER TIPSORD: Mr. Sofat,

1 now you're using HAC.

2 MR. SOFAT: Highest attainable  
3 condition. I'm sorry.

4 HEARING OFFICER TIPSORD: Thank you.

5 MR. SOFAT: That's just my -- sorry.  
6 Highest attainable condition.

7 And now I lost my thought.

8 HEARING OFFICER TIPSORD: Sorry. Do  
9 you want her to read back what you were saying?

10 MR. SOFAT: No. Did I --

11 MS. PALUMBO: That's helpful. Yeah.  
12 Thank you.

13 MS. LIU: Question B, would you  
14 please comment on whether someone seeking a new  
15 NPDES permit but who is not yet a permit holder  
16 could apply for a time-limited water quality  
17 standard.

18 MR. TWAIT: The intent is for both  
19 new and existing NPDES permit holders and new  
20 and existing 401 projects to have the  
21 opportunity to petition for a time-limited water  
22 quality standard.

23 The time-limited water quality  
24 standard is not necessarily a relief mechanism,

1 but an alternate water quality standard.

2 MR. RAO: Question No. 9, list the  
3 facilities covered by time-limited water quality  
4 standards.

5 Please comment on providing a  
6 presence on IEPA's website for a list of  
7 facilities covered by current time-limited water  
8 quality standard.

9 MR. TWAIT: The Agency can include  
10 that information on our website.

11 HEARING OFFICER TIPSORD: Yes,  
12 Ms. Franzetti.

13 MS. FRANZETTI: In doing that,  
14 though, will it be a clear that just because you  
15 might be left off the website listing, that  
16 that's not determinative of whether or not  
17 you're covered by the time-limited water quality  
18 standard.

19 MR. TWAIT: I think we can agree to  
20 that if we didn't have an updated list for  
21 whatever reason. Our intention is to put the  
22 petitioners that originally file. We'll add in  
23 the petitioners that file up to the deadline.

24 So they're part of the time-limited

1 water quality standard and then we'll include  
2 any of those that receive coverage through the  
3 time-limited water quality standard with the  
4 Agency.

5 MS. FRANZETTI: And I'm also  
6 considering the Agency's perspective on  
7 watershed based time-limited water quality  
8 standards. You may not know everybody that is  
9 covered in that situation.

10 MR. TWAIT: They would either have to  
11 file the original petition, file a petition and  
12 get coverage with the Board, or get coverage  
13 with the Agency through the Board's criteria.

14 So the Board would identify them in  
15 the order, everybody that's included at that  
16 point, and then we would include them as they  
17 ask for coverage through the criteria.

18 MS. LIU: No. 10, Information on  
19 Individual Dischargers.

20 Would you please comment on including  
21 provisions in the petition contents under  
22 proposed Section 104.530 that would clarify that  
23 an individual permittee be included under a  
24 multi-discharger variance would need to submit

1 their own information; for example, public or  
2 private discharger, industrial classification,  
3 size, effluent quality, existing or needed  
4 treatment train, pollutant treatability, and  
5 available revenue.

6 MR. TWAIT: The Agency supports the  
7 proposed clarification. But I would like to  
8 mention we think that USEPA is kind of evolving  
9 in their process for MDVs. They approved a MDV  
10 with Wisconsin, and Wisconsin looked at  
11 phosphorus MDV and they calculated all the  
12 impacts within the state.

13 I think the figure was \$6 billion and  
14 they included the impacts to the workers, and so  
15 they didn't look at the individual facilities in  
16 approving the variance. However, in order for  
17 someone to be covered, they set up criteria at  
18 that point that they had to meet for each  
19 individual facility. But the overall variance  
20 was adopted based on impacts to the state.

21 HEARING OFFICER TIPSORD: Question  
22 No. 11 and 12 both deal with the state provision  
23 at 104.525.

24 Would the Agency agree to a change in

1 104.525(a) (3) that would clarify the language as  
2 set forth in the question. Is that acceptable  
3 to the IEPA?

4 MR. TWAIT: The Agency disagrees with  
5 this particular change. We've used the language  
6 that's directly from the statute at  
7 38.5(h) (1) (c). If we changed it to the language  
8 that the Board has proposed, the stay is based  
9 upon meeting the deadline that's been  
10 established for classes.

11 If the underlying time-limited water  
12 quality standard was not applicable for a stay,  
13 such as a chloride standard for DuPage  
14 watershed, because it's an existing standard, a  
15 stay is not applicable for them.

16 If the Board set a deadline for the  
17 class of dischargers to file, then everybody  
18 that then filed within the deadline would have  
19 the stay. So we think there's some problems  
20 with the current proposed language.

21 HEARING OFFICER TIPSORD: But (a) (2)  
22 says that stays are only applicable to any  
23 person who filed a petition for a time-limited  
24 water quality standard within 35 days after the

1 effective date of the water quality standard.

2 So (a)(2) sets that forth already  
3 that it's only within 35 days that you get a  
4 stay. And I understand that this is the  
5 statutory language, but as you'll see from the  
6 next question, too, where we ask you to clarify  
7 (b) and (c), the statutory language is very  
8 convoluted. And so this is our opportunity to  
9 make it less so.

10 And so we, you know -- I was going to  
11 ask you about changing 104.525(b) and (c) with  
12 something a little more clear. I think we  
13 really need to look at trying to make this a  
14 little less convoluted. If you disagree with  
15 this language, I would ask that you take a look  
16 at this section and see if we can come up with  
17 something that's a little clearer.

18 And, like I said, I understand what  
19 you're saying about we don't want to suddenly  
20 make the stay effective to everyone, but I think  
21 you already have an (a)(2) who gets a stay;  
22 (a)(1) and (2) covers who gets a stay; and then  
23 (a)(3) then talks about classes of dischargers.  
24 And I just think that we need to make this a

1 little clearer so that people understand.

2 I don't think we need to have a white  
3 board to try to figure out who gets stays.  
4 Right now, I think under the statute, you need a  
5 white board to figure out who gets a stay.

6 So I will waive 12 because I assume  
7 the answer is similar and ask you to please take  
8 a look at this and see if we can't come up with  
9 something that's a little less convoluted.

10 MR. SOFAT: We'll try our best.

11 MS. FRANZETTI: Will the Agency just  
12 elaborate on what's the meaning of the phrase  
13 classes of dischargers versus, like, a  
14 multi-discharger variance?

15 MR. TWAIT: Well, you would have  
16 classes of dischargers in a multi-discharger  
17 variance; like, the classes of dischargers might  
18 be small lagoons or it might be large wastewater  
19 facilities or it might be a certain type of  
20 industrial facilities.

21 MS. FRANZETTI: Is the idea that you  
22 may need to define or identify classes of  
23 dischargers because under the terms of the  
24 time-limited water quality standard there may be

1 different requirements or conditions imposed  
2 depending upon which class you're in?

3 MR. TWAIT: Yes. And the burden of  
4 proof might also be different. The  
5 demonstration might be different instead of the  
6 burden of proof.

7 MS. RABCZAK: Section 104.530,  
8 Petition Contents. Question No. 13 is asking to  
9 comment on whether the term "predecessors" in  
10 Section 104.530(a)(8) needs to be defined.

11 MR. TWAIT: We've taken predecessors  
12 from existing Board regulations at  
13 104.204(b)(3). If we decide that it needs to be  
14 defined in the regulations, we're not sure where  
15 it should be defined, whether it's 104 or 101.

16 MS. RABCZAK: So you're just  
17 referring to the term that was already defined?

18 MR. TWAIT: It's not defined. But  
19 it's used in 104.204(b)(3).

20 MS. RABCZAK: Does it make sense to  
21 have a reference to a defined term?

22 MR. SOFAT: If the Board feels the  
23 need to define it, we can propose something.

24 MS. RABCZAK: Question 14.

1 HEARING OFFICER TIPSORD: Sorry.

2 Mr. Boyd has follow up.

3 MR. BOYD: Just a quick follow-up.

4 It looks like the contents of the  
5 petition, everything in 104.530, seems to be  
6 based on existing variance regulations. And my  
7 question is, why did the Agency feel that was  
8 necessary if the real intent of these  
9 regulations is to adopt a water quality standard  
10 variance process, like, under the USEPA  
11 regulations?

12 MR. TWAIT: Everything in 104.530 is  
13 not taken from existing Board regulations. Some  
14 of them are from federal rules.

15 MR. BOYD: My question is, why were  
16 the provisions that were taken from the existing  
17 variance regulations included?

18 MR. SOFAT: Because they were useful  
19 for the water quality standard variance  
20 petitions. And, again, we only took what we  
21 thought was relevant. And, again, I'll say  
22 something that what we were trying to do, you  
23 will see that we are a separate Section 38.5 in  
24 the Act and we are trying to create all of that

1 separate because historically Illinois had  
2 variances that were not consistent with 131.14.

3 So what we are trying to do our best  
4 is to make sure nobody is confused that the  
5 previous ways are still relevant. So this was  
6 our attempt to say, put it in one place, one  
7 package so that people can just read it and say,  
8 okay, I know it. For a water quality standard  
9 variance, this is all I need to worry about;  
10 this is all I need to know.

11 So that was overall the thought  
12 process as to why we draft the statute the way  
13 it is and why we are trying to create a separate  
14 subpart here, and then why are we importing  
15 provisions from existing regulations. Because  
16 we want it at one place, so that it's convenient  
17 and easy for petitioners.

18 MS. RABCZAK: Please clarify whether  
19 the word "name" in Section 104.530(a)(9) means  
20 the name of the petition holder?

21 MR. TWAIT: It does.

22 MS. RABCZAK: Question 15. To  
23 clarify Section 104.530(a)(11), would you agree  
24 to the proposed change?

1 MR. TWAIT: The Agency supports this  
2 change.

3 MS. RABCZAK: Question 16, subsection  
4 (a) (14). Would you agree to the proposed  
5 change?

6 MR. TWAIT: The Agency supports that  
7 change.

8 MS. RABCZAK: Question 17. The  
9 proposed change in Section (b) (1), would you  
10 agree to that change?

11 MR. TWAIT: Yes. The Agency supports  
12 that change.

13 MS. RABCZAK: Question 18, subsection  
14 (b) (2). Would the Agency agree to the proposed  
15 change?

16 MR. TWAIT: We would. I would like  
17 to take this time to mention that we had a  
18 typographical error between the existing and  
19 water quality standard. It should say  
20 time-limited. So it would read existing  
21 time-limited water quality standard.

22 HEARING OFFICER TIPSORD: For those  
23 of you who may not have that in front of you,  
24 the first sentence of that would be: If the

1 petition is for an extension of an existing time  
2 limit water quality standard.

3 MR. TWAIT: Thank you.

4 MS. RABCZAK: Question 19, please  
5 clarify whether Section 104.530(c) and (d) cover  
6 different potential situations. For example, if  
7 a multi-discharger can potentially be something  
8 other than a watershed water body or water body  
9 segment.

10 THE COURT REPORTER: I'm sorry. I  
11 didn't hear you. Could you please repeat what  
12 you just said.

13 MS. RABCZAK: Please clarify whether  
14 the subsection 104.530 (c) and (d) cover  
15 different potential scenarios; for example, if a  
16 multi-discharger time-limited water quality  
17 standard can potentially be something other than  
18 a watershed, water body or water body segment  
19 time-limited water quality standard.

20 MR. TWAIT: 530 (c) and (d) are  
21 similar in nature; and the Agency would support  
22 their consolidation.

23 MS. RABCZAK: Thank you.

24 MR. RAO: Question No. 20,

1 Identification of water body.

2 Please comment on revising the  
3 petition content requirements to include the  
4 name and some written identifying description of  
5 the water body or the water body segment in  
6 addition to the map.

7 MR. TWAIT: The Agency supports that  
8 change; and we would be willing to provide this  
9 information based on the Agency's current  
10 identification system.

11 MR. RAO: Thank you.

12 MS. LIU: Question No. 21,  
13 Identification of Currently Applicable Water  
14 Quality Standard.

15 Would you please comment on revising  
16 the petition content requirements to identify  
17 the currently applicable water quality standard  
18 under proposed Section 104.530.

19 MR. TWAIT: The Agency would support  
20 that change.

21 MR. RAO: Question 22, All Pollution  
22 Minimization Plans.

23 Question A, under 22, is the  
24 requirement that proposed Section 104.530

1 (a) (11) overly broad in requiring a petitioner  
2 to submit all pollution minimization plans that  
3 might have nothing to do with reduction in  
4 pollutant loadings to water?

5 MR. TWAIT: Yes. We would agree that  
6 is overly broad.

7 MR. RAO: Question B, to narrow the  
8 submission of plans to only those relating to  
9 water, should the definition in proposed  
10 Section 104.515 parallel the federal definition  
11 and include in the context of this part, such as  
12 the following language?

13 MR. TWAIT: We believe that 104.530  
14 (a) (11) should be changed to reference that all  
15 PMPs relevant to the requested relief be added  
16 instead of changing the definition.

17 HEARING OFFICER TIPSORD: Could you  
18 provide that to us in writing so that we're sure  
19 we get it.

20 MR. TWAIT: Yes.

21 MS. LIU: Question 21, would you  
22 please comment on whether Section 104.530 (a) (1)  
23 is missing a word or a phrase with respect to  
24 compliance.

1 MR. TWAIT: It is missing a phrase  
2 between the word support and compliance. It  
3 should have the petitioner's argument that.

4 So it will read: Data describing the  
5 nature and extent of the present or anticipated  
6 failure to meet the water quality standard or  
7 standards and facts that support petitioner's  
8 argument that compliance with the water quality  
9 standard regulation or regulations cannot be  
10 achieved by any required compliance date.

11 MR. RAO: Question No. 24,  
12 Consideration of Downstream Impacts.

13 Please comment on including a  
14 requirement in the petition content under  
15 Section 104.530 for the petition to demonstrate  
16 assurance that the time-limited water quality  
17 standard variance will not conflict with  
18 downstream water quality standards.

19 MR. TWAIT: We believe that with a  
20 variance, that downstream impacts to water  
21 quality standards will happen; such as, with an  
22 individual discharger, that needs to get a  
23 variance to discharge excess of a certain  
24 parameter. We know that there's going to be a

1 downstream impact. And that's fine with a  
2 variance.

3           Where that impact is affecting  
4 another downstream discharger, then that impact  
5 has to be addressed; such as, if I was  
6 discharging a parameter and using up the entire  
7 stream for, say, copper, if there is another  
8 discharger downstream that needs mixing to meet  
9 copper, then when I do my variance, I have to  
10 make -- I have to address that downstream  
11 discharger.

12           MR. RAO: Would that be the burden of  
13 the petitioner or will the agency get involved  
14 in the process.

15           THE WITNESS: I think that is the  
16 burden of the petitioner. And the Agency will  
17 try to step in and mention when that's going to  
18 happen.

19           MR. RAO: Thank you.

20           HEARING OFFICER TIPSORD: Yes,  
21 Mr. Ettinger.

22           MR. ETTINGER: I see two problems  
23 here, and I just want to make sure we're clear  
24 on both of them.

1           You're concerned about downstream  
2           dischargers that are using some sort of  
3           assimilative capacity that they've got now that  
4           they won't have in the future. And you're  
5           saying as I understand it that part of the  
6           variance procedure of the upstream variance will  
7           be consideration as to whether this will use up  
8           assimilative capacity of the downstream  
9           dischargers; is that correct?

10           MR. TWAIT: Yes.

11           MR. ETTINGER: I don't care about the  
12           downstream discharger. I care about downstream  
13           water quality. In every case, we will not allow  
14           a variance which will cause substantial damage  
15           or cause a violation of water quality standards  
16           in the downstream water; is that correct?

17           MR. TWAIT: Well, the purpose of the  
18           variance is to change the underlying water  
19           quality standard.

20           MR. ETTINGER: But not of the  
21           downstream water?

22           MR. SOFAT: If the downstream water  
23           is not included in the variance, you're right.  
24           We cannot do that.

1 MR. ETTINGER: Right. So you would  
2 have to -- if you're going to not include the  
3 downstream water in the variance, you're going  
4 to have to leave the water quality standard  
5 alone in the downstream water and protect that  
6 water quality standard. Of course, if you're  
7 going to seek a variance of that water body,  
8 too, then that would have to be shown?

9 MR. TWAIT: Right.

10 HEARING OFFICER TIPSORD: Go ahead,  
11 Mr. Andes.

12 MR. ANDES: Two clarifying questions.

13 So, when we're submitting an  
14 application, whether it's watershed or  
15 otherwise, and one specified that you were  
16 asking for a variance including as to any impact  
17 on downstream water bodies, then that impact  
18 would be covered, correct?

19 MR. TWAIT: I believe so.

20 MR. SOFAT: Can you repeat the  
21 question, please.

22 MR. ANDES: When you submit the  
23 application, you specified that you were asking  
24 for a variance not only as to the particular

1 water body you're discharging to, but any  
2 impacts on a downstream water body, then that  
3 would all be covered in the variance?

4 MR. SOFAT: Right.

5 MR. ANDES: Thank you.

6 Second question is, when you say that  
7 if you are consuming some of the assimilative  
8 capacity for a downstream discharger, that has  
9 to be addressed. The first question is, how  
10 would that be addressed? I mean, if you  
11 can't -- let me add -- if you can't comply with  
12 the water quality standard and you're getting  
13 the variance because of that, what does it mean  
14 that you would have to address the impact on the  
15 downstream discharger?

16 MR. TWAIT: We would have your length  
17 of impacted stream may change if they are  
18 discharging and cannot meet the water quality  
19 standard also. So you would just have to take  
20 that into account when you decide what length of  
21 stream that you're impacting.

22 MR. SOFAT: Just a moment.

23 MR. TWAIT: What I was referring to  
24 was violations of the water quality standard.

1 If you're using the assimilative capacity and  
2 not exceeding the water quality standard, then  
3 there is not an issue.

4 MR. SOFAT: But if you're causing or  
5 contributing to the downstream discharger,  
6 that's when the variance needs to address that  
7 issue.

8 MR. ANDES: Thank you.

9 MR. RAO: Would you make that part of  
10 a downstream, you know, part of the TLWQS? Is  
11 that how it will be addressed?

12 MR. SOFAT: So, if it's a water body,  
13 let's say, and even in the case of MDV, if the  
14 relief sought were effected as such that it  
15 will, that based on the information that we  
16 have, we believe that it will cause or  
17 contribute to the violation, we'll bring that up  
18 and say, petitioner needs to address that issue.

19 And petitioner could on their own  
20 realize that that might be the case and,  
21 therefore, address that in their petition.

22 So, I think the short answer to your  
23 question is yes, we should include that  
24 requirement in our 530, that they need to do

1 that demonstration.

2 HEARING OFFICER TIPSORD: What  
3 happens if there's a downstream discharger in --  
4 and I like to use the Mackinaw River going into  
5 the Illinois.

6 Let's say Bloomington decides  
7 suddenly that it's going to discharge all kinds  
8 of nutrients into the water and a downstream  
9 discharge -- and so they get a water body  
10 variance for where they're discharging into --  
11 I'm just going to say the Mackinaw. I think  
12 it's actually going to increase, but let's just  
13 say the Mackinaw.

14 But downstream I'm discharging into  
15 the Mackinaw the nutrients that I have. I'm not  
16 exceeding the water quality standard. I'm  
17 in-taking water from the Mackinaw and  
18 discharging, not exceeding the nutrient to water  
19 quality standard.

20 But suddenly now because of what  
21 Bloomington has, the nutrients that I'm now  
22 taking in, my discharger is now -- now, I  
23 violate the water quality standard because  
24 Bloomington had -- how am I to know that this is

1 happening? And what is my obligation as the  
2 downstream discharger to keep track of what's  
3 going on upstream?

4 MR. SOFAT: I'm not sure that they  
5 have obligation. I think the obligation lies  
6 with the IEPA, PCB and the petitioners.

7 HEARING OFFICER TIPSORD: Okay.  
8 Anything further?

9 MR. ANDES: Just to clarify one  
10 aspect. When you say that the impact on the  
11 downstream water body would have to be  
12 considered, you're not saying the total water  
13 body variance would have to be expanded to  
14 include every downstream water, correct?

15 MR. SOFAT: Well, when you say that,  
16 is the down -- whatever that, you know,  
17 everybody is, are they -- is the water body that  
18 originally somebody is asking or requesting  
19 where it's from, is causing the violation.

20 Because that's a whole issue we see  
21 that you need to consider downstream impact.  
22 You can't just creat a situation where  
23 downstream went downstream, water bodies or  
24 dischargers are exceeding standards now because

1 somebody got a variance up here.

2 MR. ANDES: So, you need to consider  
3 the downstream impact, but the group of  
4 dischargers that you're looking at in terms of  
5 the variance or the time-limited water quality  
6 standard would be the ones on the upstream water  
7 body.

8 MR. SOFAT: Uh-huh, yes.

9 MS. PALUMBO: How far downstream  
10 beyond the state border would a petitioner need  
11 to consider any impacts?

12 MR. SOFAT: If there is a water  
13 quality standard, then yes. If you don't have a  
14 water quality standard, then no. Again, it's  
15 the same basic principle. You cannot cause or  
16 contribute to a violation of a downstream water  
17 body discharger.

18 MR. RAO: Question No. 25, Water  
19 Quality Standard Triennial Review.

20 Please comment on how IEPA will  
21 include time-limited water quality standards in  
22 its triennial review.

23 MR. TWAIT: The Agency will hold a  
24 hearing for the triennial review every three

1 years, as required by 131.20(a).

2 The federal regulations do not state  
3 that when you perform the triennial review, a  
4 reevaluation of the highest attainable condition  
5 is necessary. The Agency would do the triennial  
6 review and notice if any of the underlying basis  
7 has changed, such as has technology changed or  
8 economics has improved.

9 And if that happens, we'll notify the  
10 Board and ask them to open up the time-limited  
11 water quality standard. And based on our  
12 understanding of triennial review, a  
13 reevaluation does not need to go through the  
14 triennial review process.

15 MR. SOFAT: I'll also add to the  
16 response that federal regulations do allow  
17 Agencies to use their discretion to set their  
18 the priorities.

19 So, yes, we do need to hold a  
20 hearing. We do need to ask public comments on  
21 all applicable water quality standards,  
22 including variances. However, based on our  
23 priorities and resources, we could decide to  
24 work on only a handful of standards at that

1 time.

2 MS. RABCZAK: Question 26,  
3 Section 540.

4 Please explain what IEPA means by  
5 delineates the geographic scope of the  
6 time-limited water quality standard in  
7 Section 104.540 and whether such delineation  
8 follow from the IEPA response under  
9 Section 104.535 or recommendation under Section  
10 104.550. Please also clarify which provision of  
11 the Act do you refer to in the Board's authority  
12 to make such delineation.

13 MR. TWAIT: Well, first off, I would  
14 like to say the Agency can add that information  
15 in 104.535 and 104.550. What we mean by  
16 delineates the geographic scope of the  
17 time-limited water quality standard is identify  
18 the discharger MDV, water body, water body  
19 segment or watershed to which the time-limited  
20 water quality standard applies.

21 MR. SOFAT: So the Agency will  
22 propose language to fix that.

23 MS. RABCZAK: Okay. Question 27,  
24 Section 104.540 provides in part, the Board must

1 enter a final order that establishes prompt  
2 deadlines. Please comment on whether the word  
3 prompt is necessary or can the word be deleted.

4 HEARING OFFICER TIPSORD: Just for  
5 the record, it's 104.540.

6 MR. TWAIT: The language that we've  
7 used, including the word prompt is included in  
8 statute. The Agency believes that the word  
9 prompt is necessary to address stakeholders'  
10 concern of long periods of inactivity. There  
11 was a concern that somebody might file for the  
12 variance and get the stay and the proceeding  
13 just wouldn't move forward.

14 HEARING OFFICER TIPSORD: But if this  
15 is something set in a Board order, aren't the  
16 deadlines probably going to be proposed by the  
17 petitioner and the Agency as far as what the  
18 deadlines are going to be? I mean, prompt just  
19 seems to be a word that -- depends upon who you  
20 ask what prompt means.

21 And since we're talking about  
22 something that the Board's going to enter a  
23 final order that delineates certain things and  
24 sets out deadlines, those deadlines are probably

1 going to come as part of the suggestions that  
2 we've already received. And if not isn't there  
3 recourse if, for example, you think they're too  
4 far out? Can't the Agency ask the Board to  
5 reconsider that order?

6 MR. SOFAT: Yes, we can. Again, I  
7 think that what we are doing is we are saying  
8 that the basis for these words, use of these  
9 words, is used based on a serious concern that  
10 was raised. But it's Board's discretion, it's  
11 Board who is going to interpret what prompt  
12 means.

13 And, therefore, if you think the word  
14 helps, we can keep it there. If the Board  
15 believes that without this word they can do the  
16 prompt deadlines, it's up to them.

17 HEARING OFFICER TIPSORD: I'm just  
18 wondering if JCAR is going to ask us what we  
19 mean by prompt.

20 MR. ETTINGER: Is it in the statute  
21 now?

22 MR. SOFAT: Yes.

23 MS. RABCZAK: Moving on to next  
24 section which is Section 104.545. It's the

1 Substantial Compliance Assessment.

2 Question 28. In Section 104.545(a),  
3 the phrase as soon as practicable begins the  
4 section. Please comment on whether the phrase  
5 is necessary. And that's a similar question  
6 that we just discussed and, again, it might be a  
7 JCAR concern to clarify what that means.

8 MR. TWAIT: Once again, this is  
9 language directly from the statute and it was  
10 once again included to address stakeholders'  
11 concern of long periods of inactivity. As a  
12 reference it's 38.5(g).

13 MS. RABCZAK: Question 29, in the  
14 same section please comment on whether it is  
15 appropriate to add after 40 CFR Section 131.14,  
16 and Section 38.5 of the Act, after the words its  
17 substantial compliance with Section 104.530 to  
18 be consistent with the Act.

19 MR. TWAIT: The Agency agrees with  
20 this addition. We would also like to mention  
21 that substantial compliance is not a final  
22 determination for the water quality standard  
23 variance or time-limited water quality standard.

24 HEARING OFFICER TIPSORD: So, it's

1 not appealable.

2 MR. TWAIT: No. I think my point was  
3 that just because the Board says that they're  
4 substantially compliant, that the petitioner  
5 doesn't think that they're all set to go. There  
6 is still the hearing, there's agency  
7 recommendation that can change things.

8 MS. RABCZAK: Question 30, it's  
9 Section 104.550, Recommendation and Response.

10 Please comment on whether it is  
11 appropriate to clarify proposed language in  
12 subsection (b) (3) as proposed by the Board.

13 MR. TWAIT: The proposed language  
14 doesn't quite read right. It said the Agency --  
15 reading from B, it would say at a minimum, the  
16 recommendation must include the Agency  
17 recommendation on whether the Board should  
18 adopt. We think it would be better to say at a  
19 minimum the Agency's recommendation, and then  
20 remove the Agency's down below in 1, 2 and 4.  
21 And we can make that recommendation.

22 MS. RABCZAK: Okay. Thank you.  
23 Moving on to Question 31. It's Section 104.555,  
24 Hearing.

1           Question 31 is asking to explain what  
2 IEPA means by documentation in subsection  
3 (b) (4) .

4           MR. TWAIT: We mean supporting  
5 documentation to make it consistent with 40 CFR  
6 131.14 (b) (2) (3) (a) .

7           HEARING OFFICER TIPSORD: If I may, I  
8 actually have a little bit of follow up on this.

9           The way this reads to me, and I think  
10 this is where our question came from, that the  
11 hearing notice shall include identification and  
12 documentation of any cost-effective.

13           So would we have to put in the  
14 hearing notice the documentation, or are we just  
15 identifying the documentation or telling them  
16 where they can go find the documentation?

17           MR. SOFAT: I believe that  
18 documentation has to be made available, but we  
19 can check on that and then create a response.

20           HEARING OFFICER TIPSORD: I'm just  
21 thinking about how substantial a hearing notice  
22 would become if you included all the  
23 documentation in the hearing notice. And that's  
24 to me the way this reads. And I think that's

1 where the question came from and that's why what  
2 is documentation and do you really want us to  
3 publish all the documentation that comes in the  
4 petition in the hearing notice.

5 MR. SOFAT: Go back to 40 CFR. We'll  
6 see what the intent is. But the way we were  
7 thinking is just identify the documentation.

8 HEARING OFFICER TIPSORD: With maybe  
9 a link to where they could find it.

10 MR. SOFAT: Right.

11 HEARING OFFICER TIPSORD: Yeah.

12 MR. SOFAT: But we can look into it.

13 MS. FRANZETTI: I'm going to have  
14 trouble putting this in the form of a question.  
15 It's like jeopardy, but I just want to make a  
16 comment that it will be tough with respect to  
17 the newspaper publication, you know.

18 So I just think that needs to be kept  
19 in mind that you don't want to load up the  
20 hearing notice so much that it's going to become  
21 both cumbersome and expensive potentially to  
22 publish it in a newspaper.

23 So, if you can, in particular, at  
24 least try and differentiate upon review of the

1 federal regulatory language decide it gives you  
2 flexibility for what needs to be in the hearing  
3 notice, you might want to revise this in a way  
4 that says on the website, you may include this,  
5 but it doesn't have to be in the notice of --  
6 published in a newspaper of general circulation  
7 for what that's worth.

8 MR. SOFAT: Absolutely.

9 HEARING OFFICER TIPSORD: And I would  
10 think, too, that given the availability of  
11 everything on the web anymore that we have and  
12 the Board's updating of the website and, in  
13 fact, we do all electronic filing, it's going to  
14 be very easy for the Board when they do a  
15 hearing notice, if it's okay, and it's going to  
16 be acceptable to feds to give, you know, even a  
17 link to the information.

18 MR. SOFAT: Yeah. I think all that  
19 sounds great. Our only concern is we want to  
20 make sure feds are going to be okay with that,  
21 because I think we had some discussion with  
22 them. We also now there is discussion at the  
23 national level whether or not notification, you  
24 know, on websites, et cetera, is okay; whether

1 hearings can be done via video conference, et  
2 cetera.

3 So we need to talk to them. We know  
4 this issue and we have talked with them.  
5 Because our preference would also be the same;  
6 have it online and go from there. But I think  
7 that we did not get okay from them yet. So  
8 we'll go back, talk to them, see if there's a  
9 way to modify it.

10 HEARING OFFICER TIPSORD: And I might  
11 also say that it says that you'll notify the  
12 people on the service list, give them a written  
13 notice of the hearing. And then you also  
14 publish notice on the Board's website and in a  
15 newspaper.

16 And there may be two different  
17 notices even. If the USEPA would be more  
18 amenable to a written notice perhaps to people  
19 on the service list that it would include the  
20 documentation but allow the general notice in  
21 the newspapers to be a reference.

22 MR. SOFAT: We'll definitely talk to  
23 USEPA, see what they are willing to do.

24 HEARING OFFICER TIPSORD: Thank you.

1 MS. RABCZAK: Questions 32 and 33 we  
2 propose some language change.

3 Are you okay with the proposed  
4 changes on the Question 32 which removes must  
5 and replace them with will in subsection (f) of  
6 Section 104.555?

7 MR. TWAIT: The Agency is agreeable  
8 to changing must to will. And in No. 32, we  
9 would disagree with removing the words the  
10 considerations the Board will take into account.  
11 This is language consistent with 40 CFR 25.5(e)  
12 requirements.

13 MS. RABCZAK: Could you explain what  
14 you mean by this?

15 MR. SOFAT: I would say just  
16 referencing that the Board will consider 40 CFR  
17 131.14, 38.5, and 104 subpart (f), I think will  
18 suffice. Again, we can reach out to USEPA and  
19 ask if we can delete that. But, again, our  
20 whole concept here is to make sure that feds do  
21 not say at the end of the day that your public  
22 hearing or public notice was insufficient.

23 That's where we are coming from. But  
24 we can check with them if they are okay with

1 this.

2 HEARING OFFICER TIPSORD: That's only  
3 part of what the Board takes into consideration.  
4 The Board also consideration the petition. The  
5 Board looks at the entire record in making its  
6 decision.

7 That's kind of where we were coming  
8 from is that the Board looks at the entire  
9 record and required by statute to review the  
10 entire record and then take and look at these  
11 provisions of the Act and the law.

12 So that's kind of where we were  
13 coming from. We thought it might be a little  
14 redundant. Please check with USEPA if they're  
15 hard and fast on it.

16 MR. SOFAT: We will.

17 MS. RABCZAK: Question 33, relating  
18 to subsection (g) of Section 104.555, are you  
19 okay with the proposed language?

20 MR. TWAIT: Yes.

21 MS. RABCZAK: Question 34 relating to  
22 Section 104.560. Could you please explain what  
23 you mean by the list of persons in  
24 Section 104.565(d)(2)(A)(iii) and whether this

1 list would be provided by EPA in the response  
2 under the Section 104.535 for its recommendation  
3 on the Section 104.550.

4 MR. TWAIT: At the time of the  
5 opinion and order, the list of persons will be  
6 the petitioners and anyone that has filed a  
7 substantially compliant petition before the  
8 deadline. And the Agency will provide that  
9 list.

10 However, the Board may have a more  
11 up-to-date list depending on the people that  
12 file. Because we have to file our  
13 recommendation maybe before the deadline ends.  
14 But we can include the list of persons at that  
15 time.

16 MR. ETTINGER: I guess I'm confused  
17 by the Board's questions. It seems like the  
18 caption here is on 565 Burden of Proof, but now  
19 we're down to 565.

20 HEARING OFFICER TIPSORD: Question 34  
21 was just misplaced in our list of questions. It  
22 is 565, but we'll get back to burden of proof.

23 MR. ETTINGER: Are we going to get  
24 back to burden of proof?

1 HEARING OFFICER TIPSORD: Yes. The  
2 next one goes back to that.

3 MR. ETTINGER: Very well.

4 HEARING OFFICER TIPSORD: Scrivener's  
5 error.

6 MR. ETTINGER: Well, I've got a  
7 question about the burden of proof section when  
8 we get there.

9 MS. LIU: Question 35, for  
10 Section 104.560, burden of proof.

11 Would you please comment on proposing  
12 language that would differentiate the burden of  
13 proof for a time-limited water quality standard  
14 for a Clean Water Act Section 101(a)(2) and a  
15 non-101(a)(2) uses under proposed Section 104.560.

16 MR. TWAIT: We would suggest that we  
17 use the federal language in 40 CFR  
18 131.14(b)(2)(B). And we do acknowledge that  
19 they may use a different demonstration. They  
20 don't talk about burden of proof.

21 And going back to burden of proof, we  
22 would like to change the heading for this.  
23 Instead of burden of proof, we would just like  
24 to change it to demonstration so that it would

1 be consistent with the 101(a)(2) and the  
2 non-101(a)(2) uses.

3 MR. RAO: Are you suggesting any  
4 changes to subsection (a) or are you going to  
5 keep it as burden of proof is on the petitioner?

6 MR. TWAIT: We would probably take  
7 that out.

8 MR. SOFAT: We will be suggesting a  
9 clean up on this issue.

10 MR. RAO: All right.

11 MR. SOFAT: Replacing burden of proof  
12 with demonstration. And this appears in several  
13 sections throughout the rule.

14 HEARING OFFICER TIPSORD: Mr. Boyd.

15 MR. BOYD: Just a point of  
16 clarification. I've marked the places where  
17 demonstration is required. So I'll just read  
18 them for you. My question was going to be what  
19 does demonstration mean in this context?

20 But if you're going to look through  
21 the rule and change demonstration and burden of  
22 proof, just keep these in mind; 104.538.13;  
23 there's one at 104.590 (c)(2) and (c)(3).

24 Thank you.

1 MR. SOFAT: Thank you.

2 MR. ETTINGER: I have a further  
3 question about this section.

4 HEARING OFFICER TIPSORD: Go ahead.

5 MR. ETTINGER: Which I think is kind  
6 of fundamental and we might have to clarify  
7 here. I'm a little confused by (c) of 104.560,  
8 specifically with regard to the highest  
9 attainable condition.

10 Here. And I'll just read the  
11 language. The petitioner must demonstrate that  
12 the term of the time-limited water quality  
13 standard is only as long as necessary to achieve  
14 the highest attainable condition.

15 Now, my understanding of highest  
16 attainable condition is that that is the term  
17 that's used as to what is the highest attainable  
18 condition that you can have achieve during the  
19 period of the variance, and that the variance  
20 lasts until you can achieve the underlying water  
21 quality standard.

22 So, I'm a little confused by this  
23 language here. You understand my problem here  
24 that the term highest attainable condition seems

1 to be being used in two ways here. Perhaps it  
2 would be easier if I gave an example.

3 Let's say that the current water  
4 quality standard for a particular pollutant is  
5 20 and we've decided that the proper standard  
6 should be five, but that it would cause an  
7 unacceptable level of problems that require to  
8 going below 10 during some period of time.

9 As I understand the federal language,  
10 highest attainable condition then would be 10  
11 and you would seek a variance that would go long  
12 enough to achieve five.

13 This seems to be talking about the  
14 time-limited water quality standard time as the  
15 time to achieve 10. So I believe there's some  
16 confusion in our terminology here.

17 MR. SOFAT: Let me try. Let's see if  
18 it takes us anywhere. So they are going to be  
19 circumstances where calculating HAC is pretty  
20 straightforward; single discharger and we can  
21 calculate what could be there in the five limit  
22 for copper.

23 And that becomes HAC for -- let's say  
24 they say I need seven years to get to that

1 number. There are going to be cases just like  
2 our chloride example where you cannot figure out  
3 the ultimate HAU, which will correspond to a  
4 certain kind of HAC.

5 So what you do is you go with the  
6 existing available information. And based on  
7 that information, you decide what is the HAC for  
8 this duration. And that's why you do the  
9 evaluation. And if the reevaluation says you  
10 could do better than what you did in the  
11 previous cycle, then that needs to be  
12 self-implementing, assuming it's more stringent.

13 So then that becomes the HAC for the  
14 next phase. You keep on doing HAC. So it's  
15 different for those two scenarios that I talked  
16 about. Does it add to confusion or help?

17 MR. ETTINGER: I guess my confusion  
18 is using the same terminology for two different  
19 concepts, or maybe not making clear how the time  
20 factor is going on.

21 Let's say, again, to use my example,  
22 the current standard is 20; the standard that  
23 we've decided is eventually protected is five.  
24 I can imagine a situation in which we're not

1 immediately going to get from 20 to 10 either,  
2 so we would need time to get from 20 to 10. And  
3 so that seems to be the language that we're  
4 talking about here. But then the time length of  
5 the whole variance would be the time needed to  
6 get to five.

7           And I'm just concerned that we not  
8 use the -- well, maybe I'm -- it strikes me that  
9 what we should be looking for is a variance  
10 which spells out the whole pattern overtime  
11 recognizing that the HAC might vary overtime,  
12 but also recognizing that the long run goal is  
13 to reach the actual water quality standard.

14           MR. SOFAT: And I think that is how  
15 the variance rule, federal and this one. I  
16 think the first sentence in here makes this  
17 assumption that in every scenario you can figure  
18 out that ultimate HAC. And I'm saying in some  
19 cases you are not going to be able to figure out  
20 HAC up-front.

21           MR. ETTINGER: That's where our  
22 problem is, though, on terminology. The  
23 ultimate is the water quality standard. So, the  
24 ultimate is five. The question is: How are we

1 going to work out how we're going to get there?

2 MR. SOFAT: Okay. Just one comment  
3 here. I don't think that every scenario will  
4 translate into meeting the water quality  
5 standard. There could be cases where you walk  
6 as far as you could and that eventually you end  
7 up using HAU, which is the highest attainable  
8 use.

9 So, for example, chloride is what I  
10 have in my head. After doing everything  
11 everybody could do, there might be a chance that  
12 it still doesn't comply with 500. And at that  
13 point, so ultimate compliance with the 500 may  
14 never happen, let's just say that.

15 At that point, what you do is then  
16 you come up with a limited use, a winter limited  
17 use. So that's where I'm coming from. That  
18 HAC, I think the way it's used, that's precisely  
19 how USEPA uses it. And I'm just stating my  
20 understanding with you that in cases where it's  
21 not straightforward to figure out what the HAC  
22 is, you start with HAC based on the existing  
23 information.

24 MR. ANDES: I think there's a lot of

1 confusion on this issue, and I think part of it  
2 is actually due to the way EPA wrote their  
3 regulations.

4 HEARING OFFICER TIPSORD: Which EPA?

5 MR. ANDES: USEPA. Yes. Let's be  
6 clear on that.

7 So, let me back up a step. If we  
8 have a situation where a discharger has a limit  
9 and they think they can get there, and it's a  
10 water quality base limit, you would issue a  
11 compliance schedule, correct? That's not  
12 verbally --

13 MR. SOFAT: Yes.

14 MR. ANDES: You would not need a  
15 variance in that situation?

16 MR. TWAIT: Correct.

17 MR. ANDES: Right. So the situation  
18 we're talking about is where -- at least at this  
19 point we don't have enough information. We know  
20 they can't get there or we don't know they can  
21 get there. So you're getting a variance.

22 And let's just say, hypothetically,  
23 that the water quality number is five.  
24 Everybody is at 20 right now. And two concepts.

1 One is they think they can get to ten in five  
2 years. So, at the end of the variance term,  
3 they think they can get to 10. Not to five, but  
4 they think they can get to 10. And that's as  
5 far as they can go.

6 And they think they can make progress  
7 between 20 and 10 during the term of the  
8 variance. So there are two issues, and I think  
9 Albert and I are agreeing there's two issues  
10 here.

11 One is -- and let's put aside the EPA  
12 terms for a minute, the USEPA terms for a  
13 minute. One issue is how do you define the  
14 endpoint to the variance? Where do they need to  
15 be at the end of the variance term? And we  
16 should talk about what that is and how we define  
17 it.

18 And the second issue is what  
19 conditions apply to the discharger during the  
20 time frame of the variance as they're working  
21 toward that goal. So, perhaps, the Agency can  
22 explain its thoughts in terms of, A, how you  
23 would define the end goal of the variance,  
24 understanding that they can't get to five, but

1 they can get to 10 by the end the variance. And  
2 how you define the interim conditions that would  
3 apply during the term of the variance while  
4 they're trying to get there.

5 MR. SOFAT: I'm confused by the  
6 question in this sense. It seems like the  
7 hypothetical assumes that you know how to get to  
8 five. Is that the assumption?

9 MR. ANDES: No. Let's say  
10 financially or physically we don't think we can  
11 get to five, but we think we can get to 10 by  
12 the end of the variance.

13 MR. SOFAT: So, let's start with that  
14 and maybe it will narrow down the issues.

15 So when you know that you can go from  
16 20 to 10 in five years, that becomes -- five  
17 years becomes as long as necessary to achieve  
18 10. If somebody needs a compliance schedule to  
19 do that, variance allows that, too. Okay. So,  
20 that is the HAC and as long as necessary issue  
21 addressed there.

22 Now, when we are doing that, we know  
23 anything that's greater than five years, you  
24 have to do a reevaluation. Reevaluation is the

1 mechanism through which we will all learn what  
2 else and what more can be done. And HAC is a  
3 progressive thing. It continues to evolve based  
4 on the analysis.

5 So I'm not seeing any confusion in  
6 that. The ultimate standard, yeah. The general  
7 rule is that you have to comply with the water  
8 quality standard. That's why you start the bus.  
9 However, that doesn't mean in every case you  
10 will meet that five.

11 And that's why I was asking, if the  
12 assumption in that question is that, yes, I know  
13 I can get there because let's say it's  
14 economics, then you know you don't have the  
15 money, you can use factor six. So, therefore,  
16 that becomes your HAC. Five is your HAC; and  
17 your burden of proof is factor six.

18 MR. ANDES: Well, five is not the  
19 highest attainable condition because you can't  
20 get to five, right? 10 would be the highest  
21 attainable --

22 MR. SOFAT: That's why I said I'm  
23 confused by the question. If we know how to get  
24 to five --

1 MR. ANDES: Let's say we do not know  
2 how to get to five, we cannot afford to get to  
3 five. We can afford to get to 10 by the end of  
4 the five-year term.

5 MR. SOFAT: Then, as I said earlier,  
6 your HAC is 10, as long as necessary is five.  
7 And, well, let's say six, because then it  
8 doesn't make sense. It's six. And then within  
9 five years you have to do reevaluation. And  
10 that will decide the next HAC.

11 HEARING OFFICER TIPSORD: So what  
12 you're saying Mr. Sofat is that if I come in and  
13 ask for a variance and I know the level is 20  
14 and I know I can get to 10.

15 I come in and ask for a time-limited  
16 water quality variance for five years. And in  
17 that five years, the highest achievable  
18 condition is going to be 10. And you're going  
19 to give me a variance that allows me to get my  
20 discharge to 10.

21 At the end of that five years, if I  
22 have achieved 10, or say I've achieved only 11,  
23 then I reevaluate at that point and then I may  
24 be able to get to five. So my new highest

1 achievable condition would be five.

2 Is that correct? That's what I think  
3 I'm hearing.

4 MR. SOFAT: This is what I will  
5 change in that. I won't say five of because  
6 five means you have to get to 10 in five. So I  
7 will say six is what I need to get to 10.

8 But within five years then, I'll do  
9 reevaluation and say, oh, by the way, based on  
10 what I have done, I can get to seven. Material  
11 has changed, I have a limited mainstream, new  
12 technology is out there, whatever the factors  
13 might be.

14 So what I'm saying is that you start  
15 HAC not by solving, not doing the -- it doesn't  
16 have to be an elaborate demonstration. You  
17 start with calculating HAC based on the  
18 information existing readily available  
19 information that you have.

20 HEARING OFFICER TIPSORD: But the HAC  
21 may change when you do your reevaluation?

22 MR. SOFAT: Right. If the end point  
23 is, let's say, five, that means, yes, you need  
24 to continue to do something. Either you get to

1 a point where you have met five or you get to a  
2 point where you say, I have exhausted everything  
3 and, therefore, the only option here is HAU,  
4 which is a limited use than the original use.

5 MR. TWAIT: That would be to change  
6 the underlying standard.

7 MR. ETTINGER: I don't think we  
8 actually disagree on what's happening here. I  
9 just want to get the terminology correct. It  
10 strikes me that -- and we're not limited to  
11 five-year variances anymore.

12 So it strikes me that if I had a case  
13 like the one Fred presented, in which I can get  
14 to 10, but I can't in five years, but I don't  
15 know when I can get to five, I would apply for a  
16 10 or 20-year variance.

17 MR. SOFAT: Precisely.

18 MR. ETTINGER: I would say the HAC  
19 that I can reach in five years is 10. And then  
20 during the reevaluation period, I might be able  
21 to adjust it to where I can get down to eight or  
22 maybe I'll stay. But then that would continue  
23 to be the HAC. But the ultimate goal is always  
24 five.

1           And as Mr. Twait points out, or you  
2 point out, there might come a time in which you  
3 just say five is never going to happen and you  
4 change the underlying water quality standard  
5 with the UAA.

6           MR. SOFAT: So I agree with that  
7 description.

8           MR. ETTINGER: Ill propose some  
9 language I guess that will clarify that.

10          MS. PALUMBO: We had a couple  
11 questions related to this topic. It feels right  
12 to address it currently then.

13          We talked about sort of a compliance  
14 schedule built into the time-limited water  
15 quality standard.

16          Do petitioners need to suggest this  
17 compliance schedule to meet the HAC during the  
18 term of the time-limited water quality standard?

19          MR. SOFAT: Can I ask you why you  
20 have that understanding? What's the basis for  
21 that understanding that compliance schedule has  
22 to be part of the time-limited water quality  
23 standard?

24          MS. PALUMBO: Just on our previous

1 discussion like we were having. We talked about  
2 a compliance schedule.

3 MR. SOFAT: And I said that it could  
4 be allowed. Let's say to get to 10, somebody  
5 needs to do something and, therefore, they need  
6 compliance schedule to do that. So it's  
7 permissible is what I'm saying.

8 MS. PALUMBO: Okay.

9 MR. SOFAT: It's permissible. And I  
10 think then maybe we should go to Board's  
11 question about that because I think that's the  
12 central question on compliance schedule. But  
13 anyway.

14 MS. PALUMBO: Once the HAC is met --  
15 well, does the Agency consider that that water  
16 body is no longer impaired?

17 MR. SOFAT: The water body may  
18 still -- water body is still impaired if the  
19 underlying use and the criteria has not been  
20 met. You still may have to do TMDL.

21 It's a temporary -- it's  
22 time-limited, as it states, it's a time-limited  
23 water quality standard. The underlying standard  
24 does not disappear unless somebody actually does

1 HAU.

2 MS. PALUMBO: Okay. In using the  
3 example we were working on with getting down to  
4 five, would you say it's the role of the  
5 petitioner to suggest a term that would allow  
6 the HAC to be met, or can they say, for example,  
7 I just want five years and I'll meet 10 instead  
8 of five?

9 MR. SOFAT: Okay. I'm going to  
10 respond; see if that answers your question.

11 MS. PALUMBO: Okay.

12 MR. SOFAT: We are excepting that  
13 petitioner is going to, based on the  
14 information, calculate what can be done.

15 So first is, you have to think about  
16 how to get to five. But don't know how to get  
17 to five, let's say. In that case then, you need  
18 to decide based on the existing information, to  
19 get to 10, what do I need to do, and how long do  
20 I need to get to 10.

21 So those are the two things, I would  
22 say, that's how I would think about HAC. That's  
23 what petitioner should be thinking about.

24 Did I answer the question?

1 MS. PALUMBO: Yes.

2 MR. SOFAT: Okay.

3 HEARING OFFICER TIPSORD: Ms. Palumbo,  
4 are you through?

5 MS. PALUMBO: Yep.

6 HEARING OFFICER TIPSORD: Let's take  
7 the opportunity here to take about a 15-minute  
8 break. I would anticipate then after we come  
9 back we'll go for about an hour and a half  
10 before we take lunch, if we need to take lunch.

11 We may get done. We're down to the  
12 last few questions from the Board. So let's  
13 take 15 minutes and come back and then we'll go  
14 until about 12:30 before we take lunch. So back  
15 about 10 after 11:00.

16 (WHEREUPON, a short break was  
17 taken.)

18 HEARING OFFICER TIPSORD: Back on the  
19 record.

20 We left off -- I think we're ready to  
21 start with the Board's Question No. 36.

22 MR. RAO: Section 104.565, Opinion  
23 and Order, Question No. 36.

24 Please comment on including

1 provisions in the proposed petition contents,  
2 that is Section 104.530, and Board opinion and  
3 order, which is under Section 104.565, that  
4 clarify when the petitioner should propose a  
5 compliance schedule and the Board should include  
6 a permit compliance schedule in the time-limited  
7 water quality standard.

8 MR. TWAIT: Reading the preamble,  
9 they suggest having a compliance schedule  
10 available, if necessary. And close to the end  
11 of Page 51041, it says, moreover, consistent  
12 with 131.21(c), any permit compliance schedule  
13 authorizing provision that was adopted effective  
14 and submitted to EPA before May 30th, 2000, is  
15 applicable for purposes of 131.15.

16 And I'll mention that we have a  
17 provision for compliance schedule in 309.148.

18 HEARING OFFICER TIPSORD: Mr. Twait,  
19 the preamble, you said you were reading the  
20 preamble.

21 MR. RAO: Can you provide the  
22 citation of the federal rule.

23 MR. SOFAT: Attachment A.

24 So, the Agency believes that we have

1 this provision already in Board's regulations.  
2 However, we are going to check with USEPA to  
3 make sure that they agree with our  
4 interpretation.

5 MR. RAO: Should these rules have any  
6 cross-reference to the existing provision  
7 regarding compliance schedule? Because you did  
8 mention that you wanted it to be kind of a stand  
9 alone procedural rule.

10 MR. SOFAT: We could for the  
11 clarification purposes, we could.

12 So the first thing we want to do is  
13 want to make sure that USEPA does agree that  
14 309.148 is the authorizing provision. And if  
15 that's the case, then maybe we could suggest  
16 language in there that petitioner could ask for  
17 a compliance schedule pursuant to 309.148.

18 MR. RAO: That would be helpful.  
19 Thank you.

20 MS. FRANZETTI: Do I understand  
21 correctly that the Agency believes that EPA's  
22 position is that the Agency has the authority to  
23 set a compliance schedule that may be needed to  
24 meet the terms of the water quality standard

1 variance when it is either renewing or modifying  
2 the NPDES permit?

3 MR. SOFAT: We have to clarify with  
4 USEPA whether or not 309.148 serves the purpose  
5 for permit complying schedule in general, as  
6 well as authorizing provision under the water  
7 quality standard variance that they are talking  
8 about.

9 So Board has a really good question  
10 about do you really need an authorizing  
11 provision for permit compliance schedules as the  
12 preamble talks about. But when we read the  
13 preamble, there is one sentence, which is the  
14 one that Scott read into the record.

15 Based on that, our position is, it's  
16 IEPA's position that we do meet the requirements  
17 of this compliance schedule authorizing  
18 provision, but we do want to verify with the  
19 USEPA, so that we are absolutely sure that we  
20 could continue to use -- because we have used  
21 this provision to write QBEL limits and NPDES  
22 permits in the past.

23 MS. FRANZETTI: And I would just add  
24 to that my way of additional information from

1 the preamble to the federal water quality  
2 standards TLWQS provision, and it's 510.36, that  
3 the Agency EPA, the USEPA, did state that,  
4 quote, where a permittee cannot immediately meet  
5 the WQBEL derived from the terms of the WQS  
6 variance, the permitting authority can decide  
7 whether to provide a permit compliance schedule,  
8 paren, where authorized, closed paren, so the  
9 permittee can remain in compliance with it's  
10 NPDES permit.

11 And then they reference Clean Water  
12 Act, Section 502, Subparagraph 17, for a  
13 definition of schedules of compliance, and 40  
14 CFR 122.47.

15 MR. ANDES: Let me try to make sure I  
16 understand the concepts.

17 Am I correct in EPA's terminology as  
18 Ms. Franzetti indicated, a compliance schedule  
19 as the EPA terms it is specifically for when you  
20 think you could meet the final number. You just  
21 need more time to do it. Is that accurate?

22 MR. SOFAT: So, for a newly adopted  
23 water quality standard, you may not meet the  
24 variance. You could simply use a water quality

1 a compliance schedule like we had done  
2 traditionally. But, again, you have to justify  
3 the term of that compliance schedule, just like  
4 in the past.

5 MR. ANDES: So you know you can meet  
6 the limit. You just need five years or seven  
7 years or whatever number of years, let's say  
8 five, to construct the facility needed in order  
9 to meet the limit?

10 MR. SOFAT: Right. That's  
11 permissible.

12 MR. ANDES: That's the conventional  
13 concept of a compliance schedule?

14 MR. SOFAT: True.

15 MR. ANDES: But here it seems like  
16 we're talking about compliance schedule in  
17 another way. When we're talking about in a  
18 variance, there are enforceable milestones or  
19 actions that need to be taken during the term of  
20 the variance. Now, you're in compliance, as  
21 long as you're doing the things that are  
22 enforceable and that might be called a  
23 compliance schedule.

24 But it's a different thing, correct,

1 than what I was just talking about earlier.

2 MR. SOFAT: Yes. Compliance schedule  
3 could be used like the first scenario. Newly  
4 water quality standard is adopted and  
5 dischargers need a compliance schedule to comply  
6 with the standard.

7 Okay. In here, like you said, you  
8 could have PMP that describes the things that  
9 must be done and to do the PMP, one may need a  
10 compliance schedule. And that is the compliance  
11 schedule for the water quality standard variance  
12 purposes.

13 MR. ANDES: So, for that purpose you  
14 might have a pollutant minimization program  
15 and certain steps that you might be taking at  
16 particular times over the term of the variance.  
17 And as long as you do those things, you will  
18 stay in compliance. So that's what you're  
19 calling a compliance schedule?

20 MR. SOFAT: For variance purposes.  
21 And it could be a treatment technology that you  
22 need to modify or use that you need the  
23 compliance schedule for.

24 MR. ANDES: Or it could be

1 implementing certain steps to reduce salt usage?

2 MR. SOFAT: Right. That is our  
3 understanding.

4 MR. TWAIT: There's also a compliance  
5 schedule example in the next paragraph from what  
6 Ms. Franzetti had read.

7 And their example is the water  
8 quality standard being at one for the pollutant,  
9 and the current F1 quality is at 10 and the  
10 state adopts a highest attainable condition of  
11 three milligrams per liter.

12 You can ask for a compliance schedule  
13 in your permit to go from 10 to three. That's  
14 another place that you can use a compliance  
15 schedule in conjunction with the time-limited  
16 water quality standard.

17 MR. ANDES: Just to clarify, so  
18 that's a schedule issued in conjunction with the  
19 variance?

20 MR. SOFAT: Yes.

21 MR. TWAIT: Would than be in --

22 MS. FRANZETTI: Well, I think that's  
23 part of the question. And Mr. Twait is correct.  
24 That's the point I think the USEPA was trying to

1 makes in this section of the preamble is that  
2 because you have this requirement to achieve the  
3 highest attainable condition, as a discharger,  
4 you may not be able to immediately meet what  
5 that highest attainable condition is.

6 And as Mr. Twait pointed out, the  
7 example they gave is that the generic water  
8 quality standard is at one milligram per liter.  
9 You've established in your TLWQS proceeding that  
10 the highest attainable condition is three.

11 But you, as a discharger, need time  
12 to do certain things to achieve three. And that  
13 is where you would need and/or allow according  
14 to EPA to have a compliance schedule to get to  
15 three.

16 Where I think the issue is a little  
17 unclear is does that compliance schedule have to  
18 be part of the Board order when it grants you  
19 the TLWQS at three? Does the Board have to go  
20 the next step and actually have in its order the  
21 compliance schedule for that discharger to get  
22 to three, or is that something that can fall to  
23 the Agency to provide in the NPDES permit, it  
24 does not need to be in the Board order granting

1 the three milligram per liter TLWQS. I don't  
2 think the preamble is all that clear.

3 MR. SOFAT: Couple of things. Andes  
4 example -- in your example, one milligram is the  
5 water quality standard.

6 MS. FRANZETTI: Correct.

7 MR. SOFAT: So if somebody could  
8 comply with that, that will be a compliance  
9 schedule up-front. If somebody is complying  
10 with HAC, then that is the compliance schedule  
11 for the variance purposes.

12 So, I hope that's clear because that  
13 is my understanding and I think that's what  
14 USEPA rule is saying.

15 As far as compliance schedules are  
16 concerned, based on our reading of the preamble,  
17 I think it's the Agency permitting authority  
18 function of deciding. Because you still have to  
19 justify how long and what needs to be done.

20 Because that's the whole objective of  
21 having the compliance schedule provision in your  
22 rules, that you use the factors that are  
23 mentioned or whatever the applicable regulation  
24 is on the compliance schedule.

1           So it's the Agency permitting  
2           function. That's the way the rule is written.  
3           That's what they have to decide. And not  
4           everybody is going to need that same level  
5           because you have to justify. Somebody may need  
6           three years or it says five years or one year.

7           MS. FRANZETTI: And an argument can  
8           also be made in support of that, that because  
9           NPDES permits go through public notice and  
10          comment, that compliance schedule will be  
11          subject to those public notice and comment  
12          requirements and, therefore, not run afoul of  
13          the general federal public notice and comment  
14          requirements in the TLWQS rule.

15          MR. SOFAT: True.

16          MR. RAO: Mr. Sofat, if the  
17          compliance schedule, if I'm hearing you right,  
18          doesn't have to be part of the Board's order,  
19          but do you think they should provide the  
20          compliance schedule as a part of the petition  
21          for Board to review?

22          MR. SOFAT: I guess my question would  
23          be what would be the objective of that?

24          MR. RAO: In the past when we had

1 variances, compliance plan is a requirement  
2 under the prediction content requirement for  
3 water quality variance. I know this is a  
4 different animal, but I'm just wondering, do you  
5 see any parallels for the Board to review the  
6 information as to how the TL is going to be or  
7 the highest achievable condition will be  
8 attained during the term?

9 MR. SOFAT: My review will be that  
10 for the water quality standard variances, Board  
11 really -- the function that we see Board be  
12 doing is making sure that the petition is  
13 consistent in 131.14; that the factors that are  
14 considered, the 10(g) factors, that the burden  
15 of proof or the demonstration -- not burden --  
16 demonstration is adequate enough so that when  
17 the package goes to USEPA that it gets approved.  
18 Because it is not a relief. It's a water  
19 quality standard, alternated water quality  
20 standard that we are adopting.

21 So from that perspective, I see its  
22 original Board function to make sure that the  
23 alternate standard that's being adopted is  
24 consistent with the underlying regulation, 40

1 CFR.

2 As far as deciding on what compliance  
3 schedule somebody needs, we do that now. And if  
4 somebody disagrees with us, whether we give them  
5 more or less, they can always appeal to the  
6 Board.

7 So I think Board has the ultimate  
8 authority to decide whether or not the  
9 compliance schedule somebody got is adequate.

10 So from that perspective, I would say  
11 that we could always leave that function to the  
12 Agency and Board uses the traditional authority  
13 to decide whether or not it was proper. But we  
14 will do the math up-front to decide based on the  
15 nature of the discharger, all the other factors  
16 that we need to consider, what is the right  
17 adequate, you know, amount of compliance  
18 schedule for that person.

19 And, by the way, Board has already  
20 set up in the variance what the BMP, PMP needs  
21 to be done. So that's outlined.

22 Now, for each person then we'll apply  
23 that BMP, and say, okay, you need to comply with  
24 these PMPs pursuant to the Board order, justify

1 how long you need to comply with them. So it  
2 will be a case-by-case analysis is what I'm  
3 saying.

4 MR. RAO: Okay.

5 HEARING OFFICER TIPSORD: I've got to  
6 put on the Board's other hat for a minute and  
7 ask an enforcement question.

8 How do you envision in Ms. Franzetti's  
9 example where someone is discharging at 10, they  
10 get a TL for three. And there's no compliance  
11 schedule in the Board order. So the Board says,  
12 okay, the TL is three.

13 What happens if someone says you're  
14 violating the Board order because you're still  
15 discharging 10 and there's no compliance  
16 schedule in the Board order to show that. How  
17 do you how do we reconcile that?

18 MR. SOFAT: So Board will decide,  
19 okay, it's three milligrams and you have seven  
20 years. So that's a overview of the variance.

21 So, yeah, everybody can get seven  
22 years. But Agency will be the one who will be  
23 putting, the BMP, the Board order into NPDES  
24 permit in order for that to be enforceable.

1 HEARING OFFICER TIPSORD: Well, no.  
2 If you violate the water quality standard,  
3 anybody can enforce the violation of the water  
4 quality standard.

5 So, my question is much simpler than  
6 that, and especially as I hear you talking about  
7 how these TLs are going to work. That, if we  
8 could get a TL where we adopt a time-limited  
9 water quality standard of three, that could take  
10 people 10 years to get to.

11 In the meantime, that is water  
12 quality standard. And it's a break from the  
13 general water quality standard. So the water  
14 quality standard is three. Someone is  
15 discharging 10. Even if they have an NPDES  
16 permit that says they can discharge 10, that's  
17 not a defense against the violation of the water  
18 quality standard.

19 MR. SOFAT: So once Board approves a  
20 time-limited water quality standard, that goes  
21 to USEPA for approval. Let's say USEPA approves  
22 that. Now that becomes effective for the Clean  
23 Water Act purposes. And then we use that and  
24 put that in the NPDES permits. Now it becomes

1 enforceable.

2 So that's the sequence of steps that  
3 needs to happen.

4 HEARING OFFICER TIPSORD: I  
5 understand that. And I'm saying we get to that  
6 point. And you're telling me the discharger may  
7 be discharging at 10 and can't get to the new  
8 time-limited water quality standard of three for  
9 five years.

10 A private citizen decides that they  
11 see the NPDES report and it says Company ABC is  
12 discharging at 10 and they go and look it up and  
13 there's a water quality variance that says you  
14 can only discharge three, the Board order has no  
15 compliance schedule set up in there. They  
16 charge ABC company with violating the water  
17 quality standard.

18 How do we handle that?

19 MR. SOFAT: I'm not seeing the issue  
20 there because the Board opinion will decide what  
21 steps and what duration is. If we are putting  
22 those in somebody's permits that's their  
23 defense; that this is what I'm required to do.

24 HEARING OFFICER TIPSORD: A permit is

1 not a defense against a violation of the water  
2 quality standard.

3 MR. SOFAT: Water quality standard  
4 does not apply on its own. It has to be part of  
5 the NPDES permit. That is my understanding.

6 HEARING OFFICER TIPSORD: I think  
7 we'll just let that go there.

8 MS. PALUMBO: Is it the Agency's  
9 intent that the petitioner should acknowledge  
10 the need for the compliance schedule in their  
11 petition, perhaps in their suggestion of the  
12 HAC?

13 So, if the Agency is suggesting the  
14 compliance schedule, would the petitioner need  
15 to acknowledge that that would be required?

16 MR. SOFAT: You can acknowledge that.  
17 Again, I think at the end of the day what we are  
18 trying to decide is who decides what the  
19 compliance schedule is.

20 Based on our understanding of what,  
21 you know, USEPA rules are talking about, it's  
22 the permitting authority. And I see the point  
23 that it's a case-by-case analysis. Okay. And  
24 not every variance you're going to need a

1 compliance schedule either.

2           So from that perspective, that's what  
3 my response is based upon. But if somebody  
4 wants to simply mention to the Board that, hey,  
5 I believe that I may need a compliance schedule,  
6 there's no harm in acknowledging that. But then  
7 if that request is that I need a compliance  
8 schedule from the Board, that's the issue that  
9 you we are discussing right now.

10           MS. FRANZETTI: Would the Agency  
11 consider whether for purposes of these proposed  
12 TLWQS rules that it may support, including in  
13 the contents of the petition section, making it  
14 optional for the discharger or person seeking  
15 the TLWQS to include a proposed compliance  
16 schedule which would then uncover those  
17 situations where the petitioner knows it needs a  
18 compliance schedule even to achieve the variance  
19 number and may wish to put it right into its  
20 petition so that it may also address  
21 Ms. Tipsord's point that until you have the  
22 compliance schedule incorporated into your NPDES  
23 permit, you are potentially exposed to a  
24 third-party enforcement actions.

1           Sorry. I know that was a long  
2 question.

3           MR. SOFAT: Right. However, the  
4 question doesn't change. The question remains  
5 to be the same in my view. And that is who has  
6 the authority to provide compliance schedule.

7           If, in my view, Board has given you  
8 variance, that means at that state level, right  
9 there, you have variance from the standard. So  
10 I'm not seeing how a lawsuit could be filed,  
11 enforcement, that you are not complying with the  
12 underlying standard because Board has granted  
13 the variance.

14           Now the question becomes is it  
15 effective and ready to be used for the Clean  
16 Water Act purposes. That you have to wait until  
17 USEPA has approved it. That's when it becomes  
18 effective.

19           MS. FRANZETTI: I agree. And that  
20 would be another possible reason why a  
21 petitioner might want to include a proposed  
22 compliance schedule in it's petition because if  
23 that is -- if the requested TLWQS is approved by  
24 the Board, along with the proposed compliance

1 schedule, it goes to USEPA for approval or  
2 disapproval and USEPA ultimately also has some  
3 say in that compliance schedule, well, I think  
4 it may through the NPDES permit review.

5 So, for a discharger, it might be  
6 preferable to find out sooner rather than later  
7 does EPA have an issue with the proposed  
8 compliance schedule.

9 Now, I'm not saying they would do  
10 that all the time because it may be that EPA  
11 doesn't have a problem with the TLWQS that's  
12 been approved by the Board, but does have a  
13 problem with the compliance schedule. And hence  
14 as a discharger, you might not want to risk  
15 getting your TLWQS disapproved by EPA because  
16 they have a problem with the compliance  
17 schedule. You might want to leave that to be  
18 debate the in the context of an NPDES permit  
19 issuance.

20 MR. SOFAT: Right. In my view those  
21 are two separate things. The defense somebody  
22 has in my view is because of the approved  
23 variance, not because of a compliance schedule.  
24 Variance gives you the protection, not the

1 compliance schedule.

2           And when we will send the package,  
3 the package will be for approving or  
4 disapproving the variance, not the compliance  
5 schedule. Compliance schedule is the NPDES  
6 permit people's function. That is how we are  
7 seeing it.

8           MS. FRANZETTI: Yes. But if they  
9 can't meet yet that TL standard, the three we've  
10 been using, when the standard is the one, then  
11 getting the three when they're still discharging  
12 five does potentially expose them to enforcement  
13 until a compliance schedule is approved.

14           MR. SOFAT: So three is the HAC. And  
15 it will say, the variance will say that you have  
16 X number of years to get to three. In the  
17 meantime, you must apply the following PMP. So  
18 the enforcement is based on whether or not  
19 somebody is applying those PMP.

20           MS. FRANZETTI: If the Board order  
21 says you have X amount of time to get to the  
22 three, okay, the Board order also has to say,  
23 and that three lasts for X number of years  
24 thereafter.

1 MR. SOFAT: It has to.

2 MS. FRANZETTI: So, I would say your  
3 point about if the Board says you have X amount  
4 of time to get to three, that's a compliance  
5 schedule.

6 MR. SOFAT: Okay. Compliance  
7 schedule, it's not. Traditionally speaking,  
8 it's not compliance schedule.

9 Compliance schedule is what do you  
10 need to do at your side to comply whether it's  
11 PMP or whether it's the final number. There's a  
12 distinction between then.

13 Variance is simply, so we were  
14 talking about three milligrams and you're going  
15 to get there seven years. That means the  
16 analysis was done, what is HAC, and then  
17 analysis was done based on the PMP that has been  
18 selected, which includes BMP, how long would it  
19 take.

20 And that's the whole objective of  
21 that variance that you have a different standard  
22 for that many years, if you do the PMP. PMPs  
23 are the terms and conditions.

24 HEARING OFFICER TIPSORD: Mr. Sofat,

1 let me ask you a question. A time-limited water  
2 quality variance that the Board issues, if we  
3 say the new water quality standard is three for  
4 this water body, and USEPA approves that, are  
5 you saying that it's not three until the end of  
6 the variance, or are you saying it's three  
7 through the variance?

8 MR. SOFAT: Well, it depends on how  
9 the request is made. So if I say the HAC --  
10 because we talked about as long as necessary.  
11 So somebody is saying that, look, I'm going to  
12 need X number of years to get to this endpoint,  
13 endpoint of three. So it's, you know, year one,  
14 whether it's seven, or six, or five.

15 HEARING OFFICER TIPSORD: Then what  
16 is the water quality standard for the water body  
17 from the period of the variance starting until  
18 they get to three? Is there just no water  
19 quality standard?

20 MR. SOFAT: The HAC is your water  
21 quality standard. The underlying standard is  
22 there. That's why the variance procedure is  
23 going on because you cannot comply with that.  
24 And we talked earlier about standard is five.

1 But I know based on the existing and available  
2 information, I know I can only go as far as 10.

3 HEARING OFFICER TIPSORD: So, let me  
4 ask you this. There's a time-limited water  
5 quality variance that at the end of the  
6 variance, everybody is going to be at three.  
7 Everybody that's got the variance is going to be  
8 at three. Suddenly, they start discharging 20  
9 for a year. Is there a violation of the water  
10 quality standard?

11 MR. SOFAT: So can you help me  
12 understand the question. So, let's say, five  
13 years and the number is 10. So when did they  
14 start discharging 20?

15 HEARING OFFICER TIPSORD: Let's say  
16 they're discharging 10 now. At the end of the  
17 variance, they're going to get to three. That's  
18 going to be the water quality standard at the  
19 end of the variance.

20 In the meantime, they say, hey, we  
21 can discharge 20 for a year or two before we  
22 have to start working to get to three. What  
23 happens? Is there a violation of the water  
24 quality standard.

1 MR. SOFAT: Whether or not they are  
2 in violation of time-limited water quality  
3 standard depends on whether or not they are  
4 implementing the PMP.

5 MS. ZALEWSKI: In that same example,  
6 what if they haven't done anything. If they're  
7 trying to get down to -- a discharger is trying  
8 to get down to three and they don't take any  
9 steps for the five years, say it's a five-year  
10 variance, and they come back and ask for a  
11 reevaluation. They're claiming they didn't have  
12 enough time to meet it, but they hadn't done any  
13 of those steps.

14 Again, is it a violation? Because if  
15 it's not in the Board order -- we're struggling.  
16 When we review these variances, usually we look  
17 at the whole package and we consider the  
18 steps and if they're reasonable and if we see  
19 enough movement of the needle in the right  
20 amount of time.

21 So I think they're kind of what we're  
22 struggling with up here is how we would assess a  
23 permit application.

24 MR. SOFAT: My view is that's where

1 the PMP comes in. Those PMPs have to be, like,  
2 all of you need to do this. And if you're not  
3 doing that, that means you are in violation of  
4 your Board connection, which is actually part of  
5 their NPDES --

6 MS. ZALEWSKI: Right. So it would be  
7 set by the Agency, not the Board.

8 MR. SOFAT: Right. And if somebody  
9 doesn't do anything and then they come back and  
10 say they want extension, extension requires you  
11 to say, what was required, what did you do, what  
12 can kind of progress did you make?

13 So it's not like somebody could just  
14 decide that they don't want to do anything and  
15 then they ask for extension. That's the whole  
16 objective of having reevaluation.

17 MS. ZALEWSKI: So when the Board is  
18 determining, we don't know what that timeline  
19 looks like, when we're determining whether to  
20 grant or to deny. We don't know what that  
21 timeline looks like, correct? Because it comes  
22 after the fact.

23 The timing of the conditions come  
24 before the Agency after the petition has been

1 accepted, approved by the Board; is that right?

2 HEARING OFFICER TIPSORD: If the  
3 compliance plan is part of the NPDES permit, the  
4 Board does not see that unless there's an appeal  
5 in the NPDES permit.

6 MR. SOFAT: That's true.

7 MS. ZALEWSKI: So it's after the  
8 Board has to decide.

9 MR. SOFAT: Because all agency is  
10 adding is if somebody has to do, let's say,  
11 technology or some kind of control. That  
12 requires them to have a compliance schedule.  
13 That is all we are saying how many years do you  
14 get.

15 However, the original Board order  
16 defines what is the HAC, what is the duration,  
17 and what PMPs must be done. We have no room to  
18 play with that.

19 MS. ZALEWSKI: So the PMP will be in  
20 the original petition, but not the timing of  
21 them.

22 MR. SOFAT: Right. All of that is  
23 decide by the Board. We are simply deciding the  
24 compliance schedule.

1 MS. PAPADIMITRIU: And part of the  
2 compliance then is any sort of implementation  
3 that has to be done to meet whatever that  
4 threshold is. That's part of the schedule.

5 MR. SOFAT: That's the showing they  
6 will have to do. The Board required me to do  
7 XYZ PMP or BMP. For me to do those, I'm going  
8 to need X number of years. That's the  
9 justification you are making.

10 MS. PAPADIMITRIU: In your  
11 estimation, the Board would have the appropriate  
12 information to make that determination with or  
13 without a schedule.

14 MR. SOFAT: Yes.

15 MS. ZALEWSKI: What's the benefit of  
16 the Agency deciding that over the Board in your  
17 opinion?

18 MR. SOFAT: At the point of writing  
19 NPDES permit, we will be asking the specific  
20 question about how much time do you need to do,  
21 let's say, BMP ABC. And that is case-by-case  
22 analysis. That is not required by any 131.14.

23 There are two separate functions in  
24 my view 131.14 about water quality variance is

1 that if you want a variance, what do you need to  
2 demonstrate. And that's what this whole rule is  
3 about.

4 In that rule, they are saying, and  
5 I'm sure this rule talks about compliance  
6 schedule, that there are states out there that  
7 don't have compliance schedule provisions.

8 MS. ZALEWSKI: So if it's a single  
9 discharger it would make sense for the Board to  
10 put the timing on the conditions if it's a  
11 single discharger TL.

12 MR. SOFAT: And, again, I think that  
13 my response doesn't change because I'm  
14 separating the functions. I'm saying Board has  
15 that quasi legislative and judicial authority to  
16 decide what should be the alternated water  
17 quality standard and what actions that person  
18 has to do.

19 Then we go back based on that Board  
20 order, we do our compliance schedule review and  
21 decide whether or not the person should get a  
22 compliance schedule. And if they do, how long?

23 MR. ETTINGER: Well, if you want to  
24 keep a separate, keep it separate. But it seems

1 to me 560(c) which is the language I pointed to  
2 before, you specifically ask the petitioner to  
3 demonstrate how long they need to reach the  
4 highest attainable condition which strikes me is  
5 the same showing that you need for your  
6 compliance schedule.

7 So I'm not sure why you want to  
8 require the petitioner to prove that to the  
9 Board if you were then going to do it in the  
10 permit.

11 MR. SOFAT: The demonstration that we  
12 are requiring there is for HAC, which is a very  
13 different demonstration. Based on the existing  
14 information, what is the best -- if this is a  
15 single discharger, what can you do? That  
16 becomes your HAC.

17 Or, for a water body, what is the  
18 best point and non point sources can do to get  
19 to that HAC? So that's a totally different  
20 demonstration than a compliance schedule  
21 demonstration.

22 MR. ETTINGER: I think we're going to  
23 have to work on our terminology as to HAC and  
24 water quality and what's being shown here

1 because you're 560(c) appears to overlap with  
2 some -- appears to require the Board to consider  
3 something that you say should be considered  
4 separately.

5 And the Board and the Agency are  
6 going to have to consider whether the Board  
7 wants to set the time period to meet the highest  
8 attainable condition or whether the Agency is  
9 going to set the time period to meet the highest  
10 attainable condition using a compliance  
11 schedule.

12 HEARING OFFICER TIPSORD: Mr. Andes,  
13 you had a question?

14 MR. ANDES: Just on one particular  
15 point there. In a situation where, say, a  
16 discharge has happened at a level of around 10,  
17 the time limited water quality standard is  
18 issued and they are following -- the discharger  
19 is following the minimization program measures,  
20 say, for chlorides.

21 They're doing all the right things,  
22 but it's a really cold year with a lot of road  
23 salt that's applied and the number turns out to  
24 be 12. As long as they are following all the

1 minimization program requirements that were part  
2 of this process, they should be insulated from  
3 liability, correct?

4 MR. SOFAT: I'm not sure about that  
5 scenario. I think that when you're deciding  
6 HAC, that's when you want to think about, okay,  
7 what is the best that can be done and  
8 predicting, you know, what has happened in the  
9 past, what could happen in the future. I'm not  
10 sure about that question.

11 MR. ANDES: Well, I'm just saying if  
12 the level in any particular storm turns out to  
13 be higher, but they're doing all the right  
14 things, certainly our concern would be you  
15 should not be liable for a violation in that  
16 situation based on sampling in one storm when  
17 the key, and I guess the time-limited water  
18 quality standard would lay this out, what are  
19 the terms of the compliance?

20 What are the terms by which you will  
21 be judged being in compliance or not? Our  
22 position would be sampling in one storm  
23 shouldn't do that. Rather the question would  
24 be, are you complying with the minimization

1 program requirement in your permit and doing all  
2 the right things. And if so, our thought would  
3 be, you should be judged to be in compliance.

4 MR. SOFAT: I would say if I have to  
5 do that, I will then define my HAC with some  
6 boundaries; that this HAC is calculated based on  
7 such kind of whether predictions. Rather than  
8 just saying anything outside that box is covered  
9 and, therefore, no enforcement can happen. That  
10 is how I will try to design that my HAC applies  
11 to these kind of, you know, events.

12 MR. ANDES: But this is not about the  
13 HAC at the end of the process. The three, say.  
14 This is about what are the numbers going to be  
15 in any particular storm during the term of the  
16 variance.

17 So, I guess, we would have to talk  
18 about that. But we would also want to make sure  
19 that, say, with climate change that we not be  
20 putting boundaries on the conditions that could  
21 then change and put a discharger into violation.

22 MR. SOFAT: I will have to think  
23 about that question. I'm not sure that I can  
24 say if you do -- because, again, HAC is the one

1 that decides that, okay, based on the whether  
2 predictions, based on what has happened in the  
3 past, what do we expect. And, again, that is  
4 why you cannot always have a number. You cannot  
5 always have a number either. So especially when  
6 you are dealing with such unpredictable type of  
7 issue, maybe your HAC needs to include that, and  
8 not be a number.

9 MR. ANDES: The USEPA has indicated  
10 it doesn't necessarily have to be a number, but  
11 rather could be another qualitative narrative  
12 condition.

13 MR. SOFAT: Exactly.

14 HEARING OFFICER TIPSORD:

15 MR. BOYD: Mr. Sofat, I was just  
16 going to point out the whole idea of what needs  
17 to be condition in a time-limited water quality  
18 standard is already contained in the USEPA's  
19 rules that, for example, is 131.14; is that  
20 right?

21 MR. SOFAT: Yes.

22 MR. BOYD: There's a section in here  
23 that talks about what highest attainable  
24 condition of a water body or water body segment

1 must include in that time-limited water quality  
2 standard. And we were talking about before  
3 there's a different between discharger  
4 time-limited water quality standard and water  
5 body or water body segment water quality  
6 standards and 131.14(b)(ii)(B) says that the  
7 water quality standard variance is applicable to  
8 a water body or water body segment, one, a  
9 highest attainable interim use and interim  
10 criterion, or, two, if no additional feasible  
11 pollutant control technology can be identified,  
12 the interim use and interim criterion that  
13 reflect the greatest pollutant reduction  
14 achievable with the pollutant control technology  
15 installed at the time the state adopts the water  
16 quality standard variance and the adoption and  
17 implementation of a pollutant minimization  
18 program.

19 So, does that not address this issue  
20 about what interim criterion would need to be in  
21 play during the time of the water quality  
22 standard for water body or water body segment  
23 TLWQSSs.

24 MR. SOFAT: I agree with you. It

1 does. We have been talking about these  
2 questions without laying out whether we are  
3 talking about discharger types or water body  
4 types. You are right about that.

5 HEARING OFFICER TIPSORD: I think  
6 we're ready to move on.

7 Question No. 37 is about  
8 Section 104.570. The Board has asked if the  
9 Agency would object to clarifying 104.570  
10 (c) (4), does the Agency have any objection?

11 MR. TWAIT: The Agency agrees with  
12 this change.

13 HEARING OFFICER TIPSORD: Thank you.

14 MS. LIU: Question 38, on  
15 Section 104.580, Reevaluation.

16 Would you please comment on providing  
17 provisions in the reevaluation under this  
18 section that would clarify the individual  
19 permittees to be included under the  
20 multi-discharger variance would need to submit  
21 their own information.

22 MR. TWAIT: I think including that  
23 information is good. But as I mentioned before,  
24 we think USEPA has kind of changed its thought

1 process. They recently approved a variance or  
2 time-limited -- I guess theirs was a variance,  
3 for phosphorus in Wisconsin where they looked at  
4 all the impacts to the state and they made the  
5 case that it was the economic factor for the  
6 state. And then when they approve the  
7 individual facilities to take part in that  
8 variance, then they had to prove that they had  
9 similar economic situation as what the variance  
10 called for.

11 So they set it up in conditions of  
12 what they had to meet. But when they looked at  
13 the original variance, they looked at the  
14 impacts to the state, in general, rather than  
15 specifically.

16 MR. BOYD: Could I just ask that you  
17 give the citation. Was that in the federal  
18 register? Can you give a citation to that?

19 MR. SOFAT: Citation for Wisconsin  
20 approval?

21 MR. BOYD: Yeah, the Wisconsin  
22 phosphorus time-limited water quality standard.

23 MR. SOFAT: We can file that with the  
24 Board.

1 MR. BOYD: And just to quickly  
2 follow-up. Is that the only action by EPA that  
3 you all are aware of on a time-limited water  
4 quality standard.

5 MR. SOFAT: That's the MDV that we  
6 are aware of. That's the only one. We haven't  
7 seen -- yeah, as I said earlier, I think I said  
8 it's an evolving issue, this variance is. And  
9 they're trying to streamline how to get  
10 variances across the nation.

11 And I think that Wisconsin is the  
12 biggest one that has been approved. I know  
13 they're working on Kansas. That's another MDV,  
14 and I'm not sure whether that has been approved  
15 or not.

16 MR. RAO: So Mr. Twait, are you  
17 saying that information may not be included in  
18 this package then? Or are you suggesting  
19 depending on the type of TL --

20 MR. TWAIT: I think that we would  
21 like to leave open for the possibility of  
22 instead of them going for an MDV and justifying  
23 each individual case to leave open the  
24 opportunity to do something statewide like

1 Wisconsin did.

2 But for the smaller MDVs, if there's  
3 three facilities or something, then, yes, I  
4 think they ought to include the individual  
5 information.

6 MR. RAO: Is there somewhere that  
7 could be reflected in the rules?

8 MR. TWAIT: We can take a look at  
9 that.

10 HEARING OFFICER TIPSORD: And this  
11 sort of may go to what is our next question  
12 about the Agency filing a recommendation.

13 Absent the Petitioner's bringing the  
14 Board information, whether it's on a statewide  
15 basis or individual basis, I mean, the Board  
16 doesn't have its own unit going out and getting  
17 that information like the Agency perhaps does.

18 So I guess that's kind of where our  
19 question is coming from. If this information is  
20 not submitted to us, we don't necessarily have  
21 the ability to go get it.

22 MR. TWAIT: I think it would have to  
23 be submitted to the Board. We just want to  
24 leave open the opportunity to do something

1 different than what they talked about in 2013.

2 HEARING OFFICER TIPSORD: And that  
3 makes sense. Thank you.

4 MS. FRANZETTI: I'm trying to make  
5 sure I understand what you're saying about the  
6 Wisconsin phosphorus multi-discharger variance  
7 approval.

8 So my question is in the TLWQS that  
9 Wisconsin submitted to USEPA, were there  
10 criteria for what dischargers had to meet in  
11 order to qualify for the TLWQS, including  
12 perhaps financial criteria?

13 MR. TWAIT: Yes. They put out  
14 criteria to meet the economic guidance and the  
15 preliminary screening was at 2 percent of the  
16 median household income as an example. And they  
17 said if you're over 2 percent, you're good. If  
18 you're between 11 percent and 2 percent, then  
19 you have to have mitigating factors, either two  
20 or three of them. And it's outlined in the  
21 economic guidance document.

22 MS. FRANZETTI: And then did USEPA in  
23 approving it say to Wisconsin, Wisconsin, you  
24 need to require each district who wants to avail

1 itself of the TLWQS to make a submission to you  
2 showing that it satisfies the applicable  
3 criteria?

4 MR. TWAIT: Yes.

5 MS. FRANZETTI: Okay. In Illinois,  
6 if the same thing were to occur in a  
7 multi-discharger variance TLWQS, wouldn't it be  
8 acceptable under these proposed regulations that  
9 the same thing occurred, the Board's order sets  
10 out what the eligibility criteria is to avail  
11 yourself of the TLWQS, and if a proved by EPA,  
12 then individual dischargers have to make  
13 submissions to Illinois EPA demonstrating that  
14 they do satisfy the eligibility criteria.

15 MR. TWAIT: As written, it does.  
16 This was based on the Board's question of  
17 whether each individual at the time of the  
18 application provides the individual information.

19 MS. FRANZETTI: I understand that.  
20 And my question is trying to clarify that  
21 perhaps that is not an appropriate way to rank  
22 the rules that right up-front in the TLWQS  
23 petition before the Board, that every individual  
24 discharger who may seek eligibility needs to

1 submit that information.

2 MR. TWAIT: Yes.

3 MS. PALUMBO: Did the petitioners for  
4 the Wisconsin multi-discharger variance have to  
5 propose criteria similar to the proposed rules  
6 here?

7 MR. TWAIT: No. They don't have a  
8 Pollution Control Board like we do. So the  
9 state put together the variance.

10 MS. PALUMBO: Okay.

11 MR. TWAIT: But they did create  
12 criteria to be involved. So the applicant has  
13 to demonstrate that they meet all the criteria.

14 MS. PALUMBO: So, the Wisconsin  
15 equivalent of the Illinois EPA formulated this  
16 criteria.

17 MR. TWAIT: Yes.

18 MR. ANDES: While the only  
19 multiple-discharger variance since the new USEPA  
20 rules is the Wisconsin one, isn't it true that  
21 there were other statewide variances adopted and  
22 approved for mercury in Indiana, Ohio, Michigan,  
23 and those all have been approved by USEPA,  
24 correct?

1 MR. TWAIT: I believe so.

2 MR. ANDES: So those might be  
3 relevant as well in terms of the kind of  
4 eligibility criteria that were established in  
5 those?

6 MR. TWAIT: Possibly as long as EPA  
7 hasn't changed their thought process since then.

8 MR. ETTINGER: I don't know whether  
9 to put this in the form of a question or not,  
10 but we're hearing a lot of testimony by IEPA as  
11 to what they think happened in Wisconsin.

12 I actually think that there was  
13 Minnesota variance rules that were also approved  
14 and maybe we should look at some of those. But  
15 I question the usefulness of asking Illinois  
16 witnesses about rules across the state and  
17 country that they may or may not understand.

18 I know of rules that were passed in  
19 Montana that I'm personally suing them over. So  
20 I don't know --

21 MS. FRANZETTI: But you sue  
22 everybody.

23 MR. ETTINGER: But we didn't sue over  
24 Wisconsin or Minnesota. So I'm just questioning

1 how much further we want to go on asking IEPA  
2 about things that happened in other states.

3 MS. LIU: Doing a proposed  
4 reevaluation, would you please comment on  
5 whether Illinois EPA should be required to file  
6 a comment or recommendation to the Board.

7 MR. TWAIT: I think that the Agency  
8 would agree that we should be filing  
9 recommendations at the reevaluation time and  
10 also at the extension. The reevaluations are  
11 the five-year period and the extensions -- the  
12 reevaluation would be the analysis of the HAC  
13 and an extension would be reevaluating the  
14 entire time-limited water quality standard.

15 And I think the Agency should be  
16 filing recommendations in each of those. We'll  
17 propose some language.

18 HEARING OFFICER TIPSORD: We're down  
19 to an area of Simplifying and Clarifying  
20 Language that the Board proposed several  
21 questions to the Agency and the first one -- and  
22 this is my JCAR training inserting itself even  
23 30 years later, and I know it's statutory  
24 language, substantially compliant, substantial

1 compliance.

2           Would the Agency comment on whether  
3 or not the terms should be defined or whether or  
4 not the terms could be removed.

5           MR. TWAIT: I think we can agree to  
6 come up with a definition.

7           HEARING OFFICER TIPSORD: And then  
8 the next one we have is in an attempt to address  
9 some clarification issues and some issues with  
10 the executive order on the use of requirements,  
11 we've identified several sections where it's  
12 either the Agency or the Board taking some  
13 action, and those are listed in our question  
14 where we would ask if the Agency objects to  
15 replacing the word must with the word will.

16           MR. TWAIT: I think what we would  
17 like to do is address all of these in our  
18 written response.

19           HEARING OFFICER TIPSORD: Is that the  
20 same with 2(b)?

21           MR. TWAIT: Yes.

22           HEARING OFFICER TIPSORD: Okay. And  
23 the rest of those we have.

24           MR. TWAIT: Yeah. All of two.

1 HEARING OFFICER TIPSORD: Then that  
2 is all of the Board's questions.

3 MS. PAPADIMITRIU: So let's say that  
4 an alternative standard was given for four  
5 years, let's just say, relatively speaking.  
6 After four years, nothing happens.

7 The responsibility is on the party to  
8 come back to the Board for a renewed alternative  
9 standard; is that correct.

10 MR. TWAIT: Yeah. If they would like  
11 an extension, they would have to come back to  
12 the Board.

13 MS. PAPADIMITRIU: What happens if  
14 they don't come back?

15 MR. TWAIT: Then the underlying  
16 regulation would be put into their permit.

17 MS. PAPADIMITRIU: Are they notified  
18 of that?

19 MR. TWAIT: We'll probably go through  
20 a permit modification, or it's possible that we  
21 could write that into the permit. If you only  
22 gave four years and we turned around and we're  
23 writing a permit for a five-year period, we  
24 would reference the fact that their are

1 time-limited water quality standard ends at the  
2 end of four years.

3 MS. PAPADIMITRIU: You would, or is  
4 that something you're offering right now?

5 MR. TWAIT: That's something that we  
6 would probably do.

7 MS. PAPADIMITRIU: I just wonder if  
8 that would help clarify any sort of concerns  
9 that they weren't notified or they didn't know  
10 or anything like that. I could be overly  
11 cautious on that and I don't know what the rest  
12 of the folks up here think about that.

13 I think my advisor disagrees with me.

14 MS. RABCZAK: So we are in the  
15 reevaluation scenario, the way the section is  
16 written right now is the petition has to do  
17 something.

18 MR. TWAIT: Well, that would be for  
19 reevaluation. And the reevaluation, if the  
20 Board gave them 15 years to do something, they  
21 have to reevaluate at five-year intervals.

22 MS. RABCZAK: So my question here is  
23 that because the Board has to originally set up  
24 a schedule, but then we have to wait for the

1 petitioner to come in and submit the petition,  
2 what if the petitioner doesn't submit anything?  
3 Do we still have to --

4 MR. TWAIT: If they don't submit  
5 reevaluation, then their time-limited water  
6 quality standard ends. So, if the Board were to  
7 give them 15 years and say at year four and a  
8 half, you need to have your petition in -- or I  
9 mean, your reevaluation by a set date, and they  
10 don't come in and give you their reevaluation,  
11 they're time-limited water quality standard  
12 ends.

13 MS. RABCZAK: Would it be helpful to  
14 add that to the rules because it's not in the  
15 rules right now. It's not clear what the Board  
16 has to do in terms of inactivity of a petitioner  
17 in terms of reevaluation process.

18 The question is: What is the  
19 deadline by which the petitioner must submit? I  
20 guess that's going to be part of the Board's  
21 adopted schedule.

22 MR. TWAIT: Right. If a variance is  
23 longer than a five-year period, then it has to  
24 be reevaluated every five years. And that

1 reevaluation has to get to USEPA within the  
2 five-year period.

3 MS. RABCZAK: So would it be helpful  
4 to think about the deadlines for the petitioner  
5 to submit the reevaluation petition, or should  
6 that be all set up by the Board in the original  
7 time-limited water quality standard?

8 MR. TWAIT: I think the Board needs  
9 to include it, but I also think that if we don't  
10 have in here that their time-limited water  
11 quality standard ends if they don't resubmit it,  
12 then we need to put that in.

13 MR. RAO: So would that be under  
14 104.580?

15 MR. TWAIT: Yes.

16 MS. RABCZAK: Just again to clarify  
17 the deadline for the petitioner to submit their  
18 reevaluation petition would be set by the Board  
19 in the original time-limited water quality  
20 standard?

21 MR. TWAIT: Yes.

22 MS. PAPADIMITRIU: That's five years.

23 MR. TWAIT: If it's more than five  
24 years.

1 MS. PAPADIMITRIU: Thank you.

2 HEARING OFFICER TIPSORD: All right.  
3 With that I think we can move on to the Attorney  
4 General's questions.

5 MS. PAMENTER: Kathryn Pamenter,  
6 P-A-M-E-N-T-E-R, with the Illinois Attorney  
7 General Office.

8 I just had a couple procedural  
9 questions referencing Section 104.570 entitled  
10 USEPA Review. Our first question corresponded  
11 to subsection B.

12 What is the time frame within which  
13 the Illinois EPA must submit the decision of the  
14 USEPA regarding a time-limited water quality  
15 standard to the Board?

16 MR. TWAIT: We don't have a time  
17 limit set in the proposed rules. If USEPA  
18 doesn't copy the Board when they do that, we'll  
19 send it in as soon as possible.

20 MS. PAMENTER: Also with respect to  
21 Section 104.570, subsection C addresses the  
22 steps should USEPA disapprove of the Board's  
23 decision, there are steps laid out.

24 What occurs if the USEPA approves of

1 the Board's decision? When does the  
2 time-limited water quality standard become  
3 effective?

4 MR. TWAIT: In the case of  
5 reevaluation if the Board approves -- well, wait  
6 a minute.

7 MS. PAMENTER: And actually, on this  
8 particular question, Section 104.570. It's our  
9 understanding that the Board will issue it's  
10 opinion and order and that that then goes  
11 through whatever appeal process may exist with  
12 respect to that order.

13 It needs to be then submitted to the  
14 USEPA for its review and approval. And I guess  
15 we're trying to understand when the time-limited  
16 water quality standard becomes effective.

17 And if I may, based upon the  
18 discussion that was had earlier, is the  
19 time-limited water quality standard effective  
20 upon the Board's order going final? Is it when  
21 the USEPA approves it? Or is it when you all  
22 issue your NPDES permit?

23 MR. TWAIT: For state purposes, it's  
24 effective when it's adopted by the Board. For

1 water quality -- for Clean Water Act purposes,  
2 it's effective when it's approved by USEPA.  
3 Once it's been approved by USEPA, the NPDES  
4 permit will be modified and the time-limited  
5 water quality standard will be enforceable in  
6 the permit.

7 MS. PAMENTER: Following up on the  
8 earlier question of the Board with respect to --  
9 and it corresponds to the effectiveness of the  
10 time-limited water quality standard. I'm going  
11 to go back to the hypothetical that's been used  
12 throughout this discussion.

13 If the set standard is one, they're  
14 currently a 10 and they're trying to get to  
15 three. Upon the Board's issuance of their final  
16 approval -- their opinion and order, excuse me,  
17 that's when the time-limited water quality  
18 standard becomes effective. Is the standard 10  
19 or is it a three at that point in time?

20 MR. TWAIT: For state purposes, it  
21 would be -- well depends on how the Board order  
22 was written. If the Board writes it in such a  
23 way that they've got five years to get to the  
24 three, then the 10 would be applicable until

1 that time.

2 MS. PAMENTER: Can you say that one  
3 more time.

4 MR. TWAIT: If the Board writes the  
5 time-limited water quality standard and gives  
6 them -- gives the permittee five years to get  
7 down to three milligrams per liter, the highest  
8 attainable condition in that situation says that  
9 the permittee can't get -- the treatment can't  
10 get worse.

11 And so until they can meet the three,  
12 if they're already meeting the 10, then the 10  
13 would be applicable until the three was  
14 applicable.

15 MS. PAMENTER: So for enforcement  
16 purposes, it's a 10 up until the five-year  
17 period ends at which times it's three?

18 MR. SOFAT: It's the PMP that's  
19 enforceable. Because PMP is designed to go from  
20 10 to three. That's the objective of PMP. That  
21 is what the enforceable conditions are.

22 And, of course, in my response, I'm  
23 assuming that there's no one number HAC out  
24 there. It's the -- ultimately you're going to

1 comply with three. But three gets -- we get to  
2 three by doing the PMP. So PMP will be in the  
3 NPDES permit and that is what we look at in  
4 order for us to determine enforceability,  
5 whether the issue of noncompliance exists.

6 MS. PAMENTER: So the issue of  
7 noncompliance doesn't correspond to the number,  
8 the time-limited water quality standard, the  
9 variance. It corresponds to whether the PMPs  
10 are being achieved.

11 MR. SOFAT: Exactly. Because, again,  
12 it's a best guess. You're to going to look at  
13 PMP and say what is the capability of these PMP  
14 to achieve X percent of reductions. So that's  
15 your highest attainable condition.

16 The PMP are the ones that controls.  
17 Well, PMP are controls and plus BMP. So PMP is  
18 what takes you. BMP is what people are required  
19 to do.

20 MS. PAMENTER: Thank you.

21 MS. RABCZAK: Can you please clarify  
22 in terms of enforceability one more time a  
23 scenario when the Board adopts the time-limited  
24 water quality standard, it goes to USEPA;

1 meanwhile, we have a stay, we also have an  
2 enforceability on the state level, time-limited  
3 water quality standard, then it takes some time  
4 for USEPA to review it and they disagree, so  
5 they send it back to us.

6           What happens at that moment in terms  
7 of what's enforceable? Because we will have to  
8 reopen the docket and look at it one more time  
9 before we adopt and modify the time-limited  
10 water quality standard. We still have a stay.

11           MR. TWAIT: If USEPA disapproves the  
12 time-limited water quality standard, the stay  
13 ends.

14           MS. RABCZAK: Not until they exhaust  
15 all the appeal.

16           MR. TWAIT: Well, no. The stay ends  
17 at --

18           MS. PAPADIMITRIU: At the state  
19 level?

20           MR. SOFAT: USEPA disapproval, state  
21 ends. That is how the statute is written.

22           HEARING OFFICER TIPSORD: So even if  
23 the USEPA disapproves, the Board has -- I mean,  
24 that's not the end of the TL. I mean, you can

1 come in and modify your petition and everything.  
2 You're saying that once the USEPA disapproves,  
3 they no longer have a stay, even though they're  
4 still in a time-limited water quality process?

5 MR. TWAIT: Correct.

6 MR. SOFAT: Yes. Stay is over.

7 MS. PAPADIMITRIU: At the state level  
8 as well?

9 MR. SOFAT: Yeah, because it is only  
10 for state purposes. Stay is only for state  
11 purposes. There's no such provision in the  
12 Clean Water Act.

13 MS. RABCZAK: So what happens while  
14 they are modifying based on the use of the  
15 comments? They have no stay.

16 MR. SOFAT: You always go back to the  
17 underlying standard. Any time somebody doesn't  
18 file their extension or reevaluation, the  
19 concept is that when the variance ends, you go  
20 back to the original standard.

21 MR. TWAIT: And they could still  
22 address -- they could address USEPA's comments  
23 and go back to 104.570(c) which outlines  
24 modifications of the time-limited water quality

1 standard, but their stay would have ended.

2 HEARING OFFICER TIPSORD: Yeah. That  
3 was my point. That they can modify per USEPA,  
4 but you're saying that it ends.

5 MR. TWAIT: The stay has ended.

6 MR. SOFAT: And, again, I think I  
7 would like to make a point here that we had to  
8 have certainty through the cycle, in the cycle.  
9 So that's why the stay was stopped there.

10 But our end objective is going to be  
11 that we are working with USEPA and petitioners  
12 throughout the process so that we don't get into  
13 that situation. That is the whole objective.  
14 That's the role we intend to play.

15 MS. PAMENTER: Continuing with  
16 Section 104.570, which is the USEPA Review  
17 Section. Subsection (c)(6) provides that the  
18 Agency shall submit any order issued by the  
19 Board modifying a previously granted  
20 time-limited water quality standard to the USEPA  
21 for review and approval.

22 What occurs then if the USEPA either  
23 approves or disapproves the Board's order  
24 modifying a previously granted time-limited

1 water quality standard? What's the procedure  
2 that occurs at that step?

3 MR. TWAIT: If USEPA approves the  
4 time-limited water quality standard, then it  
5 becomes applicable and will be put into the  
6 NPDES permit where it will be enforceable.

7 If USEPA disapproves, then it goes  
8 back to 104.570(c), and they can ask the Board  
9 to modify the petition, or modify the -- they  
10 can modify the petition.

11 MS. PAPADIMITRIU: If the USEPA  
12 approves in that instance, when does the, let's  
13 say, six-year clock begin? At the date of that  
14 approval or when they filed it with the Board?  
15 Because it's been stayed pending USEPA approval.

16 MR. SOFAT: So I understand the  
17 question is about when does the duration start?

18 MS. PAPADIMITRIU: Yes, sir.

19 MR. SOFAT: So if the USEPA has  
20 approved it, I think we give two options. The  
21 Board order could say that it starts at the  
22 USEPA approval. It could be six years from now,  
23 it ends; or it could be six years from the day  
24 USEPA approves it.

1           So both options are open for the  
2 Board and petitioner has to request.

3           MS. PAPADIMITRIU: Does the Agency  
4 has a preference?

5           MR. SOFAT: I think that both are  
6 equally good. It depends on the circumstances,  
7 if it's very complex. We see the advantage of  
8 having USEPA approval to make sure all the  
9 issues are resolved.

10           If it's a simple one, yeah, we know  
11 that in six years this can be done, then that's  
12 what we'll be recommending in our  
13 recommendation.

14           MS. PAPADIMITRIU: Thank you.

15           MS. PAMENTER: Just following up on  
16 if the USEPA disapproves the Board's order  
17 modifying a previously granted time-limited  
18 water quality standard, you answered that the  
19 procedure under subsection C could then be  
20 applied. Essentially they could go back and  
21 seek a new modification.

22           Would it be helpful to so indicate in  
23 the rule that you just simply go back through  
24 the same steps before? Because right now is it

1 silent in the instance of a disapproval.

2 MR. TWAIT: Well, we wouldn't  
3 necessarily have to go through the whole process  
4 again. If USEPA disapproved a MDV for the  
5 reason that one of the facilities wasn't  
6 technically in the class, the Board would have  
7 the option of not holding a hearing and to  
8 remove that person from the class.

9 You know, that would be something  
10 that relatively simple and we don't think they  
11 need to go through a hearing to do that. So,  
12 they wouldn't necessarily have to go through the  
13 whole process again.

14 MR. SOFAT: Were you asking if the  
15 Agency should just mention in the regulations  
16 that you will go back to 570(c)?

17 MS. PAMENTER: Yes.

18 MR. SOFAT: We could do that.

19 MS. PAMENTER: And then actually it's  
20 a similar question in Section 104.580 concerning  
21 Reevaluation. Again, there's a sentence that  
22 indicates that the reevaluation opinion and  
23 order goes to the USEPA for review and approval.

24 Same question, if there's a

1 disapproval, do you go back to the procedure  
2 under 104.570(c)? Like, you get to seek some  
3 sort of modification, or what happens in that  
4 instance?

5 MR. SOFAT: So rule does not say that  
6 USEPA approves or disapproves reevaluation. It  
7 requires you to submit within 30 days.

8 MS. PAMENTER: If it gets submitted  
9 to the Environmental Protection Agency for  
10 approval, which is what that 104.580 says, I  
11 guess I'm just trying to understand when it goes  
12 effective under the reevaluation scenario.

13 Maybe I'm misunderstanding that  
14 section. That's completely possible. But there  
15 is a sentence, the Agency shall submit the  
16 Board's reevaluation opinion and order to the  
17 United States Environmental Protection Agency  
18 for approval within 30 days of issuance of the  
19 Board's order.

20 And we're just trying to understand  
21 what happens if the Board approves it or doesn't  
22 approve it?

23 MR. SOFAT: So the simple requirement  
24 in the federal rule is that you have to submit

1 within 30 days or you go back to the underlying  
2 standard and use. So that's why the section  
3 simply says you need to submit it. There's no  
4 requirement -- my understanding is there's no  
5 requirement USEPA approving or disapproving that  
6 reevaluation.

7 MS. FRANZETTI: Well, then I would  
8 just raise, you may want to --

9 MR. SOFAT: Can I ask for a break?

10 MS. FRANZETTI: -- review language  
11 here because do say it's submitted to USEPA for  
12 approval.

13 MR. SOFAT: I need two-second break,  
14 please.

15 (WHEREUPON, a short break was  
16 taken.)

17 MR. SOFAT: So reevaluation -- so  
18 what the preamble talks about is that when you  
19 do the reevaluation and if the reevaluation  
20 comes up with a more stringent HAC, it needs to  
21 be self-implemented. So there's no  
22 approval/disapproval on that.

23 But if it's less stringent than the  
24 original HAC, then they are saying you need to

1 modify your variance and submit for approval to  
2 the USEPA. It's not stated in the rules, but it  
3 is in the preamble.

4 MS. PAMENTER: I would then just ask  
5 if perhaps a clarification is needed to this  
6 part of the rule, sort of along the lines of  
7 what just indicated. And then I would also ask  
8 whether, for the one that needs to be actually  
9 submitted to USEPA for approval, I think you  
10 said it's the less stringent one; is that  
11 correct?

12 MR. SOFAT: Yes.

13 MS. PAMENTER: What happens -- is the  
14 USEPA actually going to issue something that  
15 says we approve this or we disapprove of this?

16 MR. SOFAT: Because the second  
17 scenario is less stringent, they are saying  
18 modify the variance. So it's not HAC or  
19 reevaluation anymore. It's the whole package.

20 So, yes, they are approving or  
21 disapproving that package.

22 MS. PAMENTER: In that instance then,  
23 if there's a disapproval, what is the process --

24 MR. SOFAT: 570(c).

1 MS. PAMENTER: So could that also be  
2 clarified so that people understand the process.

3 MR. SOFAT: I understand. You just  
4 want the loop closed.

5 MS. PAMENTER: We want the loop  
6 closed. Thank you.

7 HEARING OFFICER TIPSORD: Thank you.

8 That leaves us with the pre-filed  
9 questions of IERG and Midwest Generation. It is  
10 about 12:35, 12:40. Let's take a lunch break  
11 until 1:30 and we'll come back at 1:30 and start  
12 with IERG. And that will give you guys a chance  
13 to look through your questions and see what may  
14 have already been addressed.

15 Thank you.

16 (WHEREUPON, a short lunch break  
17 was taken.)

18 HEARING OFFICER TIPSORD: Thank you  
19 everyone for being so prompt in getting back.

20 We'll start the afternoon session  
21 with the questions from the Illinois  
22 Environmental Regulatory Group.

23 MS. PALUMBO: The first set of  
24 questions is referring to the Board Note,

1 Section 104.520, where the Agency's encouraging  
2 persons to file a joint petition where possible.

3 So if a watershed work group or  
4 another entity files a collective petition, does  
5 the Agency intend that the stay applies to the  
6 individual facilities that are part of a  
7 watershed group?

8 MR. TWAIT: Yes. We expect that to  
9 be applicable to the individual facilities that  
10 are part of the watershed group. In addition,  
11 it applies not only to those identified within  
12 the original petition, but also any identified  
13 in the Board's order that files prior to the  
14 established deadline.

15 MS. PALUMBO: Okay. Will the  
16 watershed group need to provide any sort of  
17 documentation of the companies and/or the  
18 facilities that were members of the group at the  
19 time the petition is filed or that have since  
20 joined before the time-limited water quality  
21 standard is adopted?

22 MR. TWAIT: That will probably be a  
23 good idea.

24 MS. PALUMBO: Does that need to be

1 reflected in the rules?

2 MR. TWAIT: We would probably include  
3 that in the Board order, or the Agency's  
4 recommendation.

5 MS. PALUMBO: Can the Agency explain  
6 for the record and just so that everybody  
7 understands, why are watershed groups formed?

8 MR. TWAIT: To address widespread  
9 issues that can't be addressed by an individual  
10 applicant.

11 MS. PALUMBO: Does the Agency know  
12 how many watershed groups have been formed to  
13 date?

14 MR. SOFAT: For the purposes of MDV  
15 or just in general?

16 MS. PALUMBO: Probably both.

17 MR. SOFAT: There's several work  
18 groups out there working on the watershed  
19 conditions. Whether or not they choose to apply  
20 for a variance has to be seen.

21 MS. PALUMBO: Are watershed groups  
22 typically incorporated to your knowledge?

23 MR. TWAIT: Some of them have been.

24 MR. SOFAT: Yes. I believe the

1 answer to that question is yes.

2 MS. PALUMBO: How are the watershed  
3 groups that you know of typically legally  
4 represented?

5 MR. SOFAT: As I said earlier, they  
6 have not been in a proceeding that I can answer  
7 the question.

8 MS. PALUMBO: Do you anticipate that  
9 for the watershed pollutants that we identified  
10 earlier in the hearing, which was nutrients and  
11 chlorides, that it would be beneficial for  
12 watershed groups to sort of take the lead in  
13 filing for the time-limited water quality  
14 standards?

15 MR. TWAIT: Yeah, I think it would be  
16 good for them to take the lead. That's one of  
17 the advantages of having the watershed group.

18 MS. PALUMBO: So, if there's  
19 individual petitions that are filed, for  
20 example, for a chloride and the Board Note  
21 allows the Board to consolidate those petitions,  
22 does that consolidation anticipate that those  
23 individuals would now act collectively?

24 MR. TWAIT: It could. Just because

1 they're consolidated doesn't necessarily mean  
2 that they're going to act collectively. It all  
3 depends on what they put in their petition.

4 MS. PALUMBO: Would the lack of  
5 activity for one of those consolidated  
6 petitioners necessarily be detrimental to the  
7 petitions of the other people filing for that  
8 time-limited water quality standard?

9 MR. TWAIT: Only if they needed that  
10 person to complete their demonstration. If they  
11 can demonstrate the need without them, then that  
12 wouldn't be problematic.

13 MR. SOFAT: As I said earlier, we  
14 cannot force somebody to choose one type of  
15 variance over another. The objective here is  
16 certain cases are better suited for a watershed  
17 or MDV or single discharger. So we are trying  
18 to facilitate that discussion.

19 Again, if everybody filed their  
20 petition individually, which means, the 10(g)  
21 factors that they have chosen are individual  
22 factors. So just joining petition does not make  
23 it to be a water body and watershed variance.

24 So at the end of the day, the Board

1 needs to have the collective, if that was the  
2 water body or watershed variance people are  
3 seeking, that that 10(g) factor that they have  
4 considered has all dischargers in there.

5           It cannot just be I, as discharger X  
6 can only do this; therefore, here's my petition.  
7 And later on we join those petitions to ask for  
8 a watershed variance. That is not. So the  
9 demonstration that is necessary under the rules  
10 for a watershed variance must be presented to  
11 the Board.

12           However, whether there's one document  
13 that is later on prepared by everybody together  
14 and is provided to the Board, that is fine. So  
15 that is the underlying issue that we wanted to  
16 clarify, joining of petitions, Board has the  
17 authority. They can do that. They can remove  
18 somebody if they need to sever those.

19           However, here, I think the point we  
20 want to make is that be mindful of the type of  
21 relief that you are asking -- not relief -- type  
22 of variance that you are asking and make sure  
23 the demonstration is going to support that.

24           MS. PALUMBO: Does the Agency

1 coordinate watershed groups?

2 MR. SOFAT: We have. But Agency  
3 doesn't have to take the lead. Again, I think  
4 that now everybody knows in Illinois that there  
5 are watershed variances. If I were a  
6 discharger, I would be mindful of the things  
7 that are coming and making sure that if those  
8 pollutants are such, we have watershed, water  
9 body type variances might be necessary that I am  
10 working with others to create watershed; in  
11 fact, I'm very impressed that we have several  
12 groups out there who are doing this watershed  
13 base group work.

14 MS. PALUMBO: And will the Agency  
15 encourage -- I think we've covered this already.  
16 But just for clarification, will the Agency  
17 encourage the Board to specifically list those  
18 dischargers to whom the stay applies and an  
19 order -- I guess, is there any order -- strike  
20 that. I don't think that question makes sense.

21 Would you encourage the Board to  
22 specifically list those individual dischargers  
23 that are part of the watershed group to whom the  
24 stay would apply or to whom the time-limited

1 water quality standard would apply?

2 MR. TWAIT: Yes.

3 MS. PALUMBO: Question No. 2. This  
4 is in relation to those pending petitions that  
5 were converted from petitions for variances into  
6 petitions for time-limited water quality  
7 standards.

8 Would the Agency support allowing the  
9 petitioners with pending time-limited water  
10 quality standard petitions to amend their  
11 petitions after the Board adopts these rules,  
12 then have the Board undertake a substantial  
13 compliance assessment based on the adoptive  
14 rules, and then if there are any new substantial  
15 compliance deficiencies, issues a revised  
16 deadline for filing a substantially compliant  
17 petition?

18 MR. TWAIT: At this point the Board  
19 has already concluded non substantial  
20 compliance. The Agency believes it is up to the  
21 petitioner to either ask the Board to elaborate  
22 on the noncompliance of the petition or file an  
23 amended petition with the Board asking the Board  
24 to again determine substantial compliance, so a

1 substantial complaint petition could be filed by  
2 the deadline.

3 If the Board after adoption of the  
4 rules reconsiders or reevaluates the petitions  
5 for substantial compliance, the Agency would be  
6 in support of that.

7 MS. PALUMBO: Question No. 3 relates  
8 to Section 104.520(b), the parties to the  
9 proceeding. Can the Agency elaborate on how a  
10 person becomes a participant as that is used in  
11 520 (b) (3)?

12 MR. TWAIT: The Agency was following  
13 the intent provided by USEPA stated in the  
14 preamble to the final rule. The purpose and,  
15 these are quotes, the purpose of the 131.20(b)  
16 requirement is to implement the Clean Water Act  
17 and provide an opportunity for meaningful public  
18 input when states or authorized tribes develop  
19 water quality standards, which is an important  
20 step to ensure the adopted water quality  
21 standard reflect full consideration of the  
22 relevant issues raised by the public.

23 The citation is 80 FR 51042. And,  
24 additionally, with 25.5, public input and

1 participation is open to everyone.

2 MS. PALUMBO: What are the various  
3 rights afforded to any person that may become a  
4 participant to this proceeding?

5 MR. TWAIT: That goes back to the  
6 definition of participants. In 101.202, a  
7 person becomes a participate in one of several  
8 ways, including filing a comment, being added to  
9 the notice list of a particular proceeding,  
10 testifying at hearing or making public remarks  
11 at a board meeting.

12 MS. PALUMBO: So, is the Agency's  
13 intent that a participant would have the right  
14 to put forth testimony, correct?

15 MR. TWAIT: Yes.

16 MS. PALUMBO: Is it the Agency's  
17 intent that a participant would have the right  
18 to question witnesses at a hearing?

19 MR. SOFAT: Yes.

20 MS. PALUMBO: Is it the Agency's  
21 intent that a participant would have the right  
22 to file motions with the Board in this  
23 proceeding?

24 MR. SOFAT: Yes.

1 MS. PALUMBO: In what weight in the  
2 Agency's mind is the Board to give information  
3 provided by a participant?

4 MR. SOFAT: Equal.

5 HEARING OFFICER TIPSORD: Equal to  
6 what?

7 MR. SOFAT: Equal to the parties and  
8 petitioners.

9 MS. PALUMBO: Question No. 4, and I  
10 think we have established this earlier in the  
11 hearing. I just want to clarify.

12 Can a time-limited water quality  
13 standard be issued for a narrative water quality  
14 standard?

15 MR. TWAIT: In theory, yes. A  
16 time-limited water quality standard can be  
17 issued for a narrative water quality standard.  
18 The Agency does not believe that the federal  
19 regulations would prohibit this.

20 MS. PALUMBO: Would this process  
21 proceed differently than with a numeric water  
22 quality standard?

23 MR. SOFAT: Calculating HAC, some of  
24 those things, yeah, it will be different and

1 complicated.

2 MS. PALUMBO: For example, how would  
3 you calculate an HAC for the narrative water  
4 quality standard that prohibit unnatural algal  
5 growth.

6 MR. TWAIT: I think that would be one  
7 of the difficult things about the narrative  
8 standard.

9 MR. SOFAT: But that does not mean  
10 that you can't use variance for a narrative  
11 standard.

12 HEARING OFFICER TIPSORD: Keep your  
13 voice up.

14 MS. PALUMBO: Question No. 5,  
15 this relates to the Pollutant Minimization  
16 Programs. That's defined in Section 104.515(b),  
17 but Pollutant Minimization Plan is undefined.  
18 So is the Pollutant Minimization Plan part of  
19 the Pollutant Minimization Program?

20 MR. TWAIT: There's no substantial  
21 difference between the two.

22 MS. PALUMBO: Okay. Those are  
23 interchangeable terms.

24 MR. TWAIT: Uh-huh.

1 MS. PALUMBO: Okay. When is a  
2 Pollutant Minimization Program developed?

3 MR. SOFAT: Prior to filing a  
4 petition.

5 MS. PALUMBO: This is when I was  
6 thinking that those were different things.  
7 Okay.

8 In this, the PMP, the Pollutant  
9 Minimization Program, is intended to be  
10 implemented during the term of the time-limited  
11 water quality standard, correct?

12 MR. SOFAT: Yes.

13 MS. PALUMBO: Can you explain the  
14 differences between the Pollutant Minimization  
15 Program and the Best Management Practices as  
16 those are referenced in Section 104.530(b)(1).

17 MR. TWAIT: The Pollutant  
18 Minimization Plan can include the BMP. The BMPs  
19 are typically for non point source pollution;  
20 can also be for point source pollution.

21 But then the PMPs also include things  
22 that they can do at their facility, such as,  
23 changing the source of their product to reduce  
24 pollutants, or adding treatment.

1 MS. PALUMBO: So, in terms of  
2 chlorides as we discussed that pollutant  
3 earlier, if a facility has salt storage for  
4 deicing, that potentially impacts stormwater run  
5 off, would the Agency expect petitioner to  
6 address this salt storage facility under the  
7 Pollutant Minimization Program, Best Management  
8 Practice, or both?

9 MR. TWAIT: Either would be fine, I  
10 think.

11 MS. PALUMBO: Okay. So to avoid  
12 confusion, would the Agency be amenable to  
13 either revising the rules to just use plan or  
14 program? I believe program is used in the  
15 federal rules.

16 MR. SOFAT: Yes, we will.

17 MS. PALUMBO: Question No. 7, we've  
18 talked about the reevaluation process for the  
19 time-limited water quality standard already.

20 But does the Agency envision this  
21 process to be initiated with the Board at a set  
22 point; for example, would it be so many months  
23 in advance of the expiration of the time-limited  
24 water quality standard?

1 MR. TWAIT: Yes. There needs to be  
2 enough time for the Board to take a look at it,  
3 approve it, and for the Agency to transmit it to  
4 USEPA.

5 MS. PALUMBO: Does the discharger  
6 initiate this process or does the Agency?

7 MR. TWAIT: The petitioner. And it  
8 should be laid out in the Board order when they  
9 need to submit that plan or reevaluation.

10 MS. PALUMBO: Do you have any sort of  
11 estimate on how long every evaluation might  
12 take?

13 MR. SOFAT: Since the petitioner  
14 calculated HAC, so they should have a very good  
15 idea how long it could take to reevaluate.

16 MS. PALUMBO: Question No. 8, does  
17 the Agency believe that the variance process  
18 that is set forth in Section 35 of the Illinois  
19 Environmental Protection Act is still available  
20 for relief from a technology standard?

21 MR. TWAIT: Yes.

22 MS. PALUMBO: Will a time-limited  
23 water quality standard be addressed in a  
24 biannual Illinois Integrated Water Quality

1 report in the Section 303(d) list.

2 MR. TWAIT: Would you repeat that?

3 MS. PALUMBO: Will a time-limited  
4 water quality standard that was already  
5 effective, be addressed in the biannual Illinois  
6 Integrated Water Quality report and the  
7 Section 303(d) list?

8 MR. SOFAT: Time-limited water  
9 quality standard does not replace the underlying  
10 standard word as in use. So, therefore, it will  
11 not be considered or used to develop impaired  
12 water list or the integrated report.

13 MS. PALUMBO: Question No. 10. This  
14 refers to what you're going to change to  
15 demonstration. So as it stands now, burden of  
16 proof in Section 104.560.

17 How would the burden of proof be  
18 evaluated differently for the proposed  
19 time-limited water quality standard factors in  
20 Section 104.560(b) than they were evaluated for  
21 the preceding -- for the underlying water  
22 quality standard?

23 MR. SOFAT: So is your question --  
24 let me see if I understand the question.

1           Is the question asking what's the  
2 difference in terms of demonstration between an  
3 underlying standard option versus a time-limited  
4 water quality standard?

5           MS. PALUMBO: Yes.

6           MR. TWAIT: This comes from 408 FR  
7 51041. Finally, some commenters questioned the  
8 level of scientific rigor required for water  
9 quality standard variances as compared to use  
10 attainable analysis, required for changes to the  
11 101(a)(2) uses.

12           Section 40 CFR 131.5(a)(4)  
13 provides that EPA's review under Section 303(c)  
14 involves a determination of whether the states  
15 or authorized tribes standards which do not  
16 include the use specified in Section 101(a)(2)  
17 of the Act are based on an appropriate technical  
18 and scientific data and analysis.

19           Because water quality variances are  
20 time-limited designated uses and criteria, this  
21 requirement applies to water quality standards  
22 variances. States and authorized tribes must  
23 adopt water quality standard variances based on  
24 appropriate technical and scientific data and

1 analysis; therefore, the level of rigor required  
2 for a water quality standard variance is no  
3 different than a designated use change.

4 That said, the appropriate technical  
5 and scientific data required to support a  
6 designated use change in water quality standard  
7 variance can vary depending on the complexity of  
8 the specific circumstances.

9 EPA recognizes that the data and  
10 analysis often needed to support adoption of a  
11 water quality standard variance could be less  
12 complex and require less time and resources  
13 compared to removing a designated use because  
14 many water quality standard variances evaluate  
15 only one parameter for a single permittee for a  
16 limited period of time.

17 This level of effort, a state or  
18 authorized tribe needs to devote to a water  
19 quality standard variance will in large part be  
20 determined by the complexity of the water  
21 quality problem the state or authorized tribe  
22 seeks to address.

23 MS. PALUMBO: Last question. From a  
24 timing perspective, assuming a petition for a

1 time-limited water quality standard is filed  
2 related to a newly adopted standard, should  
3 time-limited water quality standard proceedings  
4 progress to completion prior to USEPA approval  
5 of the underlying water quality standards?

6 MR. TWAIT: If the Board adopts the  
7 standard, it's effective for state purposes.  
8 And if the petitioner needs relief, then they  
9 should move forward.

10 MS. PALUMBO: I did actually have one  
11 more question. Sorry.

12 This morning, Scott, I believe that  
13 you mentioned that a time-limited water quality  
14 standard is not meant to be a regulatory relief  
15 mechanism. And the name of this rulemaking is  
16 in the matter of regulatory relief mechanism.

17 How do we, or how does the Agency  
18 intend to ensure that the regulated public or  
19 the public that's interested knows that this is  
20 not a regulatory relief mechanism?

21 MR. TWAIT: The existing variance  
22 process that Illinois had, or the old variance  
23 process that the Illinois EPA had is in the  
24 regulatory relief section. That is the reason

1 that we kept this in that same section.

2 MS. PALUMBO: How would you term what  
3 a time-limited water quality standard is? Just  
4 a new water quality standard? I mean, just as  
5 the name suggests then?

6 MR. TWAIT: An alternative water  
7 quality standard.

8 MS. PALUMBO: No further questions.  
9 Thank you.

10 HEARING OFFICER TIPSORD: Thank you  
11 very much.

12 Ms. Franzetti on behalf of Midwest  
13 Generation.

14 MS. FRANZETTI: Thank you.

15 Question 1 under Procedural Nature of  
16 TLWQS Proceedings.

17 Section 38.5 of the Illinois  
18 Environmental Protection Act provides in  
19 relevant part that the Board, quote, may conduct  
20 non-adjudicatory proceedings to adopt a TLWQS.  
21 Section 101.108(a) of the Board's rules provides  
22 that, quote, Board proceedings can generally be  
23 divided into two categories: rulemaking and  
24 adjudicatory proceedings, end quote.

1 Section 101.108(c) identifies, quote, variance  
2 petitions, 35 Illinois Administrative Code 104  
3 as an example of an adjudicatory proceeding.

4 Does the Agency interpret the use of  
5 the term non-adjudicatory in Section 38.5 of the  
6 Act as evidencing a legislative intent to create  
7 a third category of Board proceeding; in other  
8 words, something other than a rulemaking or an  
9 adjudicatory proceeding?

10 MS. TERRANOVA: This is one of the  
11 questions that the agency has determined is  
12 legal in nature and we're hoping that we could  
13 respond to this question in writing after the  
14 hearing.

15 MS. FRANZETTI: Can I ask you this?

16 I was not involved -- I understand  
17 there were some stakeholder meetings with regard  
18 to proposed Section 38.5.

19 Was there any discussion of this  
20 particular issue of why Section 38.5 expressly  
21 denotes a TLWQS proceeding as a non-adjudicatory  
22 proceeding?

23 MR. SOFAT: Because that is what is  
24 required by the federal rule, that these

1 hearings need to be non-adjudicatory. And I  
2 think it's in 25.5.

3 MS. FRANZETTI: Okay. Do you think  
4 placing the rules -- I'm moving to 1(a.) -- in  
5 the adjudicatory proceeding section of the Board  
6 rules, which is Part 104, risks perhaps creating  
7 confusion as to the nature of the TLWQS variance  
8 proceeding?

9 MR. SOFAT: We intend to look into  
10 that issue. We're going to look into that and  
11 respond in writing.

12 MS. FRANZETTI: Would your answer be  
13 the same as to (b) about creating a stand alone  
14 part?

15 MR. SOFAT: Yes.

16 MS. FRANZETTI: Moving on to  
17 Multi-Discharger Variances, Question 2.

18 The Board Note to Section 104.520  
19 notes that the Board has the power to join  
20 additional parties and consolidate petitions.  
21 Is it also intended that the Board has the power  
22 to sever joined parties and/or break up  
23 previously consolidated petitions, such as  
24 multi-discharger petitions, when the Board

1 thinks it's appropriate to do so?

2 MR. TWAIT: Yes. We think that they  
3 have that ability where appropriate.

4 MS. FRANZETTI: And would you agree  
5 then that the Board can do that on its own  
6 motion? It doesn't need a motion by a party to  
7 the case?

8 MR. SOFAT: Board can do on its own.  
9 Again, I will caution that, as I said earlier,  
10 joining or severance of these petitions, you  
11 need to make sure that whatever demonstration  
12 you're trying to make is not jeopardized by  
13 severance of, you know, petitions or joining of  
14 the petitions.

15 MS. FRANZETTI: The purpose of these  
16 questions is to understand. I know earlier  
17 today you were saying that the primary  
18 responsibility for what type of proceeding is  
19 pursued is with the petitioner to determine.

20 Do they think it should be a single  
21 discharger, do they think it should be a  
22 multi-discharger petition? And what I'm trying  
23 to understand is, obviously, a petitioner can  
24 get that wrong. They may think it's the right

1 approach, but the Board may not. And what  
2 you're saying is it is your intent that the  
3 Board is the ultimate judge of that until it  
4 goes to the USEPA?

5 MR. SOFAT: Yes, Board is. And Board  
6 is looking at what the petition has requested  
7 and what petitioner has demonstrated.

8 So based on that, they could say,  
9 yes, you need a single discharger variance  
10 requirement. You do need the MDV requirement.

11 If you look at the rule, this whole  
12 process that's laid out, as I had said before,  
13 laid out to facilitate that so that whatever we  
14 do at the state level gets approved at federal  
15 level.

16 MS. FRANZETTI: And that's all I was  
17 referring to is the fact that the Board  
18 ultimately decides it at the state level. But  
19 because if the Board grants a TLWQS, it has to  
20 go over to USEPA, they might disagree with  
21 whatever the category of TLWQS was that the  
22 Board approved; in other words, Board may have  
23 approved the TLWQS as a water body segment  
24 TLWQS. It's possible USEPA may disagree that

1 that's the right category for this particular  
2 TLWQS; is that right?

3 MR. SOFAT: First of all, we are  
4 going to be in touch with the USEPA when these  
5 petitions are filed, which we have been doing,  
6 what is the right kind of variance type for  
7 these petitions.

8 Second of all, I think I want to make  
9 a comment, is that I believe -- and, again, I  
10 think I can -- our understanding, I can speak  
11 that way, is that Board will look at what did  
12 you file and what did you ask for and whether or  
13 not you're demonstrating consistent with the  
14 rules.

15 So I'm not sure if Board is going to  
16 say, look, you got it wrong, but here's the  
17 right answer. I believe Board would be saying,  
18 look, you asked for a MDV. I looked at the  
19 factors that you had to, you know, show  
20 demonstration on, and I don't believe you met  
21 that burden, or that, yes, you have.

22 So our rule is going to be in these  
23 proceedings that we are talking to USEPA  
24 up-front, making sure we are at least filing

1 recommendations consistent with their viewpoint,  
2 that here's what you should be doing.

3 But, again, somebody could say, you  
4 got it wrong, USEPA got it wrong. I am going to  
5 do it this way. Because I can make my case. I  
6 don't think we can stop that. And I don't know  
7 if Board is going to substitute their view for a  
8 petitioner's view.

9 MS. FRANZETTI: Staying with this  
10 topic, because it's related to it, so I want to  
11 jump to Question 12 and use the pending Midwest  
12 Generation, well, it will be a TLWQS proceeding  
13 to pursue this issue a little further.

14 So, on Question 12, says in PCB 16-19  
15 captioned Midwest Generation versus IEPA, after  
16 the filing of the Agency's response in which it  
17 suggested that the relief could be individual,  
18 water body segment, or multi-discharger  
19 time-limited water quality standard, the Board  
20 entered an order establishing a class of  
21 dischargers consisting of heated effluent  
22 dischargers into the East Chicago Sanitary and  
23 Ship Canal, Upper Dresden Island Pool, including  
24 Flint Hills, Midwest Gen, Will County Station,

1 Joliet 9 Station and Joliet 29 Station, and  
2 Stepan Chemical.

3 What is your understanding of what  
4 the effect is of establishing that class of  
5 dischargers in the Board's order?

6 MR. TWAIT: The effect of  
7 establishing classes of the discharger was to  
8 give the petitioner the option to either seek a  
9 water body segment relief or an MDV relief.  
10 Both of those need classes of discharger. The  
11 individual does not need a class of discharger.

12 MS. FRANZETTI: So it holds open the  
13 option to pick between those types of TLWQS  
14 proceedings?

15 MR. TWAIT: Yes.

16 MS. FRANZETTI: Does the Board define  
17 a class of dischargers only in water body  
18 specific variances or does this also occur in  
19 multi-discharger petitions? I think you're  
20 saying it does.

21 MR. TWAIT: It also includes  
22 multi-discharger variances.

23 MS. FRANZETTI: I'm going to keep  
24 going to 13, stay with this same general idea or

1 concept.

2 Does the Agency agree that the  
3 April 12th, 2017 PCP 16-19 Order does not make a  
4 determination whether Flint Hills and the other  
5 identified dischargers in PCP 16-19 are  
6 proceeding as single discharger petitions, as a  
7 combined multi-discharger petition, or some  
8 other form of petition?

9 MR. TWAIT: It was not the Agency's  
10 intent to decide which type of relief was  
11 appropriate. We're helping to facilitate that  
12 decision.

13 MS. FRANZETTI: And you agree the  
14 Board order is not making a determination yet as  
15 to what type of proceeding it is.

16 MR. TWAIT: Correct.

17 MS. FRANZETTI: Moving to 13 (a), so  
18 under the proposed rule, when and how does the  
19 Board determine the type of TLWQS proceeding to  
20 be utilized? Is that in its final order, for  
21 example?

22 MR. TWAIT: Yeah. It's not the Board  
23 that will ultimately decide. At this time we're  
24 just listing the options of the types of relief

1 that are appropriate.

2 MS. FRANZETTI: Do you really mean  
3 what you're saying in that answer? Because I  
4 thought a few moments ago we were in agreement  
5 that it's the Board who's the ultimate arbiter  
6 or decider of what type of TLWQS is to be  
7 granted.

8 MR. TWAIT: Well, the Pollution  
9 Control Board can make -- we can make a  
10 recommendation to the Board and say, we think it  
11 should be a stream segment and they can do their  
12 order accordingly. And the petitioner can turn  
13 around and say, no, that's not the one that I  
14 want. I'm going to do an MDV or they can do an  
15 individual.

16 And when they resubmit their  
17 petition, their amended petition, then the Board  
18 will look at what relief they've asked for and  
19 whether or not they've justified that relief.

20 MS. FRANZETTI: So moving to (b), I  
21 think based on the last part of your answer, I  
22 can anticipate your answer to (b) but I want to  
23 be certain.

24 So if the decision on whether the

1 proceeding is an individual water body segment  
2 or a multi-discharger TLWQS is not made before  
3 the 90-day deadline for filing the amended  
4 petition that the Board set in its April 12th  
5 order in the Midwest Gen pending proceeding.

6 Doesn't this leave unclear the  
7 substantive requirements that the amended  
8 petition must satisfy to be deemed in  
9 substantial compliance by the Board?

10 And let me clarify. What we're  
11 struggling with is we filed the petition as an  
12 individual discharger petition. That's what we  
13 think is appropriate. The Agency, in its  
14 submission to the Board, really didn't take a  
15 position, said it could be this, it could be  
16 that. Also said, as the next question gets  
17 into, that it was talking with the EPA about it,  
18 just as Mr. Sofat a few moments ago said, we're  
19 going to be talking to the EPA to get an idea  
20 from them or sense from them what type of TLWQS  
21 proceeding it should be.

22 You didn't get that at least as of  
23 the time of filing your submission in the  
24 Midwest Gen proceeding. You didn't get that

1 kind of response from EPA, correct? They were  
2 still thinking about it, too.

3 MR. TWAIT: We've talked to them and  
4 with the MDV. We talked to them and they were  
5 leery of whether or not you could put together  
6 an MDV because of the differing industrial  
7 facilities. You've got a refinery there, a  
8 chemical plant, and a power generation.

9 They didn't think that the  
10 petitioners would be able to make their  
11 demonstration for an MDV; however, they said  
12 that they're going to go back and talk to  
13 headquarters and get back to us. They haven't  
14 done that yet.

15 I'm going to reach out and see if --  
16 prod them to make sure they've done that. The  
17 other thing that we've talked to them about was  
18 a stream segment TLWQS. And we asked them one  
19 of the questions that you asked, whether or not  
20 you had to look at non point source pollution.

21 They said that that type of variance  
22 does have to look at non point source pollution;  
23 however, if the facility looks for non point  
24 source pollution in the case of thermal and

1 doesn't find it, then they just have to include  
2 that with their submission.

3 MR. SOFAT: Let me clarify a few  
4 things.

5 If Midwest Gen believes they can make  
6 a single discharger variance case, we are not  
7 stopping. What our recommendation is saying  
8 that you could do water body segment, MDV, et  
9 cetera, those are the options that we are saying  
10 you have. You may or may not like those  
11 options.

12 As far as MDV is concerned, each  
13 individual, if they can get a variance as  
14 individual dischargers, they cannot get MDV.

15 But the real issue there is -- so,  
16 therefore, petitioner has to decide up-front  
17 what do they want. And I think what we are  
18 doing is we are saying we'll keep on talking to  
19 USEPA so that we are clear.

20 But because these are new rules and  
21 USEPA has been doing variances in Region 5, but  
22 the standard rules were not out there for public  
23 to know exactly what they have in mind.

24 So what we want to do is we want to

1 make sure that we give petitioners as much  
2 guidance as possible towards the process. But  
3 that does not mean that petitioner doesn't have  
4 to make their decision. That's their decision.

5 And as far as MDVs are concerned,  
6 they are simply a streamline convenience  
7 mechanism. And that is why when you're thinking  
8 about MDVs, you want to think about homogenous  
9 groups, which groups go together.

10 And I think in this case, there are  
11 all three different types of industries. And  
12 that is why USEPA is having issue with how are  
13 you going to do a combined burden of proof  
14 demonstration, or is it going to be individual  
15 discharger. Because if you want to do  
16 individual discharger, you can always do that.

17 So MDV is really still -- you still  
18 have to think in terms of individually making  
19 your case. Which factor are you going to take  
20 under 10(g) and what level of demonstration do  
21 you need to make the case? So that part does  
22 not go away, whether you do single or MDV.

23 And as far as, I think in our view,  
24 the Board is concerned, the Board is going to

1 look at in their judicial capacity as, okay, did  
2 you comply with; you are asking MDV; did you  
3 meet the MDV burden or not? I doubt that the  
4 Board will be suggesting maybe you should go  
5 with MDV, or you need to go with MDV.

6 So these classes and all those  
7 things, they are just for convenience. They are  
8 established up-front so that people have an idea  
9 because, like, as I said, these are new rules  
10 and new requirements and sort of new concept.

11 So what we want to do is we want to  
12 make sure that the process -- it's not, like,  
13 Board issues one order and boom. Either you  
14 have a variance or you don't. So that's why  
15 substantial compliance concept is in there, and  
16 that's why we are going to be continuing to talk  
17 to USEPA. Tell us if these provisions are  
18 adequate, sufficient or not.

19 MS. FRANZETTI: I think what I hear  
20 you saying is -- and let's stick with the  
21 Midwest Generation example for some clarity.

22 The clearest path for Midwest  
23 Generation to take is to pursue a single  
24 discharger TLWQS, because the Agency isn't going

1 to object to that. Now, whether the Board does  
2 or not, but probably not likely, because single  
3 discharger variances are allowed. And it's less  
4 likely the USEPA would have an issue with that.

5 Is that what you're trying to tell me  
6 Mr. Sofat?

7 MR. SOFAT: I'm definitely saying  
8 that, but I'm saying a little more also.

9 But for Midwest Gen you can choose to  
10 be a single discharger and make your case as a  
11 single discharger and Board will decide whether  
12 the case was made or not and USEPA will just  
13 make sure that whether or not it's consistent  
14 with 131.14.

15 MS. FRANZETTI: And where I'm trying  
16 to go is to also say the flipside. Let's just  
17 say the other dischargers, Flint Hills Resources  
18 has a pending proceeding as well, two other  
19 dischargers have been mentioned as potentially  
20 effective, Stepan and Exxon Mobil.

21 If Midwest Gen and Flint Hills, for  
22 example, were to get together and decide let's  
23 go the multi-discharger approach, that actually  
24 has a little more risk to it. The Board may

1 disagree. And even if the Board doesn't  
2 disagree, when it goes over to USEPA in a  
3 Board-approved TLWQS, USEPA might ultimately  
4 disagree that should be a multi-discharger  
5 TLWQS, correct?

6 MR. SOFAT: I don't read that way. I  
7 think the risk associated to me is whether or  
8 not somebody can make the case for MDV.

9 HEARING OFFICER TIPSORD: Before you  
10 move along, there's a couple things I want to  
11 state for the record.

12 First of all, I would note that  
13 ordinarily in a case where another case before  
14 the Board is being discussed to this extent, it  
15 would be a situation where I would tend to  
16 caution the parties about that.

17 But I would note, first of all, that  
18 because, by definition, the PCB 16-9, and the  
19 time-limited water quality variances are not  
20 adjudicatory cases, and this is also a  
21 non-adjudicatory proceeding, I've given a little  
22 bit more leeway.

23 But do keep in mind that this is the  
24 decision-maker up here in both instances. So,

1 please keep that in mind. I just want to get  
2 that on the record because I know that I am  
3 pretty hard and fast when it comes to  
4 adjudicatory cases and rulemakings and not  
5 letting you talk about them.

6 But because by definition, 16-9 and  
7 the other time-limited water quality standard  
8 variances that are before us are not  
9 adjudicatory cases, I've given you a little bit  
10 more leeway on those. I noticed them when I  
11 came into the questions, but I wanted to get  
12 those on the record.

13 I have a question for the Agency.  
14 And, that is, you've told us that you're going  
15 to be in contact with USEPA and you're going to  
16 come in with recommendations that you think the  
17 USEPA are going to be on board with so that you  
18 hope that you're going to be able to put  
19 together this packet so that when it gets to  
20 USEPA with the Board's order, the chance of  
21 disapproval are going to be very slim because  
22 you're going to be in constant contact with the  
23 USEPA.

24 My question is, we already have an

1 issue where Ms. Franzetti was just talking about  
2 16-9 and the fact that you didn't have a yes or  
3 no or a plus or minus or whatever from the USEPA  
4 when you were required to file your  
5 recommendation.

6 My question is: While you may think  
7 this is going to really work well, my experience  
8 with USEPA is that USEPA doesn't care what our  
9 deadlines are. Have you thought through the  
10 prospect of given the deadlines that are written  
11 into the rule and to the statute, how the IEPA  
12 is going to handle the situation where they have  
13 to file a recommendation and USEPA says, yeah,  
14 yeah, we'll get to you later?

15 MR. SOFAT: Again, I think that just  
16 because Agency thinks that water body based  
17 water quality standard variance is the best way  
18 to go, we can't tie a petitioner to that.

19 HEARING OFFICER TIPSORD: That's not  
20 the question I'm asking, Sanjay.

21 My question is: You have said a  
22 couple of times today that your intent is to  
23 stay in constant contact with USEPA such that  
24 when the process gets done, as far as you're

1 concerned and as far as the Agency is concerned,  
2 the Board's determination that 131 is met,  
3 you're going to have been in constant contact,  
4 you're going to talk to them before you file  
5 your recommendation, you're going to do all  
6 that.

7 My question is: What happens when  
8 USEPA doesn't pay any attention to your  
9 deadlines, and you don't have contact from them  
10 before you have to file answers?

11 MR. SOFAT: So, again, we are talking  
12 about a 21-day deadline, right? In that one,  
13 one all we have to suggest is the four things --  
14 and at that point, as I said, USEPA is not going  
15 to care whether somebody is going form MDV or  
16 water body. They're going to care about whether  
17 or not somebody has met the burden, which is  
18 later on.

19 So the deadlines that Board and IEP  
20 have, they're simply about guiding. The Agency  
21 deadlines that we have, we are saying, okay,  
22 yes, for this kind of pollutant issue, you could  
23 have the following three types of variances.  
24 Petitioner can decide which one of those they

1 want.

2 HEARING OFFICER TIPSORD: The  
3 petitioner comes in with their petition; the  
4 Board deems it's a sufficient petition. And we  
5 set prompt deadlines at that point, do we not?  
6 Doesn't the Board set prompt deadlines for the  
7 Agency to come?

8 MR. SOFAT: Right.

9 HEARING OFFICER TIPSORD: Don't you  
10 have feedback on the petition at that point?

11 MR. SOFAT: Yes, we do.

12 HEARING OFFICER TIPSORD: And if we  
13 set a deadline of 21 days and the USEPA chooses  
14 not to get back to you in that time -- I mean, I  
15 appreciate what you're saying. I appreciate  
16 that you think you're going to be able to be in  
17 contact.

18 But I would point out that part of  
19 the reason we're here is it took them three  
20 years to decide not to approve the word variance  
21 for Citgo. So USEPA doesn't operate like we do  
22 with deadlines.

23 So my question is: If they don't get  
24 back to you -- if the Board says, Agency, we

1 have a sufficient petition and you have 21 days  
2 to respond to this sufficient petition and USEPA  
3 doesn't get back to you so that you can say with  
4 a certain amount of certainty, that they're  
5 going to approve this variance, where does that  
6 leave us if somebody loses their stay if USEPA  
7 decides to disapprove it, if you can't even tell  
8 somebody, yeah, you're on the right track?

9 MR. SOFAT: Citgo did not get  
10 approved because it was not consistent with  
11 their regulations. It took them that many  
12 years. So I'm not using that as an example to  
13 say they will not get back to us.

14 I think the issue that we are facing  
15 is this -- what level of justification is  
16 required to get any kind of variance I don't  
17 think even USEPA knows.

18 So it's a matter of us, IEPA telling  
19 them, Board, Board, we are talking to them and,  
20 therefore, don't set a 21-day deadline. Prompt  
21 simply means that we want things to move because  
22 that's the concern we heard from USEPA and other  
23 stakeholders.

24 So given the clarity that we can see,

1 I am saying that USEPA is going to work with us.  
2 We have been -- there's an example of how  
3 closely we have been working with them from day  
4 one. And that is the cause chloride work group  
5 that is out there that will file their variance  
6 at some point. We have been asking them what  
7 level of justification is required by that  
8 group.

9 HEARING OFFICER TIPSORD: Right. And  
10 that's not reassurance to me because I know when  
11 the cause chloride standard was originally  
12 adopted. So I guess what I hear you saying, and  
13 please forgive me if I'm wrong, but what I hear  
14 you say is that there's a real possibility that  
15 these time-limited water quality variances could  
16 be in front of the Board for years at a time.

17 MR. SOFAT: No.

18 MS. PAPADIMITRIU: Can I ask a  
19 follow-up, do you mind?

20 MS. FRANZETTI: Not at all.

21 MS. PAPADIMITRIU: So just a  
22 different scenario, if that's okay.

23 Let's say the Board issues an order  
24 instructing the Agency to respond back in

1 21 days. What if you hear back from the USEPA  
2 on the 26th day and the docket is still open?  
3 What happens then?

4 MR. SOFAT: We can supplement our  
5 recommendation.

6 MS. PAPADIMITRIU: So would that  
7 derail the -- would that change the current  
8 proceeding pending before the Board?

9 MR. SOFAT: Unless Board was doing  
10 something on day 22nd, I don't believe so.

11 MS. PAPADIMITRIU: If the USEPA comes  
12 back and says that it's not accepted, what  
13 happens to the proceeding pending before the  
14 Board?

15 MR. SOFAT: So, for context purposes,  
16 are we looking at the substantial compliance  
17 step, or are we have gone true public  
18 participation and everything and we are right  
19 before the Board order?

20 Because, again, what we are going to  
21 do is we're going to make sure that, as I said  
22 earlier, the types of variances is simply so  
23 that people who are sleeping, they can wake up,  
24 and really establish a process where the state

1 is actually helping the petitioners and helping  
2 the water body achieve its goals. That is the  
3 point there.

4 Individually, anybody can decide I am  
5 not going to have MDV. I don't want water body.  
6 I'm just going to do single discharger. As long  
7 as you make the case, proceed.

8 So, as far as USEPA is concerned,  
9 that's not the focus. The focus -- Citgo  
10 lessons that we learned were that you need to  
11 have a demonstration that's consistent with  
12 their rules. And that is really the main --  
13 that's really the main import that we are  
14 seeking from USEPA.

15 MS. PAPADIMITRIU: So, my question  
16 goes back to if you have responded to the Board  
17 within the docket and then you have a subsequent  
18 conversation with the USEPA, does that  
19 information make its way into the Board's  
20 proceeding?

21 MR. SOFAT: It will. If it's  
22 material and substantial, it will.

23 MS. PAPADIMITRIU: And the Agency  
24 files that?

1 MR. SOFAT: The Agency will file  
2 that.

3 MS. PAPADIMITRIU: Okay. Thank you.

4 MR. HOUSER: Hi, my name is Josh  
5 Houser, H-O-U-S-E-R. I'm with the law firm of  
6 Hepler and Broom; here today on behalf of Exxon  
7 Mobil, Flint Hill Resources, and the Sanitary  
8 District of Decatur.

9 If a discharger is discharging a  
10 pollutant from multiple facilities, can this be  
11 an individual time-limited water quality  
12 standard or must it be an MDV?

13 MR. SOFAT: Can you repeat the  
14 question, please.

15 MR. HOUSER: Sure. If a discharger  
16 is discharging pollutant from multiple  
17 facilities, can this be an individual  
18 time-limited water quality standard or must it  
19 be an MDV?

20 MR. SOFAT: So multiple facilities  
21 owned by the same party?

22 MR. HOUSER: Yes.

23 MR. SOFAT: So I have three plans.  
24 Plan one, plan two, plan three?

1 MR. HOUSER: Sure.

2 MR. SOFAT: I can do MDV for that.  
3 Assuming my plans are homogenous, they are not  
4 one is a refinery, another is POTW, and the  
5 third is something else.

6 MR. HOUSER: Must it be an MDV?

7 MR. SOFAT: No, it doesn't have to  
8 be.

9 MR. HOUSER: It can be an individual?

10 MR. SOFAT: Yes.

11 MR. HOUSER: For all three  
12 facilities?

13 MR. SOFAT: (Inaudible speaking.)

14 HEARING OFFICER TIPSORD: You got to  
15 talk for the record or talk off the record.

16 MR. HOUSER: Is it going to be three  
17 petitions -- I'm sorry.

18 Can you file one petition as an  
19 individual time-limited water quality standard  
20 for three facilities?

21 MR. SOFAT: Are you using the same  
22 10(g) factor?

23 MR. HOUSER: Yes.

24 MR. SOFAT: Are you asking for

1 individual for MDV?

2 MR. HOUSER: Can that be an  
3 individual?

4 MR. SOFAT: If you're going to be  
5 individual and you have the same burden of proof  
6 for all three, is that the question?

7 MR. HOUSER: Yes.

8 MR. SOFAT: If it's same burden of  
9 proof for all three of them, and you want  
10 individual, I'm not sure why you want  
11 individual. That's exactly what an MDV does.

12 MR. HOUSER: Well, I'm asking if it  
13 has to be an MDV?

14 MR. SOFAT: Nothing is has to be.

15 MR. HOUSER: But it can be an  
16 individual still? Whether or not it's  
17 preferable, it can be?

18 MR. SOFAT: Yes.

19 MR. TWAIT: That would be three  
20 individual petitions if you're going to do  
21 individual.

22 MR. HOUSER: Okay. And so that would  
23 still be the case then if you were discharging  
24 that pollutant into two different water bodies

1 because there would be three different  
2 individual time-limited water quality standard  
3 petitions being filed?

4 MR. SOFAT: So MDV don't care whether  
5 or not you have common water body.

6 MR. HOUSER: And single, it would  
7 just be because there are individual -- they  
8 have to be individual petitions, then it  
9 wouldn't matter.

10 MR. SOFAT: Yes.

11 MS. FRANZETTI: Just following up on  
12 that, you could make perhaps them individual  
13 petitions, but if there is a lot of commonality  
14 to the relevant information to support those  
15 petitions, you might ask the Board to  
16 consolidate the two proceedings or the three  
17 proceedings for ease of administration?

18 MR. SOFAT: That Board has the  
19 authority to do it, yes.

20 MS. FRANZETTI: It does have the  
21 authority?

22 MR. SOFAT: Yes.

23 MS. RABCZAK: Would it make sense to  
24 have a recommendation or have a clarification as

1 part of the rules to distinguish between all  
2 those types so the people can understand which  
3 type they should go with?

4 MR. SOFAT: I will say a very good  
5 discussion about MDV actually is part of Midwest  
6 Gen. They have an attachment at the back. It's  
7 2013 FAQ.

8 MS. FRANZETTI: For the record, it's  
9 the USEPA guidance document entitled  
10 Discharger-Specific Variances on a Broader  
11 Scale: March 2013.

12 MR. SOFAT: Question, I believe, 7 or  
13 so. I mean, it's a pretty good document to read  
14 about what they had in mind in terms of how to  
15 decide whether you want MDVs or not.

16 MS. RABCZAK: That's going to be a  
17 document you will be using in determining what  
18 type you will suggest?

19 HEARING OFFICER TIPSORD: Can't hear  
20 you. Talk to the back of the room, not to  
21 Sanjay.

22 MS. RABCZAK: My question was: Would  
23 that be the guidance document for the IEPA to  
24 decide which type they would recommend?

1 MR. SOFAT: This as well as any other  
2 document that USEPA might come up in the future.

3 MS. FRANZETTI: A potential downside,  
4 however, Mr. Sofat of the March 2013 guidance is  
5 it does predate the federal rule on TLWQSs.

6 So, in some respect, it may not  
7 reflect post federal rule thinking by the USEPA.  
8 Would you agree with that?

9 MR. SOFAT: Yeah. And in absence of  
10 however any document, I think we'll continue to  
11 use it and we'll continue to talk to them and  
12 see if their thought process was evolved since  
13 '13.

14 MS. FRANZETTI: I'm going to go back  
15 to Question 3 before I jumped ahead to one of my  
16 other questions.

17 It's a straightforward question. Can  
18 the Board create subdockets in TLWQS variance  
19 proceedings -- I should have added -- under your  
20 proposed rules?

21 Is that something that you  
22 contemplated the Board can do in this type of  
23 non-adjudicatory proceeding?

24 MR. TWAIT: What would be the purpose

1 for a subdocket?

2 MS. FRANZETTI: Well, I'm not going  
3 to be able to probably identify all of them, but  
4 there might be a situation where the Board feels  
5 that it can move ahead with respect to certain  
6 elements of the TLWQS petition with respect to  
7 potentially multi-dischargers, but may want to  
8 segregate out either certain of the dischargers  
9 and wait to see as it gets further along through  
10 hearing on perhaps the subset of dischargers  
11 that it feels have clearly shown an entitlement  
12 to a TLWQS.

13 MR. TWAIT: Yeah. I believe they  
14 have that authority.

15 MS. FRANZETTI: Again, these  
16 questions are coming -- I'm not trying to trick  
17 you in anyway. It's coming from the perspective  
18 of what is envisioned by a non-adjudicatory  
19 proceeding instead of having put it in the  
20 rulemaking category. Because clearly in  
21 rulemaking, the Board can create subdockets.  
22 It's done so.

23 So, I'm just trying to understand  
24 what the Agency's intent here is in terms of how

1 this non-adjudicatory proceeding is  
2 characterized and what the Board's authority is.

3 Moving to Assimilative Capacity,  
4 Question 5.

5 If a discharger only needs a variance  
6 because it claims another upstream discharger  
7 has used up the assimilative capacity of the  
8 water body for a particular pollutant at issue,  
9 does this change anything about how the matter  
10 proceeds?

11 You touched on this a little bit  
12 earlier today with respect to the upstream  
13 discharger seeking a TLWQS having to show that  
14 it doesn't adversely impact a downstream  
15 discharger by whatever the TLWQS relief is it's  
16 seeking. But this is different.

17 This is assume the upstream  
18 discharger hasn't -- they're not seeking any  
19 TLWQS. But a downstream discharger does feel  
20 that they've used up -- some upstream discharger  
21 or dischargers have used up the assimilative  
22 capacity of the water body and that inability to  
23 get a mixing zone by the downstream discharger  
24 is preventing it from complying with a new water

1 quality standard, or an existing one.

2 So is that a situation where it can  
3 seek a TLWQS as the question asks? Does that  
4 change anything about how the matter proceeds  
5 before the Board?

6 MR. TWAIT: Could you clarify what  
7 the upstream discharger has done? Because  
8 typically, when we give mixing zones, we won't  
9 give 100 percent of the receiving stream.  
10 Presumably we won't give 100 percent of the  
11 receiving stream to the time-limited water  
12 quality standard.

13 Can you give me an example?

14 MS. FRANZETTI: I don't think I can  
15 in real life. I understand what you're saying.  
16 You're saying this will never happen because the  
17 Agency will never give mixing zones or any other  
18 relief in an NPDES permit, to the extent it  
19 would use up all of the downstream assimilative  
20 capacity stream.

21 MR. TWAIT: With mixing zones, the  
22 regulations we can't give 100 percent. When we  
23 do mixing zones, we use 25 percent of the  
24 upstream flow. So I'm just trying to figure out

1 what's the cause of it.

2 MS. FRANZETTI: I understand what  
3 you're saying. I can move on.

4 MR. ETTINGER: Do you anticipate  
5 granting any variance which will allow you or  
6 increase dischargers?

7 MR. TWAIT: I believe the answer  
8 would be yes.

9 MR. ETTINGER: Under what  
10 circumstances?

11 MR. SOFAT: Variances for new or  
12 increased?

13 MR. ETTINGER: A variance which  
14 allowed an increased loading into the water over  
15 the current.

16 MR. SOFAT: Yes, we'll support that.  
17 And, again, the purpose there is to make  
18 improvements.

19 In the coverage, Agency could propose  
20 to the Board any new discharger should be  
21 required to do more than, let's say, what others  
22 are. So what it does is, I'm assuming, of  
23 course, water body, watershed variance in my  
24 head when I'm talking about this.

1           And I'm saying if you're truly going  
2 to make improvements, then we need to have all  
3 the sources participating. To make that happen,  
4 what you need to do, if a new one wants to come  
5 in, that is okay. But you will have to do more  
6 than X. Whether it's 1.2X, 1.5X, that's  
7 separate.

8           But, yes, for those kind of water  
9 body based variances, I believe that's the right  
10 way to do it.

11           MS. FRANZETTI: Moving on to Public  
12 Participation. I'm going to skip Question 6.

13           Seven, let me just change it a little  
14 bit because I think you may have answered it in  
15 response to Counsel for IERG's questions.

16           Is it the Agency's position that the  
17 level of public participation that is required  
18 under Section 38.5 of the Act the same as that  
19 required under the federal regulation?

20           My point being, do you think  
21 Section 38.5 of the Act calls for a greater  
22 level, greater degree of public participation  
23 than do the federal TLWQS regulations?

24           MR. SOFAT: I do not believe so. I

1 think it's the same.

2 MS. FRANZETTI: Question 8. And you  
3 have touched on this, but I would still like to  
4 pose the question.

5 This use of the term parties to  
6 classify non petitioners, how did you decide  
7 that non petitioners should be classified as  
8 parties to the proceeding rather than just as  
9 participants, you know, public commenters.

10 MR. SOFAT: We need to go back to  
11 that section. We see that issue. So we need to  
12 file something in writing.

13 MS. TERRANOVA: We would like to take  
14 Questions 8 and 9 and answer those in writing,  
15 if that's okay.

16 MS. FRANZETTI: Okay. Moving on to  
17 Question 10 under Board Established  
18 Classes/Deadlines.

19 Question 10, why did the Agency  
20 propose in Section 104.540 that the Board's  
21 order establishing classes of dischargers and  
22 deadlines should be a final order rather than an  
23 interim order?

24 MR. TWAIT: The Agency did that so it

1 could be appealed.

2 MS. FRANZETTI: That was the Agency's  
3 intent under these proposed rules that that  
4 order can go up on appeal and not await towards  
5 final decision on the requested TLWQS relief?

6 MR. TWAIT: Yes.

7 MS. FRANZETTI: Question 11, do the  
8 proposed regulations prevent the Board from  
9 revising either the class, the geographic scope,  
10 or deadlines later on in the proceeding; in  
11 other words, after that order referenced in  
12 Section 104.540 is issued?

13 MR. TWAIT: No, they do not.

14 MS. FRANZETTI: We asked 12, 13.  
15 Moving on to 14.

16 Going back to the pending Midwest Gen  
17 proceeding in PCB 16-19, and specifically the  
18 April 12th order issued by the Board which  
19 references Stepan Chemical and Exxon Mobil  
20 neither of whom as of yet filed a TLWQS petition  
21 with the Board.

22 Given that Section 38.5(b) provides  
23 in relevant part that, quote, a time-limited  
24 water quality standard may be sought by, one,

1 persons who filed with the Board a petition for  
2 a time-limited water quality standard under this  
3 section, will entities like Stepan Chemical and  
4 Exxon Mobil need to file either an individual  
5 petition or joint petition with the Board in  
6 order to be eligible to receive a TLWQS?

7 MR. TWAIT: If either of them wants  
8 to participate in the TLWQS, they need to file a  
9 petition; or, if the existing petition moves  
10 forward as a water body segment petition or MDV  
11 time-limited TLWQS and a class of dischargers is  
12 defined by the Board and they establish  
13 criteria, then they could potentially get  
14 coverage from the Agency, if they meet the  
15 criteria.

16 MS. FRANZETTI: Moving to 15. If one  
17 or more of the entities referenced in that  
18 April 12th Board order do not file an appearance  
19 in the Midwest Gen proceeding or otherwise  
20 participate, does the Board have the authority  
21 to make the TLWQS applicable to that party?

22 MR. TWAIT: No. Unless they are  
23 included in the class of dischargers.

24 MS. FRANZETTI: I'm going to skip the

1 next question because I think you just answered  
2 that.

3 Moving on to 16. And I'm not sure  
4 whether Ms. Terranova, you may want to answer  
5 this one in writing. It relates back to this  
6 issue of who's a participant, but I'll ask it.

7 Under the proposed rules, are each of  
8 the entities named in the Board's order in the  
9 Midwest Gen proceeding a participant in the  
10 proceeding regardless of whether they file or  
11 join in a TLWQS petition filed with the Board?

12 MR. TWAIT: No. These are potential  
13 petitioners, permit holders that might be  
14 affected to be a participant. They must meet  
15 the definition in 101.202.

16 MS. FRANZETTI: Moving to 17. The  
17 April 12th order states that Exxon Mobil is a,  
18 quote, potentially-affected discharger subject  
19 to the Agency's further evaluation, end quote.

20 Do the proposed rules prescribe how  
21 and when the Agency will conduct the referenced,  
22 quote, further evaluation, end quote.

23 MR. TWAIT: No, they do not.

24 MS. FRANZETTI: So the next question

1 then is, if not, how and when does the Agency  
2 expect to complete this evaluation.

3 MR. TWAIT: That is going to be  
4 dependent on Midwest Generation and the amount  
5 of relief that they ask for. If they ask for no  
6 more relief than what they had, say, two years  
7 ago before their conversion to gas, then Exxon  
8 Mobil wouldn't be affected. If they ask for  
9 more relief than what they had two years ago,  
10 then it might potentially be impacting Exxon  
11 Mobil.

12 MS. FRANZETTI: Thank you. That  
13 clarifies the Agency's position.

14 Question 18, can a petitioner file an  
15 amended petition before the Agency conducts its  
16 evaluation and determines whether Exxon Mobil is  
17 an affected discharger? I would think the  
18 answer would be yes based on your answer to  
19 Question 17.

20 MR. SOFAT: Yes.

21 MR. HOUSER: Just going back real  
22 quick. Scott, you mentioned, that there had to  
23 be a definition of class of dischargers. But  
24 the Board's order, I believe that if that was a

1 class of dischargers and named them as you, know  
2 thermal, dischargers, wouldn't that include  
3 Exxon Mobil and Stepan Chemical?

4 MR. TWAIT: It would if the Board --  
5 well, if the petition is filed as either an MDV  
6 or a stream segment time-limited water quality  
7 standard, an individual -- if Midwest Generation  
8 was to file an individual, then it does not have  
9 classes of dischargers.

10 The other thing is, is whether or not  
11 the Board sets criteria for those classes and  
12 whether they meet those criteria.

13 MR. HOUSER: So the class of  
14 dischargers in the Board's order only applies  
15 pending how Midwest Gen files their petition,  
16 whether it's individual or not?

17 MR. TWAIT: Correct.

18 MS. FRANZETTI: Moving on, Filing,  
19 question 19.

20 Under the proposed rules, is there a  
21 point in time in a multi-discharger proceeding  
22 where the petitioners must file a document  
23 jointly rather than individually?

24 MR. TWAIT: This would be prior to

1 determining final substantial compliance.

2 MS. FRANZETTI: Are you asking me a  
3 question?

4 MR. TWAIT: No. This would be prior  
5 to the final substantial compliance evaluation.

6 MR. SOFAT: If you can't do that,  
7 then you need to let the Board know that they'll  
8 be doing so in the future.

9 MS. FRANZETTI: Question 20. If the  
10 USEPA disapproves of a TLWQS adopted by the  
11 Board in a multi-discharger proceeding, do the  
12 proposed rules require that all of the  
13 dischargers named in the multi-discharger TLWQS  
14 join in a petition to modify filed with the  
15 Board, or may only one or some of those  
16 dischargers file a petition to modify with the  
17 Board.

18 MR. TWAIT: It would not need all of  
19 the petitioners to continue. This would be  
20 especially if based on USEPA's approval, or  
21 disapproval, if they specifically said this  
22 chemical company can't be included with the  
23 other classes of discharge.

24 And so they would definitely not -- I

1 mean, they could come back and make their  
2 demonstration based on their class. But, I  
3 mean, that would be one reason why they would  
4 not come back is if they weren't, they were  
5 specifically mentioned by USEPA.

6 MS. FRANZETTI: Given there is a  
7 number of places today where you said you're  
8 going to reconsider and revise rules, this  
9 section of the rules, it just might need be  
10 clarified that one or more of the -- I don't  
11 know what word to use, participants or  
12 petitioners in multi-discharger proceeding can  
13 seek.

14 MR. SOFAT: I think we can try to  
15 clarify that. It really depends on the  
16 underlying case. If we needed five people to  
17 make a case, then after disapproval the  
18 modification needs to make sure that you are  
19 able to make that case.

20 So underlying, you know -- where was  
21 the underlying case? If they were simply  
22 grouped together for the efficiency purposes,  
23 yeah, then you just need two for an MDV in  
24 theory, right. But underlying case load depends

1 on that. What was underlying case? Let's say  
2 it was factor six, widespread, socioeconomic  
3 impact. So if removing one brings you back  
4 into -- it's not going to cause that widespread.  
5 So, now, you can make your case.

6 MS. FRANZETTI: I understand what  
7 you're saying. I might agree with you that that  
8 is a substantive issue as to burden of proof and  
9 not a procedural issue with respect to whether  
10 one or more, but not all of the dischargers need  
11 to be joining in a petition to modify submitted  
12 to the Board after EPA disapproval of the prior  
13 Board order.

14 MR. SOFAT: As long as substantive  
15 requirements are clear, that's fine.

16 MR. HOUSER: In that situation, after  
17 the USEPA's disapproval, does the Agency agree,  
18 I think, based on earlier conversations at that  
19 point all dischargers have lost their stay?

20 MR. TWAIT: Yes.

21 MR. ANDES: Let me step back a minute  
22 to the issue addressed in Question 19.

23 Before EPA makes a decision when the  
24 multi-discharger proceeding is going on and say

1 that several petitions have been consolidated,  
2 so now they're going forward as a  
3 multi-discharger petition and they've had a  
4 finding of not substantial compliance and they  
5 need to file for their information and say 16  
6 out of 17 dischargers put something together and  
7 decide to file it and the other one just doesn't  
8 agree, can those 16 fulfill their obligations by  
9 submitting that information to the Agency and  
10 saying this is the information we think  
11 justifies the multi-dischargers variance?

12 MR. TWAIT: Yes.

13 MR. ANDES: How would that other  
14 discharger be dealt with?

15 MR. SOFAT: That discharger needs to  
16 decide if they can make a single discharger case  
17 or maybe they don't need variance anymore.

18 MR. ANDES: So they can potentially  
19 be pulled out of the process.

20 MR. SOFAT: As I said, our concern is  
21 that the underlying case needs to be made,  
22 whether 14 makes it, whether two make it. As  
23 long as that is there, I think the  
24 requirement -- it's not the full need to take

1 the steps.

2 MS. FRANZETTI: I think that takes  
3 care of my Question 21. So I can move on to 22.

4 HEARING OFFICER TIPSORD: Before you  
5 get to 22, it's been about an hour and a half  
6 since lunch so why don't we take about a  
7 10-minute break and come back.

8 (WHEREUPON, a short break was  
9 taken.)

10 HEARING OFFICER TIPSORD: Question  
11 No. 22 for Midwest Gen.

12 MS. FRANZETTI: Under the proposed  
13 rules, is it correct that under Section 104.545,  
14 a newly filed petition as opposed to a converted  
15 petition under Section 104.520(a)(2) is allowed  
16 at least two opportunities to obtain a finding  
17 of substantial compliance from the Board; first  
18 in the initially filed petition and then in an  
19 amended petition if the Board finds that the  
20 initial petition was not substantially compliant  
21 before a stay expires.

22 So, in other words, you get two bites  
23 at the apple to get a substantial compliance  
24 determination from the Board before you would

1 risk losing the stay of the applicability of the  
2 underlying water standard.

3 MR. TWAIT: It's the Agency's  
4 intention to allow as many opportunities to file  
5 an amended petition as the petitioner would  
6 file. And, however, this ultimately depends on  
7 the Board.

8 But we did not write in there that  
9 you get two bites at the apple. The way that we  
10 laid it out was that you would have as many  
11 times as necessary before your deadline.

12 MS. FRANZETTI: Yes. But you're  
13 switching to a converted petition in answering  
14 that way.

15 MR. TWAIT: Regardless, we do not  
16 foresee two bites at the apple for everybody.

17 MR. ANDES: You don't foresee only  
18 two bites at the apple?

19 MR. TWAIT: Correct. It would be as  
20 many times as you want to file an amended  
21 petition. And, once again, that is dependent on  
22 the Board.

23 MS. FRANZETTI: Let's take that  
24 separately. First, though, so we're all

1 understanding the proposed rules correctly.

2 The proposed rules do speak to, you  
3 file a petition, the Board makes a determination  
4 that it is substantial compliant, and if they  
5 find that it is not, in one or more respects the  
6 rules expressly provide for a second opportunity  
7 to satisfy the substantial compliance standard  
8 by filing an amended petition, correct?

9 MR. TWAIT: We don't see it as only  
10 two.

11 MS. FRANZETTI: I understand you  
12 don't see it as only two. It's at least two,  
13 correct?

14 MR. TWAIT: Yes.

15 MS. FRANZETTI: Now, where it's a  
16 converted petition, the Agency -- what you're  
17 telling me in your prior answer is that -- and  
18 let's use the Midwest Gen pending proceeding as  
19 an example.

20 Do I understand your answer correctly  
21 that in the Agency's view between now and  
22 90 days from when the Board adopts these TLWQS  
23 rules, which is what you're referring to as the  
24 deadline, correct?

1 MR. TWAIT: Uh-huh.

2 MS. FRANZETTI: Midwest Gen order  
3 gives Midwest Gen up to 90 days subsequent to  
4 the adoption of these rules to file an amended  
5 petition to address the deficiencies that the  
6 Board notes in that order, correct?

7 MR. TWAIT: Correct.

8 MS. FRANZETTI: So you're saying  
9 between now and that 90-day deadline Midwest Gen  
10 could be filing an amended petition or it may  
11 rule it's deficient again. If we're not yet at  
12 that 90-day deadline, we can file another  
13 amended petition, not yet a substantial  
14 compliance determination, and this can just keep  
15 going up until the 90-day deadline?

16 MR. TWAIT: So as long as the Board  
17 will allow that. But that is the Agency's  
18 intention.

19 MS. FRANZETTI: Now, you would agree  
20 that even though a petitioner might, like  
21 Midwest Gen, file an amended petition now trying  
22 to get a substantial compliance ruling from the  
23 Board, the Board may not rule on that until  
24 close to the 90-day deadline. Perhaps the Board

1 wants to wait until these rules are final before  
2 it makes a substantial compliance decision.

3 Would you agree with that?

4 MR. TWAIT: It's possible.

5 MS. FRANZETTI: Midwest Gen does not  
6 control how and when the Board rules on an  
7 amended petition, correct?

8 MR. TWAIT: Correct.

9 MS. FRANZETTI: Given that your  
10 proposed rules allow a party that is not covered  
11 by the converted petitions, and a party comes in  
12 tomorrow to file a petition -- well, not  
13 tomorrow -- that files a petition after these  
14 rules are adopted clearly knowing what the rules  
15 contain is allowed at least two opportunities.

16 Why is the Agency opposed to  
17 providing in these rules that a converted  
18 petitioner gets that same opportunity of two  
19 filings, an initial and then an amended, if  
20 their first petition is deemed not to meet the  
21 substantial compliance requirement after the  
22 petitioner sees what these final rules contain  
23 before it loses the stay?

24 MR. TWAIT: I don't think there's

1 anything in our rules that would limit the  
2 number of filings that you have. And if you  
3 file tomorrow with an attempt at a substantially  
4 compliant rule or petition and the Board didn't  
5 review it until 89 days after adoption of the  
6 rules, then, I would suggest that you petition  
7 the Board to change the deadline.

8 MS. FRANZETTI: And give you an  
9 extension of that 90 days so you can get a  
10 second attempt at achieving a substantial  
11 compliance ruling from the Board?

12 MR. TWAIT: Yes.

13 MR. ANDES: Let me ask. So, in a  
14 converted petition, let's say, that the  
15 petitioner or petitioners, since they submitted  
16 the original petition before the new EPA rules  
17 were in effect and before these new rules were  
18 in effect, they submitted an amended petition  
19 after these rules go in effect, but before  
20 90 days ends.

21 That's their first petition that  
22 tries to comply with the new EPA rules, and the  
23 Agency and/or the Board determined that it's not  
24 yet substantially compliant. Say, they done

1 most of what is required in the new regulations,  
2 but not everything. They're not substantially  
3 compliant. What happens then?

4 MR. TWAIT: It would be they would  
5 issue -- the Agency would issue a recommendation  
6 to the Board and the Board would then rule on  
7 substantial compliance.

8 MR. ANDES: So if the Board ruled  
9 that that petition, which is really the first  
10 documents being submitted under the new rules is  
11 not substantially compliant, do the petitioners  
12 now have a chance to amend and fill in the  
13 blanks.

14 MR. TWAIT: Yes. Up until the  
15 deadline, if they want the stay.

16 MR. ANDES: That wasn't my question.

17 Let's say that they waited until the  
18 new rules are effective so they know what the  
19 new rules actually say, and they file their new  
20 amended petition, the first one under the new  
21 rules, 60 days in, and the Agency delivers it's  
22 recommendation, the Board issues an order,  
23 120 days pass when the new rules are effective.

24 So within 60 days after the amended

1 petition was filed, but we're now past the  
2 90-day period. And you determine, well, they  
3 did most of what was needed but there's this one  
4 issue where we're still not comfortable.

5 Does that party now, even though they  
6 can easily amend their petition to add in the  
7 incomplete information, have they now lost their  
8 stay?

9 MR. TWAIT: I believe they lost their  
10 stay unless the Board has modified their  
11 deadline.

12 MR. ANDES: As your rules are  
13 currently written?

14 MR. TWAIT: Correct.

15 MR. ANDES: Could those be revised so  
16 that party has another chance to complete its  
17 petition?

18 MR. SOFAT: No. I don't think we  
19 need to do that. What makes us say that after  
20 two attempts somebody will get it right? I  
21 think that where we have issues is because of  
22 the complexity of the variance or situation at a  
23 particular discharger site, that they should say  
24 to the Board, that, look, because of the

1 following conditions, I need extension.

2 And Agency, because this is the first  
3 time these requirements are getting applied,  
4 we're going to be generous about that.

5 Definitely. But it cannot be a blanket sort of  
6 let's just move the deadline for everyone.

7 MR. ANDES: So if the parties  
8 determine at some point in developing the  
9 amended petition, look, we think this one is  
10 complex enough that we are probably going to  
11 need another attempt, when would we need to go?

12 And would this be then we would file  
13 a petition to the Board to modify the deadline,  
14 or would that be something the Agency would go  
15 in and we would engage with the Agency as to the  
16 recommendations to modify the deadline?

17 MR. SOFAT: I think it could be a  
18 joint motion. But petitioner needs to come  
19 forward with here are the basis, because of  
20 which we are not going to be able to reach this  
21 deadline.

22 And as I said, this is the first  
23 cycle. We definitely want to work with  
24 petitioners. We definitely want to make sure

1 that people understand what the requirements  
2 are. We all are sort of learning. But it  
3 cannot just be that everybody gets extension.

4 Because, again, what if the six-month  
5 expense is not good enough. So, from that  
6 perspective, you know, I understand the concern  
7 here, I think. It's, like, somebody is going to  
8 get more chances than I do. And I think we  
9 understand that. We fully understand the  
10 concern there. But the way to respond is not  
11 modify the rule, but to make your case before  
12 the Board.

13 MR. ANDES: I think the concern is  
14 not somebody's getting more chances. The  
15 question is the converted petitions particularly  
16 that have been developed under another set of  
17 regulations, so we're having to convert them and  
18 add new information under two new sets of  
19 regulations and then have one shot in getting  
20 into a substantial when we don't even know what  
21 substantial means, at risk of losing the stay,  
22 that's the real issue.

23 How do we make sure we don't lose the  
24 stay while we're figuring out with the Agency

1 what is really required? That's the challenge.

2 MR. SOFAT: Right. And I understand  
3 that. And I think this discussion happened when  
4 we were doing the legislation. But at that  
5 point, there was a view that, no, there is 40  
6 CFR 131.14 out there and people can read that  
7 and they can get their lead based on that.

8 These rules don't have to be in  
9 place. And I think there's a specific provision  
10 in the statute for that.

11 So I understand those concerns, and  
12 I'm staying we all collectively can address  
13 them. But, you know, just simply saying we  
14 should just move the deadline or everybody  
15 should get at least two or three attempts, I  
16 don't think it really gets to the issue.

17 Because a certain petition might have  
18 really complex issues. So as these issues come  
19 up, our view is that let's figure out what needs  
20 to be done and then we present our case to the  
21 Board.

22 MS. FRANZETTI: Are you saying,  
23 Mr. Sofat, that you think that Section 38.5  
24 intends to allow the petitioner who comes in,

1 post these rules being adopted, so knew exactly  
2 what the rules required, unlike the converted  
3 petitioners, their first attempt as it's just  
4 been stated, didn't have even the benefit of the  
5 final rule.

6 Are you saying that you think 38.5 of  
7 the Act deliberately chose to give those  
8 post-rules adoption petitioners expressly two  
9 opportunities, at least two to get it right, but  
10 did not intend to give that same at least two  
11 opportunities to the converted petitioners?  
12 Because I don't see that in 38.5.

13 MR. SOFAT: No. I'm not saying that.  
14 What I'm saying is 38.5 has a provision that  
15 says Board could adopt a time-limited water  
16 quality standard variance without the subpart F  
17 or 104 rules that we are discussing today;  
18 38.5(k).

19 MS. FRANZETTI: And it says what?  
20 That the Board can adopt a TLWQS without these  
21 rules being in effect? Okay. I don't follow  
22 the logic.

23 MR. SOFAT: And that was in response  
24 to Fred's question. I was saying, if we are

1 saying rules are getting adopted and then we  
2 have 90 days to figure out what the rules  
3 require, that issue was discussed is what I was  
4 saying.

5 And when this statute was written,  
6 there's in fact a provision, the last paragraph  
7 under subsection K that says, Board has the  
8 authority to proceed with adopting this  
9 time-limited water quality standard even in  
10 absence of these procedural rules that we are  
11 talking about today.

12 MR. ANDES: But it sounds like the  
13 legal reading of the -- and this might be  
14 helpful to have this laid out -- is that for  
15 converted petitioners, you only have one  
16 opportunity to file an amended petition.

17 It has to be substantially complete,  
18 and they can do that up until that 90-day time  
19 period, and that's it. Anything they do, and  
20 including if the Board doesn't act on their  
21 amended petition before the 90 days expires,  
22 once the 90 days expires, they cannot submit a  
23 new amended petition and keep their stay.  
24 That's the legal reading I think the Agency is

1     laying out.  And that's a final order.

2                   MR. SOFAT:  I am not really following  
3     this question about somebody gets two attempts  
4     versus only gets one.  I'm not following that at  
5     all.

6                   I think it -- it says amended  
7     petition.  It doesn't say the amended petition.  
8     You can have as many amended petitions you want  
9     to file with the Board as long as Board can  
10    entertain that.  There's no restriction on how  
11    many attempts you get.

12                   It's really about at some point, you  
13    have a deadline to show to the Board, here's my  
14    substantial compliance petition.  And we just  
15    talked about in cases where we find during the  
16    process of doing those petitions that, guess  
17    what, the substantial compliance petition is not  
18    going to be ready by the Board's, you know,  
19    previously defined deadline.  Maybe it's time to  
20    tell the Board here are the reasons why, so that  
21    we can get that extended.

22                   MR. ANDES:  Okay.  My only other  
23    question is maybe this is something that we can  
24    state in writing to get a clear answer.  Because

1 I think we're not clear right now in terms of  
2 there's some specific legal questions we're  
3 trying to get the answer to.

4 And I think it would be helpful to  
5 get the Agency's clear legal statement of how it  
6 reads -- how it reads to the proposed  
7 regulations and why it thinks that the process  
8 you just laid out is dictated by the statute.  
9 Because that's part of what we're not getting.  
10 We're not sure why this is dictated by the  
11 statute.

12 MS. FRANZETTI: He took that, but  
13 he's not saying it is. Correct?

14 MR. SOFAT: Subsection K mentioned  
15 was in response to the fact that these rules --  
16 it was not envisioned from day one that these  
17 rules had to be in place before Board can adopt  
18 it.

19 That's all that part K reference  
20 stands for. It doesn't say how many times you  
21 can file or not file. So I hope I'm making that  
22 at least comment clear.

23 HEARING OFFICER TIPSORD: Go ahead.

24 MS. PAMENTER: I just had a follow-up

1 question. 104.525 speaks to the stay  
2 provisions.

3 Do you believe that this provision  
4 precludes a petitioner from filing a motion with  
5 the Board for an extension of the stay?

6 Should someone be in this, for  
7 example, this situation that's been set forth to  
8 you all? Can the stay be extended, the stay  
9 period?

10 MR. SOFAT: Could you repeat the  
11 subsection, 525?

12 MS. PAMENTER: I was looking --  
13 104.525 seems to be the section that deals with  
14 stays and how long they are effective, how long  
15 they go for.

16 I am not seeing a provision in here  
17 that affords the opportunity for someone to file  
18 a motion with the Board to extend the stay.

19 Do you believe that petitioners are  
20 precluded from filing a motion to extend the  
21 stay given how Section 104.525 is currently  
22 written?

23 MR. SOFAT: The section is silent. I  
24 agree with you. But I do not believe that

1 precludes somebody from filing that.

2 MS. PAMENTER: Thank you.

3 HEARING OFFICER TIPSORD: I see where  
4 the confusion is coming from and I think it also  
5 comes out, if you read (c)(3), if the person  
6 files an amended petition by the deadline  
7 established by the Board, but the amended  
8 petition is not in substantial compliance, then  
9 the Board shall deny the amended petition and  
10 the stay will only continues until judicial  
11 rights are extinguished. It doesn't talk  
12 anything about another amended petition.

13 And when you read Section 545 where  
14 it talks about the substantial compliance  
15 assessment, it again only talks -- there's  
16 nothing -- it's not clear from that that you can  
17 have more than one amended petition.

18 I think the Agency in view of these  
19 questions and the legal issue that they're  
20 looking at, I'm not sure that that's consistent  
21 with what the Agency thinks the rule is saying.  
22 I see some reason for some confusion, and I  
23 would ask the Agency to take another look at  
24 those two sections together, as well as the

1 statutory language.

2           Because I believe some of this is  
3 very close to what's in the statute, and see  
4 where we're at. Because I think the point  
5 they're making is if they come in -- if a  
6 converted variance comes in and they're not in  
7 substantial compliance with the new rules,  
8 that's it. That's their bite of the apple.

9           If it's a brand-new variance that  
10 comes in after these rules are adopted, they  
11 come in, the Board says you're not in  
12 substantial compliance, then you can come in  
13 with an amended petition and that's their two  
14 bites of the apple that they're talking about.

15           So I would just suggest that you go  
16 back, it's late in the day, take another look at  
17 this. And I see where the confusion is coming  
18 from. I have to admit that I'm a little  
19 confused by all of this, and see if you think  
20 there might be some clarification.

21           But like I said, I do think some of  
22 this comes from the statutory language as well.  
23 So it maybe that we're tied in with statutory  
24 language on this. Please take another look,

1 especially if you read 545 with 525.

2 MS. FRANZETTI: I'm going to jump to  
3 26. Question 26.

4 Under the proposed rules, does the  
5 Board accept the petition's factual contentions  
6 as true in making its determination on the  
7 substantial compliance issue, similar to when a  
8 court is determining a motion to dismiss  
9 complaint in state court.

10 MS. TERRANOVA: This is going to be  
11 another one of those legal questions that we are  
12 going to answer in writing.

13 MS. FRANZETTI: As well as the next  
14 question?

15 MS. TERRANOVA: Yep.

16 MS. FRANZETTI: 27. Is it the  
17 Agency's intent that the standard of review that  
18 applies to a petition to modify under  
19 Section 104.570(c) is a de novo review by the  
20 Board?

21 MS. TERRANOVA: We can classify this  
22 as a legal question also.

23 MS. FRANZETTI: I would just ask that  
24 if you do agree that the standard of review

1 should be or is intended to be a de novo review  
2 under your proposed rules, then I would ask you  
3 to consider revising the proposed rules to  
4 expressly reference that standard.

5 Okay. Question No. 28. Appeal  
6 Deadlines. If a party other than the petitioner  
7 files a motion to reconsider a Board order,  
8 approving a TLWQS, requesting that the Board  
9 instead deny the TLWQS or impose stricter  
10 requirements as part of it, must the Agency  
11 delay transmitting the approved or adopted TLWQS  
12 to USEPA pursuant to Section 104.570(b) until  
13 the motion to reconsider is resolved, or does it  
14 have the discretion as to how to proceed  
15 regarding the transmittal to USEPA?

16 MR. TWAIT: If a third party files a  
17 motion to reconsider, the Agency will send the  
18 petition to USEPA. And this is synonymous with  
19 a permit appeal where the permits issued.

20 MS. FRANZETTI: Are you saying that  
21 where a Board approves a TLWQS, even if some non  
22 petitioner participant moves to reconsiders,  
23 arguing the Board shouldn't have approved it or  
24 should have been imposed stricter standards,

1 you'll move ahead to send the Board's order  
2 approving the TLWQS to USEPA?

3 MR. SOFAT: As well as the motion to  
4 reconsider.

5 MS. FRANZETTI: Question 29, does a,  
6 quote, person adversely affected or threatened,  
7 by Board approval of a TLWQS under  
8 Section 104.565 immediately appeal the Board's  
9 decision in state court without waiting for the  
10 USEPA to complete its review?

11 MR. TWAIT: Yes, because they must  
12 meet their deadline. It must be filed within  
13 35 days after the petition was served on the  
14 person affected by the order.

15 MS. FRANZETTI: So it is contemplated  
16 that under the rules, a person may have to  
17 appeal a board decision before the USEPA decides  
18 whether it's approving or disapproving a board  
19 TLWQS decision?

20 MR. TWAIT: Yes.

21 MS. FRANZETTI: Question 30. If one  
22 or more petitioners in a multi-discharger  
23 petition do not want to appeal a Section 104.565  
24 order, does this prevent the appeal from being

1 filed?

2 MS. TERRANOVA: This is another one  
3 that we considered a legal question that we  
4 would like to answer in writing.

5 MS. FRANZETTI: Question 31, if the  
6 USEPA reviews an adoptive multi-discharger  
7 variance and concludes that the variance is  
8 appropriate as to some but not all of the  
9 dischargers, do the proposed regulations treat  
10 the appropriate dischargers as having an  
11 approved TLWQS variance?

12 MR. TWAIT: We expect that USEPA will  
13 spell that out in their approval/disapproval  
14 document. And so, yes, if they approve part of  
15 it, then it would be applicable.

16 MS. FRANZETTI: Question 31, does a  
17 pending appeal of a USEPA disapproval decision  
18 in federal court prevent the Board from  
19 considering a petition to modify under Section  
20 104.570(c) or can both of those things be done  
21 simultaneously?

22 MR. TWAIT: They can both be done  
23 simultaneously.

24 MS. FRANZETTI: Question 32, if a

1 stay is terminated by a USEPA disapproval  
2 decision under Section 104.525(b)(2)(B) and the  
3 Board modifies the adopted TLWQS variance under  
4 Section 105.570(c), does this put the stay back  
5 in effect while the modified TLWQS variance is  
6 again reviewed by the USEPA?

7 MR. TWAIT: No. The stay ended with  
8 the USEPA disapproval.

9 MS. FRANZETTI: Would you explain why  
10 the Agency is proposing in the rules that the  
11 stay terminates even though the Board may  
12 receive a petition to modify that addresses the  
13 alleged deficiencies in the USEPA disapproval?

14 MR. TWAIT: We did that to avoid an  
15 infinite loop. We wanted there to be a finite  
16 cycle for the stay. And it's from the  
17 legislation 38.5.

18 MS. FRANZETTI: During the -- and I  
19 don't know what to call it? Do you call it  
20 negotiations on the language of 38.5? Is that  
21 the way I should refer to them?

22 MR. SOFAT: Discussion.

23 MS. FRANZETTI: During the  
24 discussions about the language of 38.5, was this

1 issue specifically discussed? I mean, was it  
2 even contemplated at that time that, you know,  
3 these scenarios where USEPA may disapprove a  
4 board order TLWQS on a readily rectifiable  
5 ground and even your rules anticipate that with  
6 allowing motions to modify to the Board  
7 subsequent to USEPA disapproval, in those  
8 discussions, was that discussed that the stay  
9 should not stay in effect to cover at least that  
10 initial petition to modify?

11 MR. SOFAT: I'm not sure if there was  
12 explicit discussion or not. But I also know  
13 that we were not trying to extend stays to every  
14 scenario.

15 MS. FRANZETTI: I can understand  
16 that. Some scenarios may be unreasonable to  
17 extend the stay, correct? And that's what  
18 you're concerned about when you say an infinite  
19 loop I think was the phrase you used; is that  
20 right?

21 MR. TWAIT: Yes.

22 MS. FRANZETTI: Would you be opposed  
23 to modifying your proposed rules to at least  
24 allow the stay to continue through one

1 opportunity to obtain the Board's decision on a  
2 petition to modify subsequent to USEPA  
3 disapproval?

4 MR. SOFAT: It's based on the  
5 statutory language. So I don't think these  
6 rules can go beyond what the statute allows.

7 MS. FRANZETTI: You think that would  
8 be going beyond what that statute allows?

9 MR. SOFAT: It specifically says --  
10 USEPA approval.

11 MS. FRANZETTI: But isn't it  
12 conceivable that the USEPA disapproval that  
13 would be intended there would be after  
14 the Board -- well, the petitioner and the Board  
15 get an opportunity to respond to the USEPA  
16 comments, and the USEPA says, no, this  
17 disapproval is final.

18 Because certainly you would agree  
19 there are instances where the EPA has  
20 disapproved, it then comes back to the stay, or  
21 in our instance, the Board, and the concerns the  
22 USEPA had are, in fact, successfully addressed,  
23 in which event that initial disapproval turns  
24 into an approval.

1           So the initial disapproval was an  
2 interim type disapproval to which I could argue  
3 your Section 38.5 is only speaking about a final  
4 EPA decision after you've gotten an opportunity  
5 to respond to your initial decision; would you  
6 agree?

7           MR. SOFAT: No.

8           MS. FRANZETTI: Do you have any law  
9 to back that up?

10          MR. SOFAT: I think the way we review  
11 that is -- the thought process I have laid out  
12 before is Agency intends to work with USEPA from  
13 day one. And, therefore, once they write a  
14 formal opinion, it's final. There would be a  
15 lot of discussion before they issue their final  
16 decision.

17          So, therefore, that's why I'm saying  
18 that at some point you got to put a stop to the  
19 process. And that is what the statute says,  
20 that's what we are saying today. But I will  
21 also say that our working with the USEPA will  
22 give us plenty of heads-up that this is what's  
23 going to happen.

24          MS. FRANZETTI: And Mr. Sofat, I wish

1 I could be as optimistic as you are about EPA  
2 being so communicative with the stay, but I  
3 happen to share the thought that has been  
4 expressed earlier that absolutely there have  
5 been situations where you can't get a clear  
6 answer out of them in advance; wouldn't you  
7 agree with that?

8 MR. SOFAT: I'm speaking out of  
9 experience. And even in case of Citgo, we were  
10 told this is what's going to happen.

11 MS. PALUMBO: In the scenario that  
12 we're discussing right now in which USEPA  
13 disapproves the TLWQS, the Board would have  
14 already adopted it, correct?

15 MR. SOFAT: Uh-huh.

16 MS. PALUMBO: So, in that instance,  
17 it is effective for state use? It is effective  
18 at the state level, correct?

19 MR. SOFAT: Yes.

20 MS. PALUMBO: So if the TLWQS is not  
21 effective for the purposes of the Clean Water  
22 Act, and the stay has ended, what sort  
23 enforcement is the discharger opened up to at  
24 that point? Can you be elaborate on that?

1 MR. SOFAT: So USEPA has disapproved.  
2 As I said before, the stay provision is only a  
3 state law. It's not Clean Water Act. The Clean  
4 Water Act has no provision that says you can  
5 somehow stay things.

6 So, your stay is only going to be  
7 relevant for the stay purposes.

8 MS. PALUMBO: So, theoretically, a  
9 citizen suit could be brought pursuant to the  
10 Clean Water Act in federal court, let's say,  
11 because USEPA disapproved the TLWQS; is that a  
12 correct assessment?

13 MR. SOFAT: So USEPA has disapproved  
14 it and the line standard applies. And during  
15 that time, yes, that's a possibility.

16 HEARING OFFICER TIPSORD: Mr. Sofat,  
17 just as - on that, too, on that didn't you state  
18 earlier, and maybe I misheard and mistook notes,  
19 but that if the USEPA disapproves the  
20 time-limited water quality standard, that in  
21 effect ends the state time-limited water quality  
22 standard. So you no longer have a state stay  
23 either.

24 MR. SOFAT: That is true.

1 HEARING OFFICER TIPSORD: So at that  
2 point, you're subject to the underlying  
3 provision, both state and federal?

4 MR. SOFAT: Yes.

5 HEARING OFFICER TIPSORD: Then a  
6 follow-up question to that, you're saying USEPA  
7 disapproval, you're saying that's final. Are  
8 there no appeals in the USEPA disapproval to the  
9 EAP or to the circuit court?

10 MR. SOFAT: I have to think about  
11 that. I don't know if they have to publish it.  
12 If it's published in the federal register, then  
13 yes. If it's not, then not.

14 HEARING OFFICER TIPSORD: But if it's  
15 appealed, and if there is an appeal period, then  
16 surely the stay would stay in effect while it's  
17 under appeal.

18 MR. SOFAT: Again, I don't know -- we  
19 will look into whether or not appealing to a  
20 federal code, you could request an extension of  
21 your stay. That part we need to check into  
22 that.

23 HEARING OFFICER TIPSORD: Mr. Andes.

24 MR. ANDES: Let's take that issue a

1 step further. This strikes me, two issues to  
2 the explore. One is, before EPA disapproves  
3 this kind of action, which is what I call a  
4 standard action, the EPA has to issue a proposed  
5 disapproval, correct, and allow public comment?

6 MR. SOFAT: I'm only going with my  
7 experience with Citgo. I don't think they did  
8 that. They simply issued an order.

9 MR. ANDES: So, that's one issue.  
10 Certainly when the EPA disapproves a state water  
11 quality standard, they are supposed to do that?

12 MR. SOFAT: Yes.

13 MR. ANDES: Take at least 30 days of  
14 comments and publish it under the federal  
15 registry notes. They haven't done that in the  
16 past. That's another issue.

17 So that's one issue where there might  
18 be an opportunity to say, this is coming, can we  
19 work on a provision that says in that kind of  
20 situation, say, the EPA, suppose it disapproves  
21 it, but you're working with them to try to  
22 address the issue, is there a way to extend the  
23 stay in that circumstance?

24 So that's, I guess, one issue for us

1 to explore further.

2 The other aspect for you to explore  
3 would be in answer to the hearing officer's  
4 question about challenges. Absolutely there  
5 would be an opportunity -- I'm not afraid to say  
6 this since we've done this -- there would be an  
7 opportunity to challenge the EPA disapproval in  
8 federal district court.

9 And one could ask for an injunction  
10 on the EPA. It wouldn't be an automatic stay,  
11 but you can certainly ask for an injunction  
12 conjoining the effectiveness of the EPA  
13 disapproval, which then would I think leave the  
14 stay in effect. So, I think these are legal  
15 issues for us to explore further.

16 MS. FRANZETTI: At the time of the  
17 discussions of Section 38.5, was it even  
18 discussed the situation where the grounds for  
19 the EPA disapproval can be addressed through a  
20 petition to modify filed before the Board; and  
21 that in that situation, was it a purposeful  
22 decision that in that situation the stay should  
23 still expire?

24 MR. SOFAT: I don't remember explicit

1 discussions. But I will say this, the state  
2 provision that we have, I was very happy to have  
3 what we got.

4 MS. FRANZETTI: I understand. And  
5 I'm not challenging the reasonableness generally  
6 of the stay provision.

7 Was there discussion about generally  
8 letting the stay continue while the Board worked  
9 to resolve the deficiencies identified by the  
10 USEPA, you know, any discussion along those  
11 lines?

12 MR. SOFAT: No.

13 MS. FRANZETTI: Now, let me take the  
14 flipside.

15 Was there any discussion by advocates  
16 of -- it doesn't matter how minor the deficiency  
17 may be that the USEPA identifies in its  
18 disapproval, the stay should still expire; was  
19 there that kind of argument being made about  
20 Section 38.5?

21 MR. SOFAT: You are asking the wrong  
22 guy who can't remember what happened yesterday.  
23 I can't recall.

24 MS. FRANZETTI: Okay. All right.

1 Let me move on. I'm going to ask (c) here.

2           Given that the USEPA disapproval  
3 decision has the effect of terminating a stay,  
4 did the Agency consider the alternative approach  
5 of having the Board issue a preliminary or  
6 tentative decision to be submitted to the USEPA  
7 for comment upon the conclusion of the hearing  
8 and post-hearing briefing before the Board  
9 proceeds to enter a final decision that is then  
10 submitted to USEPA for approval or disapproval?

11           Obviously, a different approach, but  
12 one where if there's no alternative, the stay  
13 automatically expires upon EPA disapproval of a  
14 Board order granting a TLWQS, what about an  
15 approach then that submits a preliminary  
16 determination by the Board for USEPA review and  
17 response?

18           MR. SOFAT: The issue I see with that  
19 is USEPA is going to say it's not a final  
20 action. We don't need to tell you anything.  
21 And I understand that everybody has concerns  
22 regarding this stay expiring and things like  
23 that. But I cannot emphasize enough when I say  
24 we're going to work with USEPA, we are very,

1 very serious about that. We do not want those  
2 examples. This whole exercise started because  
3 we got a disapproval.

4 So, again, yes, it might seem like  
5 yes, there's a certainty in the process,  
6 somebody could, you know, lose their stay, et  
7 cetera, all that stuff. Yes, it's there. But  
8 that is there because we needed a process that  
9 ends at some point.

10 But as far as -- and, again, I know  
11 the challenge that now we have certain  
12 transitioning from 35 (a) type petitions to  
13 38.5. So, I think, yes, challenges will be  
14 there. We'll have to figure out solutions.  
15 Statute is what it is now.

16 But that doesn't mean we are just  
17 saying if we see something needs to be done or  
18 needs to be addressed, that we don't intend to  
19 be reasonable. We are going to be reasonable.  
20 And that is one way to handle these complex  
21 issues.

22 MS. FRANZETTI: Final question.  
23 Question 33.

24 Section 104.570(c) (6) requires a

1 30-day comment period. Does this prohibit the  
2 Board from approving the petition to modify in  
3 less than 30 days? Must it wait at least  
4 30 days before it rules on a petition to modify?

5 MS. TERRANOVA: We're going to take  
6 33(a) and (b) as legal questions and respond in  
7 writing.

8 MS. FRANZETTI: All right. Let me,  
9 therefore, add -- I think you really need to  
10 consider this provision because based on what we  
11 just finished discussing, if somebody is going  
12 to lose the stay upon disapproval by the USEPA,  
13 time will be of the essence to go back to the  
14 Board under a petition to modify.

15 And I submit you are going too far  
16 with the public participation angle of this.  
17 And a petitioner should not have to sit there  
18 and wait 30 days. Nobody may comment. If they  
19 are so interested, they ought to get in there  
20 and comment extremely quickly.

21 So, I really would ask the Agency to  
22 reconsider a 30-day comment period. Because  
23 certainly, typically, when the Board allows for  
24 a comment period on any sort of motion, they

1 don't rule before the comment period ends. So I  
2 would really ask the Agency to reconsider that.

3 MR. ETTINGER: Ms. Tipsord, if we're  
4 going to have more testimony today as opposed to  
5 questions that should be scheduled for another  
6 proceeding.

7 HEARING OFFICER TIPSORD: I  
8 appreciate what you're saying Mr. Ettinger. I  
9 believe that Ms. Franzetti is finished.

10 MS. PALUMBO: I just have one final  
11 question.

12 So in the clause in the Chicago Area  
13 Waterway System Rulemaking, USEPA participated  
14 with comment letters.

15 Does Illinois EPA anticipate that  
16 USEPA's participation in the water quality  
17 standard rulemaking take a similar form to that?

18 MR. TWAIT: I don't know if they'll  
19 be participating in that way or not.

20 MR. SOFAT: But we will definitely be  
21 encouraging them.

22 HEARING OFFICER TIPSORD: Any other  
23 questions?

24 Let's go off the record for just a

1 moment.

2 (WHEREUPON, a discussion was  
3 held off the Record.)

4 HEARING OFFICER TIPSORD: After  
5 discussion was held off the record, it's been  
6 decided that the IEPA will submit comments to  
7 the Board and the members of people on the  
8 service list by November 14th, 2017.

9 Response comments and everyone else's  
10 comments -- or initial comments are due by  
11 December 5th, 2017. And we will allow for the  
12 right to reply by December 19th, 2017.

13 Mailbox rule doesn't apply. I know  
14 that's an old-fashioned term especially since we  
15 do all electronic filing. It does not apply.  
16 Those should be in the Clerk's office on those  
17 days.

18 Any other questions?

19 I want to thank everyone again for  
20 their professional and for the good questions.  
21 It's been a good rulemaking. Thank you very  
22 much. We're adjourned.

23 MR. SOFAT: And the Agency would like  
24 to thank the Board for the time and the efforts

1 they have put into this. Thank you very much.

2 HEARING OFFICER TIPSORD: Thank you.

3 (WHEREUPON, the proceedings  
4 were concluded at 4:13 p.m.)

5 (WHEREUPON, which were all  
6 proceedings had in  
7 above-entitled cause on said  
8 date and time.)

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1 STATE OF ILLINOIS )

2 ) SS:

3 COUNTY OF C O O K )

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5 JAMYE GIAMARUSTI, being first duly sworn,  
6 on oath says that she is a court reporter doing  
7 business in the City of Chicago; and that she  
8 reported in shorthand the proceedings of said  
9 hearing, and that the foregoing is a true and  
10 correct transcript of her shorthand notes so  
11 taken as aforesaid, and contains the proceedings  
12 given at said hearing.

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Certified Shorthand Reporter

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<p><b>A</b></p> <p><b>A-N-T-O-N-E-T-...</b> 19:24</p> <p><b>A-T</b> 6:19</p> <p><b>a.m</b> 1:16</p> <p><b>ABC</b> 100:11,16 112:21</p> <p><b>ability</b> 123:21 170:3</p> <p><b>able</b> 5:4 73:19 79:24 81:20 93:4 178:10 184:18 187:16 198:3 210:19 221:20</p> <p><b>above-entitled</b> 1:11 250:7</p> <p><b>absence</b> 11:22 197:9 225:10</p> <p><b>Absent</b> 123:13</p> <p><b>absolutely</b> 63:8 88:19 239:4 243:4</p> <p><b>accept</b> 231:5</p> <p><b>acceptable</b> 36:2 63:16 125:8</p> <p><b>accepted</b> 111:1 190:12</p> <p><b>account</b> 14:2 50:20 65:10</p> <p><b>accurate</b> 89:21</p> <p><b>achievable</b> 79:17 80:1 96:7 119:14</p> <p><b>achieve</b> 70:13,18 70:20 71:12,15 77:17 93:2,12 102:18 138:14 191:2</p> <p><b>achieved</b> 46:10 79:22,22 138:10</p> <p><b>achieving</b> 218:10</p> <p><b>acknowledge</b> 4:23 68:18 101:9,15,16</p> <p><b>acknowledged</b> 4:24</p> <p><b>acknowledging</b> 102:6</p> <p><b>act</b> 9:14 10:14,23</p>	<p>26:4 29:22 30:6 40:24 56:11 59:16 59:18 66:11 68:14 89:12 99:23 103:16 136:1 140:12 151:23 152:2 156:16 162:19 164:17 167:18 168:6 202:18,21 224:7 225:20 239:22 240:3,4,10</p> <p><b>action</b> 122:2 129:13 242:3,4 245:20</p> <p><b>actions</b> 90:19 102:24 113:17</p> <p><b>active</b> 20:24 22:11</p> <p><b>activity</b> 152:5</p> <p><b>actual</b> 73:13</p> <p><b>add</b> 26:22 33:22 50:11 55:15 56:14 59:15 72:16 88:23 132:14 220:6 222:18 247:9</p> <p><b>added</b> 45:15 157:8 197:19</p> <p><b>adding</b> 5:14 7:23 18:22 111:10 160:24</p> <p><b>addition</b> 28:8 44:6 59:20 149:10</p> <p><b>additional</b> 8:5 88:24 119:10 169:20</p> <p><b>additionally</b> 156:24</p> <p><b>address</b> 17:14 47:10 50:14 51:6 51:18,21 57:9 59:10 82:12 102:20 119:19 129:8,17 140:22 140:22 150:8 161:6 165:22 216:5 223:12 242:22</p>	<p><b>addressed</b> 47:5 50:9,10 51:11 77:21 148:14 150:9 162:23 163:5 211:22 237:22 243:19 246:18</p> <p><b>addresses</b> 134:21 235:12</p> <p><b>addressing</b> 7:12,14</p> <p><b>adequate</b> 96:16 97:9,17 181:18</p> <p><b>adjourned</b> 249:22</p> <p><b>adjudication</b> 25:16</p> <p><b>adjudicatory</b> 167:24 168:3,9 169:5 183:20 184:4,9</p> <p><b>adjust</b> 81:21</p> <p><b>Adm</b> 1:7 3:7 26:4</p> <p><b>administration</b> 28:11 195:17</p> <p><b>Administrative</b> 168:2</p> <p><b>admit</b> 230:18</p> <p><b>adopt</b> 9:18 10:6 30:12 40:9 60:18 99:8 139:9 164:23 167:20 224:15,20 227:17</p> <p><b>adopted</b> 10:20 24:18 35:20 86:13 89:22 91:4 96:23 126:21 132:21 135:24 149:21 156:20 166:2 189:12 209:10 217:14 224:1 225:1 230:10 232:11 235:3 239:14</p> <p><b>adopting</b> 96:20 225:8</p> <p><b>adoption</b> 119:16 156:3 165:10</p>	<p>216:4 218:5 224:8</p> <p><b>adoptive</b> 155:13 234:6</p> <p><b>adopts</b> 92:10 119:15 138:23 155:11 166:6 215:22</p> <p><b>advance</b> 161:23 239:6</p> <p><b>advantage</b> 143:7</p> <p><b>advantages</b> 23:24 151:17</p> <p><b>adversely</b> 199:14 233:6</p> <p><b>advisor</b> 131:13</p> <p><b>advocates</b> 244:15</p> <p><b>affect</b> 25:16</p> <p><b>afford</b> 79:2,3</p> <p><b>afforded</b> 20:21 21:3 157:3</p> <p><b>affords</b> 228:17</p> <p><b>aforsaid</b> 251:11</p> <p><b>afoul</b> 95:12</p> <p><b>afraid</b> 243:5</p> <p><b>afternoon</b> 148:20</p> <p><b>AG</b> 5:18</p> <p><b>Agencies</b> 55:17</p> <p><b>agency</b> 3:24 5:22 6:8 7:20 8:7,10 14:12 21:6,8 22:18 23:7 25:19 25:21 26:5,6,19 27:11,20 28:5 33:9 34:4,13 35:6 35:24 36:4 38:11 40:7 42:1,6,11,14 43:21 44:7,19 47:13,16 54:23 55:5 56:14,21 57:8,17 58:4 59:19 60:6,14,16 65:7 67:8 76:21 83:15 86:24 87:21 87:22 89:3 93:23 94:17 95:1 97:12</p>	<p>98:22 101:13 102:10 110:7,24 111:9 112:16 115:5,8 120:9,10 120:11 123:12,17 128:7,15,21 129:2 129:12,14 141:18 143:3 144:15 145:9,15,17 149:5 150:5,11 153:24 154:2,14,16 155:8 155:20 156:5,9,12 158:18 161:5,12 161:20 162:3,6,17 166:17 168:4,11 175:2 177:13 181:24 184:13 185:16 186:1,20 187:7,24 189:24 191:23 192:1 200:17 201:19 203:19,24 205:14 206:21 207:1,15 211:17 212:9 215:16 217:16 218:23 219:5,21 221:2,14,15 222:24 225:24 229:18,21,23 232:10,17 235:10 238:12 245:4 247:21 248:2 249:23</p> <p><b>Agency's</b> 7:20 17:3 34:6 44:9 60:19 60:20 101:8 149:1 150:3 157:12,16 157:20 158:2 173:16 175:9 198:24 202:16 204:2 206:19 207:13 214:3 215:21 216:17 227:5 231:17</p> <p><b>ago</b> 23:1 176:4</p>
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