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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)	
)	
PRAIRIE RIVERS NETWORK,)	
)	
Petitioner,)	
)	
-vs-)	PCB 01-112
)	VOLUME I
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY AND)	
BLACK BEAUTY COAL COMPANY,)	
)	
Respondents.)	

The following is the transcript of a hearing held in the above-entitled matter, taken stenographically by Jennifer E. Johnson, CSR, before John Knittle, Hearing Officer, at 6 North Vermilion Road, 2nd Floor Conference Room, Danville, Illinois, on the 1st day of May, 2001 A.D., commencing at the hour of approximately 9:28 a.m.

1 PRESENT:

2 HEARING TAKEN BEFORE:

3 ILLINOIS POLLUTION CONTROL BOARD
4 100 West Randolph Street, Suite 11-500
5 Chicago, Illinois 60601
(312) 814-6923
BY: MR. JOHN KNITTLE

6 APPEARANCES:

7 ENVIRONMENTAL LAW & POLICY CENTER
8 BY: ALBERT ETTINGER, ESQUIRE
9 35 East Wacker Drive, Suite 1300
Chicago, Illinois 60601-2110
(312) 795-3707
10 On Behalf of the Petitioner.

11 ILLINOIS ENVIRONMENTAL PROTECTION AGENCY
12 BY: SANJAY K. SOFAT, ESQUIRE
1021 North Grand Avenue East
Springfield, Illinois 62794-9276
13 (217) 782-5544
14 On Behalf of the Respondent Environmental
Protection Agency.

15 OPPENHEIMER WOLFF & DONNELLY, LLP
16 BY: W.C. BLANTON, ESQUIRE
Plaza VII, Suite 3300
45 South Seventh Street
17 Minneapolis, Minnesota 55402-1609
(612) 607-7450
18 On Behalf of the Respondent Black Beauty
Coal Company.

19 ALSO PRESENT:

20 FRED L. HUBBARD, ESQUIRE
21 415 North Gilbert Street
Danville, Illinois 61834
22 (217) 446-0144
On Behalf of Vermilion Coal Company.

23

24 MEMBERS OF THE PUBLIC WERE ALSO PRESENT

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P R O C E E D I N G S

HEARING OFFICER: Good morning, officially.
My name is John Knittle. I am the Chief Hearing Officer with the Illinois Pollution Control Board. I'm also the assigned hearing officer for this matter, specifically Pollution Control Board Number 2001-112, Prairie Rivers Network versus the IEPA and Black Beauty Coal Company.

This is a third-party appeal of an Illinois Environmental Protection Agency decision regarding an NPDES permit. I'm going to run this hearing pursuant to 35 Illinois Administrative Code 101, Subpart F, which is entitled Hearings, Evidence and Discovery. Of course, more specifically, the hearing will be run in accordance with 35 Illinois Administrative Code, Part 105, Subpart B, which is entitled Appeal of Agency Decisions and Other Final Decisions of the Agency. This hearing has been publicly noticed pursuant to the Board regs and the Illinois Environmental Protection Act.

The hearing was publicly noticed on or about March 20th, 2001. I do want to note for the record that we have a fairly large contingent of members of the public here today. As I explained off the record, we do welcome public comment at the Illinois Pollution Control Board, and generally the time for public comment is at

the end of the hearing, after all the parties have put on

2 their evidence but before they have made the closing
3 arguments. However, as I also explained, if anybody
4 needs to leave earlier, if you have an obligation that
5 you have to meet, raise your hand, wave at me, do
6 anything but yell out, and we'll fit you in as soon as we
7 can.

8 This hearing is a little bit odd in that we
9 have an amicus party. Mr. Fred Hubbard is representing
10 it, Vermilion --

11 MR. HUBBARD: Vermilion Coal, sir.

12 HEARING OFFICER: -- Vermilion Coal. He
13 petitioned to intervene. The petition to intervene was
14 denied by the Board. However, Mr. Hubbard was granted
15 amicus standing to participate in that fashion pursuant to
16 101.628 of the Board's procedural rules and 101.110(c) of
17 the Board's procedural rules. This will allow him to file
18 an amicus brief -- and we'll set that up in the briefing
19 schedule at the close of the hearing -- along with
20 everybody else's brief. It will also allow him to provide
21 public comment just like any of the other members of the
22 public. I'm also going to allow Mr. Hubbard to present a
23 closing argument as his amicus standing -- because of the
24 amicus standing.

7

1 That's all I have at this point in time. I

2 want to let the parties introduce themselves, starting
3 with the petitioner.

4 MR. ETTINGER: I'm Albert Ettinger of the
5 Environmental Law & Policy Center. I'm representing
6 Prairie Rivers Network here today. And its executive
7 director, Rob Moore, is sitting to my right.

8 MR. SOFAT: My name is Sanjay Sofat. I'm a
9 special assistant attorney general and assistant counsel
10 with the Illinois EPA. Today with me is Toby Frevert, who
11 is the acting manager of the Bureau of Water.

12 HEARING OFFICER: We'll get to you at the end
13 there, Mr. Hubbard.

14 MR. BLANTON: I'm W. C. Blanton of
15 Oppenheimer, Wolff & Donnelly, and I represent the
16 respondent Black Beauty Coal Company. On behalf of Black
17 Beauty Coal Company, I have with me today Eric Fry to my
18 left.

19 HEARING OFFICER: Sir, Mr. Hubbard, you can
20 introduce yourself.

21 MR. HUBBARD: I'm Fred Hubbard, who's been
22 permitted to participate as amicus. Mr. Fred Keady, the
23 principal officer of Vermilion Coal, is present with me.

24 HEARING OFFICER: Thank you very much.

8

1 Do we have any preliminary matters that we
2 have to address before we start off with opening

3 statements? I see a lot of shaking of heads. I hear
4 nothing, so we'll move on and start with opening
5 statements, starting with Mr. Ettinger.

6 MR. ETTINGER: I will waive opening statement.

7 HEARING OFFICER: Fair enough. Mr. Sofat?

8 MR. SOFAT: Yes. The agency believes that the
9 information in the agency record filed with the Board and
10 the testimonies to be presented here today would prove
11 that the admission of the Black Beauty's NPDES permit did
12 not violate the Environmental Protection Act or the
13 applicable regulations.

14 HEARING OFFICER: Thank you, Mr. Sofat.
15 Mr. Blanton?

16 MR. BLANTON: Thank you, Mr. Knittle. First
17 thing I want to point out is what we are involved with and
18 what we are not involved with. Although this is an NPDES
19 permit proceeding, it is atypical, to some extent,
20 compared to the sorts of NPDES permits that are normally
21 issued with respect to industrial facilities. What we are
22 really talking about here today is an intermittent storm
23 water discharge. We are -- have at issue the terms and
24 conditions under which Black Beauty may discharge storm

9

1 water that is collected at the surface facility for an
2 underground mine held in sediment basins, treated -- if

3 necessary -- and discharged only under certain conditions
4 which basically are that the receiving waters are in a
5 certain proportion to the discharge waters. Given the
6 requirements of the permit, the size of the basins, and
7 the general way the situation will operate, we would
8 anticipate a discharge of fewer than a dozen times a year
9 into the receiving waters.

10 The permit itself -- or the effluent itself is
11 of the nature that is commonly found in coal mining
12 operations throughout the state and the Midwest. There's
13 nothing unusual about it. It's specifically addressed in
14 the Illinois regulations for water quality as something
15 that can and should be treated differently than normal
16 industrial effluent.

17 The permit was issued after a great deal of
18 public concern and public input. It was issued after, I
19 believe, an unusual amount of scrutiny by all affected
20 Illinois agencies. As you're aware, this permit was
21 issued along with an operating permit from the Department
22 of Natural Resources. All affected and interested local,
23 state, and federal agencies had the opportunity, and many
24 did comment. The public commented extensively. There

10

1 were public meetings and public hearings that are in the
2 record.

3 The permit was issued, we believe, with terms

4 and conditions that exceed the requirements of the
5 Illinois laws that apply to such permits. It was worked
6 out basically and presented to Black Beauty on a
7 take-it-or-leave-it basis after there had been a consensus
8 between the Illinois Environmental Protection Agency, all
9 affected divisions of the Illinois Department of Natural
10 Resources, and the United States Environmental Protection
11 Agency which had originally objected to the draft permit
12 and has agreed to the final terms. In effect, this permit
13 probably has as much regulatory consensus at every level
14 as any permit that the agency has issued.

15 We believe that the record shows and the
16 evidence today will show that the permit fully complies
17 with law. There is no basis for a reasonable argument
18 that the discharge allowed under this permit will violate
19 any Illinois water quality standard or any other Illinois
20 water quality law, and there is no reasonable basis to
21 conclude that the agency in any way failed in its duty to
22 make sure that that's the case. The permit was lawfully
23 permitted and should be affirmed by the Board.

24 HEARING OFFICER: Thank you, sir. I want to

11

1 note a couple more things. In my excitement to get toward
2 the body of the hearing, I forgot to state that today's
3 date is May 1st, 2001. We started this hearing at

4 approximately 9:20 a.m. We had a bit of a delay starting
5 off and a bit of a disagreement and discussion that ensued
6 about the order that the Board issued on April 19th, 2001,
7 denying Vermilion Coal Company's motion to intervene.

8 I also want to note for the record that I do
9 not make the ultimate decision in this matter. My job is
10 to rule on evidentiary matters and provide a clear and
11 concise record for the Board, the Illinois Pollution
12 Control Board. They make the ultimate decision. The
13 Board is comprised of seven members located throughout the
14 state of Illinois chosen for their environmental
15 expertise.

16 I also want to note for the record that we
17 have Mr. Steve Langhoff -- I'm going to point to him so
18 everyone can see him there in the back corner. He is an
19 employee of Illinois Pollution Control Board as a hearing
20 officer and also a staff attorney.

21 That being said, we can move on to the
22 petitioner's case in chief.

23 Mr. Ettinger, your first witness, please.

24 MR. ETTINGER: Yes. Mr. Moore.

12

1 HEARING OFFICER: Mr. Moore. Why don't you
2 come up -- actually, does anyone object if he stays where
3 he's seated? Can everyone see him?

4 MR. ETTINGER: The question is whether the

5 court reporter can hear him.

6 MR. BLANTON: You're very soft spoken; so if
7 you've got your back to me, that will be hard.

8 (A discussion was held off the record.)

9 HEARING OFFICER: We will have the court
10 reporter swear you in.

11 (Witness sworn.)

12 HEARING OFFICER: Mr. Ettinger, your witness.

13 ROBERT MOORE,

14 called as a witness, after being first duly sworn, was
15 examined and testified upon his oath as follows:

16 DIRECT EXAMINATION

17 BY MR. ETTINGER:

18 Q. Would you please state your name?

19 A. Robert Moore.

20 Q. And what is your address?

21 A. My personal residence is 108 Janice Avenue in
22 Paris, Illinois.

23 Q. And do you have a business address?

24 A. Yeah. I work for Prairie Rivers Network, and

13

1 that's at 809 South Fifth Street in Champaign, Illinois,
2 and I'm the executive director of that organization.

3 Q. What is Prairie Rivers Network?

4 A. We're a statewide river conservation group.

5 We work with organizations and individuals throughout
6 Illinois on issues that deal with protection of our
7 rivers and streams as well as water quality issues
8 throughout the state of Illinois.

9 Q. How did you and Prairie Rivers Network come
10 to be involved in the matter that brings us here today?

11 A. Early in 2000, a local resident, Bill Ellis,
12 came to our office and actually informed us of a coal
13 mine being built on the banks of the Little Vermilion
14 River, something we were really concerned about because
15 the Little Vermilion is a really high-quality stream.
16 And we've been involved with many efforts over the past
17 few years to make sure that the Little Vermilion and the
18 aquatic life which lives there are protected from
19 pollution.

20 Q. Did you, in the course of your efforts, work
21 with the people living in the area of the mine?

22 A. Yes, we did. After the initial meeting with
23 Mr. Ellis, we met with a lot of local residents
24 repeatedly over a fairly long period of time to discuss

14

1 the mining permit that was being issued by the Illinois
2 Department of Natural Resources, as well as the water
3 pollution permit being issued by the Illinois EPA.

4 Q. Did some of those local residents, were they
5 Prairie Rivers Network members or become so after you

6 talked to them?

7 A. Yes.

8 Q. Can you briefly describe your participation
9 in the proceedings that led to the issuance of the
10 permit?

11 A. On the NPDES permit, we participated in a
12 public meeting, I think which was held September 20th,
13 2000. We actually never received any official
14 notification of that public meeting from the agency even
15 though I think our interest in that meeting was pretty
16 clear. We had to request, I think in a letter to
17 Director Skinner, that we be allowed to participate in
18 that meeting and present information there.

19 We also participated in the public hearing
20 which was held on this permit on September 27th, the
21 following week, and we provided oral testimony as well as
22 asked several questions of the agency at that hearing.
23 And we filed written comments following the hearing
24 during the public comment period.

15

1 We also did arrange to meet with Illinois EPA
2 and Illinois DNR in December to try to get an update on
3 where they were in their decision-making process.

4 Q. Had you corresponded with the agency prior to
5 September 20th on this meeting that you spoke of?

6 A. Yes, I had sent some letters to Director
7 Skinner, I believe, requesting that we be kept abreast of
8 the situation, reviewing the NPDES permit application as
9 well as comments that the agency might provide to DNR on
10 the mining permit.

11 Q. Tell me a little bit about the September 20
12 meeting. What happened there?

13 A. It was a public meeting. I think it was held
14 at the Georgetown High School. It was basically Illinois
15 EPA, Vermilion County Department of Public Health, the
16 Illinois Department of Natural Resources, our
17 organization, and another group of concerned citizens
18 from the area had information booths there. And members
19 of the public were invited to come to that meeting and
20 talk to the various parties and learn what they could
21 about issues surrounding the various parties' perspective
22 on the coal mine.

23 Q. And could you briefly describe the hearing
24 that was held after that?

16

1 A. Yeah, the public hearing was very well
2 attended. I think there were, I'd estimate, probably
3 about 200 people were there in attendance. The
4 overwhelming majority of them were opposed to the mine.
5 Most of them were -- were opposed to the mine, excuse me.
6 Most of them were local residents. Even people from

7 outside of town came and voiced their concern about
8 protecting Little Vermilion River and making sure the --
9 urging the agency to deny the permit.

10 Q. Were there a number of Prairie Rivers members
11 at the hearing?

12 A. Yes, there were.

13 Q. Okay. Did you decide to appeal the permit
14 after it was issued?

15 A. Yes, we did.

16 Q. What's wrong with the permit?

17 A. Well, there are a number of concerns that
18 we've had with the draft permit as well as the final
19 permit. We felt there was no demonstration made that the
20 effluent concentration --

21 MR. BLANTON: I object, Your Honor. The, the
22 question is what's wrong with the final permit, and that's
23 what's at issue. The voluntary information about the
24 draft permit is not relevant, not germane, will confuse

17

1 the record; and it is important for us to know what
2 they're complaining about in the final permit because
3 that's what we're here for.

4 HEARING OFFICER: Mr. Ettinger?

5 MR. ETTINGER: I believe Mr. Moore was
6 describing what's wrong with the final permit. He did

7 mention the draft permit in passage. I think, however,
8 Mr. Blanton has now made clear -- as I thought my question
9 was -- that it addresses the final permit.

10 Q. So, now that we understand that and will
11 clarify once again, for Mr. Blanton's comfort, what's
12 wrong with the final permit?

13 HEARING OFFICER: Let me just make sure --
14 Mr. Blanton, as long as the question is relating to the
15 final permit, do you have an objection?

16 MR. BLANTON: No, that's fine.

17 HEARING OFFICER: Okay. Proceed, Mr. Moore.

18 A. Well, we thought there was no adequate
19 demonstration made that the final effluent concentration
20 limits in the permit were, indeed, protective of water
21 quality; would, indeed, ensure compliance with state
22 water quality standards; or would protect existing uses
23 in the stream, whether those are recreational, personal
24 uses in the stream or existing uses such as aquatic life

18

1 uses. We didn't think there was an adequate
2 demonstration by the agency or the applicant that the --
3 that the discharge was even necessary, that there were
4 not other alternative locations perhaps for the
5 discharge, that there were other alternatives for
6 treatment, alternatives for possibly process changes that
7 would actually minimize the amount of pollution released

8 from outfall 003.

9 There were also some concerns with the
10 monitoring provisions included in the final permit. One
11 concern, the monitoring of flow of effluent from outfall
12 003 as well as flow in the unnamed tributary which
13 receives those discharges. We were also concerned about
14 the lack of whole effluent toxicity monitoring that was
15 required in the permit. There is no whole effluent
16 toxicity testing required in the permit; we think that's
17 a, a very big concern on our part.

18 And we were also concerned that no biological
19 inventories were conducted before the permit was issued,
20 and that biological inventories, indeed, were not
21 conducted before mining activities occurred, discharges
22 occurred from this facility.

23 Q. Let me go over some of those points, and we
24 can discuss them in greater length. With regard to the

19

1 effluent limits, did you have concerns regarding Lake
2 Georgetown?

3 MR. BLANTON: Objection, leading.

4 HEARING OFFICER: Mr. Ettinger? Let me give
5 you a chance to respond before I rule. If you don't want
6 to take that chance, I'll make a ruling now.

7 MR. ETTINGER: You can make a ruling.

8 (A discussion was held off the record.)

9 HEARING OFFICER: I'm going to overrule, let
10 this witness answer that question. Sir?

11 A. Lake Georgetown is a drinking water reservoir.
12 It's a reservoir located on the Little Vermilion River,
13 downstream from the tributary's confluence with the
14 Little Vermilion River. It's also located very near to
15 the coal mine itself, this mining site. Lake Georgetown
16 is identified on Illinois EPA's biannual water quality
17 assessment as being impaired by a variety of pollutants.
18 According to the responsiveness summary which Illinois
19 EPA provided after issuing this permit, this lake is
20 impaired by metals. This permit is going to allow the
21 discharge of certain metals which we think could
22 exacerbate those documented water quality problems.

23 Probably more importantly, Illinois EPA's
24 305(b) report -- the water quality assessment that I

20

1 referred to earlier -- states that Lake Georgetown is
2 impaired by sediments and excessive levels of total
3 suspended solids which we would expect to increase as a
4 result of discharges from outfall 003.

5 Q. Okay. You said the monitoring conditions, I
6 believe, were not sufficient, particularly as to flow.
7 Why is that important to you?

8 A. The final permit which was issued has some

9 conditions which are heavily dependent on the flow
10 characteristics, both from outfall 003 and the instream
11 flow. There has to be a constant level of dilution
12 maintained during a discharge event. I believe that
13 level of dilution is instream flow has to be three times
14 the effluent flow. We really think it's important to be
15 able to measure compliance with that condition, that
16 continuous monitoring be required in order to be able to
17 accurately gauge if the discharge is even allowed.

18 Beyond that, there's also a condition of the
19 permit which says that flows from outfall 003 must cease
20 once flow in the unnamed tributary begins to diminish.
21 Without continuous flow monitoring, I'm not sure how
22 you'd know when flow begins to diminish so that the
23 discharger knows when to stop discharging. So, in order
24 to be able to adequately monitor compliance with those

21

1 conditions, I don't think the permit describes how that
2 compliance is going to be monitored.

3 Q. Have you had any experiences which raise
4 further concerns with the flow monitoring?

5 A. Yeah. Actually, in February there were three
6 discharges from this facility.

7 MR. BLANTON: Objection.

8 HEARING OFFICER: What's the objection,

9 Mr. Blanton?

10 MR. BLANTON: The objection is that the issues
11 relevant to this proceeding are whether the permit was
12 lawfully issued, not what has happened since December of
13 2000. I believe that's outside the scope of the issues in
14 the case to talk about activities that have taken place,
15 particularly in view of the fact that they are activities
16 that are not the activities that will be addressed in the
17 terms of the permit.

18 We are in the process of constructing -- doing
19 construction at the site after the permit has been issued
20 and before the control mechanisms are in place that are at
21 issue in the case. Basically, it's beyond the time period
22 that we're interested in in this case.

23 HEARING OFFICER: Mr. Ettinger?

24 MR. ETTINGER: I guess I'll stand, just be on

22

1 a par here. First of all, I'm interested to hear from
2 Mr. Blanton that he doesn't believe that there's any
3 permit that's controlling his discharges now. I don't
4 believe that's the case. If that is the case, then
5 there's something else for us to appeal.

6 Secondly, my question was directly related to
7 the monitoring conditions that are in this permit and how
8 and why we believe that the monitoring conditions are not
9 adequate. It specifically relates to the conditions of

10 the permit. And if there's experience -- if you say
11 there's a bad roof and then you can furthermore say that
12 it's leaking, I think that shows and goes to show that the
13 roof is bad.

14 HEARING OFFICER: You should go back to his
15 original question.

16 (The preceding question was read back by the
17 court reporter.)

18 HEARING OFFICER: Mr. Blanton, anything
19 further?

20 MR. BLANTON: May I voir dire the witness?

21 HEARING OFFICER: Pardon?

22 MR. BLANTON: May I voir dire the witness?

23 HEARING OFFICER: Proceed.

24

23

1 VOIR DIRE EXAMINATION

2 BY MR. BLANTON:

3 Q. Mr. Moore, do you have any information
4 regarding the flows from the discharges at the mine in
5 February?

6 A. No, no flows were reported by the permittee,
7 in violation of the permit.

8 Q. That's a yes or no question.

9 MR. SOFAT: Mr. Hearing Officer, we object to

10 this questioning, and we think it's outside the scope of
11 this permit appeal.

12 HEARING OFFICER: Was there something further,
13 Mr. Sofat?

14 Anything further, Mr. Sofat and Mr. Ettinger?

15 MR. ETTINGER: Actually, he pretty much
16 answered the question. That's our specific problem. We
17 don't have information about the flows because the
18 monitoring is not adequate. And with that, I guess, we
19 can go to the next set of questions.

20 MR. BLANTON: You're withdrawing the question
21 pending?

22 MR. ETTINGER: No, I am accepting your
23 question.

24 MR. BLANTON: No, I'm voir diring the witness

24

1 for purpose of continuing my objection to the question.
2 If you want to withdraw the question, I'll quit asking
3 voir dire questions.

4 MR. ETTINGER: He's doing fine with his voir
5 dire, so I'll let you go on with that; and maybe he'll
6 develop all the points I wanted to make with my question.

7 HEARING OFFICER: I'm not going to let the
8 voir dire go on too much longer. Mr. Blanton, do you have
9 more questions for this witness?

10 MR. BLANTON: Yes, I have one more question,

11 which is a yes or no question, and request that the
12 witness be instructed to answer the question yes or no
13 rather than volunteering comments.

14 HEARING OFFICER: If I think it's a question
15 that can be answered with a yes or no, I'll direct him to
16 answer so.

17 BY MR. BLANTON:

18 Q. Was the information on what the flow was into
19 the underlying tributary into which the discharge was
20 made on these discharges in February that you're talking
21 about?

22 A. No.

23 MR. BLANTON: I have no other questions. I
24 would -- I would stand on my objection that if the witness

25

1 has no information about flows, then the question asking
2 about post permit discharges, supposedly addressing the
3 question of whether continuous flow monitoring is
4 required, is not relevant. It's outside the scope of this
5 pleading.

6 HEARING OFFICER: Anything further,
7 Mr. Ettinger?

8 MR. ETTINGER: No, I think I've made my
9 points.

10 HEARING OFFICER: I'm not going to rule on the

11 objection then. Well, actually, you're not withdrawing
12 your question, right?

13 MR. ETTINGER: I think my question was asked
14 and answered a long time ago, so I --

15 MR. BLANTON: Move to strike the answer.

16 HEARING OFFICER: Yeah, I'm going to deny the
17 motion to strike. I think if he does not have information
18 regarding the flows, then he -- as he so stated in
19 response to your voir dire, that's responsive to
20 Mr. Ettinger's question, and I think that's what I'm going
21 to allow to stand.

22 So, the question is going to stand, the motion
23 to strike is denied. And, Mr. Ettinger, you can proceed.
24

26

1 CONTINUED DIRECT EXAMINATION

2 BY MR. ETTINGER:

3 Q. Yes. Would you like to have information
4 regarding the flows?

5 A. Yes. I think that information was required
6 to be reported by the permittee, and it was not. The
7 only reason I don't have information about the flows is
8 because that was not information that was required to be
9 reported.

10 Q. Well, if the monitoring were better, would
11 you have that information?

12 A. I believe so, yes.

13 Q. Would you elaborate on why you believe that
14 whole effluent toxicity testing is necessary for this
15 permit?

16 A. Yeah. Whole effluent toxicity testing
17 differs from the normal chemical -- monitoring chemical
18 parameters in the permit. When you're monitoring
19 specific parameters, specific chemicals within a permit,
20 you're basically measuring concentrations of a pollutant
21 and comparing them against a standard which has been
22 established and assumed to be protective of various uses
23 of the stream.

24 It's commonly accepted that those standards

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1 are certainly not assumed to be protective of every use
2 of every aquatic organism known to man because, quite
3 honestly, they haven't been tested.

4 Whole effluent toxicity testing is done in
5 order to gauge the toxicity of the effluent in its
6 entirety. All chemicals present at one time in
7 specific -- in whatever concentrations they happen to be
8 present in, you'll then be able to measure the actual
9 toxicity of the effluent itself, not simply measuring the
10 chemical concentrations and comparing those against some
11 standard which has been assumed to be protective. It's

12 really an important backstop. It's a well accepted
13 methodology which U.S. EPA encourages the use of in
14 numerous permits. And, in fact, based on some initial
15 research which Prairie Rivers conducted, we've even found
16 other mines in the country which require whole effluent
17 toxicity testing.

18 Q. Are there any particular reasons why you
19 think it's needed here?

20 A. Well, this is an amazingly high-quality
21 stream in the state. The Illinois Natural History
22 Survey, which is an office of the Department of Natural
23 Resources, refers to the Little Vermilion River as one of
24 the ten most outstanding aquatic ecosystems in the state.

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1 It has a tremendous diversity of aquatic life in it. And
2 we know for certain that within the immediate vicinity of
3 this mine there are at least three state-protected
4 species: The bigeye shiner, which is a fish, the little
5 spectacle mussel, and the slippershell mussel. And it's
6 -- DNR also thinks it's quite likely that the river chub
7 and other state-protected species probably exist in the
8 area as well.

9 So, whole effluent toxicity testing is really
10 -- I think would be an essential requirement in order to
11 monitor whether toxic conditions are existing and to
12 measure compliance with Illinois's narrative standard on

13 toxic issues.

14 MR. BLANTON: Move to strike the witness's
15 last statement. He's not been qualified as an expert.
16 His opinions about whether this is the proper testing or
17 not he's not qualified to render.

18 HEARING OFFICER: Mr. Ettinger?

19 MR. ETTINGER: Well, I think that, A, his
20 statement in general is, is quite -- he's quite capable of
21 saying what our position is and why this permit
22 requirement should have been required. I'm not certain --
23 I guess my major problem, Mr. Blanton is treating this
24 proceeding something like a federal court case. I don't

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1 believe that the Rules of Evidence applicable in a federal
2 case are applicable here. We're dealing with a much
3 broader range of what is relevant and what can be
4 expressed in this type of proceeding.

5 Now, if we had been planning on something of
6 the nature that Mr. Blanton apparently visualizes, perhaps
7 we would have treated the case differently. However, in
8 general, what we're trying to do here is spell out the
9 petitioner's concerns with this permit and explain why
10 they're necessary, why they are reasonable. And I think
11 in that context, this is well within the realm of
12 admissibility that's generally considered in this type of

13 proceeding.

14 MR. BLANTON: May I respond? We are also not
15 in a free-for-all where uninformed, untrained persons may
16 make bald assertions of fact without support, without
17 foundation, without qualification. If the petitioner will
18 stipulate that Mr. Moore's opinions that he has rendered
19 so far and that he will continue to render, I assume, are
20 merely the positions of his organization and that they are
21 a combination of the personal opinions of his
22 organization's members and himself and are not intended to
23 be asserted as matters of fact upon which the Board must
24 make a finding, I'll accept the question without further

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1 interruption. But without such a stipulation, I will
2 continue to object to a person with no demonstrated
3 qualifications making assertions of this sort of a highly
4 technical scientific issues.

5 HEARING OFFICER: Anything further,
6 Mr. Ettinger? Are you willing to so stipulate?

7 MR. ETTINGER: Well, I'm willing to stipulate
8 as to the highly technical scientific assertions. I'm not
9 sure I've heard any of those yet. There's been a large
10 amount of testimony that Mr. Moore has given so far. Some
11 of it got close to scientific statements; most of it did
12 not. I'm certainly not willing to stipulate as to the
13 facts -- as to Mr. Moore's name or his address or many of

14 the other things that he testified, that that's simply a
15 matter of opinion.

16 However, I think what we should probably do is
17 let him go ahead and testify as to what he sees based on
18 what he knows, and Mr. Blanton may certainly probe that in
19 cross-examination, and the Board is certainly capable of
20 weighing Mr. Moore's qualifications as to the statements
21 he made. So, I don't want to go through now and try and
22 remember every question and decide which one of them might
23 arguably have slipped over into expert opinion. And I
24 think the Board's quite capable of deciding what Mr. Moore

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1 is capable of testifying to.

2 HEARING OFFICER: All right. I'm going to
3 rule now. First of all, this is not a federal court case;
4 however, we still have to abide by Rules of Evidence, at
5 least partially.

6 In terms of scientific or expert type
7 testimony that this witness is going to offer, I do agree
8 that he should be qualified. I don't think the
9 appropriate foundation was laid for that last question, so
10 I'm going to sustain that objection. I'm not saying that
11 the appropriate foundation couldn't be laid. He may know,
12 as you said, what he knows. I just want to know how he
13 knows what he knows and why he knows it.

14 MR. ETTINGER: It's been awhile. Off the
15 record.

16 (A discussion was held off the record, and the
17 preceding question was read back by the court reporter.)

18 HEARING OFFICER: I sustain that objection.

19 MR. ETTINGER: Okay.

20 HEARING OFFICER: Now as I -- as I said,
21 Mr. Ettinger, I'm not saying he is not qualified to make
22 that statement. I just don't know that he is yet. So if
23 you want to lay some foundation as to that, I may allow
24 the question to go forward.

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1 MR. ETTINGER: I think I'll simply ask:

2 Q. Would you please state for the record why
3 Prairie Rivers Network believes that whole effluent
4 toxicity testing is necessary?

5 A. Well, whole effluent toxicity testing is
6 often used --

7 MR. BLANTON: Objection. The witness is
8 volunteering factual statements of a technical nature not
9 responsive to the question. The question invited him to
10 restate the objectionable testimony. I object to this
11 question, and I would request that the witness be
12 instructed to answer the questions rather than ambushing
13 and giving answers he wants regardless of what question's
14 asked.

15 HEARING OFFICER: Anything further,
16 Mr. Ettinger?

17 MR. ETTINGER: I'll withdraw the question.

18 BY MR. ETTINGER:

19 Q. Mr. Moore, in the course of your work at
20 Prairie Rivers Network, have you had occasion to review
21 NPDES permits?

22 A. Yes, several.

23 Q. Have you reviewed NPDES permits that contain
24 provisions for whole effluent toxicity testing?

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1 A. Yes, many.

2 Q. Have you reviewed permits for storm water
3 discharges?

4 A. Yes, I have.

5 Q. Have you reviewed permits for storm water
6 discharges in other states?

7 A. I have.

8 Q. Did some of those include provisions for
9 whole effluent toxicity testing?

10 A. Yes, they did.

11 MR. BLANTON: Objection, not relevant. We're
12 in an Illinois proceeding under Illinois rules and what's
13 required in an Illinois permit.

14 HEARING OFFICER: I'm going to allow the

15 question to go forward, sir. He's attempting to lay a
16 foundation about this witness's knowledge, I take it,
17 Mr. Ettinger?

18 MR. ETTINGER: Basically.

19 HEARING OFFICER: And experience? Go ahead.

20 THE WITNESS: Could you repeat the question
21 for me?

22 (The preceding question was read back by the
23 court reporter.)

24 A. Yes, they did.

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1 Q. Based on your study of NPDES permits and your
2 review of such permits, why does Prairie Rivers Network
3 -- based on whatever level of experience and knowledge
4 that you may have or not have -- believe, emphasis here
5 is on "believe," that whole effluent toxicity testing is
6 needed on this permit?

7 A. Well, whole effluent toxicity testing is
8 commonly used to be able to gauge the toxicity of an
9 effluent above and beyond just the levels of chemical
10 pollutants and discharge. Given the high-quality nature
11 of the Little Vermilion River, the presence of protected
12 species, and the concerns of many members of the public
13 who have commented on this permit, we thought it was most
14 appropriate that whole effluent toxicity testing be
15 included as a condition of the permit. And it seems to

16 be an accepted methodology of -- U.S. EPA, Illinois EPA
17 requires whole effluent toxicity testing in permits on a
18 routine basis, and whole effluent toxicity testing has
19 been required around the country for mines of various
20 types.

21 Q. You said at the beginning that another flaw
22 that Prairie Rivers believes is present in the permit has
23 to do with biological studies. What biological studies
24 do you believe should have been done?

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1 A. Well, we know for a fact that there are at
2 least three protected species which reside in this
3 stretch of the Little Vermilion River near the mine.
4 That information is provided by the Illinois Department
5 of Natural Resources and the Illinois Natural History
6 Survey. Nobody, to the best of our knowledge -- and no
7 information was ever offered in the course of reviewing
8 this permit or in the public record -- nobody has ever
9 done any biological inventories of the unnamed tributary
10 that will directly receive discharges from the mine.

11 In fact, in a letter from Deanna Glosser at
12 the Illinois Department of Natural Resources to Illinois
13 EPA commenting on this permit, she pointed out that the
14 aquatic habitat in the unnamed tributary could quite
15 likely sustain the river chub and the bigeye shiner, two

16 state-protected species. However, no biological
17 inventories were ever conducted of the unnamed tributary
18 to ascertain whether they were there; therefore, there
19 was -- no analysis was ever done by Illinois EPA to
20 determine if the permit was, indeed, protective of those
21 existing uses.

22 We also thought that the permit actually
23 requires a biological inventory to be required. That
24 should have been done before the permit was issued. That

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1 information would have been essential to making decisions
2 on the permit.

3 Q. Have you seen the unnamed tributary?

4 A. Yes, I have.

5 Q. What does it look like?

6 A. It's a really pretty, scenic little creek.

7 It's got a pretty intact riparian quarter, nice mature
8 trees along a meandering stream. It's a real idyllic
9 body of water for this area.

10 Q. Okay. Is Prairie Rivers happy with the
11 process that led to the issuance of the permit?

12 A. No, not entirely. There were a lot of --
13 there are a lot of processes which we urged the agency to
14 follow that we thought were appropriate and compliant
15 with Illinois water quality standards which we feel the
16 agency did not follow or pay close attention to in making

17 its final decision to issue this permit.

18 As I said before, there was, for instance, no
19 demonstration that the discharges are absolutely
20 necessary or that these are really even the appropriate
21 effluent limits for this discharge. There was -- there
22 was a lot of information that was generated off the
23 public record after the close of the public comment
24 period that we were never allowed an opportunity to

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1 review or give the agency any input on.

2 In fact, we even arranged a meeting on
3 December 13th to talk with the agency about where they
4 were at in their decision process and to learn more
5 information about where they were, and we really -- the
6 only thing that we got out of that meeting was that they
7 had requested the mixing zone analysis be conducted, and
8 I was given a copy of that mixing zone analysis. But I
9 was never asked for my opinion of it or -- in fact, the
10 permit was issued two weeks after I was even provided a
11 copy of it. And there was a lot of conditions in the
12 final permit which were never put forth to the public for
13 review.

14 Q. You mentioned a mixing zone evaluation, was
15 that what you called it? If you had had a chance to look
16 at that during the public comment period, would it be

17 commented on?

18 A. Oh, yes.

19 Q. What would you have commented?

20 A. Well --

21 MR. BLANTON: Objection, no foundation. He's
22 about to ask for his opinions on a scientific study with
23 no foundation that this witness is qualified to have any
24 such opinions.

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1 MR. ETTINGER: I believe Mr. Blanton misses
2 the thrust of the question entirely. Our argument, which
3 is one that's stated in our petition, was that the public
4 was cut out of the public participation process here. And
5 what I'm asking for is testimony as to how we would have
6 commented as part of the public participation process if
7 we had not been shut out of it as to a key part of what
8 this permit is based on, and that is the thrust of the
9 question.

10 Now, the whole IEPA or NPDES process assumes
11 public comment on permits is valuable. Mr. Blanton may
12 not feel that. However, if we are not to presume that
13 ignorant people who happen to live in the area aren't
14 allowed to comment on the permits, I think we have to
15 assume that whether Mr. Moore would have commented on this
16 Advent study is a very relevant part to this petition, and
17 it's certainly very relevant to whether or not public

18 participation was frustrated by the way that the agency
19 conducted this proceeding.

20 HEARING OFFICER: Mr. Blanton?

21 MR. BLANTON: If I misunderstood the question
22 as -- if the question is simply would Prairie Rivers have
23 commented, I have no objection. I understood the question
24 to be, What would your comments have been?

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1 I have deposed the witness. I know what the
2 witness's opinions are, and I don't think he's qualified
3 to render them. I believe they're asking for expert
4 opinion, and I think the objection should stand.

5 I would also request the Hearing Officer to
6 instruct Mr. Ettinger to stop making personal comments in
7 response to legal objections. I'm not the focus of the
8 hearing, and I do not appreciate having my legal position
9 on behalf of my client referred to pejoratively every time
10 Mr. Ettinger refers to a legal point.

11 HEARING OFFICER: Mr. Ettinger, we do want to
12 have a civil hearing here in more ways than one, so I have
13 not noticed anything too extreme to this point; however,
14 if Mr. Blanton feels that things have been untoward, I
15 would advise you to attempt to keep things limited to the
16 legal issues here.

17 Do you have a response to the -- well, to

18 anything that Mr. Blanton said?

19 MR. ETTINGER: Well, I guess as to the key
20 point, as to Mr. Blanton's objection, if he will stipulate
21 that any flaw that may be in the Advent study that we
22 identify subsequently in our papers we would have been
23 able to identify had we been given an opportunity to
24 comment on it, then Mr. Moore need not answer the

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1 question.

2 HEARING OFFICER: Mr. Blanton?

3 MR. BLANTON: No, we will not so stipulate.

4 HEARING OFFICER: All right. I'm going to
5 overrule the objection because I don't know what the
6 answer to that question is yet. I don't know if it's
7 going to call for some sort of testimony that may require
8 additional foundation from this witness. So at this
9 point, the objection is overruled.

10 You probably don't remember the question, do
11 you?

12 THE WITNESS: I think it would be safe to go
13 ahead and reread it.

14 HEARING OFFICER: Can we do that, unless you
15 want to re-ask it, Mr. Ettinger?

16 MR. ETTINGER: Well, my question is basically:

17 Q. What would you have commented had you had an
18 opportunity to comment on the Advent study report?

19 A. If we had had an opportunity to supply public
20 comments, we would have informed the agency of our belief
21 that the study underestimated the amount of pollution
22 that would be released from outfall 003, that the water
23 quality impacts themselves were underestimated, the
24 amount of pollution which would be released and present

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1 in the environment, and that we thought it was highly
2 inappropriate that the entire flow of the unnamed
3 tributary was being used for mixing purposes.

4 Q. Do you have a personal interest in this
5 permit?

6 A. Certainly.

7 Q. What is that?

8 A. Well, I've done a variety of activities in
9 the area on the Little Vermilion River, including been
10 boating on the river before, I have viewed wildlife along
11 the river, I have walked along the banks, I have talked
12 with people, members of ours that live along the river.
13 I drive over the river quite a bit. I actually live in
14 Paris. I commute back and forth to Champaign, and on
15 occasion I do take Route 1 up to Danville, take the
16 interstate over to Champaign. So, I've done a variety of
17 activities in the area, and I really find the Little
18 Vermilion to be a beautiful stream. I've been involved

19 with several efforts over the years to protect the Little
20 Vermilion River.

21 Q. In terms of personal activities, what sort of
22 recreational activities do you engage in on rivers that
23 might be affected by this?

24 A. I've boated on the river before, most

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1 recently August of 2000. I've also viewed wildlife along
2 it. And as a person who as a -- professionally, I work
3 for an organization that really cherishes and places a
4 lot of value on natural areas, particularly those that
5 exist along river corridors. I travel a lot, and I go
6 to -- I visit a lot of streams in the state, and I've
7 done a lot of activities of various sorts on a lot of
8 rivers. And it's certainly not unusual for me, when I'm
9 hiking along a river, to even wade out into a stream.
10 I've often looked for mussel shells and checked mussel
11 shells along rivers that I've walked along, that I've
12 paddled in.

13 I get a lot of enjoyment from rivers. And in
14 many ways, my future use of the Little Vermilion River
15 and even the unnamed tributary are diminished by the
16 presence of this mine and discharge from the mine.

17 MR. ETTINGER: Thank you. I have no more
18 questions.

19 HEARING OFFICER: We're going to go off for a

20 second.

21 (A discussion was held off the record, and a
22 recess was taken.)

23 HEARING OFFICER: All right. We are back on
24 the record after a short recess. It's approximately 10:35

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1 a.m. Let me remind you, Mr. Moore, you are still under
2 oath, and we are starting with the cross-examination.

3 Who's going first? Mr. Sofat?

4 MR. SOFAT: Yes.

5 HEARING OFFICER: Okay. You can begin your
6 cross-examination.

7 CROSS-EXAMINATION

8 BY MR. SOFAT:

9 Q. Mr. Moore, you testified today that -- why
10 you think biological study was important. I have a
11 clarification question on that. Is it your position that
12 every time there is a discharge from a mine in the
13 vicinity of a endangered species -- where endangered
14 species reside, the agency should require the permittee
15 to do a bio monitoring?

16 A. When you say "bio monitoring," do you mean
17 whole effluent toxicity testing, or do you mean
18 biological?

19 Q. Bio monitoring means -- okay. Either one.

20 MR. ETTINGER: I'm not clear on what "either"
21 is on the table now.

22 BY MR. SOFAT:

23 Q. Okay. The first question then I would say is,
24 would you require them to -- would you require the

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1 permittee to bio monitor the aquatic, the -- that lives
2 in that water body?

3 A. I guess I would ask for some clarification on
4 the term "bio monitoring" because in IEPA's -- most of
5 IEPA's permits, they use the term bio monitoring to refer
6 to whole effluent toxicity testing.

7 Q. Okay, I'll simplify that. I would say, would
8 you require the permittee to go in the stream and
9 document all the species that live there?

10 A. For a coal mine located where the endangered
11 species were suspected to be?

12 Q. Yes.

13 A. Yes, I think that would be a prudent decision
14 on the agency's part.

15 Q. And your answer still stays even though the
16 agency believes that they have adequate information on
17 that stream?

18 A. If the agency could produce that information
19 and show that it was adequate, that might be acceptable.

20 Q. Okay. My question is, would you still answer

21 thing going there.

22 CROSS-EXAMINATION

23 BY MR. BLANTON:

24 Q. Mr. Moore, the Vermilion Grove mine is not

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1 located and will not be located on the banks of the
2 Little Vermilion River, will it?

3 A. I believe the property -- if I remember the
4 maps correctly -- abuts, is adjacent to the Little
5 Vermilion River.

6 Q. That would be part of the area up to the
7 north where there are dams and collection ditches?

8 A. Well, I believe the property that's covered
9 by the permit does abut the Little Vermilion River.

10 Q. Did your description of the receiving waters,
11 the unnamed tributary, what you described as a stream, is
12 that the condition it's in all year-round, all the time?

13 A. Yeah, it's pretty -- it's in pretty good
14 shape every time I've ever been there. I've visited it
15 at various times of the year.

16 Q. I believe it has been identified as a 07 10 q
17 stream? I got the letters wrong.

18 Do you know the phrase I'm thinking of?

19 A. If you're referring to a 7 q 10 flow --

20 Q. Right.

21 A. -- it means -- yes, it has zero flow -- it's

22 at a 7 q 10 flow of zero.

23 Q. What does that mean?

24 A. That means over -- in a ten -- over a

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1 ten-year period, you could expect the average low flow
2 over a seven-day -- let me back up here and make sure
3 that I explain this as simply as possible. The 7 q 10
4 flow stream is the seven-day average low flow that you
5 would expect over a ten-year period. So, once in ten
6 years, the seven-day low flow average would be zero.

7 Q. And around those time periods, would you
8 expect the flow to be pretty minimal as it was
9 approaching and then coming back up from zero?

10 A. I suppose so, yes.

11 Q. In fact, the lack of water in the unnamed
12 tributary was part of the concern that Ms. Glosser
13 indicated that her division was concerned about in the
14 letter you referred to earlier, right?

15 A. I believe that was one of the concerns she
16 expressed.

17 MR. BLANTON: May I approach the witness?

18 HEARING OFFICER: Yes.

19 BY MR. BLANTON:

20 Q. Show you what's been marked as BBCC Exhibit 7,
21 ask if that's a copy of the letter from Ms. Glosser you

22 were talking about?

23 A. I believe it is, yes.

24 Q. Draw your attention to the fifth page, the

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1 fourth bullet point. That's an area where she's, in
2 fact, concerned that there won't be any water or there
3 will be very little water in the unnamed tributary at the
4 time of discharges from the mine; is that correct?

5 A. I believe that's the thrust of her statement.
6 I didn't write this letter, though.

7 Q. But you're familiar with it?

8 A. I am -- I have read it before.

9 Q. You've discussed her concerns with her
10 before, haven't you?

11 A. I've spoken with Ms. Glosser before about
12 this.

13 MR. BLANTON: We offer BBCC Exhibit 7.

14 HEARING OFFICER: Mr. Ettinger?

15 MR. ETTINGER: I don't object to the exhibit.

16 HEARING OFFICER: Mr. Sofat? It will be
17 admitted.

18 (Whereupon, BBCC Exhibit Number 7 was marked
19 for identification.)

20 MR. ETTINGER: I do have a question. How did
21 we get to BBCC 7?

22 MR. BLANTON: Because I haven't offered 1, 2,

23 3, 4, 5, 6 yet.

24 HEARING OFFICER: Do you mean the acronym or

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1 the number?

2 MR. ETTINGER: No, 7.

3 HEARING OFFICER: I think he's going out of
4 order on cross here.

5 MR. ETTINGER: Oh, okay.

6 MR. BLANTON: I wasn't aware that there were
7 any rules that said I had to offer exhibits in
8 chronological order and --

9 MR. ETTINGER: I'm not objecting to you
10 offering them out of chronological order. I am just
11 hoping I didn't miss 1 through 6 sometime during the
12 break.

13 HEARING OFFICER: If you've missed them,
14 Mr. Ettinger, I've missed them as well. So far as I know,
15 this is the first exhibit offered by Black Beauty Coal
16 Company.

17 BY MR. BLANTON:

18 Q. You began your testimony by describing your
19 contact and your involvement and your organization's
20 involvement in the permitting process; is that right?

21 A. I believe so, yes.

22 Q. In addition to participating in a meeting

23 September 20th of 2000 and a public hearing and meeting
24 with IEPA and IDNR in December of 2000, you've had other

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1 contact with agencies involved with permitting decisions
2 for this mine, didn't you?

3 A. Yes, I requested information.

4 Q. Did you ever discuss positions of Prairie
5 Rivers with regulatory officials?

6 A. I probably expressed our concerns about items
7 that we were concerned about.

8 Q. And how did you do that?

9 A. The method of communication?

10 Q. Yes.

11 A. Written letters perhaps, phone calls. I
12 really can't recollect every instance.

13 Q. Do you recall any individuals that you
14 communicated with directly during the process in addition
15 to the letters that you wrote that are a part of the
16 record?

17 A. I requested some information from Deanna
18 Glosser about the presence of what endangered or
19 protected species might be in the area. I also requested
20 information from the Illinois Natural History Survey
21 about the exact locations of species that -- protected
22 species that had been collected in the area.

23 Q. Any other things that you recall?

24 A. Not off the top of my head, not that isn't in

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1 the public record, I don't recollect.

2 Q. What was Ms. Glosser's role in this process
3 as you understood it?

4 A. Ms. Glosser at the time was in charge of the
5 office within DNR that would usually comment on permits
6 of this nature.

7 Q. Did you ever discuss with her what her views
8 of either the operating permit or the NPDES permit were?

9 A. I don't recollect if I did or not.

10 Q. Did you ever have any communication with her
11 about how you could more effectively advance Prairie
12 Rivers Network's views within the agencies?

13 A. I don't know if I would have -- if I would
14 have communicated with her, I don't know if I would have
15 used that exact phrase, but I may have asked about how
16 do -- about the concerns I had.

17 Q. Are you a registered lobbyist?

18 A. Yes, I am.

19 Q. You know how to approach people in government
20 to present your point of view usually, don't you?

21 A. I usually approach them as I would approach
22 anybody else.

23 Q. But you don't, as a matter of normal

24 practice, ask people in the agency how to approach their

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1 bosses or the governor's office or legislators to get
2 your organization's point of view across, do you?

3 A. As a matter of practice?

4 Q. Yes.

5 A. In other words, do I habitually do that?

6 Q. Yes.

7 A. No, I don't think I have any habitual
8 inclinations towards that.

9 MR. BLANTON: May I approach the witness?

10 HEARING OFFICER: Yes.

11 BY MR. BLANTON:

12 Q. You have before you a document that's been
13 marked as BBCC Exhibit 1. Do you see that?

14 A. Yes.

15 Q. Is that a copy of an e-mail you sent to
16 Deanna Glosser on July 11, 2000?

17 A. I'm sorry, did you say --

18 Q. Is that a copy of an e-mail that you sent to
19 Deanna Glosser on July 11, 2000?

20 A. No, it is not.

21 Q. What is it?

22 A. It's a letter from Deanna Glosser to me.

23 Q. I'm sorry. Correct. It's late already.

24 And you did receive this from her? This was

1 in response to your first information request, right?

2 A. Yes.

3 Q. And you have Exhibit 2?

4 A. Yes.

5 Q. Is that a copy of an e-mail from you to
6 Ms. Glosser dated July 13, 2000?

7 A. Yes, it's a copy of a letter that I was
8 sending to Governor Ryan about this mine, and I --

9 Q. I'll ask you if I have any questions about
10 the content.

11 The question was, is this an e-mail that you
12 sent to her that day?

13 A. Yes.

14 Q. You have Exhibit 3 in front of you?

15 A. Yes.

16 Q. Is that another e-mail, copy of another
17 e-mail you sent to Deanna Glosser on July 13, 2000?

18 A. Yes.

19 Q. Do you have Exhibit 4 in front of you?

20 A. Yes, I do.

21 Q. Is that a copy of an e-mail you sent to
22 Ms. Glosser on July 24, 2000?

23 A. Yes.

24 Q. Do you have Exhibit 5 in front of you?

1 A. Yes.

2 Q. Is that a copy of an e-mail you sent to
3 Deanna Glosser on August 30, 2000?

4 A. I believe it is, yes.

5 MR. BLANTON: We would offer BBCC Exhibits 1
6 through 5.

7 HEARING OFFICER: Mr. Ettinger? Do you want
8 to take them one by one?

9 MR. ETTINGER: No, let's let them all in.

10 HEARING OFFICER: No objection to BBCC --
11 BBCC's 1 through 5? Mr. Ettinger?

12 MR. ETTINGER: No, I don't have any objection.

13 HEARING OFFICER: Mr. Sofat?

14 MR. SOFAT: No objection.

15 HEARING OFFICER: Okay, those will be
16 admitted.

17 (Whereupon, BBCC Exhibit Numbers 1 through 5
18 were marked for identification.)

19 BY MR. BLANTON:

20 Q. Please look at Exhibit 4.

21 A. Okay.

22 Q. Did Ms. Glosser provide you any suggestions
23 of things you should ask about at your meeting with the
24 OMM folks?

1 A. Not to the best of my recollection.

2 Q. Are you familiar with the -- I think it's
3 Illinois Nature Preserves Commission?

4 A. Yes, I am.

5 Q. What is that?

6 A. It's a commission set up within the
7 Department of Natural Resources that's responsible for
8 nature preserves, designation of and protection of.

9 Q. Do you know whether they had any role in this
10 permit?

11 A. Yes, I believe they submitted comments on
12 this permit.

13 Q. Do you know who signed the letter --

14 A. I believe --

15 Q. -- that had comments?

16 A. I believe Caroline Grosboll would have signed
17 those comments.

18 Q. Do you know who wrote the letter?

19 A. Not off the top of my head, no.

20 Q. Do you know what staff member of their
21 commission was assigned to investigate the situation on
22 behalf of the commission?

23 A. Yes.

24 Q. Who was that?

1 A. Believe it was Mary Kay Selekee (phonetic).

2 Q. Do you know her before -- did you know her
3 before she had that assignment for the commission?

4 A. Before she had the assignment of reviewing
5 this permit?

6 Q. Yes.

7 A. Yes, I did.

8 Q. How did you know her?

9 A. She's a resident in the local area. She also
10 happens to be a member of Prairie Rivers Network.

11 Q. How long has she been a member of Prairie
12 Rivers Network?

13 A. I think about three years.

14 Q. Were you aware of -- at the time she was
15 doing her review of this permit for the commission that
16 she was a member of your organization?

17 A. Yeah, I was probably aware of that.

18 Q. Did you know that she had that assignment?

19 A. I was aware of the fact that she was involved
20 with this in some way as the Nature Preserves Commission
21 staff person that was in the immediate vicinity of the
22 area.

23 Q. You knew that one of your members was in a
24 position to do comments for a state agency essentially on

1 this permit, right?

2 A. At some point. I certainly knew it after she
3 testified at the public hearing.

4 Q. Did you ever raise any concerns with her
5 about whether that was appropriate or not?

6 A. I'm sorry?

7 Q. Did you ever raise any concerns with her
8 about whether it was appropriate?

9 A. For her to do her job for the Nature
10 Preserves Commission?

11 Q. As a member of your organization.

12 A. No, I didn't think it was inappropriate for
13 her to do that.

14 Q. Now, as I understand Prairie Rivers' concerns
15 about this permit from your deposition testimony, from
16 your testimony today, one of the things that you're
17 concerned about is degradation of the unnamed tributary
18 to the Little Vermilion and the Little Vermilion River;
19 is that right?

20 A. Yes.

21 Q. And when you said you're concerned about
22 degradation and water quality, what do you mean?

23 A. Degradation would be the increase of any
24 concentration or loading of pollutants to a water pipe.

1 HEARING OFFICER: Mr. Blanton, maybe you could
2 put that microphone towards you.

3 AUDIENCE MEMBER: We can't hear Mr. Blanton at
4 all.

5 MR. BLANTON: No promises.

6 BY MR. BLANTON:

7 Q. And you define a pollutant as any constituent
8 of the river that's not water, right?

9 A. Yes.

10 Q. And your definition of degradation does not
11 take into account the concept of whether there are
12 actually any adverse effects on any uses of the water or
13 any biota in the water; is that correct?

14 A. I believe my interpretation is based on the
15 definition of pollutant in the federal Clean Water Act.

16 Q. That was a yes or no question. Do you
17 remember the question?

18 A. Could you repeat it?

19 Q. The question was, Your definition of
20 degradation does not take into account the concept of
21 whether there is any actual adverse impact on either any
22 existing use of the water or any biota living in the
23 water; is that correct?

24 A. Could you define "adverse impact"?

1 Q. That the uses will either be limited or
2 prohibited or not possible or that biota would be
3 injured, not as prolific, not as healthy?

4 A. I think water pollution could -- I think you
5 can safely assume that water pollution will --

6 Q. Do you recall the question?

7 A. -- have an adverse effect.

8 Q. Do you recall the question? It was a yes or
9 no question. I'm not looking for position statements.
10 I'm asking whether or not your definition of degradation
11 is limited to the mere increase of existing
12 concentrations of any constituent of the river other than
13 water, H₂O?

14 A. Yes.

15 Q. As I understand the position of your
16 organization in this proceeding, your position is that
17 Black Beauty failed to show that there would not be
18 degradation of the water; is that right?

19 A. Yes.

20 Q. And your position is that Illinois EPA did
21 not have an adequate basis for determining that there
22 would not be degradation of the water; is that correct?

23 A. I kind of got lost there with the two not's.
24 Could you repeat the question?

1 Q. Another one of your positions is that the
2 Illinois EPA did not have an adequate basis for
3 determining there would not be degradation of water
4 quality in the Little Vermilion River and the unnamed
5 tributary?

6 A. Did not have an adequate basis to not
7 determine that there would --

8 Q. I'm not responsible for double negatives.
9 That's the way the law is written basically, as I
10 understand it.

11 A. Could you repeat the question one more time?
12 I apologize.

13 Q. All right. I'll try to give it to you. You
14 said it's your position that Black Beauty has failed to
15 show that its discharge would not degrade the receiving
16 waters, correct?

17 A. Yes.

18 Q. And you understand that it was the agency's
19 role to determine whether Black Beauty had made that
20 showing or not, right?

21 A. Yes.

22 Q. And it is your position that the agency did
23 not have an adequate basis for making that determination,
24 right?

1 A. Yes. Thank you.

2 Q. Now, as I understand it, Prairie Rivers has
3 not attempted to prove that there would be degradation
4 with the exception of some calculations that you did
5 relating to the Advent report; is that right?

6 A. Yes, that's correct.

7 Q. And I'll come back to those. As I understand
8 it, it is also your position that Black Beauty failed to
9 show that there will not be an adverse effect on the
10 endangered species and other biota in these receiving
11 waters, right?

12 A. Yes.

13 Q. And it is your position that the agency did
14 not have an adequate basis for making its determination
15 on that issue, right?

16 A. Yes.

17 Q. And Prairie Rivers Network has not attempted
18 to demonstrate that there will be an adverse effect on
19 biotas in those receiving waters, correct?

20 A. Could you repeat the question one more time?

21 Q. Prairie Rivers has not attempted to prove
22 that there will be an actual adverse effect on the biota
23 in the receiving waters; is that right?

24 A. No, we have not -- we have not attempted to

1 prove that.

2 Q. With respect to these issues, one of the
3 things you said earlier was that there are coal mines for
4 which whole effluent toxicity testing monitoring is
5 required; is that right?

6 A. Yes.

7 Q. What coal mines in Illinois have, as part of
8 their NPDES permits, a requirement for whole effluent
9 toxicity monitoring?

10 A. I haven't done a comprehensive search of
11 Illinois.

12 Q. Name one.

13 A. Anywhere?

14 Q. No. In Illinois.

15 A. Any coal mine?

16 Q. Yes, in Illinois, where is that part of its
17 permit?

18 A. Oh, that requires coal effluent toxicity? I
19 haven't done a comprehensive search of coal mines in
20 Illinois. I'm not aware of any in Illinois.

21 Q. What coal mines in Indiana require whole
22 effluent toxicity monitoring as part of its NPDES permit?

23 A. I have not looked at coal mine permits in
24 Indiana.

1 Q. That means you don't know any, right?

2 A. I don't know of any.

3 Q. What coal mines in Kentucky require whole
4 effluent toxicity monitoring?

5 A. I have not reviewed any NPDES permits for
6 coal mines in Kentucky.

7 Q. Where are the coal mines for which you have
8 done research and claimed to have found requirements for
9 whole effluent toxicity monitoring in an NPDES permit?

10 A. For a coal mine?

11 Q. Yes.

12 A. There was a coal mine in Alaska that requires
13 it.

14 Q. And what analysis have you run of the
15 chemical composition of that coal and receiving waters as
16 compared to that coal and receiving waters in Illinois?

17 A. I believe -- I haven't looked at detail and
18 compared all of the permit conditions between the two.

19 Q. No, that wasn't the question. What analysis
20 have you conducted of the coal composition and the
21 receiving water composition --

22 A. Oh.

23 Q. -- which is what affects -- what the effect
24 might be on the biota? What analysis have you done to

1 compare the Alaska coal and the Alaska water to the

2 Illinois coal and the Illinois water?

3 A. None.

4 Q. You said almost in passing that the permit
5 requires constant dilution of a 3:1 ratio. Did I hear
6 you right?

7 A. I believe requires constant dilution during a
8 discharge, yes.

9 Q. Right. In fact, the permit says there cannot
10 be a discharge unless there is at least a 3:1 dilution
11 ratio, right?

12 A. I don't have the permit in front of me. I
13 would be happy to read it for you, though.

14 Q. The 3:1 ratio is a limit; it's not the only
15 condition under which a discharge can be made, is it?

16 A. Yeah, it has to be -- there has to be at
17 least 3:1 dilution.

18 Q. So it could be more, and that would be fine
19 under the permit?

20 A. That wouldn't be a violation of the permit as
21 I read it.

22 Q. Are you familiar with any process under which
23 the uses of various streams in Illinois are assigned?

24 Need more detail on the question?

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1 A. I think I know where you're going, but maybe
2 you can flush it out for me.

3 Q. As I understand it, many streams in Illinois
4 have designated uses for those waters?

5 A. Designated uses, yes.

6 Q. Those are found in what I refer to generally
7 as the 303 regulations?

8 A. I'm not an attorney, but I think that's about
9 where they're at. Think they're defined in there, and
10 these numerical standards were in part 302.

11 Q. Do you know what designated uses of the
12 Little Vermilion are under Illinois law?

13 A. General use.

14 Q. Are there more than ten rivers in Illinois
15 that have that designation; do you know?

16 A. That have the --

17 Q. Are there more than ten that are designated
18 for general use?

19 A. Oh, yes.

20 Q. Are there some streams that have more
21 restrictive designations?

22 A. I'm not aware of any. Oh, I would
23 actually -- the drinking water designated use has more
24 restrictive limits for certain water bodies. Public

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1 water supply, I believe, is the name of the designated
2 use.

3 Q. Are there any others more restrictive than
4 general use?

5 A. There's only three designated uses in
6 Illinois.

7 Q. Coming back to the subject Mr. Ettinger had
8 asked you about, as I understand it, the -- are you
9 familiar with a document called the Advent report or
10 something in this case we have been calling the Advent
11 report?

12 A. Yes. I assume the Advent Storm Water Mixing
13 Analysis.

14 MR. BLANTON: Have just a second to get a
15 copy of it?

16 HEARING OFFICER: Let's go off.

17 (A discussion was held off the record.)

18 HEARING OFFICER: Let's go back on.

19 BY MR. BLANTON:

20 Q. Are you familiar with the document in front of
21 you?

22 A. Yes.

23 Q. And what is it?

24 A. It's entitled the Vermilion Grove Mine Storm

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1 Water Mixing Zone Evaluation.

2 MR. BLANTON: And I note for the record that
3 this is found in this case as a supplement to the

4 administrative record that was provided to the Board by
5 the agency. And I believe it's now part of the record at
6 pages 981 through 997.

7 Q. Now, can you tell me what you generally
8 understand this document to be?

9 A. I generally understand it to be a mixing zone
10 analysis which Illinois EPA requested of the permittee.

11 Q. And do you know when that was requested?

12 A. No, I don't.

13 Q. Was it done after the draft permit had been
14 issued and there was a hearing?

15 A. It was certainly after the hearing.

16 Q. Did you understand that it was in response to
17 some of the concerns raised at the hearing and other
18 comments on the draft permit?

19 A. Yes.

20 Q. As I understand it, Prairie Rivers has not
21 done any independent analysis of the flows and volumes of
22 water for the watersheds that feed the Little Vermilion
23 River; is that right?

24 A. That's correct.

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1 Q. And Prairie Rivers has not done any
2 independent analysis of the flows and volumes of water
3 that are contributed to that watershed and from the

4 unnamed tributary's watershed; is that right?

5 A. That's correct.

6 Q. And as I understand it, Prairie Rivers has
7 not done any independent analysis of the economic
8 benefits of this mine; is that right?

9 A. That is correct.

10 Q. I understand that Prairie Rivers has not
11 offered any alternative methods of dealing with the storm
12 water that will be the subject of the discharge under
13 this permit; is that right?

14 A. I believe we may have referenced some ideas
15 on alternatives in our comment letter, but --

16 Q. Beyond what the record shows, you haven't
17 done any independent analysis of different ways of
18 handling this water, have you?

19 A. No.

20 Q. Prairie Rivers has not conducted any
21 independent analysis of the effect of this discharge on
22 any species in either the receiving waters or the Little
23 Vermilion River, has it?

24 A. No.

1 Q. Prairie Rivers has not conducted any
2 independent analysis of the effect on the Georgetown
3 Reservoir drinking water supply as a result of this
4 discharge, has it?

5 A. Outside of the calculations? We assume all
6 of these questions are outside of the calculations.

7 Q. Yeah, we'll get there pretty soon.

8 A. No, we have not.

9 Q. Now you did do some calculations relating to
10 the Advent report, right?

11 A. Yes.

12 Q. Please explain what you did.

13 A. We took -- basically just taking all of the
14 assumptions that were described in the Advent report,
15 even those assumptions that we disagree with, we simply
16 redid the calculations using effluent data that is
17 reflective of the permitted levels in the final permit.

18 Q. And what did you conclude from that?

19 A. That various pollutants' concentrations would
20 increase.

21 Q. What else? Which pollutants would increase?

22 A. I don't have a copy of my spreadsheet in
23 front of me, but I believe total suspended solids
24 increased. Believe almost all the pollutants increased

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1 under some of the conditions.

2 MR. BLANTON: Can I have a second,
3 Mr. Knittle?

4 HEARING OFFICER: Yes.

5 (A pause was had in the record.)
6 MR. BLANTON: Approach the witness?
7 HEARING OFFICER: Yes.
8 BY MR. BLANTON:
9 Q. Mr. Moore, I've handed you what's been marked
10 as BBCC Exhibit 8. Are you familiar with that document?
11 A. Yes.
12 Q. What is it?
13 A. It's Prairie Rivers Network's responses to
14 Black Beauty Coal Company's interrogatories.
15 Q. And are the -- is the -- are the spreadsheets
16 that you've just referred to that show your calculations
17 attached as an exhibit there?
18 A. Yes, the final two pages.
19 MR. BLANTON: Okay. We would offer BBCC
20 Exhibit 8.
21 HEARING OFFICER: Mr. Ettinger?
22 MR. ETTINGER: No objection.
23 MR. SOFAT: No objection.
24 HEARING OFFICER: That's admitted.

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1 (Whereupon, BBCC Exhibit Number 8 was marked
2 for identification.)
3 BY MR. BLANTON:
4 Q. Now please take a look at your spreadsheet so
5 that you're sure what your answer is on the calculations.

6 A. Uh-huh.

7 Q. I believe you had said that you concluded
8 that the -- that all constituents would increase; is that
9 right?

10 A. For some of the conditions in the permit,
11 yes.

12 Q. Okay. Let's try to be a little more specific
13 and -- because the question was pretty broad, what
14 constituents increase where, under what conditions?

15 And take as much time as you need to explain
16 in detail what you -- what your conclusions you believe
17 show.

18 A. Well, looking at the first spreadsheet which
19 covers a 4.65 inch rainfall, when we plugged in the
20 monthly average effluent limits indicated in the final
21 permit, at the tributary downstream of outfall 003, our
22 calculation showed that chloride would increase from 118
23 -- 118 milligrams per liter to 206 milligrams per liter.

24 Q. Okay. Hold on. I think you just said when

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1 we plugged in the monthly average permit limits, and
2 those are two different concepts. I think that's what
3 you said, though, in the record. What you plugged in
4 were the permit limits --

5 A. Yes.

6 Q. -- for each of the effluents for which there
7 is a limit in the permit, right?

8 A. Well, for chloride, I plugged in -- oh, I'm
9 sorry. On chloride there is only a daily maximum
10 effluent limit.

11 Q. All right. Let me --

12 MR. BLANTON: May I approach the witness?

13 HEARING OFFICER: Yes, you may.

14 BY MR. BLANTON:

15 Q. -- show you what's been marked as BBCC
16 Exhibit 6 --

17 A. Thank you.

18 Q. -- which, if I'm lucky, is a copy of the
19 final permit. Would you check and see whether that's
20 what it appears to be?

21 A. I believe it is, yes.

22 Q. In connection with your discussion of your
23 calculations, please direct us all to where in the permit
24 that's Exhibit 6 you found these permit limits.

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1 A. Yeah, for the -- again let's start with
2 chloride. Under the third table from the top, the one
3 labeled Monthly Average Effluent Limits --

4 Q. What page is it? What page of the permit do
5 you find that at?

6 A. Oh, on page two. The effluent concentration

7 limit is 1,000 milligrams per liter daily maximum. We
8 went ahead and used 1,000 milligrams per liter and went
9 ahead and used that number in the monthly average
10 effluent limit as well.

11 Q. All right.

12 A. So, in the tributary downstream of outfall
13 003, if you use the 1,000 milligram per liter
14 concentration from the permit, you'll get a concentration
15 of 206.1 milligrams per liter chloride.

16 Q. And --

17 A. If you assume no -- that's an increase of
18 over 100. If you run the same equation assuming no
19 discharge from outfall 003, you get a concentration of --
20 much lower of 118.7 milligrams per liter. Continuing
21 to --

22 Q. Hold on. Wait a second.

23 A. I thought you had asked me to go through
24 this.

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1 Q. I will, but the rules let me interrupt before
2 we go ahead.

3 A. Okay.

4 Q. Do you have any understanding as to whether
5 there is a water quality standard for chlorides
6 applicable to these receiving waters?

7 A. Yes.

8 Q. Do you know what that number is?

9 A. The general use water quality standard is 500
10 milligrams per liter.

11 Q. So, with your calculation, the result you get
12 is less than half of the water quality standard, right?

13 A. Yes.

14 Q. What's the next one?

15 A. Sulfate.

16 Q. What happened -- what did you find on
17 sulfates?

18 A. Well, if you take the daily maximum
19 concentration limit for sulfate on page two of the
20 permit, which is 1,000 milligrams per liter, again we use
21 that for -- assumed it was also the 30-day average, the
22 concentration in the tributary downstream from outfall
23 003 is predicted to be 133.5 milligrams per liter.
24 Without the discharge, the concentration is only 38.1

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1 milligrams per liter.

2 Q. And what's the water quality standard for
3 sulfates?

4 A. 500 milligrams per liter.

5 Q. So, with the discharge, it's approximately
6 between a quarter and a third of the water quality
7 standard?

8 A. Yes, and quite a bit higher than what it was
9 before the discharge.

10 Q. I would appreciate it if you would not
11 volunteer --

12 A. Sorry.

13 Q. -- statements when there's not a question
14 pending.

15 What's the next one?

16 A. Total suspended solids.

17 Q. What did you find out?

18 A. We used the monthly average, 30-day average
19 concentration limits specified on page two of the permit
20 which are 35 milligrams per liter. With that, we
21 calculated with a discharge concentration of 36.9
22 milligrams per liter. Without the discharge, the
23 concentration predicted was 37.1 milligrams per liter.

24 Q. What's the water quality standard for these

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1 waters?

2 A. There is no water quality standard for total
3 suspended solids.

4 Q. Go ahead then.

5 A. For iron, again we used the monthly average,
6 30-day average concentration limit listed on page two
7 which is 3.0 milligrams per liter. When we plugged that

8 into our concentration, into our model -- into those
9 calculations, I'm sorry, there would be a predicted iron
10 concentration of 1.39 milligrams per liter with the
11 discharge. That's an increase over one point -- of --
12 that's an increase over the predicted quality without a
13 discharge which is 1.213 milligrams per liter.

14 Q. What do you believe the water quality
15 standard to be for iron?

16 A. Believe it's one milligram per liter.

17 Q. So, based upon your analysis in the letters,
18 your answers to interrogatories and deposition testimony,
19 you contend that that is a violation of water quality
20 standards, right?

21 A. Yes.

22 Q. What's the next?

23 A. Going down to the third and fourth lines of
24 that same table, we did the same calculations for

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1 chloride, sulfate, total suspended solids and iron
2 looking at concentrations in the Little Vermilion River
3 downstream of the tributary with and without the
4 discharge.

5 Q. And all of those numbers are lower than the
6 numbers you just gave us for the unnamed tributary,
7 right?

8 A. Yes.

9 Q. Can you look at Exhibit 6, please, on page
10 two, the --

11 A. I have a lot of exhibits in my hand here.
12 Let me shuffle around a little bit.

13 HEARING OFFICER: Go off for a second.

14 (A discussion was held off the record.)

15 MR. BLANTON: I'm sorry, we offer BBCC
16 Exhibit 6.

17 HEARING OFFICER: Okay. I just don't have
18 that down.

19 MR. BLANTON: The permit.

20 MR. ETTINGER: No objection.

21 THE WITNESS: Okay. The permit is Exhibit 6?

22 MR. BLANTON: Right.

23 THE WITNESS: Yes, I have that here.

24 (Whereupon, BBCC Exhibit Number 6 was marked

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1 for identification.)

2 BY MR. BLANTON:

3 Q. The concentration limit for iron in the permit
4 is what?

5 A. The 30-day average is 3.0 milligrams per
6 liter, and the daily maximum concentration limit is 6.0
7 milligrams per liter.

8 Q. Which of those numbers did you use in your

9 calculations to lead to the conclusion that there would
10 be a violation of water quality?

11 A. Well, for calculating using the monthly
12 average effluent limits, we used the 30-day average
13 effluent limit of 3.0 milligrams per liter.

14 Q. What is the word that follows the word "iron"
15 in the permit?

16 A. The word is "total" in parentheses.

17 Q. What does that mean to you?

18 A. It's the total amount of iron that would be
19 present in the water column.

20 Q. And in what physical states can that be in
21 the water column?

22 A. It could be on particulate matter, it could
23 be dissolved in the water column.

24 Q. You have some training in physics, right?

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1 A. Yes.

2 Q. This would be part of your academic field?

3 A. I took two semesters of chemistry, so I'm
4 familiar with --

5 Q. Do you know how iron is sampled for in a
6 water quality level, how the quantitative analysis is
7 performed?

8 A. No, I do not.

9 Q. Have you ever seen water quality laboratory

10 reports that report total iron?

11 A. Yes, I have.

12 Q. Have you seen them report any other type of
13 iron?

14 A. Yes, I have.

15 Q. What other types of iron are routinely
16 recorded in water quality laboratory reports?

17 A. Dissolved iron.

18 Q. What does that mean?

19 A. That means the portion of the total iron that
20 is dissolved in a solution.

21 Q. Do you have any information or knowledge as
22 to how the proportion of total iron dissolves in certain
23 waters under certain conditions?

24 A. No. No information was provided on that.

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1 Q. And you told me that the water quality
2 standard for these receiving waters for iron is one
3 milligram per liter, right?

4 A. Uh-huh.

5 Q. What kind of iron?

6 A. That's actually for dissolved iron.

7 Q. And what you did in your calculation was
8 compare total iron --

9 A. Yes.

10 Q. -- to dissolved iron, right?

11 A. Yes.

12 Q. And dissolved iron is always less than total
13 iron, isn't it?

14 A. I believe so, yes.

15 Q. And you don't have any idea as you sit here
16 today what the proportion of dissolved iron would be and
17 the total iron in water coming from this water discharge?

18 A. No, I think that would have been a useful
19 piece of information for the agency to collect.

20 Q. But if the standard is dissolved iron and
21 that's the only part that counts for water quality
22 standards, it is not a violation of the water quality
23 standard to be over one milligram per liter for total
24 iron, is it?

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1 A. No. The permit should probably require
2 monitoring of dissolved iron.

3 Q. That's a yes or no question, Mr. Moore. It's
4 a real simple question.

5 A. No.

6 Q. And so when you have asserted in your
7 testimony and your deposition, and you asserted it here
8 today, that there was a violation of the water quality
9 standard for iron based on your calculation, that is not
10 an accurate statement, is it, because you compared total

11 iron calculations to a dissolved iron standard with no
12 knowledge of what the relationship is between dissolved
13 iron and total iron in these or any other waters; is that
14 right?

15 A. We used the available data.

16 Q. Is that right? Is that right?

17 A. Yes.

18 MR. BLANTON: Thank you.

19 HEARING OFFICER: Anything else, Mr. Blanton?

20 MR. BLANTON: No. Thank you.

21 HEARING OFFICER: Mr. Ettinger? Do you have
22 any redirect for this witness?

23 REDIRECT EXAMINATION

24 BY MR. ETTINGER:

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1 Q. Mr. Sofat asked you a question regarding
2 whether it was the position of Prairie Rivers Network
3 that a biological inventory was necessary under various
4 conditions. Do you remember that line of questioning?

5 A. I believe so, yes.

6 Q. And he asked something -- I don't want to
7 mischaracterize the record, but I do have to refer to the
8 testimony. Something to the effect of, is it the
9 position of Prairie Rivers Network that further
10 biological studies would be necessary even if the agency

11 believes they're not necessary. Do you remember that?

12 A. Yes.

13 Q. Does Prairie Rivers Network believe that
14 biological studies may be necessary even if the agency
15 believes that they aren't?

16 A. Yes.

17 MR. ETTINGER: That's all I wanted to
18 clarify. Done.

19 HEARING OFFICER: Mr. Sofat? Recross?

20 RE-CROSS-EXAMINATION

21 BY MR. SOFAT:

22 Q. And the basis for that "yes" is -- what is
23 Prairie Rivers Network's concern or cause that makes them
24 say that yes, even if the agency believes that there is

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1 adequate information that there's still a biological
2 survey or monitoring or study that should be done?

3 A. Well, a simple statement to the effect that
4 we believe that no harm will come to an aquatic creature
5 that has absolutely no backing of a scientific study, no
6 scientific evaluation done of any sort, and certainly no
7 mention of any type of analysis done in the public record
8 or provided to concerned members of the public,
9 particularly when members of the public actually request
10 that information. I don't think a belief on the agency's
11 part constitutes what the agency's responsibility is.

12 Q. Are you testifying that you are aware how the
13 agency determines whether or not the information they
14 have is adequate?

15 A. I'm aware of the information which the agency
16 provides to members of the public, including Prairie
17 Rivers Network.

18 Q. So that is -- in other words, you're saying
19 that that is not to the satisfaction of PRN, right?

20 A. Yes.

21 MR. SOFAT: Okay. Thank you.

22 HEARING OFFICER: Mr. Blanton, do you have
23 recross on that issue?

24 MR. BLANTON: No. Thank you.

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1 HEARING OFFICER: Mr. Ettinger?

2 MR. ETTINGER: We're done.

3 HEARING OFFICER: We're done. Thank you, sir.
4 You can step down.

5 THE WITNESS: Thank you.

6 HEARING OFFICER: Let's go off for a second.

7 (A discussion was held off the record.)

8 HEARING OFFICER: We will be back here at
9 11:32, according to my watch.

10 (A recess was taken.)

11 HEARING OFFICER: All right. Mr. Ettinger, we

12 are back on the record.

13 MR. ETTINGER: I think the witness, however --

14 HEARING OFFICER: That's unfortunate. Let's
15 go off the record for a second.

16 (A discussion was held off the record.)

17 HEARING OFFICER: All right. We are back on
18 the record.

19 Mr. Ettinger, your next witness, please?

20 MR. ETTINGER: Yes. Please be seated.

21 HEARING OFFICER: Your name, ma'am?

22 THE WITNESS: Rosa Ellis.

23 HEARING OFFICER: Could you affirm -- we had
24 an off-the-record discussion about the oath or affirmation

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1 that Ms. Ellis is going to take. And, Ms. Ellis, it's my
2 understanding you are not going to take an oath, correct?
3 You're going to affirm instead?

4 THE WITNESS: That's right.

5 HEARING OFFICER: You understand that there's
6 a moral obligation to tell the truth?

7 THE WITNESS: That's right.

8 HEARING OFFICER: Okay.

9 (Affirmation administered.)

10 HEARING OFFICER: Thank you, ma'am.

11 ROSA ELLIS,

12 called as a witness, after being first affirmed, was

13 examined and testified upon her oath as follows:

14 DIRECT EXAMINATION

15 BY MR. ETTINGER:

16 Q. Would you please state your name for the
17 record?

18 A. My name is Rosa Ellis. Everyone knows me as
19 Rose.

20 Q. And what is your address?

21 A. My address is 13956 East 400 North Road,
22 Indianola, Illinois, 61850.

23 Q. Where is that in relationship to the mine
24 site?

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1 A. It's not quite one-half mile due southwest of
2 the site.

3 Q. And where is that in relationship to the
4 unnamed tributary?

5 A. Well, we've had quite a discussion about
6 that. It's over the hill from our place, but I would say
7 it's between an eighth and a quarter of a mile.

8 Q. And about how far do you live from the Little
9 Vermilion River?

10 A. It's over a mile. I'd say probably a mile
11 and a half.

12 Q. Are you a member of Prairie Rivers Network?

13 A. I am.

14 Q. Did you participate in the process that led
15 to the issuance of this permit?

16 A. Yes.

17 Q. Could you just briefly describe your
18 participation in the process?

19 A. It was back in February of 2000. Linda Ryan
20 and I made up a petition, took it around to people in
21 Bermene (sic) Grove and all that, had them to sign, and
22 then we sent it in to get our hearings.

23 Q. And that was the DNR --

24 A. Uh-huh.

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1 Q. -- permit for the mine?

2 A. Uh-huh. And we also requested the EPA.

3 Q. What did you do with regard to the EPA
4 permit? How did you participate in that process?

5 A. I belong to a group called Concerned Citizens
6 for a Quality Environment, and we had a booth at the
7 September 20th hearing. We had videotape of the Riola
8 mine which belongs to Black Beauty Coal, of their dust
9 problems over there. And we had different things on the
10 river.

11 Q. And did you participate in a hearing after
12 the September 20th meeting that you just described?

13 A. Yes.

14 Q. And how did you participate there?

15 A. Well, I gave testimony there.

16 Q. Do you make use of the Little Vermilion
17 River?

18 A. Yes, we do.

19 Q. How do you do that?

20 A. Well, I myself don't fish, but my husband
21 does. He was there last week twice fishing. We boat
22 occasionally. Now, last year we took our boat down, but
23 the times that we go over there to the water, we don't go
24 up the river because our boat -- we don't want to hit the

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1 trees and things as they come off the river.

2 But we did take two trips with Concerned
3 Citizens. One trip we took DNR up the river in boats
4 that belonged to our friends. Another trip we took the
5 EPA up the river to show them what we were talking about
6 of our concerns for the river.

7 Q. And do you use the area or the areas around
8 the unnamed tributary?

9 A. Yes, we've been mushrooming there quite
10 frequently in the last two weeks, and we do occasionally
11 go down through there and walk through the woods. We
12 blackberry pick, we bird-watch in that area.

13 Q. Have you observed the water in the unnamed

14 tributary?

15 A. Yes.

16 Q. Have you observed any discharges to the
17 unnamed tributary from the mine site?

18 A. Yes.

19 Q. Could you just briefly describe those?

20 MR. BLANTON: Objection, not relevant, outside
21 the time period. The issue's whether the permit should
22 have been issued.

23 HEARING OFFICER: Mr. Ettinger? Any response?

24 MR. ETTINGER: Well, this comes back to what

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1 we were talking about before. Our position is that the
2 monitoring is not adequate at -- under the permit and, as
3 a result, we don't have information regarding discharges
4 we would like to have.

5 Our point here is that there are discharges,
6 and we're not learning about the flow either from the mine
7 site or in the creek. And what we're simply doing is
8 pointing to instances in which there were discharges about
9 which we are not knowledgeable now because of inadequate
10 monitoring required by the permit.

11 HEARING OFFICER: Anything further,
12 Mr. Blanton?

13 MR. BLANTON: No.

14 HEARING OFFICER: I'm going to overrule the

15 objection, allow the question to go forward.

16 Ma'am, do you remember the question?

17 A. Yes. We were there -- in fact, we took
18 pictures on April the 5th, April the 11th, and on
19 Thursday of last week, whatever that date was, and there
20 is still a small flow coming from that.

21 We did not only look, look -- observe that,
22 you can hear it. Someone has put small -- what's it
23 called -- riprap up in front of the tube now so that you
24 can see it's still wet, but you don't see the flow, but

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1 you can hear it. And when you go across the road and
2 down to the unnamed tributary where their tubes come out,
3 it is there; it is frothy looking. It's not a lot, but
4 it is water.

5 Q. And there's no way for you to monitor the
6 amount of flow given the way that it's physically set up
7 now?

8 A. No.

9 MR. ETTINGER: Thanks. I have no further
10 questions.

11 HEARING OFFICER: Mr. Sofat?

12 MR. SOFAT: I have no questions.

13 HEARING OFFICER: Mr. Blanton?

14 MR. BLANTON: Just a couple.

15

CROSS-EXAMINATION

16 BY MR. BLANTON:

17 Q. Mrs. Ellis, when did you first learn that
18 there were any sort of endangered species in the Little
19 Vermilion River?

20 A. It was in the Nineties. I cannot tell you
21 what year.

22 Q. As I recall, it was about the time of the
23 issue regarding a possible expansion or some change in
24 the Georgetown Reservoir?

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1 A. Yes, yes, that was it. It was in the late
2 Nineties.

3 Q. And has your use of the river and your
4 husband's use of the river changed in any way since you
5 learned that there are endangered species in the river?

6 A. No, because we don't do anything to harm the
7 endangered species. We don't fish for them. We don't
8 pick them up. We don't pollute, to our knowledge.

9 Q. But your use of the river hasn't changed
10 because of anything?

11 A. No.

12 MR. BLANTON: That's all I have.

13 HEARING OFFICER: Mr. Ettinger, any redirect?

14

REDIRECT EXAMINATION

15 BY MR. ETTINGER:

16 Q. Do you derive any benefit, in your mind, from
17 the endangered species being in the river?

18 A. Well, I think we derive benefit from anything
19 that's living on this earth, whether it's a plant,
20 animal, or -- you know, once you lose an endangered
21 species, it's gone forever. We should protect everything
22 we have. Everything is God's creatures.

23 MR. ETTINGER: I have no further questions.

24 HEARING OFFICER: Mr. Sofat?

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1 MR. SOFAT: I have no questions.

2 HEARING OFFICER: Mr. Blanton?

3 MR. BLANTON: No other questions.

4 HEARING OFFICER: Thank you, ma'am. You may
5 step down.

6 Mr. Ettinger, do you have any further
7 witnesses?

8 MR. ETTINGER: I don't have really a witness.
9 I did have occasion to go over Mr. Blanton's deposition
10 designation, and I wanted to make one -- well, should we
11 discuss this now or do you --

12 MR. BLANTON: I haven't offered them yet.

13 MR. ETTINGER: You haven't offered them yet.

14 HEARING OFFICER: Yes. I don't think we have
15 anything on the record about them. We had an

16 off-the-record discussion.

17 MR. ETTINGER: All right. We'll handle it
18 later. There was one addition that I would make, actually
19 one line change to add a few extra lines.

20 HEARING OFFICER: If you're worried about
21 being out of your case in chief and being able to offer
22 these parts of the depositions you want, I can advise you
23 I don't think Mr. Blanton would object. And you would
24 have an opportunity in your case in rebuttal to do that

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1 anyway.

2 MR. ETTINGER: That's fine. Actually all I
3 wanted to do was modify his designation slightly.

4 HEARING OFFICER: No further witnesses then?

5 MR. ETTINGER: No witnesses.

6 HEARING OFFICER: Did you have any exhibits
7 that you had offered? No, I don't see any.

8 All right. Thank you very much, Mr. Ettinger.
9 Your case in chief is closed.

10 I have Mr. Blanton signaling.

11 MR. BLANTON: I want to hear those words.

12 HEARING OFFICER: Case in chief is closed?
13 Correct. Case in chief is closed.

14 We're going to start off with Mr. Sofat's case
15 in chief. Let's take an off-the-record discussion here.

16 (A discussion was held off the record, and a

17 lunch recess was taken at 11:45 a.m.)

18 HEARING OFFICER: All right. Let's go back on
19 the record. It is approximately 12:50 p.m. We've taken a
20 one-hour lunch recess. We're now about to start with the
21 case in chief of the respondent, the Illinois
22 Environmental Protection Agency. Mr. Sofat?

23 MR. SOFAT: Yes, Mr. Hearing Officer. We
24 would like to call Toby Frevert.

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1 HEARING OFFICER: Sir, if you could have a
2 seat in the witness chair? We're going to swear him in in
3 a second. I've had a request both from the court reporter
4 and the people in the back row if we could all try to
5 elevate our voices a little bit, I think everyone will be
6 happier. So we will try. And there are microphones there
7 and there. Feel free to speak into the microphones, if
8 you want to. I don't think I'm the problem because I am
9 generally fairly loud.

10 THE WITNESS: I'm not.

11 HEARING OFFICER: You can do your best, sir.

12 THE WITNESS: I will be happy to use the
13 microphone if you want me to.

14 HEARING OFFICER: Yes. Why don't we set you
15 right there. We'll set you right there. Try to speak
16 into the orange thing.

17 (Witness sworn.)

18 HEARING OFFICER: Mr. Sofat?

19 TOBY FREVERT,

20 called as a witness, after being first duly sworn, was

21 examined and testified upon his oath as follows:

22 DIRECT EXAMINATION

23 BY MR. SOFAT:

24 Q. Okay. Mr. Frevert, would you please tell us

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1 where you work?

2 A. I work for the Illinois Environmental
3 Protection Agency.

4 Q. How long have you worked there?

5 A. About 30 years.

6 Q. Are you familiar with Black Beauty Coal
7 Company's NPDES permit?

8 A. I believe you're talking about the permit for
9 the Vermilion Grove mine. Yes, I am.

10 Q. How so?

11 A. I was directly involved in its preparation.

12 Q. Could you please explain the scope of your
13 involvement in the issuing of this permit or the writing
14 of this permit?

15 A. I certainly will attempt to. I don't
16 remember the actual date of the permit application. I
17 was only peripherally involved early on in this

18 proceeding. And approximately August time frame of the
19 year 2000, I managed to take on the lead role in
20 coordinating the agency's review and preparation in
21 response to that permit application.

22 Q. Would you tell us briefly the process that
23 the agency gets involved, how the agency gets involved
24 and the review process of an NPDES permit application?

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1 A. Certainly. And let's focus on this specific
2 permit rather than the permit program in general.

3 Q. Okay.

4 A. We were aware of public interest --
5 significant public interest, more than a routine permit
6 application as early as last summer, maybe even last
7 spring. I do all sorts of communication directly with us
8 and also with the state agencies, and with the applicant,
9 of course. Based on the obvious public interest in this
10 matter, our agency decided to issue a draft permit,
11 schedule a public hearing with a public meeting in
12 advance of that public hearing to sort of help, help
13 communicate information so the hearing itself would, we
14 hoped, be more sufficient. We hoped there would be more
15 understanding of the issues that were within our
16 jurisdiction and the issues that were not.

17 The public meeting was held in, I believe,

18 mid September, perhaps the 20th. I believe the public
19 hearing was held about a week later, maybe the 27th. I
20 think routinely and in this case the comment period to
21 receive supplemental comments after the close of the
22 hearing was held open for approximately 30 days.

23 At the close of the record in that case, the
24 agency evaluated the information that was brought in,

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1 assessed the issues which came to the surface as it were.
2 We weighed in on -- during that process, including the
3 permit itself, prepared a response to the summary,
4 drafted the revisions to the permit, discussed and
5 reached consensus with U.S. EPA on the substance of that
6 permit as modified, and proceeded to issue that permit, I
7 believe, on December 27th.

8 Q. Could you tell us why U.S. EPA was involved
9 in this permit review and issuance?

10 A. Certainly.

11 HEARING OFFICER: Sir --

12 THE WITNESS: I said, "Certainly."

13 HEARING OFFICER: No, I understand. I heard
14 you. Could you sort of shift so you're speaking that way
15 a little bit? The court reporter's having trouble hearing
16 you.

17 THE WITNESS: Sure, I'll do my best.

18 A. Okay. Yes. This is a joint state and federal

19 discharge permit in the state of Illinois. My agency is
20 the delegated NPDES permitting authority. That delegation
21 is consistent with a formal delegation agreement between
22 us and U.S. EPA. They retain some of their federal
23 oversight responsibilities and have access to review NPDES
24 permits and comment upon them. And they did so.

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1 I believe their interest in this particular
2 situation came about as a result of public interest and, I
3 believe, public letters or some kind of public
4 communication to U.S. EPA's Region 5 director.

5 MR. SOFAT: Mr. Hearing Officer, I would like
6 to approach the witness.

7 HEARING OFFICER: Yes

8 BY MR. SOFAT:

9 Q. Do you recognize this document?

10 A. This document is the NPDES permit in
11 question, the subject here and a cover letter forwarding
12 that permit.

13 MR. SOFAT: Mr. Hearing Officer, we would
14 like to file this as IEPA Exhibit 1.

15 HEARING OFFICER: Any objections?

16 Mr. Ettinger?

17 MR. ETTINGER: No.

18 HEARING OFFICER: Mr. Blanton?

19 MR. BLANTON: No objection.

20 HEARING OFFICER: All right. This will be
21 admitted.

22 (Whereupon, IEPA Exhibit Number 1 was marked
23 for identification.)

24 BY MR. SOFAT:

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1 Q. Now I would like to go through some permit
2 conditions in this permit.

3 Mr. Frevert, I would like you to look at page
4 two of the permit. Could you briefly describe the
5 condition 1-A of the permit?

6 A. Condition 1-A. Describe it? It's a
7 two-sentence requirement that's part of the discharge
8 operating restrictions. I'm not sure I fully appreciate
9 your question beyond that.

10 Q. Okay. Could you tell us what this condition
11 intends to do?

12 A. This indicates that routine operating
13 discharges from this facility are subject to the
14 limitations in the limitation schedule above that.

15 Q. Above condition 1-A, we have a table that
16 lists the parameters, load limits, concentration limits,
17 sample frequency, sample type. I would like you to focus
18 on that table, please.

19 A. Okay.

20 Q. Could you tell us how those permit
21 concentration limits were reached, how the agency came up
22 with those numbers?

23 A. I believe these numbers primarily came from
24 Subtitle D regulations which are the Illinois Pollution

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1 Control Board's regulations governing the discharge from
2 mining facilities.

3 Q. Based on your understanding of Subtitle D,
4 would the proposed effluent standards for sulfates and
5 chlorides violate water quality standards?

6 A. Discharges operating from this facility are
7 consistent with this limitation schedule, in my opinion,
8 and as a result of the assessment of myself and my staff
9 in this facility, are adequate to assure the water
10 quality standards in place with the State of Illinois
11 will be met. I believe there are further restrictions
12 within this permit that require that those water quality
13 standards be met, these numbers notwithstanding.

14 Q. Would --

15 A. So, my general reaction is not only is this
16 table adequate to protect water quality, but some
17 unforeseen circumstance, should there be a peculiarity
18 where they weren't, that would still not be authorized by
19 this permit.

20 Q. Would the mine discharge exacerbate water
21 quality problems in the drinking water supply for the
22 Georgetown Village?

23 A. Not in my opinion, no.

24 Q. Did the agency look at that factor?

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1 A. Yes, the agency did.

2 Q. Does this condition or any condition in this
3 permit require the permittee to do whole effluent
4 toxicity testing?

5 A. The agency issued this permit without
6 requirements -- consciously without requirements to
7 conduct effluent toxicity testing of this discharge.

8 Q. Why?

9 A. Several reasons, first of which is we don't
10 believe it's an appropriate or proper tool to use in this
11 circumstance. But supplementary -- supplementally, the
12 issues being dealt with and the basis for the
13 recommendation of some parties to what the whole effluent
14 toxicity is we believe are more properly addressed by
15 some other monitoring conditions we have established; so,
16 we viewed it as inappropriate for this type of discharge.
17 And to the extent that there were issues that outside
18 parties may have thought needed to be addressed, we
19 thought there were other monitoring mechanisms that were
20 more appropriate to do that.

21 Q. Mr. Frevert, I would like you to look at page
22 number six, condition number 11-A. Please take your time
23 to read it. Let me know when you're finished.

24 A. You can proceed with your question if you'd

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1 like.

2 Q. Could you please tell us the intended purpose
3 of this condition?

4 A. I believe this particular condition, 11-A,
5 establishes the requirement that discharges cannot be --
6 are not authorized by this permit at times and at such
7 volumes they would exceed basic requirement that upstream
8 flow available at point of discharge be three times or
9 more times higher than the actual rate of discharge.

10 Q. Does this condition or any other condition in
11 this permit specify the mixing zone for the mine
12 discharge in the receiving waters?

13 A. That's a term that's, that's kind of
14 difficult not only in this case but in other cases. This
15 paragraph uses the terminology "mixing zone." In
16 reality, in this particular case, we recognize and we are
17 allowing mixing of the effluent with the instream waters
18 consistent with mixing zone provisions and allowed mixing
19 provisions of the water quality standards. We
20 specifically did not delineate a geographic zone that

21 would be called the mixing zone, but we did recognize the
22 Board's intent that there be allowance for dilution prior
23 to measuring or requiring compliance with water quality
24 standards.

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1 Q. If you could, look at page number nine,
2 special condition number twelve. Please take your time
3 to read the condition.

4 A. I'm generally familiar with this special
5 condition.

6 Q. What is the intended and practical effect of
7 this condition?

8 A. This particular condition was added to this
9 permit after collaboration with Illinois Department of
10 Natural Resources Endangered Species program staff and
11 their Office of Mines and Minerals program staff. The
12 intent of this discharge -- or of this condition was to
13 require chemical monitoring of the discharge in the
14 receiving stream for a number of parameters. We did not
15 believe they were necessary to be specifically limited or
16 of a significant concern, but the intent here was to
17 provide an additional comfort level, if that's the proper
18 term, in speaking to assure people that if, indeed, there
19 was some peculiarly restrictive need of an endangered
20 species, there was a way to address that and monitor
21 things and essentially demonstrate that this facility was

22 resulting in a net condition that was well within -- well
23 within the state's adopted water quality standards, and
24 also would provide some comfort level if there was

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1 something out there in the biological community that was
2 unusually susceptible to something that the water quality
3 standards were intended to protect.

4 Q. Does this condition or any other condition in
5 this permit require the permittee to measure 3:1 dilution
6 present in the receiving waters?

7 A. I don't believe special condition number 12
8 refers to that. I think it's another condition, but
9 there is -- yes, there is a requirement in here, and it
10 might have been condition 11-A.

11 Q. Did you say condition 11-A?

12 A. I believe that's the condition. I'm
13 double-checking that. Yes, as part of special -- excuse
14 me, I don't believe it's special condition. I think it's
15 standard condition 11-A. Part of that condition is at
16 times of discharge and monitoring -- let's see.

17 "At times of discharge and monitoring of
18 outflow 3 receiving stream, flow rates shall be
19 determined and submitted with discharge analysis results
20 to demonstrate that adequate mixing is provided to ensure
21 water quality standards are not exceeded in the receiving

22 stream." And that includes a demonstration, the
23 documentation that that 3:1 minimum dilution rate has
24 been achieved.

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1 Q. Going back to condition 12-A -- I'm sorry,
2 12. Special condition number twelve, does this condition
3 or any other condition require continuous flow monitoring
4 of either the receiving water or their discharge?

5 A. I don't believe there's a requirement or
6 intent for requirement of continuous monitoring of flow
7 rate, no.

8 Q. Why?

9 A. We felt that was not necessary, that there
10 were other ways to -- other less burdensome ways to
11 demonstrate and document that the intent of the
12 requirements and special conditions had been met. It
13 doesn't prohibit continuous discharge monitoring, but it
14 doesn't specifically require it.

15 Q. I'm asking for your personal opinion: Are
16 the monitoring requirements of the permit protective of
17 existing uses?

18 A. The discharge limitations of the permit are
19 protective of existing uses. They're also protective of
20 the water quality standards of the State of Illinois.
21 And the monitoring requirements are adequate, in my
22 opinion, to demonstrate whether or not those limitations

23 have been honored.

24 Q. Mr. Frevert, in the process of writing this

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1 permit, did the agency at any point do an antidegradation
2 analysis?

3 A. Yes, we considered antidegradation issues as
4 contained in the Board's water quality standards, part
5 302, essentially throughout the majority of the review
6 process.

7 Q. Could you briefly explain that agency
8 process?

9 A. Well, it was the permit review process which
10 was a, a multimonth -- six months we were involved in
11 processing and reviewing that application which included
12 technical reviews, the public participation, response to
13 the public input. I'm saying we considered --
14 continuously considered and evaluated the need to meet
15 water quality standards and antidegradation throughout
16 that time period.

17 Q. In this antidegradation analysis, did the
18 agency consider that a new discharge is necessary to
19 accommodate for social and economic development of the
20 area in which the mine is located?

21 A. I believe we did, yes.

22 Q. Did you consider any alternatives as part of

23 this analysis?

24 A. We looked at several what we believe were

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1 reasonable alternatives. And alternatives, I'm saying
2 the ways to accomplish those social and economic goals of
3 proper, proper usage and jobs and prosperity for the
4 citizens of Illinois. How to do that with the minimal
5 and, if at all possible, avoidable incremental loading of
6 pollutants to the state's water resources.

7 And as a result of that review, I believe we
8 identified some supplemental provisions in the permit
9 which required additional design and operational features
10 for the wastewater, the storm water handling and
11 discharge facility here that go beyond the basic minimum
12 treatment requirements that are actually required in
13 other locations.

14 Q. Could you describe briefly the public
15 participation process for NPDES permits or for this
16 permit?

17 A. Typically, we receive permit applications and
18 draft permits as consistent as we believe we understand
19 them to be with the state requirements established by the
20 Pollution Control Board and any add-on federal
21 requirements that we're also obligated to consider.
22 Publish that draft for public notice for a period of
23 time, receive comment. If comment is sufficient, we go

24 to another staff and schedule a public hearing process.

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1 Conduct the public hearing, allow the record to remain
2 open for a time to, to bring in supplemental information.
3 At the close of the hearing, evaluate that additional
4 information, do whatever additional technical analysis or
5 follow-up studies we need to do to address those issues,
6 and then develop a permit that's consistent with the
7 state regulations and responds to all those issues that
8 were brought out in the public participation process, at
9 least those issues that are within our jurisdiction. I
10 believe those issues that are outside of our statutory
11 jurisdiction we would comment on to the extent of,
12 "That's an interesting issue, but it's beyond our ability
13 to deal with." That's the -- and that's it.

14 At that point, we have to take action. We've
15 got to make our technical recommendations and
16 administrative process of the permit or deny the permit,
17 as the case will be. At that point, the state
18 regulations provide opportunities, if there are still
19 issues that were risen during that public participation
20 process that people believe were not adequately or
21 properly dealt with, the next stage is appeal such as
22 we're in here.

23 Q. What is the agency process in dealing with

24 the information that is required or obtained after the

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1 close of the permit hearing?

2 A. Typically, if issues come up during the
3 hearing where we don't believe the record or our permit
4 files are adequate to resolve those issues, we will seek
5 supplementary information that we need to deal with those
6 issues and reach a proper conclusion. That may be going
7 to sister agencies or other organizations to get data or
8 information; it may be going back to the permit applicant
9 if we have specific questions on -- or gather more
10 information to address those issues that we feel maybe
11 could be dealt with in more depth; and then document in a
12 responsiveness summary what those issues were and how the
13 issues were resolved.

14 Q. Did you receive any comments from U.S. EPA on
15 this permit?

16 A. Yes, we have. As a matter of fact, at one
17 point I believe we got a letter of objection from U.S.
18 EPA regarding some conditions in the draft permit. That
19 triggered some dialogue or discussion with U.S. EPA
20 regarding those issues. And in the process of not only
21 resolving the issues at hand as part of the public
22 participation process, we also had to resolve any
23 discrepancies in issues and the positions between
24 ourselves and the U.S. EPA because, as I stated earlier,

1 this is a joint federal-state permit. We are the
2 delegated U.S. EPA authority, but the United States
3 Environmental Protection Agency obtains some oversight
4 and opportunity to participate in final authorization of
5 those permits.

6 Q. Did they approve the agency's final permit
7 that was issued to Black Beauty?

8 A. U.S. EPA withdrew their objection and went on
9 record in favor and support of a permit to be issued
10 consistent with, with the specific ways which were
11 resolved, some of the issues we were concerned with. So,
12 I believe they actually saw an electronic copy of the
13 permit before it was signed saying exactly how we were
14 going to resolve the issues they were interested in, and
15 they signed off on it. And I suspect that letter is part
16 of the record. If it isn't, it can be.

17 MR. SOFAT: Mr. Hearing Officer, I don't have
18 any further questions.

19 HEARING OFFICER: Thank you, Mr. Sofat.
20 Mr. Blanton, do you have any cross-examination for this
21 witness?

22 MR. BLANTON: Yes. Is it all right if I sit
23 here?

24 HEARING OFFICER: It's all right.

1 MR. BLANTON: May I approach the witness?

2 HEARING OFFICER: Yes, you may.

3 CROSS-EXAMINATION

4 BY MR. BLANTON:

5 Q. Mr. Frevert, I've handed you some documents
6 that we've marked as Exhibits BBCC 9, 10, 11, 12, and 13.

7 Do you have those?

8 A. Yes, I do.

9 Q. Mr. Sofat asked you about antidegradation
10 analysis as part of his questioning. Can you explain how
11 that process most formally is done within your agency on
12 permits like this?

13 A. I'll attempt to. Antidegradation is a
14 federally required component of the state's water quality
15 standards. And in its truest sense, antidegradation, I
16 believe, would be called more a policy component of the
17 standards than standard, per se.

18 The policy intent is that any increment of
19 additional pollutant loading -- any incremental pollutant
20 loading to a water resource that's a state and public
21 water resource is, indeed, a resource of the public, and
22 there should be a conscious decision of whether or not to
23 allocate that incremental loading to any particular
24 entity or not. And that conscious decision should

1 involve some general principles as stated in the state's
2 policy.

3 Q. In carrying out that policy, was there a
4 particular individual within your agency who was assigned
5 initial responsibility for doing a nondegradation
6 evaluation?

7 A. It was probably Scott Twait.

8 Q. I would like you to look at Exhibit BBCC 9
9 and tell me what that is, please.

10 A. That appears to be Scott's initial review of
11 the nondegradation -- of the antidegradation issues
12 related to this permit application dated July 10th, the
13 year 2000.

14 Q. And who is Larry Crislip?

15 A. Larry Crislip is one of our more
16 distinguished mine staff who is responsible for
17 processing and issuance of NPDES permits for mining
18 activities in the state of Illinois.

19 MR. BLANTON: We offer Exhibit BBCC 9. I've
20 given copies to other counsel. I would note that this
21 document appears in the administrative record at pages
22 710 and 711.

23 HEARING OFFICER: Mr. Ettinger?

24 MR. ETTINGER: No objection.

1 HEARING OFFICER: Mr. Sofat? That's admitted.

2 (Whereupon, BBCC Exhibit Number 9 was marked
3 for identification.)

4 BY MR. BLANTON:

5 Q. Mr. Frevert, could you look at Exhibit
6 BBCC 10?

7 A. Yes.

8 Q. What is that, please?

9 A. In reality, that is a supplement to the
10 July 10th memo from Scott Twait to Larry Crislip.

11 Q. Can you explain that?

12 A. It's also from Scott to Larry identifying
13 some additional considerations and supplemental
14 evaluation he went through at that stage of his
15 contribution towards the permit review for the particular
16 issue of the nondegradation standard.

17 Q. And what circumstances prompted this
18 supplemental review?

19 A. I believe at that particular point in time we
20 had made an administrative decision to proceed to a
21 public hearing, and we wanted additional information
22 available to facilitate the public hearing process.

23 MR. BLANTON: We offer Exhibit BBCC 10. I'm
24 providing copies to counsel.

1 HEARING OFFICER: Mr. Ettinger?

2 MR. ETTINGER: No objection.

3 HEARING OFFICER: Mr. Sofat?

4 MR. SOFAT: No objection.

5 HEARING OFFICER: That will be admitted.

6 (Whereupon, BBCC Exhibit Number 10 was marked
7 for identification.)

8 BY MR. BLANTON:

9 Q. As part of the review process of this permit,
10 were other agencies other than the ones you've mentioned
11 which, I believe, so far is U.S. EPA and I think that's
12 all you've mentioned so far, were there other state --
13 were there other federal agencies given an opportunity to
14 comment on the permit?

15 A. Well, every, every citizen of the free world
16 had an opportunity to see our public comment and weigh in
17 on the issues. We did not -- to the best of my
18 recollection, we did not specifically contact any other
19 federal agencies. As I'd stated, we at some point opened
20 a dialogue with Illinois Department of Natural Resources
21 which is the state agency that administers the Endangered
22 Species Act in Illinois.

23 Q. One of the documents you have in front of
24 you -- mine aren't numbered -- appears to be a memo from

1 you and Bill Hammel to a Brett Schmidt dated October 27,
2 2000. Do you have that document?

3 A. Yes, I do.

4 Q. What exhibit number is it, please?

5 A. Number 11.

6 Q. At this bottom -- excuse me. Do you recall
7 sending this document to Mr. Schmidt?

8 A. No, I do not. I don't know -- I don't recall
9 who Brett Schmidt is. I believe at one point in time
10 Bill Hammel forwarded me an e-mail of some questions he
11 had received from a citizen. That citizen may be this
12 Brett Schmidt. I provided some information to Bill, and
13 perhaps Bill forwarded that back to this gentleman under
14 my name and his. That's the best of my recollection.

15 MR. BLANTON: I'll note for the record this
16 document is found in the administrative record at page
17 917, and I offer Black Beauty -- BBCC Exhibit 11.

18 MR. ETTINGER: I don't object, but I do want
19 to state for the record that my failure to object to this
20 shouldn't be construed as implying that I think that
21 anything that's in the public record is outside of this
22 hearing; so, technically, I believe all of these things,
23 because they are part of the public record and the
24 permit, would be admissible whether they were offered in

1 this hearing or not.

2 HEARING OFFICER: That's noted. But no
3 objection for this?

4 MR. ETTINGER: I don't object to him offering
5 an additional copy of this document into the record, but I
6 am just saying that I don't want it to be construed that
7 if somebody later in the proceeding, as part of a brief or
8 something, refers to a document that was part of what the
9 agency certified as the public record that that was
10 somehow objectionable because it wasn't offered today.

11 HEARING OFFICER: Okay. I think I understand
12 what you're saying. Mr. Sofat?

13 MR. SOFAT: We have no objection to this
14 document.

15 THE WITNESS: Could I --

16 HEARING OFFICER: No, sir, sorry. That will
17 be admitted.

18 (Whereupon, BBCC Exhibit Number 11 was marked
19 for identification.)

20 BY MR. BLANTON:

21 Q. Mr. Frevert, if you look at the last
22 paragraph --

23 A. Okay.

24 Q. -- of Exhibit 11, it says, "The comments on

1 the draft permit were solicited from U.S. Fish and
2 Wildlife Service and U.S. Corp of Engineers, and your
3 response is" -- did you see that?

4 A. Yes, I see that.

5 Q. Does that refresh your recollection as to
6 whether or not the agency solicited comments from certain
7 of their agencies?

8 A. Yes, it does a little. I, I know I did not
9 specifically carry out that activity, but I might have
10 asked Scott Twait to make sure that he contacted these
11 organizations and asked for their input.

12 Q. To the best --

13 A. You're testing the best of my recollection.

14 Q. That's all we can do. And is the best of
15 your recollection that there were no responses received?
16 Is that an accurate statement at the bottom?

17 A. Yes. And again, at that time it must have
18 been the best of my recollection.

19 Q. I would like to next follow up on a few
20 questions that Mr. Sofat asked you. First, the subject
21 of the Georgetown water supply had come up, and I believe
22 your testimony was that the agency had looked at that
23 issue and concluded that the permit terms and conditions
24 were sufficient to address that issue.

1 Can you tell us more about the agency's
2 reasoning and bases for saying -- for concluding that the
3 permit terms and conditions were adequate to protect the
4 Georgetown water supply?

5 A. The specific drinking water supply problem
6 related to the Georgetown Reservoir pertained to high
7 nitrates and eutrophication within the lake that may
8 result in test problems or treatment difficulties at the
9 water treatment plant. The parameters contained in the
10 storm water runoff that would be discharged throughout
11 003 under this permit are not believed to have any
12 ability to exacerbate or, or really affect those two
13 conditions in any way, shape or form.

14 Q. Were you here this morning when Mr. Moore
15 testified that at least part of the problem with the
16 Georgetown water supply were metals?

17 A. I believe I heard that comment.

18 Q. And I take it from your testimony just now
19 you do not agree with that assessment of the Georgetown
20 problem as stated by Mr. Moore?

21 A. The best of my recollection, metals is not a
22 problem for the palatability or the meeting of drinking
23 water standards for the Georgetown supply.

24 Q. You also told Mr. Sofat that the agency had

1 concluded that the whole effluent toxicity test for
2 monitoring was not a proper tool for this type of
3 discharge, if I heard you correctly. Why is that?

4 A. We don't -- the agency does not believe that
5 the whole effluent testing is a particularly reliable or
6 proven monitoring mechanism to predict any significant --
7 or any problems with confluence relating to storm water
8 discharge.

9 Q. And what leads you to that conclusion -- you,
10 the agency?

11 A. Some of the complexities of administering the
12 test and getting good, reliable performance in the test
13 and maintaining conditions that are conducive to the
14 organisms being functional in that test.

15 Q. What are the other kinds of discharges for
16 which, under some circumstances, whole effluent toxicity
17 testing would be an appropriate tool and use?

18 A. We use whole effluent toxicity testing in the
19 state of Illinois as a screening or monitoring mechanism
20 to deal with a number of industrial type operations and
21 also some POTWs, or publicly owned treatment works, which
22 are a combination of domestic wastewater and industrial
23 wastewater. Typically, we use them as a screening
24 mechanism in conjunction with other monitoring

1 mechanisms. Seldom are they of much value in and of

2 themselves, but they're part of a framework of a
3 monitoring strategy that we find some useful applications
4 for.

5 Q. On those discharges of an industrial
6 nature -- what's a POTW, just for the record?

7 A. Publicly owned treatment works. It's a
8 facility that primarily treats human wastewater, domestic
9 solution.

10 Q. Those are types of discharges that are, for
11 the most part, ongoing, continuous, not episodic like the
12 storm water discharge from this monitoring?

13 A. That is correct.

14 Q. And that would have some significance as to
15 what you're actually trying to find out from the whole
16 effluent toxicity test, isn't it?

17 A. I believe that is correct.

18 Q. Because what you're wanting to do with that
19 test is find out how do the organisms of concern respond
20 to waters that are in a condition on an ongoing basis,
21 right?

22 MR. ETTINGER: I'm going to object to leading
23 at this point.

24 MR. BLANTON: It's cross-examination,

2 I'm sorry, Your Honor.

3 MR. ETTINGER: Cross-examination of a
4 co-respondent?

5 MR. BLANTON: Yeah.

6 I'm sorry, Your Honor, I didn't mean to
7 respond to that.

8 HEARING OFFICER: That's okay. It's not "Your
9 Honor" as much as I wish it would be. But it's --
10 "Mr. Hearing Officer" would be fine, and I am going to
11 overrule the objection.

12 Do you recall the question, sir?

13 (The preceding question was read back by the
14 court reporter.)

15 A. That's generally correct, yes.

16 Q. And if you have a storm water discharge like
17 one from this mine that is predicted and expected to
18 occur only, I believe, 8.9 or 10 times a year, that would
19 not be the sort of ongoing, permanent alteration of the
20 quality of water in the receiving waters like those where
21 the agency does use WET as a tool, right?

22 A. The toxicity test is designed to, to try to
23 measure a response to a specific exposure, period. And
24 in order to make this test of much validity at all, you

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1 have to have some standard laboratory procedures and some
2 stability within the exposed materials and exposed

3 concentrations for that exposure period. And it results
4 in just an incredible amount of complexity and
5 uncertainty. It makes a relatively expensive monitoring
6 tool probably -- well, in my mind, definitely less
7 reliable than other alternatives to look at water quality
8 and characteristics of wastewater during those short-term
9 discharges.

10 Q. And I believe you told Mr. Sofat in your
11 direct testimony that you believe the permit does contain
12 other conditions that address those issues in a better
13 way than the WET test would, right?

14 A. And that is why we issued the permit the way
15 we did.

16 Q. And explain in a little more detail what
17 those other conditions and terms are and the alternatives
18 that you think address it better.

19 A. We have chemical monitoring which we believe
20 is perhaps more proven, more applicable to these types of
21 intermittent and infrequent discharges. There's also a
22 special condition that requires a very broad, broad range
23 of chemicals be looked at, coupled with some requirements
24 there be some introductory or preliminary biological

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1 inventories; and then if those chemical monitoring
2 results show some spikes above what we believe were

3 relatively conservative triggers, we would require some
4 supplemental biological monitoring, again, as a comfort
5 level to demonstrate the integrity of the aquatic
6 community in that receiving body.

7 Q. In your testimony earlier about mixing zones
8 under condition 11-A, you stated, if I heard you
9 correctly, that the way the agency is treating the mixing
10 of the discharge from the mine at outfall 3 and the
11 receiving waters of the unnamed tributary was consistent
12 with the Board's position on mixing of effluent with
13 receiving waters. Can you explain a little more about
14 what that was based on?

15 A. My reading of the Board regulations is that
16 particular provision contains within it both the concept
17 of specifically designating a geographical area that you
18 can call a mixing zone and also the provision for some
19 allowed dilution or allowed mixing of a wastewater before
20 the water quality standard specifically applied. It does
21 not involve a geographic designation of a mixing zone.

22 Q. And what --

23 A. And we refer to that within the agency as
24 allowed mixing as a component of 302.105, I believe it

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1 is.

2 Q. Along the same lines, there was -- you had
3 indicated earlier that the permit does not require --

4 although it does not prohibit -- continuous monitoring as
5 a way of ensuring compliance with the 3:1 minimal
6 dilution ratio between the receiving waters and the
7 effluent or the discharge. What are the methods that
8 were considered adequate so that continuous monitoring
9 was not required?

10 A. I believe the option was for the permittee to
11 determine that, but certainly calibration and direction
12 of staff in a receiving stream to record stream flows and
13 similar measurement techniques in the overflow structure
14 itself, sometimes a control structure, be it a valve or
15 whatever, and whatever hydrologic measurement techniques
16 they choose to use and the type of discharge structure
17 they design are available.

18 We don't believe that either one of these
19 scenarios are going to be such that there's going to be
20 radical variation of flows from one second to the next,
21 such that periodic monitoring is predictable of some
22 length of operating period.

23 Q. You also indicated earlier that on the issue
24 of -- these sort of got mixed together. I believe what

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1 you were talking about was alternatives to the treatment
2 structures that are being proposed -- that were proposed
3 by Black Beauty and are, in fact, approved on

4 sedimentation basins. You looked at different
5 alternatives, and you required different features for
6 these structures. Do you recall any details about that?

7 A. Excuse me, that is correct. In terms of
8 alternatives, I'm speaking of options that we thought
9 were reasonable and feasible to consider as ways to
10 accommodate the, the mining activity, per se, that would
11 result in less pollutant discharge to the stream. And
12 some of those provisions we considered we thought were
13 feasible and required.

14 And perhaps two specific components of that,
15 I thought, were additional storage capacity within the
16 sedimentation basins, so the efficiency of those
17 sedimentation basins was improved. The necessity to
18 discharge was reduced because there was more storage time
19 in, of course, the control structure such that those
20 discharges can be physically stopped if the 3:1 stream
21 conditions were not present. Those are features that we
22 do not routinely require to be installed in facilities of
23 this nature.

24 Q. So, you're saying that the basin from which

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1 outfall 3 -- with which it is associated won't just
2 automatically overflow when it rains enough?

3 A. There are facilities within the state of
4 Illinois and other states where there is no control

5 structure and no way to exert operational control and
6 ability to stop or consciously release the discharge from
7 that facility, yes. This facility does have that
8 provision and that requirement.

9 Q. On the question of economics of the
10 situation, what is your understanding of what the actual
11 test is under the state's current antidegradation policy
12 as to what role economic benefit and other benefits of
13 this activity which may lead to degradation of water
14 quality to some extent, what's the test, what's the
15 balancing that's taking place?

16 A. It is a balancing, but I don't believe there
17 is a specific number, equation, cut-off point, any other
18 hard-and-fast decision-making tool that would apply
19 universally to all the potential permit applications we
20 have to review.

21 Q. I'm sorry for the awkwardness of this
22 question, but I'm not as familiar with the policy as you
23 are. I know that there is the word "necessary" that
24 Prairie Rivers likes to use a lot in this proceeding

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1 that's affiliated with some larger phrase. Do you
2 know -- it's like necessary economic or social
3 development, something like that? That's the concept.

4 A. I believe the concept is to consciously

5 determine that the level of pollutant release which
6 you're authorizing is necessary -- reasonably necessary
7 and technically economically feasible to accomplish the
8 social and economic goals you're going to -- such as
9 jobs, prosperity, citizens' freedom to use this property
10 consistent with other social goals.

11 Q. Do you know what the coal from this mine is
12 going to be used for?

13 A. I would assume it's a source of energy.

14 Q. And do you know what the energy will be used
15 for?

16 A. I presume it could be used in the steel
17 industry, could be used in the electric-generating
18 industry. I suppose it -- well, I don't know if it's
19 going to be used for home heating anymore. My
20 presumption is majority of the coal in Illinois that's
21 mined is probably used for electric generation.

22 Q. Does the agency believe that the generation
23 of electricity for use by businesses and individuals in
24 the state of Illinois is a necessary economic and social

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1 benefit?

2 A. The agency recognizes the worth of
3 electricity to Illinois's current society, yes.

4 Q. Prairie Rivers has complained and objected to
5 the permit on lack of public access after the draft

6 permit had been issued and they had a chance to
7 participate in that; they have essentially asked for a
8 further review and like -- they want a further -- as I
9 understand their position, they want a further review of
10 the final permit very similar to the one that they had on
11 the draft permit.

12 A. Isn't that what we're doing today?

13 Q. Well, that's --

14 A. I'm sorry. I'm not supposed to ask
15 questions.

16 Q. You explained the process in response to
17 Mr. Sofat that the regulations and the applicable law for
18 the processing of these permits in Illinois provides for
19 public hearing after a draft permit is issued, right?

20 A. That's correct.

21 Q. And it does not provide for public hearing in
22 the same sense after the final permit is issued, does it?

23 A. It provides an appeal process, not an
24 additional review process; that is correct.

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1 Q. And so to the extent Prairie Rivers wants
2 another public hearing and another comment period like
3 the one they had on the draft permit, they're asking for
4 something that is not authorized by the applicable
5 process, right?

6 A. There may be an occasional circumstance in
7 operating a permit program with over 3,000 registered
8 permits that one could envision a scenario where some
9 issue -- some unique issue or some other circumstance
10 came up that may justify the agency going to a second
11 hearing. It's not a matter of practice. I don't believe
12 there is a prohibition against our having a second
13 hearing, but as a matter of normal operation we do not do
14 that. We review the process, as I explained it earlier.

15 Q. And Prairie Rivers' remedy is what we're
16 doing today?

17 A. I don't know if it's Prairie Rivers' remedy
18 or if it's the remedy that's created by the procedural
19 rules or our regulatory process.

20 Q. As I understand what you described as a joint
21 permit between the state and federal authorities and what
22 you've said about your role as coordinating, as I
23 understand it, there are numerous agencies who have
24 agreed to the terms of this and related permits so those

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1 permits could all be issued at the same time, at the end
2 of 2000, right?

3 A. That is correct.

4 Q. Who are the agencies, federal and state, who
5 have agreed to the terms of this and related permits?

6 A. There may be a number of them. The specific

7 agencies that I sought out coordination with and
8 consensus-building with is the U.S. EPA's Region 5 permit
9 and water division office people, Illinois Department of
10 Natural Resources Endangered Species people, Illinois
11 Department of Natural Resources, Office of Mines and
12 Minerals people. Those are the -- those are the three
13 organizations that come to light as the specific focal
14 point of our collaboration.

15 There probably were other organizations I
16 dealt with to one extent or another along the way, but
17 those were the, the organizations that I felt necessary
18 to have a common understanding of what, what we were
19 doing was being consistent with the legal requirements
20 that the program is designed to address.

21 Q. I think you still have a couple documents in
22 front of you, and I think the first one would be BBCC 12.
23 What is that?

24 A. That's correct.

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1 Q. What is that?

2 A. It looks to me like a copy of an e-mail from
3 myself to Scott at U.S. EPA's Region 5 office.

4 Q. And did that involve the subject of this
5 permit and your efforts to coordinate approvals for it by
6 all independent parties?

7 A. That's correct.

8 MR. BLANTON: We offer BBCC 12, of which I do
9 not have multiple copies. If anyone wants to look at
10 it --

11 HEARING OFFICER: Mr. Ettinger, do you need to
12 see that?

13 MR. ETTINGER: Is it in the record?

14 MR. BLANTON: Yes. There's a record number on
15 it.

16 MR. ETTINGER: Just read the record number.

17 THE WITNESS: 000944. Is that the right
18 number?

19 MR. BLANTON: Yes.

20 HEARING OFFICER: Mr. Ettinger?

21 MR. ETTINGER: Sorry. Was I called on to do
22 something?

23 HEARING OFFICER: I was waiting to see if you
24 had an objection to this exhibit.

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1 MR. ETTINGER: Part of the public record.

2 HEARING OFFICER: I still have to ask you if
3 you have an objection.

4 MR. ETTINGER: No. No, I do not.

5 HEARING OFFICER: Mr. Sofat?

6 MR. SOFAT: No, I don't.

7 HEARING OFFICER: Okay. That will be

8 admitted.

9 (Whereupon, BBCC Exhibit Number 12 was marked
10 for identification.)

11 BY MR. BLANTON:

12 Q. Mr. Frevert, could you look at the document
13 that's BBCC 13?

14 A. Okay.

15 Q. What's that?

16 A. It's a letter from Jody Traub to Jim Park.
17 Jody Traub is the director of the water division,
18 Region 5. Jim Park is the recently retired chief of
19 Bureau of Water, my agency.

20 Q. And is this the letter by which U.S. EPA
21 withdrew its objection to the permit?

22 A. I believe it is, yes.

23 MR. BLANTON: We offer Exhibit BBCC 13.

24 HEARING OFFICER: Mr. Ettinger?

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1 MR. BLANTON: And for the record, what pages
2 does that appear in the administrative record?

3 THE WITNESS: 000942.

4 MR. ETTINGER: No objection.

5 MR. SOFAT: The agency has no objection.

6 HEARING OFFICER: That will be admitted as
7 well.

8 (Whereupon, BBCC Exhibit Number 13 was marked
9 for identification.)

10 BY MR. BLANTON:

11 Q. Is the author of that letter the head of the
12 division or portion of U.S. EPA Region 5 in Chicago that
13 had lodged the objection to the draft permit?

14 A. I'm sorry. What's the question again?

15 Q. Is the author of that letter the head of the
16 division of U.S. EPA Region 5 that lodged the objection
17 in the first place?

18 A. I'm not entirely sure I know who the author
19 is. I know Jody Traub's the head of the division that
20 lodged the objection. And Jody Traub approved the --
21 this letter that withdrew the objection.

22 MR. BLANTON: Those are all the questions I
23 have of this witness at this time.

24 HEARING OFFICER: Mr. Ettinger, your cross.

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1 MR. ETTINGER: Sure. I'll work with the
2 permit awhile. That's been marked now --

3 Off the record.

4 HEARING OFFICER: Let's go off.

5 (A discussion was held off the record.)

6 MR. ETTINGER: IEPA 1 --

7 HEARING OFFICER: Are you ready to go back on
8 the record now, Mr. Ettinger?

9 MR. ETTINGER: Yes, I'm sorry.

10 CROSS-EXAMINATION

11 BY MR. ETTINGER:

12 Q. IEPA Exhibit 1, is that still in front of
13 you, Toby? That's the permit.

14 A. I have the permit. It's an exhibit, but I
15 don't see the Number 1 there.

16 MR. SOFAT: That is the letter.

17 A. Okay. I have it.

18 Q. It's numbered 967 through 980. You said that
19 those numbers for the effluent notifications, where do
20 those come from?

21 A. My recollection is these numbers come from
22 Subtitle D.

23 Q. Do all of the numbers come from Subtitle D?

24 A. I, I don't know. I can't give you an exact

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1 answer on that right now.

2 Q. Well, do you know if those numbers have
3 changed in any way between the draft permit and the final
4 permit?

5 A. I would have to review the draft permit. I
6 believe -- I believe we did reduce one number, one
7 parameter.

8 Q. In writing the permit, did you make an effort

9 in selecting these numbers to make them as low as the
10 company could reasonably be expected to meet?

11 A. That was our objective, yes.

12 Q. That was your objective. So, did you look at
13 what the effluents were at other coal mines around the
14 state in deciding what could be expected?

15 A. I did not personally, but the staff working
16 with me on this permit did, yes.

17 Q. So, you wouldn't expect any of these numbers
18 to be substantially higher than the effluents from the
19 Riola mine that the same company operates?

20 A. We would have to discuss what was intended by
21 the word "substantial." There probably is some, some
22 allowance above the actual numbers at whatever mines they
23 used as the representative surrogates, and I believe
24 Riola was one of those.

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1 Q. Okay. In condition or rule number one below
2 the set effluent limits, there's 1-A. And am I reading
3 that correctly to say that these effluent limits apply
4 when this condition 1-A applies, that the precipitate --
5 that there's a discharge caused by a precipitation less
6 than or equal to one year, 24-hour precipitation?

7 A. I think you're reading that correctly, yes.

8 Q. And am I correct that those limits don't
9 apply as to larger precipitation events?

10 A. I believe paragraph 1-B governs discharge
11 under those large events.

12 Q. And under the larger events, there's only a
13 few limits for settleable solids and pH; is that correct?

14 A. That's correct.

15 Q. Okay. Under 1-D it says, "Following such
16 precipitation event but not within 24 hours of cessation
17 of such event, the discharge shall be monitored and shall
18 comply with the limitations specified in the above
19 table." What does that mean?

20 A. I believe the intent there is to define at
21 what point that the same event is over and you're back
22 under the limitations presented in the table above.

23 Q. And what constitutes the cessation of the
24 event?

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1 A. These are -- these are significant events and
2 may be -- may be flooding conditions in the watershed
3 itself. For the most part, it's cessation of the
4 immediate discharge resulting from the actual
5 precipitation event itself.

6 Q. When would the monitoring be done at this
7 point? Within -- at 25 hours after the cessation of the
8 event?

9 A. We're talking now about --

10 Q. Says, "The discharge shall be monitored and
11 shall comply with the limitations specified in the above
12 table."

13 I guess my question is, when shall it be
14 monitored to comply with the limitations specified in the
15 above table? Seems to imply that sometime not within 24
16 hours of cessation of the event, it shall be monitored;
17 and I'm asking if I were to try and apply this permit,
18 when would I do that monitoring?

19 A. I believe after the completion of that
20 24-hour period, at any point from that point forward,
21 that monitoring can take place.

22 Q. So, it could take place 25 -- it could take
23 place 24 hours or 48 hours after the cessation of the
24 event and still be in compliance with my monitoring?

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1 A. I believe either one of those alternatives
2 would -- the application of limitations for either one of
3 those sampling events would be the table itself rather
4 than the paragraph, if I understand your question
5 properly. Once that event is over, any monitoring that
6 takes place after that, whether it be an hour later, a
7 month later, a hundred years later or during the life of
8 the permit, again, you're no longer eligible to operate
9 under paragraph B. Now you're back under the permit.

10 Q. Okay. So how would I know, as the person

11 operating under this permit, when the 24 hours had ended,
12 and I had to be under the tighter limits?

13 A. I think what you're getting at is, at what
14 point does that event end? What's the official -- what's
15 the official closure of the event that's this extreme
16 emergency?

17 Q. That's my point. As I understand the permit
18 -- and please correct me if I'm wrong -- the certain set
19 of effluent limits apply when there's a discharge caused
20 by precipitation of less than a certain amount, and
21 another set of weaker limitations apply after the
22 cessation of a larger precipitation event. And I'm
23 asking, how, as the operator under this permit, I would
24 know which set of limitations apply?

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1 A. I'm not sure I have an answer for you with
2 this particular time. I believe there's consultation and
3 documentation to trigger these events back and forth.

4 Q. Okay. Now, as a member of the public --

5 A. However -- well --

6 Q. As a member of the public, if I were seeking
7 to enforce this permit and make sure that that condition
8 wasn't violated, how would I learn of that?

9 Let me strike that. How would I learn of a
10 violation of this condition as a member of the public?

11 A. Well, there are options. Of course, you can
12 go to the self-monitoring data and review that monitoring
13 and make your own allegation of what applies (sic). The
14 agency has the authority and the staff to do monitoring.
15 There may be provision for your own monitoring if a
16 citizen wanted to do a monitoring program.

17 Q. Okay. Let's say I'm a member of the public,
18 and I have seen that there was a discharge that exceeded
19 some of the numeric limits, one or more of the numeric
20 limits on 1-A -- on which 1-A covers but are not covered
21 by 1-D.

22 How would I know reading the discharge
23 monitoring report or some other document whether, in
24 fact, there had been a violation or not?

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1 A. Well, I can tell you from my perspective in
2 doing the -- carrying out the compliance responsibilities
3 for our agency, we would -- you would specifically
4 communicate with the permittee, probably with the
5 presumption that this is not an extreme event unless you
6 have the documentation to demonstrate it's an extreme
7 event and, therefore, the table applies --

8 Q. Okay.

9 A. -- and they would have the opportunity to, to
10 demonstrate why paragraph D was in operation. My
11 presumption would be paragraph B is not in operation

12 unless you can document that ten-year, 24-hour event took
13 place.

14 Q. Now, as to all of these, it says, "The
15 discharge caused by the precipitation." I presume that
16 something can be caused by the precipitation without
17 occurring strictly during the precipitation; is that
18 correct?

19 A. I believe that's correct, yes.

20 Q. You could have a big rain, and the water's
21 going to continue to flow off the land for a period after
22 the rain stops?

23 A. And in reality, that's the way it works.

24 Q. Right.

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1 A. And each event will be different.

2 Q. Okay. And so how is the import of this
3 clause then that any, any discharge more than 24 hours
4 after it stops raining in one of these rain events is
5 governed by the limits above, or are they limited -- are
6 they covered by the limits below?

7 MR. SOFAT: Mr. Hearing Officer, I'm going to
8 object.

9 MR. ETTINGER: That wasn't one of my better
10 questions. I'll try again.

11 HEARING OFFICER: You withdraw your -- you're

12 going to re-ask it?

13 MR. ETTINGER: I'll withdraw my question.

14 HEARING OFFICER: Give it another shot,

15 Mr. Ettinger.

16 MR. ETTINGER: I'll give it another try here.

17 BY MR. ETTINGER:

18 Q. Okay. There was a big rain, a big rain that

19 comes under B rather than A.

20 A. Uh-huh.

21 Q. Water keeps running after -- for some period

22 after the big rain; there continues to be a discharge.

23 My question is, is -- what's the trigger that allows me

24 to know when the 24-hour period has run so that I'm under

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1 the A limits rather than the B limits?

2 A. The question -- I've got to understand. The

3 question is, a large event comes through, runs its course

4 and moves on, the facility continues to discharge?

5 Q. Right.

6 A. The storm stops, but the discharge doesn't

7 stop?

8 Q. We all agree that --

9 A. At what point --

10 Q. At what point does the discharge cease to be?

11 A. Revert back to paragraph A? I believe

12 approximately 24-hour time period as the systems are

13 designed for that kind of storage.

14 Q. So, if I've got discharge more than 24 hours
15 after it stops raining, it's got to be under the A
16 limits, not the B limits?

17 A. The intent here is to recognize there are
18 certain design and retention parameters to this facility.
19 And when the system's back, when the operating load is
20 consistent with those design parameters, it's expected to
21 perform that way; so you're back under paragraph A and
22 the table.

23 Q. And now as a citizen looking at the permit --
24 I've done this; you've probably done it. You look at the

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1 discharge monitoring reports, and you see numbers, okay?
2 I've got a number which is higher than one of the A
3 numbers -- the numbers governed by A, but I know that
4 there was a big storm in that period. How will I be able
5 to tell when the A numbers cover and when the B numbers
6 cover?

7 A. You as a citizen?

8 Q. I'm a citizen; I'm looking at the DMRs.

9 A. Well, you can -- you could offer your own
10 speculation, or you could consult with the agency and ask
11 for clarification of what applies, or presumably you can
12 allege a violation and proceed to sort it out that way.

13 Q. Okay. The permit as to the -- as to the
14 large rain events and then, under page three and four of
15 the permit, talks about settleable solids. What are
16 settleable solids?

17 A. That's material that readily will settle out
18 of water suspension under certain test parameters
19 specified by standard method for conducting a test. That
20 may be -- some people use the word "readily settleable."
21 There are solids that are amenable to physical separation
22 and gravity settling out of the water.

23 HEARING OFFICER: Mr. Ettinger?

24 MR. ETTINGER: Yes.

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1 HEARING OFFICER: I hate to interrupt, but the
2 court reporter has told me she needs to change her paper.

3 MR. ETTINGER: I think it's a great time to
4 break.

5 HEARING OFFICER: Would you like five minutes?

6 MR. ETTINGER: A lawyer's five minutes.

7 HEARING OFFICER: Let's go off the record for
8 a second.

9 (A discussion was held off the record.)

10 HEARING OFFICER: We are back on the record
11 after a short recess at approximately 2:25 p.m. We're
12 still continuing with the cross-examination of this
13 witness by Mr. Ettinger.

14 Let's go off.

15 (A discussion was held off the record.)

16 HEARING OFFICER: We are back on the
17 record. And sorry for the interruption. Mr. Ettinger, it
18 is still your witness.

19 Sir, let me remind you, you are still under
20 oath.

21 BY MR. ETTINGER:

22 Q. Among the limits in the -- on this page two
23 are limits for iron, and there are three 30 -- I guess
24 three milligrams per liter, 30-day average, and six

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1 milligrams per liter for daily maximum, and it says
2 below -- behind iron in parentheses, that's total. I
3 think we heard earlier that there's a difference here
4 between total and dissolved iron, or there could be, and
5 that the Illinois Water Quality Standard actually works
6 off of the dissolved iron in -- I'm sorry, that the
7 Illinois Water Quality Standard is actually stated in
8 terms of dissolved iron. Is that all correct?

9 A. I believe that's correct.

10 Q. Why is the agency measuring total iron in the
11 effluent limits if the Water Quality Standard is based on
12 total iron?

13 A. Because I believe that's the technology-based

14 discharge limitation contained in Subtitle D. Also,
15 there's a U.S. EPA provision that requires metals
16 monitoring for permit compliance basis in terms of total
17 amount.

18 Q. On page five of the permit, there is a page
19 entitled -- well, it's got the permit number, then
20 Construction Authorization. Is it typical for there to
21 be a construction authorization in an NPDES permit?

22 A. For new facilities and expansions of existing
23 facilities there is a State construction authorization
24 requirement in the regulations. That construction

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1 authorization is viewed as directly tied to an integral
2 two, the discharge authorization, and we view this
3 construction authorization as a component within the
4 NPDES authorization.

5 Q. So, all of these terms within the
6 construction authorization are part of the NPDES permit
7 like everything else in the permit?

8 A. In, in the nonmine instances, we issue
9 separate construction authorization documentation. In
10 the case of mining discharges, some of those construction
11 authorizations are within the body of the discharge
12 permit, is my understanding.

13 Q. Does this -- is this permit already in
14 effect?

15 A. Yes, I believe it is.

16 Q. Are all the effluent -- are the effluent
17 limits specified in the permit in effect?

18 A. In my opinion, yes, they are.

19 Q. Are you aware of another opinion?

20 A. I've been around 30 years. There's always
21 another opinion.

22 Q. Okay. Looking down now -- I'm on page five
23 still -- it talks about, "These facilities were
24 consistent with preparation plant," some other things,

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1 "and three sedimentation ponds in series."

2 What's your understanding of what is meant by
3 "in series"?

4 A. Discharge from the first sedimentation pond
5 flows into the second sedimentation pond which flows into
6 the third sedimentation pond. The only authorized
7 discharge to water in the state is from the third
8 sedimentation pond.

9 Q. Okay. It says here, "The discharge from
10 basin 003 designated as outfall 003 will be classified
11 acid mine drainage from coal refuse piles and will report
12 to an unnamed tributary to Little Vermilion River." Why
13 is it classified as acid mine drainage?

14 A. I believe that's a specific classification

15 that came directly from Subtitle D regulations.

16 Q. What, what is there about this discharge that
17 makes it acid mine drainage?

18 A. I don't know that it is acid mine drainage.
19 It's a formal classification; I believe it brings with it
20 pH limitations.

21 Q. Well, what causes it to be classified as acid
22 mine drainage? What characteristic does it have, or not,
23 that makes it fall into that category?

24 A. I can't give you a direct answer to that

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1 question. I coordinated the review, but I didn't
2 specifically focus on that one aspect with this permit.

3 Q. Are you aware of any study as to how much
4 water will enter the mine?

5 MR. BLANTON: Object to the form of the
6 question. I don't understand the phrase "enter the mine."

7 HEARING OFFICER: Mr. Ettinger, can you
8 rephrase that, please?

9 BY MR. ETTINGER:

10 Q. Okay. I think we can work on that. Are you
11 aware of any study of how much groundwater will enter the
12 mine?

13 A. Not personally, no.

14 Q. Are you aware from your background that a
15 frequent occurrence in mining is the groundwater gets

16 into the mine?

17 MR. BLANTON: Objection, not relevant.

18 MR. SOFAT: Objection.

19 HEARING OFFICER: Mr. Ettinger?

20 MR. ETTINGER: Do you want me to speak to that
21 objection?

22 HEARING OFFICER: He objected on relevance.

23 I'm wondering how it's relevant. I don't see the
24 relevance off the top of my head, but I'm willing to be

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1 convinced if you can convince me.

2 MR. ETTINGER: Well, something is going to be
3 done with the groundwater that enters the mine. We're
4 going to find out, and that's why I'm asking that.

5 HEARING OFFICER: I'm going to have to sustain
6 that objection at this point in time.

7 MR. ETTINGER: Okay.

8 BY MR. ETTINGER:

9 Q. Are you aware that the groundwater that
10 entered the mine will be put into basin 003-A?

11 A. I recall some discussion of potential for
12 pumpage of water from the underground mine, some
13 discussion of the extent to which that is really a
14 substantive issue here. I know it varies from mine to
15 mine. Some geology is such that there's a significant

16 amount of mine pumpage that has to be dealt with. Other
17 instances, it's little or nothing. I know the staff
18 dealt with that issue.

19 My recollection is it was viewed as
20 relatively little mine pumpage would be anticipated from
21 this facility, and it would go into one of the basins.

22 Q. And are you aware of any study which
23 attempted to quantify how much mine pumpage would go into
24 the basin?

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1 A. I suspect that was addressed. I'm not
2 personally familiar with that.

3 Q. So, sitting here today, you don't know of any
4 study that's in the record that speaks to the amount of
5 mine pumpage that will go into that basin that's
6 connected to the outfall?

7 A. I believe that issue was dealt with in the
8 permit application. I don't have personal knowledge to
9 the extent that was dealt with. This is my answer.

10 Q. You do agree that the basin which will
11 receive the mine pumpage is connected to the basin from
12 which outfall 003 will flow?

13 MR. SOFAT: Mr. Hearing Officer, I object.
14 He has no personal knowledge about it whether or not
15 there is groundwater, whether or not there is a mine
16 pumpage.

17 HEARING OFFICER: Mr. Ettinger?

18 MR. ETTINGER: If he has no personal
19 knowledge, then his answer is he has no personal
20 knowledge; and I'm certainly satisfied with that as an
21 answer.

22 (The preceding question was read back by the
23 court reporter.)

24 HEARING OFFICER: I'm going to let him answer

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1 that question. Do you need it read back to you, sir?

2 THE WITNESS: Please.

3 (The preceding question was read back by the
4 court reporter.)

5 A. Yes.

6 Q. Thank you. Turning now to page six of the
7 permit, on -- there's a condition seven that states,
8 Initial construction areas in -- I'm sorry. Strike that.

9 Seven states in its first sentence, "Initial
10 construction activities in areas to be disturbed shall
11 be" -- believe it says, "for collection and treatment
12 facilities only." Do you see that?

13 A. Yes.

14 Q. Did I read that right? It should say "for"
15 rather than "or" collection and treatment facilities
16 only. Is that the import, the intent of the --

17 A. I believe that is the intent of it, yes. It
18 looks like a typo.

19 Q. What are initial construction activities?

20 A. Site preparation, construction of the storm
21 water collection basins, storm water routing patterns,
22 and other related surface site preparation activity.

23 Q. It says, "These initial construction
24 activities shall be for collection and treatment

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1 facilities only." What does that mean?

2 A. I believe the intent there was that the
3 original construction should focus on getting those storm
4 water basins constructed and in place to receive and
5 treat any storm water that subsequently came from the
6 site during other construction and operating activities.

7 Q. So, it was the intent of this permit that the
8 basins be constructed first?

9 A. That's correct.

10 Q. It says, "At such time as runoff water is
11 collected in the sedimentation pond, a sample shall be
12 checked and analyzed with the results sent to the agency
13 to show compliance with the applicable effluent and water
14 quality standards."

15 When was that to occur with regard to -- in
16 the order of construction of the mine?

17 A. I believe the intent here is to get

18 monitoring data, water quality characterization of the
19 water in the basins prior to the time you need to
20 discharge, so one could make a conscious assessment of an
21 assurance that the discharge would take place in such
22 time and nature that water quality standards were
23 protected in the receiving body.

24 Q. So, there shouldn't be any discharge prior to

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1 this collection and analysis?

2 MR. BLANTON: Object to the form of the
3 question. There's no foundation for that, and it's wrong.

4 HEARING OFFICER: Mr. Ettinger?

5 MR. ETTINGER: Mr. Frevert says he was one of
6 the people responsible for writing the permit. I'm simply
7 asking for an interpretation of the permit which is the
8 very subject that we're all here for. I have a hard time
9 finding something more relevant.

10 MR. BLANTON: I didn't say it wasn't relevant.
11 I said there was no foundation for it, and it's wrong. If
12 you read the second sentence which Mr. Ettinger skipped,
13 it explains the sequence and says that prior to the start
14 of other activities, surface drainage controls shall be
15 constructed and operated to avoid violations of the act or
16 Subtitle D. The permit, on the face of it, as
17 Mr. Ettinger well understands, says that you have to build

18 a collection pond before you can collect the runoff; and
19 if you're going to construct, there is -- and you don't
20 have a settlement basin, then you're going to have a
21 discharge. The premise of his question is false. There's
22 no foundation for it.

23 MR. ETTINGER: Well, I think Mr. Blanton's
24 testified as to his interpretation of the permit. I asked

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1 the witness. The witness is fully capable of reading that
2 sentence, too; and if he reads at this time the way
3 Mr. Blanton did, he can now explain it the way Mr. Blanton
4 attempted to so. But I would like to hear the witness's
5 answer as to what the permit means, as he was one of the
6 authors of the permit. And if Peabody Coal has a
7 different interpretation, they can argue that later.

8 MR. BLANTON: Peabody's not a party.

9 MR. ETTINGER: I'm sorry, Black Beauty mining.

10 HEARING OFFICER: I'm going to let the
11 question go forward.

12 Sir, do you remember it?

13 THE WITNESS: No.

14 HEARING OFFICER: Mr. Ettinger, can you re-ask
15 it?

16 MR. ETTINGER: I'm certain I can't re-ask it.
17 I can try and ask something close. Actually, I would
18 rather -- given there was much discussion of this

19 question, I would rather the court reporter read it back.

20 (The preceding question was read back by the
21 court reporter.)

22 HEARING OFFICER: Do you understand the
23 context of the question, sir?

24 A. I think I do. This is a standard condition

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1 that goes in all mining permits. It's not unique to this
2 facility. The intent here is that the operators know the
3 quality they're about to discharge before it's
4 discharged.

5 Q. Okay. Let's go down to -- going down to
6 condition eleven -- sorry, going back to seven, it says,
7 "Discharge from this pond is not" -- this is the last
8 sentence of condition eleven. "Discharge from this pond
9 is not allowed unless applicable effluent and water
10 quality standards are met." Is that condition in
11 operation now?

12 MR. SOFAT: Outside the scope.

13 HEARING OFFICER: Mr. Ettinger, any response
14 to the outside the scope of direct examination objection?

15 MR. ETTINGER: I am attempting to interpret
16 the permit which is the subject here, and I can't see how
17 this could be outside the scope of that. And I'm --
18 outside the scope of what? I'm asking one of the authors

19 of the permit for an interpretation of one of the permit
20 conditions.

21 HEARING OFFICER: I think the objection is it
22 was outside the scope of the direct examination elicited
23 by Mr. Sofat. If he didn't talk about it, then it's
24 clearly outside of the scope, and you can't ask about it

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1 on cross-examination. You could, of course, have called
2 this witness and elicited that testimony on your own.

3 Mr. Sofat, was it outside the scope? Explain
4 to me why it was.

5 MR. SOFAT: I agree with the Board's
6 interpretation.

7 HEARING OFFICER: No, no, no. Number one, I
8 am not the Board. I am strictly the Board's designated
9 hearing officer.

10 Mr. Ettinger, are you arguing that it was not
11 outside the scope of direct examination? That I'd
12 entertain, but --

13 MR. ETTINGER: All right. We'll go on. I'll
14 withdraw the question.

15 BY MR. ETTINGER:

16 Q. You testified during Mr. Sofat's examination
17 regarding condition eleven, and in the second sentence of
18 condition eleven, they -- it's stated that the 3:1
19 dilution requirement is stated; is that correct?

20 A. I believe so, yes.

21 Q. In the third sentence it says -- third
22 sentence, "Offsite discharge from this facility is
23 approved only at such times as sufficient flow exists in
24 the receiving stream to ensure that water quality

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1 standards in the stream beyond the mixing zone were not
2 exceeded." Is that requirement a requirement in addition
3 to the second sentence requirement of 3:1?

4 A. Perhaps the people that collaborated on this
5 particular special condition thought this was important
6 enough to say it twice because I believe the intent of
7 that sentence is the same as the sentence before it.

8 Q. So, you believe that if you meet the 3:1
9 condition, you'll have also met the Water Quality
10 Standard condition?

11 A. That is my belief, that the permit -- the
12 permit doesn't authorize exceedence of water quality
13 standards, whether my belief is right or wrong.

14 Q. Okay. Now, when this permit refers to water
15 quality standards, is this referring to the Subtitle D
16 standards or the general Water Quality Standards?

17 A. The intent here and the language as we
18 crafted it, it goes to the water quality standards that
19 apply to the water, and they are contained in Subtitle C

20 regulations.

21 Subtitle D, indeed, addresses and deals with
22 water quality standards for this specific application of
23 special condition eleven, or standard condition eleven,
24 whatever condition we're talking about. This is

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1 specifically talking about the general use water quality
2 standards that are in place to protect that stream.

3 Q. It says, Following any -- the next sentence
4 -- I'm sorry. Going back here, it says, "To ensure that
5 water quality standards in the stream beyond the mixing
6 zone will not be exceeded." My question is, where is the
7 mixing zone?

8 A. I believe I attempted to clarify that there
9 is no geographically defined mixing zone. The area in
10 the immediate proximity of the discharge pipe has been
11 recognized as an area available for allowed dilution to
12 take place.

13 Q. That's at the end of the pipe; is that your
14 interpretation? Some area outside of the end of the pipe
15 is available for dilution?

16 A. The intent here is application of water
17 quality standards and monitoring of the conditions in the
18 receiving stream to determine whether or not that
19 requirement has been met shall take place far enough away
20 from that discharge pipe to allow for mixing of that

21 discharge with the stream flow that's coming down past
22 the pipe.

23 Q. Okay. I've got a citizen water quality
24 monitor with chemical monitoring equipment, and he finds

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1 a violation of the water quality standard some distance
2 below the pipe. How far below the pipe does it have to
3 be for him to be reasonably confident that he's found a
4 violation of this condition of the permit?

5 A. I can't give you a specific number of feet.
6 I think some common sense may take place here, and under
7 most circumstances there should be a visual -- a visual
8 distinction between the effluent quality and the stream
9 flow. And I would expect the effluent quality actually
10 to be of a better visual quality than the natural stream
11 flow.

12 From our perspective, our, our field staff
13 would, indeed, inspect the area and, and do whatever
14 measurements they took to make sure they were at a
15 location where the opportunity was sufficient to allow.
16 If the stream is small, it shouldn't be a long distance;
17 but it varies from stream to stream.

18 Q. Do we have any idea how far down below the
19 pipe it should be?

20 A. In a case like this, I would assume in the

21 range of a couple of hundred feet.

22 Q. So, if you found a violation a couple of
23 hundred feet down from the pipe, you would be reasonably
24 confident that you could then bring an enforcement action

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1 against them, assuming that the water color looked -- was
2 consistent with that?

3 A. Well, in our investigation and for us to have
4 any confidence that we even have an issue to deal with,
5 we would want upstream information and effluent
6 information. There are many, many excursions that take
7 place across the state that are not attributable to any
8 particular source, and I do not think it would be prudent
9 to take a sample of any particular place based on that
10 one sample and be certain that you knew how that
11 condition came about and who caused it.

12 Q. Do the mixing zones -- do the mixing zones
13 of -- at 35 Illinois Administrative Code 302 apply to
14 this permit?

15 MR. SOFAT: Objection, asks for a legal
16 conclusion.

17 MR. BLANTON: Join in the objection.

18 HEARING OFFICER: Mr. Ettinger?

19 MR. ETTINGER: He's testified as to all sorts
20 of legal conclusions as the permit writer, and, and he
21 stated earlier that it did comply with various

22 regulations.

23 HEARING OFFICER: Yeah, but just because there
24 were no objections earlier doesn't mean I can let it go

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1 now. If you have a response, I'll be happy to listen to
2 it.

3 MR. ETTINGER: Very well. I withdraw the
4 question.

5 BY MR. ETTINGER:

6 Q. Is the unnamed tributary a 7 q 10 zero stream?

7 A. Yes, that's my understanding.

8 Q. Does this discharge potentially use the
9 entire unknown tributary -- I'm sorry, unnamed tributary
10 for mixing?

11 A. In most circumstances, I would think not.

12 Q. But do you know?

13 A. We're talking about a stream where the flow
14 varies week to week. I'm not sure it varies day to day,
15 but certainly varies a lot, and seven day -- 7 q 10 means
16 a stream whose average seven-day flow is zero at least
17 one time during a ten-year period. That also includes
18 streams that are dry, you know, 99.9 percent of the time,
19 and the streams that only have zero flow once in a
20 ten-year period.

21 In the case of this particular stream, I

22 believe there's going to be a multitude of times when
23 there is 20:1, 50:1, a lot more dilution than even
24 resemble the 3:1 minimum requirement we established. And

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1 in those instances, certainly you're not going to use
2 anywhere near quarter, third, half, three quarters, all
3 of the available stream flow for dilution.

4 Q. Will there be instances in which all of the
5 stream is used for dilution?

6 A. I don't know. That, to a great extent,
7 depends on their operating protocols and how they, they
8 need and choose to release water. We've established a
9 minimum requirement of 3:1. Perhaps the question should
10 be if, indeed, the minimum requirement of 3:1 is reached,
11 will that require the entire stream to flow? And I
12 believe it would under those circumstances.

13 Q. Does the permit allow --

14 MR. BLANTON: Excuse me. Can you read back
15 that answer?

16 HEARING OFFICER: Pardon me, sir?

17 MR. BLANTON: Could I have that last answer
18 read back, please?

19 (The preceding answer was read back by the
20 court reporter.)

21 BY MR. ETTINGER:

22 Q. Does the permit allow the entire flow of the

23 stream to be used for dilution?

24 A. The permit requires there be a minimum of 3:1

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1 dilution available. There is no limitation that a
2 portion of that 3:1 be excluded from consideration for
3 mixing availability. All of that 3:1 dilution under that
4 extreme condition is available for mixing with the
5 effluent under this permit.

6 Q. So, is the answer to my question yes?

7 A. I think it is.

8 Q. Thanks. Proceeding on through condition
9 eleven, it says, "Following any storm water discharge
10 from outfall 003, but prior to the flow and receiving
11 stream subsiding, a portion of the impounded water in the
12 basin shall be pumped or otherwise evacuated sufficiently
13 to load the discharge elevation to provide capacity for
14 storm water storage."

15 This isn't my prose. What does that mean?

16 A. That means that we established the
17 requirement that they design and operate such that there
18 is some storage capacity to accommodate sudden storm
19 events and sudden runoff events so they do not have to
20 discharge immediately.

21 Q. And how much lag time are they supposed to
22 leave?

23 A. They're supposed to have an operating
24 mechanism under this concept such that they don't violate

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1 that requirement that the stream have 3:1 flow rate
2 before they discharge. This is a design feature such
3 that it enhances their ability to meet the 3:1
4 requirement. They now have control where they do not
5 have to discharge even in a sudden summer thundershower
6 until such time as the rest of the basin responds and
7 there's stream flow in the stream so we don't have a
8 physical situation where we could not accommodate the
9 discharge limitation of 3:1.

10 Q. Now, you say the water shall -- I'm sorry,
11 you don't say. The permit says, "The pump shall be
12 pumped or otherwise evacuated." Does that mean anything
13 other than discharge?

14 A. I believe that part of this water is also
15 used in their coal preparation process so there is --
16 there is the opportunity to dispose of water facility
17 limits in this fashion other than through discharge.

18 Q. I see. So following any storm water
19 discharge, they're supposed to bring their basin down to
20 allow lag time, and they can do that by either pumping it
21 back into their processing in some way or discharging?

22 A. That's correct. In the proper operating
23 mechanism, you would think they would give consideration

24 and have provisions to partial dewatering of that system

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1 to regain some storage capacity while the stream flows
2 remain high enough to give them that 3:1 dilution ratio.

3 Q. So, the -- their discharge -- their discharge
4 stopped for the time being, but they notice that they've
5 still got enough water in the stream so that they could
6 discharge at 4:1 or 5:1 dilution, so they might pump it
7 down or let it go down a little more so as to make more
8 space for the next rain. Is that the idea?

9 A. That's correct.

10 Q. In the last sentence of this condition eleven
11 it says, "Within 180 days of the effective date of the
12 permit, the permittee shall submit an operational plan
13 specifying the procedures to be utilized to accomplish
14 the requirements of this paragraph."

15 What is this operational plan supposed to
16 look like?

17 A. It's supposed to describe how they intend to
18 accomplish the objectives stated out in this condition.

19 Q. Could that include continuous flow
20 monitoring?

21 A. Could it? If, if it would play a role in
22 their operational -- day-to-day operational practices, I
23 don't believe there's any prohibition against it.

24 Q. Okay.

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1 A. It's not specifically required, but we did
2 not set -- we didn't design the system for them. We
3 identified what needed to be accomplished and gave them
4 180 days to tell us how they were going to accomplish
5 that.

6 Q. And will the agency approve this plan?

7 A. I don't know. We may disprove it. We will
8 certainly review and comment on that plan.

9 Q. Okay. Well, have you reserved the right in
10 this clause to -- reserved a right to comment on the
11 plan?

12 A. I believe we have, but I think more to the
13 point of focus if they don't accomplish this objective
14 and discharge contrary to the other limitations in this
15 permit, they have violated the permit. If they discharge
16 with a less than 3:1 dilution, then I believe they've
17 violated the permit. And whether or not their
18 operational plan was good, bad, right or wrong is
19 inconsequential. They still violated the permit if that
20 happens.

21 Q. Does this operational plan include the
22 monitoring procedures that will be put in place to assure
23 that the 3:1 dilution condition is met?

24 A. To the extent that they're going to

1 accomplish this with an operational plan that does lower
2 the water level in the basins to give them that storage
3 capacity through discharge when there's adequate stream
4 flow in the stream, they will describe how they're going
5 to accomplish that.

6 Q. Will the public be given an opportunity to
7 comment on this operational plan?

8 A. I believe that operational plan would be
9 public information available for the public access, and
10 they can certainly comment on it, yes.

11 Q. But you don't have to pay attention to our
12 comment?

13 A. I feel an obligation to pay attention to all
14 the comments that I receive.

15 Q. Will the operational plan be part of the
16 permit?

17 A. The discharge is subject to the permit. To
18 the extent that the operational plan is deemed adequate
19 by us, life goes on. To the extent the operational plan
20 is viewed as inadequate or contrary to this permit, I
21 believe we would take subsequent permit action to deal
22 with that issue which may be a permit modification or
23 some other action.

24 Q. Why wasn't the operation plan considered

1 before issuing the permit?

2 A. To a great extent, it was a timing issue.

3 Q. Well, what's the timing issue?

4 A. Give the, the permit applicant the
5 opportunity to, to review their option and come up with
6 designs and plans on how they're going to accomplish that
7 objective.

8 Q. Well, was there a reason they couldn't get
9 their ducks in a row before the permit was issued?

10 A. To a great extent, these were issues that
11 went well beyond normal permit activity and probably
12 could not have been anticipated; and there was some
13 desire to get on with determining what discharge
14 limitations apply and allow the facility to proceed with
15 those discharge limitations.

16 And this particular instance is not unusual
17 or rare in terms of our normal permitting program.
18 Routinely, in virtually all types of facilities we deal
19 with, there are some operational provisions; there are
20 compliance provisions that we incorporate that require
21 some lead time to get flushed out. It's a relatively
22 standard operating practice.

23 Q. What does continuous flow monitoring cost?

24 A. I have no idea.

1 Q. Okay. But you believe that it's burdensome.
2 How is it burdensome?

3 A. I believe it may be more burdensome than
4 other opportunities or options that they're free to
5 explore.

6 Q. Did the agency explore the cost of requiring
7 continuous flow monitoring?

8 A. To a minor extent. We, we actually have some
9 contractual arrangements with the United States Geologic
10 Survey and some cooperative monitoring programs where
11 we've supported and participated in a continuous stream
12 gauging station around the state for decades. And we
13 have some personal knowledge that it is a very
14 resource-intensive activity, both the instrumentation and
15 the staff time it takes to operate it.

16 Q. You'll be delighted to hear that we're moving
17 off of special condition eleven now. Going on to special
18 condition one of the -- outside the construction permit,
19 it speaks, "No effluent from any mine-related facility
20 area under this permit shall, alone or in combination
21 with other sources, cause a violation of any applicable
22 water quality standard as set out in the Illinois
23 Pollution Control Boards and Regulations, Chapter 1,
24 Subtitle C, Water Pollution."

1 Do those applicable water quality standards,
2 is that limited to the Subpart D rules, or does that also
3 include Subpart C rules -- the standards, I'm sorry?

4 A. I believe even though this is identified as a
5 special condition, I believe it's a standard condition of
6 most of our permits. And I think what you're asking me
7 is if the provisions of Subtitle D waive the application
8 of water quality standards that exist in Subtitle C.

9 Q. That would be a way of asking the question,
10 so why don't you answer that?

11 A. My reading of Subtitle D is it's the Board's
12 intent that mining activities not be held accountable to
13 Subtitle C water quality standards the way other sources
14 in Illinois are.

15 Q. Okay. Is that the case as to this special
16 condition here?

17 A. In this particular permit -- and again, I'm
18 going to go back to the reality that this is a joint
19 state-federal NPDES permit. The U.S. EPA's objection
20 letter and U.S. EPA's indication was that Subtitle C
21 general use water quality standards are applicable to the
22 streams at issue and the discharge from this facility.
23 And this permit specifically requires adherence and
24 compliance to those Subtitle C regulations irrespective

1 of whether Subtitle D under the state regulations would
2 allow something else.

3 Q. Okay. Skipping down now to special condition
4 seven, it says, "Plans must be submitted to and approved
5 by the agency prior to construction of the sedimentation
6 plan" --

7 A. Pond.

8 Q. "Pond," I'm sorry. Are those plans available
9 to the public?

10 A. I believe they are.

11 Q. Were they made part of the permit?

12 A. I believe the, the actual design drawings,
13 some of them were accessible at the public hearing. The
14 full context of the construction application is publicly
15 available. To the extent that it was reproduced and
16 provided in the responsive summary or something else, I
17 don't believe it is. Again, it's engineering design
18 documents. Typically, we get with these facilities.
19 They're available. Unless you're an engineer, usually
20 you don't want to look at them, but you can.

21 Q. Going down now to special condition eleven as
22 to biological inventory, is there any requirement in this
23 permit that there be a biological inventory of the
24 unnamed tributary?

1 A. Are you talking about the unnamed tributary
2 upstream of the point of discharge?

3 Q. Well, at the point of discharge and below or
4 anywhere on the unnamed tributary.

5 A. I know there is not a requirement to, to
6 conduct a biological inventory above the point of
7 discharge. There is a commitment that we will conduct a
8 biological survey in that area this summer as a
9 commitment to U.S. EPA, and that is going forward.

10 Q. Okay. Who is "we"?

11 A. We, Illinois Environmental Protection Agency,
12 will conduct a biological survey of this unnamed
13 tributary above outfall 003 this summer.

14 Q. Above?

15 A. Upstream. But that is not specifically --
16 that is not a requirement of this permit, and it's not a
17 burden upon the permittee. It's a commitment on the part
18 of the agency to do that.

19 Q. And there's no commitment by anyone that you
20 know of to do a biological inventory of the unnamed
21 tributary between the discharge and its confluence with
22 the Little Vermilion River?

23 A. That's my recollection, yes.

24 Q. The beginning -- sorry. The first sentence

1 of the second paragraph states, "Before runoff impacted
2 by mining operations is discharged, two components of the
3 aquatic life community of the river community, fish and
4 mussels" -- I'm not a biologist -- "must be inventoried
5 in the Little Vermilion River."

6 Why was it important that this be done before
7 runoff impacted by mining operations is discharged?

8 A. The impetus for this special condition came
9 from collaboration with Department of Natural Resources
10 and specifically the endangered species people. They
11 thought it would be prudent -- not necessarily from their
12 concerns of dire consequences but from an additional
13 comfort level -- that there be a baseline inventory of
14 the two biological families that contained endangered
15 species. That's why mussels and fish were chosen. And
16 the belief was we would like a comfort level to document
17 baseline conditions prior to the active coal mining or
18 bringing coal to the surface.

19 We specifically stated that we desired those
20 surveys to be done during the spring and mid-summer
21 months of this year with the understanding that coal --
22 actual coal mining or bringing coal to the surface would
23 not take place until after those time periods. And the
24 reason for those time periods were the expert opinions of

1 the biologists that those were the best times of the year
2 to get the best survey results.

3 Q. Did DNR also suggest that macroinvertebrates
4 be sampled?

5 A. I don't believe they did. And to the extent
6 they did, they did not -- if they did, we specifically
7 spoke to that issue, and there was a consensus that that
8 would not provide any information of value relative to
9 the issues we were trying to address. And it would have
10 been unnecessarily another burden, whether it be large or
11 small, another unnecessary, unbeneficial burden that we
12 would place upon the applicant.

13 Q. Okay. Turning now to special condition
14 twelve, it says, "The monitoring program will be with the
15 initial discharge from the sedimentation basins and
16 continue for every discharge event up to and including
17 ten events per year."

18 When in the course of the construction of the
19 mine was the -- or operation of the mine was the initial
20 discharge to occur?

21 A. I believe that was pretty much at the mercy
22 of the weatherman. The permit was effective, I believe,
23 December 27th. At that point, discharges were
24 authorized. There was the presumption that -- certainly

1 a high likelihood that there could be some -- enough
2 water generated with spring rainfall, the spring rainy
3 season that there would be runoff from this site into the
4 site preparation area, and there may be a discharge even
5 prior to the actual onset of the mining operation, but
6 that there wouldn't be -- it wouldn't be mining-related
7 material, coal and coal refuse within that exposed area
8 subject to that storm water runoff. So, this permit
9 anticipates the potential for discharge even before
10 actual mining takes place.

11 Q. What is meant by mining activities in this
12 permit?

13 A. I believe we did not use the term mining
14 activity.

15 Q. I'm sorry, mining operations in the spring.

16 A. In this particular condition, the intent and
17 the specific purpose of mining operations is the bringing
18 of coal and coal refuse from underground to the surface
19 and processing for sale. It did not include some of the
20 other preparatory activities that, I believe, Office of
21 Mines and Minerals includes in their official definition
22 of mining activities, meaning site preparation and site
23 construction work.

24 Q. Is there anywhere in the record where we can

1 find a discussion of the meaning of mining operations as
2 you just discussed it?

3 A. I don't recall any documentation to that
4 effect. I do recall specific discussions during the
5 collaborative stage with the other state and federal
6 agencies that we were collaborating with about that
7 issue. I honestly don't recall any written
8 documentation, but I can assure you that was the intent.

9 Q. How were these trigger concentrations
10 selected that occur in this table in special condition
11 twelve?

12 A. Again, they were selected through a
13 collaborative process with the intent being to make them
14 relatively conservative, such that even concentrations --
15 significant, perhaps, increases that were deemed to be
16 significant in one context, even though they were far
17 short of meeting the water quality standard, which may
18 suggest some slight change in the overall environmental
19 community. And to a great extent, those would be
20 conditions known to be protective of aquatic communities
21 in general, but maybe would be a good starting point if
22 there was one specific species that for some reason was
23 overly sensitive to those parameters.

24 And the specific reason this was chosen was

1 because there's little or no toxicity data on the few

2 endangered species that may be of concern here. Cousins
3 and related species known to be relatively common,
4 there's a comfort level there that -- to reason these
5 things are endangered isn't because of these parameters,
6 but for comfort level let's go ahead and do the
7 monitoring assessment anyway. And if there's any --
8 anything that we -- "we" being a biologist, not myself --
9 anything that the biologists think may constitute a
10 significant shift in the overall water quality would
11 trigger some additional biological survey to see if there
12 was a biological reaction, even recognizing we were still
13 in a protective condition for the overall aquatic
14 community.

15 Q. Did these numbers bear any particular ratio
16 to any standard or --

17 A. It varies.

18 Q. -- formula?

19 A. Some of them were like a -- some of them were
20 maybe half of the standard. Others were some statistical
21 increment over what we believed the ambient was.

22 Q. Okay. In the third full sentence beginning
23 on page ten, it says, "If the sampling results at site
24 number four exceed the trigger concentrations given in

1 the following table, the biological inventories specified

2 in special condition eleven must be repeated during the
3 next spring and summer sampling season."

4 And my question is, how many of the trigger
5 concentrations does the sample have to violate for this
6 condition to come into effect?

7 A. I believe one is enough.

8 Q. Okay. So a violation of any one of these
9 trigger -- of these trigger concentrations will require
10 another biological evaluation and the samples?

11 A. To the best of my recollection, that was
12 the -- yes, the intent and the consensus.

13 Q. If there is some shift in the health of the
14 biota that is linked to the mine, would that be a permit
15 violation?

16 A. Not necessarily. I'm not sure I know exactly
17 where you're going.

18 Q. Well, let's say you find that as a result --
19 let's just say you find that there has been a -- you do
20 your biological inventory, and you find that there has
21 been some degradation of the aquatic life in the Little
22 Vermilion River that can be traced to a discharge. What
23 happens?

24 A. Well, number one, I'm not -- I'm not in

1 agreement with you that a shift in species makeup is
2 necessarily degradation. Number two, if there is some --

3 you could shift from actually lower quality organisms to
4 higher quality or more sensitive organisms. A shift in
5 and of itself is not necessarily detrimental. It may
6 even be advantageous.

7 Q. Okay.

8 A. Number two, if there's something that
9 actually is identified and determined by the biologists
10 who are expert in this area to be degradation -- well, be
11 a degraded condition, I believe we'd have to evaluate
12 that and determine whether or not that degradation is,
13 indeed, a violation of state regulations or standards.

14 And keep in mind the way some of this is done
15 is through biological indices and given numbers. And a
16 shift from a number of 49 to 48, for instance, may be
17 identified or determined by somebody to be degradation,
18 and other biologists may say that's not degradation at
19 all; they just may be data scatter, something of that
20 nature.

21 So, I can't give you an exact answer that a
22 particular shift in community structure from one area to
23 another is indeed degradation, pollution in violation of
24 state law or regulations. It's more complicated.

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1 MR. ETTINGER: Okay. You'll be happy to know
2 I'm winding down, but could I have like five or ten

3 minutes, and then I hope to come back and finish with
4 this witness?

5 HEARING OFFICER: See if there's an objection?

6 MR. SOFAT: No objection.

7 MR. ETTINGER: Okay. Let's take a break. I
8 want to talk to my client here, and we'll come back and
9 finish.

10 (A recess was taken.)

11 HEARING OFFICER: We are back on the record
12 after a short recess.

13 Sir, let me remind you you're still under
14 oath.

15 Mr. Ettinger, you may continue your
16 cross-examination.

17 MR. ETTINGER: All right.

18 BY MR. ETTINGER:

19 Q. On special condition twelve, let's -- let's
20 assume for the sake of argument that under special
21 monitoring and testing required under special condition
22 twelve you detect a problem. Would IEPA do anything
23 about the problem?

24 A. I would hope so.

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1 Q. And what could you do under this permit?

2 A. I think, in reality, if there is anything
3 that produced results from special condition twelve that

4 suggested a problem, we would consult with -- internally
5 certainly and with any other experts and the regulatory
6 authorities involved in the issue and weigh the
7 significance of that and identify a proper action and
8 proceed with whatever it took to implement that action.
9 May be a permit modification, may be something that's as
10 harsh as even the suggestion that a -- the act and some
11 regulation had been violated in order to give a higher
12 response than the modification of the permit. May be
13 some consultation on operating modifications of the
14 facility. There's a whole myriad of things we could do.
15 I mean, the point is, we would address the issue and
16 respond appropriately, whatever that may be.

17 Q. Mr. Sofat, ask you some questions regarding
18 the water quality violation or problem at the Georgetown
19 Reservoir, and I believe you testified that the problem
20 mainly had to do with taste and odor caused by nitrates;
21 is that correct?

22 A. No. I believe the two identified problems
23 relative to its functionality as a drinking water source
24 were high nitrate levels and some eutrophication issues

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1 that may periodically create taste and odor or
2 operational problems at the water treatment. Beyond
3 that, there may be some -- there certainly is probably

4 some ramification from the eutrophication on other uses
5 of the reservoir beyond its use as a water supply.

6 Q. So, your response principally focused on
7 nutrients entering the Georgetown Reservoir; is that
8 correct?

9 A. I'm not sure what your question is. Which
10 response?

11 Q. Let me go back and try to review where we
12 are, understanding that it's hard for people to remember
13 what we have said without going back and looking at the
14 transcript, which won't be prepared for days.

15 But my recollection is that Mr. Sofat asked
16 you about problems in the Georgetown Reservoir, and the
17 thrust of your testimony was that it is principally a
18 nitrate and nutrient problem, and that those sorts of
19 pollutants would not be expected to come from the mine.
20 Is that a fair characterization of your earlier
21 testimony?

22 A. That's correct. That's correct.

23 Q. Okay. Do you have a copy of this public
24 hearing record here? Like to offer this whole thing.

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1 MR. BLANTON: What pages?

2 MR. ETTINGER: Page 000586. Just read this --
3 if I can show this to the witness.

4 Q. It says Georgetown Lake is listed as impaired

5 on the Illinois 303-D list primarily for suspended solids
6 and siltation and, to a lesser degree, for metals, organic
7 enrichment, dissolved oxygen depletion, taste and odor.
8 Let you read that.

9 A. And your question is?

10 Q. And my question is, Will the discharge from
11 the mine add metals or suspended solids or siltation to
12 the Little Vermilion River?

13 MR. BLANTON: Object to the form of the
14 question unless we clarify what metals we're talking
15 about.

16 HEARING OFFICER: Mr. Ettinger?

17 BY MR. ETTINGER:

18 Q. Well, what metals are present in Lake
19 Georgetown to your knowledge?

20 A. I don't have personal knowledge of that at
21 this moment. And knowing what I know about our 303-D
22 listing process, it would be difficult to speculate.
23 Metals is a category in the federal guidance. It's hard
24 to infer specifically what extent Lake Georgetown does or

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1 does not have any real metal problem based on the
2 information I have available.

3 Q. Okay. Now, there are some metals whose
4 discharge is being permitted from the mine?

5 A. That's correct.

6 Q. So, your uncertainty is that you don't know
7 whether the metals for which Lake Georgetown is listed
8 are the same metals that may be discharged from the mine?

9 A. I don't recall that. I believe staff who
10 worked on this permit with me had addressed that issue,
11 but I right now don't have the personal recollection of
12 that.

13 Q. Okay. Now, you saw earlier that settleable
14 solids is something that will be discharged from the
15 mine. Settleable solids -- settleable -- that's a toughy
16 -- solids, would they add to siltation or suspended
17 solids?

18 A. The settleable solids that would result from
19 discharge 003 under this permit would be insignificant in
20 my opinion.

21 Q. However -- I'm sorry. The settleable solids
22 are the same thing as siltation, are they not?

23 A. Settleable solids are probably the source of
24 siltation.

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1 Q. Thank you.

2 A. That is restricted to these extreme events.
3 Those settleable solids are essentially removed under
4 normal operating conditions.

5 Q. Now, Mr. Sofat, I believe, also -- I forgot

6 whether it was Mr. Sofat or Mr. Blanton; I guess it was
7 Mr. Blanton because these were his exhibits -- also
8 talked to you about the nondegradation analysis that was
9 done in connection with issuing this permit. I think you
10 said that there were various alternatives that were
11 considered by the agency in the course of the issuance of
12 the permit?

13 A. I believe that's correct.

14 Q. Where are those alternatives documented in
15 the record, to your knowledge?

16 A. I believe that's in the responsive summary.

17 Q. Now, Mr. Blanton showed you -- Mr. Blanton's
18 exhibits, I guess. It's BBCC Exhibits 9 and 10 are the
19 nondegradation evaluations that were done by
20 Mr. Crislip -- I'm sorry, Mr. Twait and Mr. -- they were
21 both by Mr. Twait. I'm sorry. Would that be one of the
22 places where the consideration of alternatives took
23 place?

24 A. There was some discussion and consideration

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1 of alternatives at this stage, but I believe it was more
2 substantive consideration of those issues as this permit
3 got into the public comment, public hearing stage.

4 Q. So --

5 A. And I believe that should have been

6 documented and was documented, the extent to which we
7 supplemented the alternatives, considerations as part of
8 our water quality standard review in the responsiveness
9 summary and public participation component of the review.

10 Q. Sitting here today now, I might be --
11 admittedly we haven't reviewed the whole record recently.
12 But sitting here today, all of the nondegradation
13 analysis that you're aware of is in the public
14 responsiveness document and these two exhibits that were
15 offered earlier; is that correct?

16 A. Best of my recollection, that is correct.

17 Q. Okay. We all agree that electricity is a
18 nice thing. Did we consider -- did the agency ever
19 consider whether the coal that is to be mined through
20 this mine could be removed and burned to create
21 electricity without building another mine at this site?

22 A. My recollection is that issue came up, and we
23 considered that more than once and, at one point,
24 specifically directed those questions back to the permit

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1 applicant. And I believe we got a, a written response on
2 those components of the review that should be in that
3 responsiveness summary or referenced in that
4 responsiveness summary.

5 Q. Do you recall who wrote that?

6 A. Agents or employees of Black Beauty Coal

7 Company.

8 Q. And about when did they do that?

9 A. My recollection is I specifically asked for
10 that either the day of or shortly following the public
11 hearing, that they revisit that issue and give us
12 additional documentation beyond what we had discussed and
13 had available earlier.

14 Q. So, a document was -- and was a document
15 submitted to the agency following the public hearing?

16 A. There were a couple of documents under my
17 recollection that we specifically requested as issues
18 that came out of the public hearing that we referred back
19 to the permit applicant for additional information. And
20 I believe a letter regarding those alternatives and the
21 Advent report were two specific products that we
22 solicited to further address some of the public issues.

23 Q. To your recollection, did this document give
24 any idea of what it would cost to mine the coal from the

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1 Riola site?

2 A. I believe it went into logistics and other
3 factors, and there may have been some cross issues there
4 as well. I'd have to go back to the document.

5 Q. And the Advent -- the Advent study is another
6 thing that resulted from your request following the

7 public hearing?

8 A. Somewhere along the time of the public
9 hearing or shortly thereafter, I specifically asked that
10 we addressed that issue internally ourselves, but we
11 wanted the permit applicant to address it more
12 specifically. And I communicated that request, that they
13 supplement their application with that material. I don't
14 remember the date or the exact discussion, but I do
15 remember making that request.

16 Q. And you -- do you know why manganese was not
17 considered in the Advent study?

18 A. No, I don't. Not -- today I can't recall
19 that.

20 Q. Do you recall the form in which your request
21 is made for additional information upon either
22 nondegradation or anything else following your review?

23 A. Pardon me?

24 Q. What was the form? Did you write them a

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1 letter, did you call them up, or how did you convey to
2 them that they were to supply additional information?

3 A. I think it might have been a face-to-face
4 communication the night of the hearing and subsequent
5 phone calls to clarify what I thought they needed -- what
6 my request was for supplemental information. Whether or
7 not I ever reduced that to either an e-mail or a letter,

8 I don't recall.

9 Q. And who did you talk to?

10 A. I talked to a number of people probably, but
11 specifically I remember talking to Eric Fry about that
12 issue. And then subsequently, I believe, other employees
13 of the mine company and I think at one point I even had
14 some communication with the contractor they hired.

15 MR. ETTINGER: I'm done.

16 HEARING OFFICER: Mr. Sofat, do you have any
17 redirect?

18 MR. SOFAT: Yes.

19 REDIRECT EXAMINATION

20 BY MR. SOFAT:

21 Q. Going back to condition number twelve, page
22 ten of the permit, is this the first time that the agency
23 included such a condition in a Subtitle NPDES program?

24 A. To the best of my knowledge, yes.

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1 Q. Okay. Did the agency get input from other
2 state agencies in writing this condition?

3 A. We collaborated with the Department of
4 Natural Resources, two different groups within that
5 department on this condition, collaborated to the point
6 of agreeing on the language. And my understanding was
7 identical language would also go in the mines and

8 minerals permit that went in our permit.

9 Q. And what was the purpose of having a group
10 formed to write a -- write this condition? Was it to
11 explore -- go for how you're going to enforce this
12 condition?

13 A. This was trying to resolve an issue of how --
14 what's the appropriate, proper way to address the
15 specific issue of, of the potential that there be
16 endangered species within the watershed that may have
17 much higher water quality requirements than Illinois's
18 typical aquatic communities. To what extent that was
19 much of a concern and even, even if it was not much of a
20 concern, to what extent should there be some, some
21 response or additional way to address that issue, provide
22 a comfort level to those people who may, may be
23 nonexperts in this area.

24 Q. Let's look at special condition number

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1 eleven, page nine. As you testified earlier, that this
2 condition does not require bio inventory in the unnamed
3 tributary. Would you tell us if there are any technical
4 difficulties to do that?

5 A. My recollection is that, again, the special
6 condition eleven and twelve were both the product of this
7 collaboration with our endangered species counterpart in
8 the Department of Natural Resources. My specific

9 recollection is the endangered species people over there
10 who, to a great extent, participated and helped us fill
11 out this concept did not think it was appropriate or
12 beneficial to include a station in their unnamed
13 tributary.

14 Q. Under condition number 11-A on page number
15 six, could you tell us what your understanding is about
16 whether this allowed mixing will be done prior to the
17 confluence of this unnamed tributary with the Little
18 Vermilion River or after?

19 A. Prior to.

20 Q. Or in the --

21 A. Prior to.

22 Q. Prior to. Okay. Looking at the same
23 conditions, last sentence, that 180 days, do you think
24 the permittee needs the actual knowledge of the site to

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1 prepare this operational plan? That means when the
2 basins are constructed and they know how the water is
3 flowing, do they need that kind of technical information
4 before they can prepare this operational plan?

5 A. They'd certainly need to be familiar with
6 the, the design of the system to capture and treat storm
7 water. They need to be familiar with the topography and
8 the physical circumstances of the unnamed tributary. And

9 then I believe they would also need to have some
10 information on their own internal staffing and --
11 operationally in order to know how to put together a plan
12 that would be functional and would accomplish the
13 objectives laid out for them.

14 Q. Do you think that you would get a better
15 product -- that is, a better written operational plan if
16 the permittee submits after the permit is written or if
17 they were required to submit that as part of their
18 application, permit application?

19 A. I think under the circumstances we were
20 dealing with, it would have been unnecessary and
21 unreasonable hardship to slow down the processing of this
22 permit, sort out these things which could, indeed,
23 proceed part and parcel with completion of design and
24 construction and creation of the operating system that

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1 they're going to need to run a coal mine and manage storm
2 water at that site.

3 Q. I want to go back on condition number 1-A and
4 B on page two. Would you please read the last line under
5 1-A?

6 A. Yes, I have.

7 Q. Okay. What is your understanding about this
8 one year, 24-hour precipitation event?

9 A. That is the event that determines whether or

10 not discharge results from that event are subject to the
11 effluent limits schedule on the top of the page or are
12 subject to the alternate limits on paragraph 1-B. And
13 the specific purpose of that paragraph A is to get
14 further definition to say, whereas in the federal
15 guidance documents and the federal program
16 recommendations they define the shift from normal
17 operating conditions to extremely damp conditions is a
18 one year, 24-hour event. We further describe in this
19 particular location that event is 2.47 inches of rain in
20 a 24-hour period. So we are defining the one year,
21 24-hour criteria.

22 Q. So, if this ten (sic) year, 24-hour
23 precipitation event greater than 2.47 inches, which is
24 condition 1-B --

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1 A. If the 24-hour precipitation event is
2 significant enough to amount to 2.47 inches or more of
3 precipitation, that shifts the discharge limitations from
4 the schedule to paragraph B.

5 Q. So, then if we read this line which is the
6 last paragraph under 1-B, "Following such a precipitation
7 event but not within 24 hours of cessation of such
8 event," then what would you consider this such event to
9 be?

10 A. Can you read that back to me?

11 Q. What is your understanding of the word "such
12 event"?

13 A. A storm equal to or greater than a one year,
14 24-hour precipitation event.

15 Q. Could you tell us then a little more detail
16 about how this condition -- this particular paragraph
17 would be enforced?

18 A. When a storm of that magnitude occurs, and
19 this is -- this is a component of our permitting program
20 for mines that's taken directly from federal guidance,
21 and I believe the same approach is used in virtually
22 every state that has a mining industry or coal mining
23 industry. This is an event that is believed to exceed
24 the design parameters of what is believed to be an

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1 appropriate technology for managing storm water at coal
2 mines. And in those circumstances, consideration of the,
3 the impact on the treatment facility itself and the, the
4 concurrent water quality conditions and storm runoff
5 conditions that are in the overall basin, that you're
6 going to probably have poorer performance than the system
7 is going to normally operate under, and that that poorer
8 performance is acceptable because that's an extreme
9 circumstance such that no, no environmental detriment is
10 expected to occur. Again, I want to emphasize that's not

11 something we created. That's the federal pattern that is
12 common in most states.

13 Q. What is your understanding about -- what's
14 the nature of settleable solids? Do they settle
15 immediately, or do they take hours, days, years to
16 settle?

17 A. Again, settleable solids is a concept. In
18 this particular instance, the laboratory procedures and
19 the standard methods specify settling periods and
20 conditions over which they settle. These are solids that
21 are -- in aquatic condition are going to fall out of the
22 water column, and obviously you're going to get a
23 different level of settling in five minutes than you are
24 in an hour and such and such. So, there is some

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1 standardization within, within the profession or the
2 industry, and this is key to a standard sampling or
3 monitoring protocol.

4 There may, indeed, be a particle in there
5 that does not settle under those testing protocols. It
6 may settle under other protocols or vice versa. There
7 may be settleable solids there that can be discharged in
8 the environment such that they will never settle, they
9 will always stay in suspension; but it's a standardized
10 measurement of, of the solids content of that water and

11 how it behaves under these laboratory conditions.

12 Q. What would you say to this permit -- let's be
13 more specific. In this permit, the Georgetown Reservoir
14 area is approximately 2.5 miles. What is your prediction
15 whether or not the Black Beauty coal discharges, the
16 settleable solids in their discharge, whether or not they
17 would reach Georgetown Reservoir under the conditions
18 they are allowed to discharge at these conditions only?

19 A. Under these conditions, that event is likely
20 to occur only once per year for one event which is
21 probably going to be in the range of 24 hours,
22 thereabouts, sometimes maybe slightly more, sometimes
23 maybe slightly less. Under those circumstances, that may
24 be the cleanest water going into that reservoir. The

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1 ambient suspended solids concentrations of the streams
2 carrying normal runoff that doesn't have the benefit of
3 any type of a sedimentation pond would probably have
4 higher sediment content than the discharge regulated
5 under this permit.

6 MR. SOFAT: Thank you. Mr. Hearing Officer,
7 I have no further questions.

8 HEARING OFFICER: Thank you, Mr. Sofat.
9 Mr. Blanton, do you have any --

10 MR. BLANTON: Yes.

11 HEARING OFFICER: -- recross?

12 MR. BLANTON: Yes.

13 HEARING OFFICER: Off the record.

14 (A discussion was held off the record.)

15 HEARING OFFICER: Let's go back on the record.

16 Mr. Blanton, your cross-examination.

17 RE-CROSS-EXAMINATION

18 BY MR. BLANTON:

19 Q. Mr. Frevert, could you get Illinois EPA
20 Exhibit 1 which is the permit?

21 A. Got it.

22 Q. First, could you turn to page five which is
23 the construction permit, construction authorization?

24 Going to draw your attention to the paragraph, the first

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1 indented paragraph at the top, talking about the sediment
2 ponds that Mr. Ettinger was asking you about. Do you see
3 that?

4 A. Okay. Okay.

5 Q. You mentioned in your testimony that this
6 discharge was, quote, "classified," close quote, as acid
7 mine drainage, right?

8 A. That's correct.

9 Q. And the construction permit explains --
10 actually doesn't stop with those words. It is, quote,
11 "acid mine drainage from coal refuse piles," close quote,

12 right?

13 A. Where are you reading from?

14 Q. The third line of the first indented
15 paragraph.

16 A. Okay, yes, got it.

17 Q. The fact of the matter is -- the first fact
18 is there are no coal refuse piles there now, are there?

19 A. I wasn't there today.

20 Q. But you --

21 A. I don't think there are.

22 Q. But there can't be any. There wouldn't be
23 any coal refuse piles until there is coal being removed
24 from the mine, would it?

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1 A. That's correct. I, I agree with that. I'm
2 saying I have no personal knowledge because I haven't
3 seen the site.

4 Q. That's a fair response. But the discharge
5 that is permitted and its classification is premised upon
6 the fact that this is water that will -- is expected to
7 come into contact with coal refuse piles, right?

8 A. At some point in time.

9 Q. Otherwise, it's just storm runoff water?

10 A. That's correct.

11 Q. And do you have a classification of just
12 storm runoff water in your classification of discharges?

13 A. There is a storm water permitting program,
14 and there is municipal storm water, and there is rural
15 storm water, and there is industrial storm water.
16 Municipal storm water and various types of industrial
17 storm water are subject to the NPDES permit programming.

18 Q. What about construction?

19 A. Construction sites are also subject to NPDES
20 programming.

21 Q. Until there is coal on the surface to make
22 contact with the precipitation, there is not a potential
23 for acid mine drainage, is there?

24 A. That would --

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1 Q. It's just --

2 A. In this particular location, that would be my
3 premise. I have no reason to believe there's any
4 acid-bearing material, coal related or otherwise, on the
5 property at this time.

6 Q. And so during this construction of the
7 treatment facilities and the collection facilities,
8 essentially what you're dealing with is a site just like
9 numerous other construction sites. It's just a
10 construction area that's got disturbed soil; and when it
11 rains, it runs off?

12 A. That's correct.

13 Q. And it is classified as acid mine drainage
14 because of a potential for the water to acquire the
15 characteristics of acid mine drainage which, by
16 definition, basically is lower pH than normal, right?

17 A. Yes.

18 Q. And the purpose of the permit is to set
19 limits, in part, to make sure that you don't have acid
20 mine drainage, at least of an extreme nature, of the sort
21 that people think of as bad things from abandoned mines
22 and that sort of stuff, right?

23 A. Yes.

24 Q. And so the way this permit works is to say to

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1 Black Beauty, You must collect the water that has come
2 into contact with your coal refuse piles and other
3 materials that are uniquely associated with mining,
4 evaluate them, treat them -- at least in part -- through
5 the settlement basins, and discharge them only in
6 compliance with the limits that will protect water
7 quality, right?

8 A. Yes.

9 Q. Could you look at page six of the permit,
10 same exhibit? Can you look at condition seven, the top
11 of the page?

12 Please read the second sentence which is the
13 one Mr. Ettinger skipped when he was going through this

14 with you. Just read it out loud, please.

15 A. "Prior to the start of other activities,
16 surface drainage control shall be constructed and
17 operated to avoid violations of the act or Subtitle D."

18 Q. And the reference of "other activities" means
19 activities other than those that are identified in the
20 first sentence, correct?

21 A. I believe so, yes.

22 Q. And so initial construction activities are
23 not other activities as used in section -- in the second
24 sentence, are they?

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1 A. That's correct.

2 Q. And, therefore, under the construction of --
3 under the terms of this condition, the initial
4 construction activities -- excuse me, the initial
5 construction activities, which is building the collection
6 and treatment facilities, is not subject to the
7 prohibition in the second sentence that says that these
8 activities have to be carried out in order -- at a time
9 when surface drainage controls have been constructed and
10 operated to avoid violations of the act?

11 MR. ETTINGER: Objection to form.

12 MR. BLANTON: My response is this -- as
13 Mr. Ettinger has argued, he's one of the persons who wrote

14 the permit. Trying to find out what it means.

15 MR. ETTINGER: I merely objected to the form.

16 It was a very long and convoluted question, in my view.

17 HEARING OFFICER: Sir, do you understand the
18 question?

19 THE WITNESS: No.

20 MR. BLANTON: Try it again.

21 HEARING OFFICER: Objection sustained. Try it
22 again.

23 MR. BLANTON: That's not a way to get out of
24 any more questions. I will keep trying.

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1 BY MR. BLANTON:

2 Q. Under condition seven, initial construction
3 activities, that is, building the collection and
4 treatment facilities, is not subject to the prohibition
5 in the second sentence that you do that using surface
6 drainage controls to avoid violations of the act, right?

7 A. Those initial -- the discharge affiliated
8 with those initial construction activities are not
9 subject to the additional parts of standard condition
10 seven.

11 Q. Because you can't be subject to the
12 requirement of operating collection and treatment systems
13 before they're built or while you're in the process of
14 building them, can you? That's why it's written this

15 way; it recognizes that fact?

16 A. Okay. I think the issue here, as I
17 understand it, your specific question is, are those
18 initial construction activities and the discharge related
19 to them subject to the provisions of --

20 Q. This condition?

21 A. -- this condition versus other conditions of
22 the permit?

23 Q. Correct.

24 A. Yes. Restricted just to these provisions,

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1 yes.

2 Q. Okay. Can you look at special condition
3 twelve, beginning on page nine?

4 A. Yes.

5 Q. Would you agree that there are substances
6 and/or units that the permittee is required to monitor
7 for under this condition that are not associated with its
8 operations at the mine? Do you understand the question?

9 A. I'd like to hear it again.

10 Q. Let me start at a different place. Where did
11 the list of substances and units on pages ten and eleven,
12 the permit under special condition twelve come from?

13 A. This was assemblage of parameters that the
14 scientists and biologists we collaborated with and who --

15 the scientists thought were pertinent and appropriate
16 parameters to monitor, and it was not specifically tied
17 to whether or not we thought those parameters were likely
18 to be present in any specific amount in the absence of
19 such.

20 Q. These were basically substances and units
21 that people thought might affect these endangered
22 species, right? That was basically why they wanted to
23 know what was going on with them?

24 A. I wouldn't even go that far. These were

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1 parameters they thought may have water quality and
2 aquatic life, meaning they would be good parameters to
3 pay attention to. Some of them probably are not
4 necessarily considered related to any particular species
5 or endangered species, but still surrogate or a parameter
6 to look at to get an overall picture of water quality.

7 Q. And some of these substances and units are
8 items that the people who put this list together did not
9 necessarily believe would be associated with the mine
10 operations or the discharge that was being permitted
11 under this permit, right?

12 A. Absolutely, yes.

13 Q. So, in effect, Black Beauty gets to fund the
14 water quality study for the biologists who were
15 interested. Is that a fair characterization of what some

16 of these things are?

17 A. I don't know that I have an opinion on that.

18 Q. Okay. Then I'll accept that as an answer.

19 Coming back to the Lake Georgetown situation,
20 do you have any familiarity with the actual operation of
21 a public water supply, one where treatment is common in
22 the state of Illinois?

23 A. Surface water supply -- typical surface water
24 treatment units, flocculation clarification, filtration,

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1 probably fluoride addition, disinfection.

2 Q. Do you know what sort of substances are used
3 for flocculation?

4 A. Coagulants; that's a common one. Materials
5 that enhance agglomeration of smaller particles and
6 increase their settle ability.

7 Q. Do you know if it's common to use -- to
8 basically treat public water supply water in such a way
9 that it's initially made alkaline and then adding acid to
10 bring it back to normal?

11 A. That's a common treatment technique for
12 softening. I don't know whether the Georgetown water
13 supply provides softening or not.

14 Q. Do you know whether it's common in Illinois
15 public water supplies to add substances that have the

16 effect of increasing the sulfates level in finished water
17 compared to the source water?

18 A. There may be some increment -- marginal
19 incremental increases associated with some of the
20 chemical additives used to enhance the flocculation
21 clarification processes.

22 Q. Do you know whether they do that at
23 Georgetown?

24 A. I don't know the specifics of the Georgetown

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1 water treatment plant.

2 Q. Come back to the mixing zone questions
3 Mr. Ettinger was asking you about and in terms of
4 geographical reach of where the mixing would actually
5 take place. That would depend, wouldn't it, in large
6 measure on the rate of flow in the unnamed tributary and
7 the amount of water being discharged from the outfall 3?

8 A. Certainly.

9 Q. If you have a larger volume of water coming
10 down the creek at a faster rate, the mixing might
11 continue further down the stream, mightn't it? Which way
12 do you think it would go?

13 A. It might, although I think more likely the
14 mixing would be facilitated and occur earlier and quicker
15 rather than slower and later.

16 Q. The agency hasn't made a determination of

17 which way it goes or to what geographical extent?

18 A. We have experience with requiring dispersion
19 analyses on some of the larger rivers we deal with around
20 the state. I'm not aware of any occasion when we've
21 required that type of dispersion study in some of the
22 smaller streams.

23 Q. But in general, it would vary from time to
24 time depending on the relative flows of water from the

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1 two places, wouldn't it?

2 A. Oh, there's definitely a distinction between
3 a regulatory recognition and quantification of the
4 physical area where you believe mixing takes place to a
5 certain portion. In the actual hydrodynamics that take
6 place every day of the week, sure. This is an
7 administrative and regulatory concept, but it is --
8 certainly will not exactly consistently parallel what
9 physically happens in any river or stream.

10 Q. When you were talking about the mixing zone,
11 I thought I heard you say that one of the ways you could
12 tell where the mixing had taken place was from the color
13 of the stream; is that right?

14 A. Or appearance of it. There are instances
15 where there's a, a visual distinction between two streams
16 of water such that, with a reasonable level of accuracy,

17 you can actually see where those discolorations or
18 visibility differences disappear, and it appears to be a
19 close-to-homogenized condition.

20 Q. Did I hear you correctly say that you
21 expected whenever -- that when there were discharges from
22 outfall 3 that discharge would be clearer or lighter than
23 what was actually coming in the creek?

24 A. I believe under certain conditions that would

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1 be true. I'm not convinced that's true all the time.
2 There are going to be times when that stream looks
3 very -- has a very high level of clarity, and there are
4 going to be times when that stream does not have a high
5 level of clarity, just simply because of the geology and
6 the soil types and the land use patterns and the climatic
7 patterns in Illinois.

8 Q. What are the conditions you understand or
9 believe would cause the discharge from outfall 3 to be
10 clearer than the water coming down the unnamed tributary?

11 A. High flow conditions, when there's a lot of
12 surface runoff in the watershed, probably particularly in
13 times of the year when the land surface is not covered
14 with vegetation. The distinction here now being that if
15 there's rain falling on the entire watershed, this
16 particular parcel of land has actually got treatment in
17 place to provide sedimentation to purify that water,

18 whereas the bulk of our property in the state of Illinois
19 doesn't have that.

20 Q. Mr. Ettinger asked you about any information
21 about the mine location. Do you have a copy of the
22 administrative record with you?

23 MR. ETTINGER: I gave him my copy.

24 THE WITNESS: Is that what this is?

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1 MR. ETTINGER: Does it have a picture on the
2 front of it? Yes.

3 A. I guess.

4 Q. Could you look at the second volume -- Book 2
5 of 2 of the administrative record at page 524?

6 THE WITNESS: You tricked me. You started at
7 481.

8 MR. ETTINGER: It's Book 2.

9 THE WITNESS: That was still a trick. Oh,
10 that's a memo from myself to Eric.

11 BY MR. BLANTON:

12 Q. Could you say that more audibly for the
13 reporter, for the record? What is page 524 of the
14 administrative record?

15 A. Page 524 appears to be a, a reproduction of a
16 memorandum from myself to Eric Fry.

17 Q. What's the date?

18 A. October 6th, year 2000.

19 Q. Is that the memo by which you asked Mr. Fry
20 to answer some issues that had come up at public hearing
21 a little over a week earlier?

22 A. It's certainly part of that communication
23 line, yes.

24 Q. Did you get a response from Mr. Fry?

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1 A. I got at least one response. I might have
2 gotten multiple responses.

3 MR. BLANTON: May I approach the witness?

4 HEARING OFFICER: Yes.

5 BY MR. BLANTON:

6 Q. Hand you what's been marked as Exhibit
7 BBCC 14. Are you familiar with that?

8 A. Is this the same thing?

9 Q. No, it's more than the same thing.

10 A. Okay.

11 Q. Is that Mr. Fry's response?

12 A. It appears to be.

13 Q. A response from Mr. Fry to your October 6th
14 memo that's in the record at page 524?

15 A. This appears to be a reproduction of my
16 e-mail and a response, approximately three days later,
17 from Eric Fry.

18 MR. BLANTON: I offer Exhibit BBCC 14, which

19 I don't have any more copies of, and which I'm not sure
20 Mr. Ettinger has seen. Could you pass that to
21 Mr. Ettinger?

22 MR. ETTINGER: Is it in the record?

23 MR. BLANTON: I don't think so. If it is, I
24 don't know where it is; that's the more accurate

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1 statement. I have no idea whether it is or not, but I
2 don't know where it is if it's in there.

3 MR. ETTINGER: Okay. Well, I don't object to
4 its admission in this proceeding. I think it is
5 interesting that we have documents that aren't in the
6 agency record at this point. If that's the case --

7 MR. BLANTON: Is that a philosophical
8 observation or --

9 MR. ETTINGER: No, it's a future argument.

10 HEARING OFFICER: Mr. Sofat?

11 MR. SOFAT: No objection.

12 HEARING OFFICER: It will be admitted.

13 (Whereupon, BBCC Exhibit Number 14 was marked
14 for identification.)

15 BY MR. BLANTON:

16 Q. Did Mr. Fry provide you any information in
17 there about the mine location and where it was?

18 A. That's correct.

19 Q. Can you read that into the record?
20 A. In response to October 16 --
21 Q. You need to slow down and speak up, please.
22 A. "In response to a 10/6/2000 e-mail on the
23 Vermilion Grove permit, we submit the following: To
24 address the question, number of -- question number one

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1 which is related to questions I had itemized in my
2 original e-mail, Advent performed mixing calculations
3 based on instream water quality data and historical data
4 from the Riola mine," in a parentheses, "DMRs."

5 Q. Excuse me. Can you just read the one that's
6 in response to number three?

7 A. Number three is all you're looking for? Make
8 it easier. "Many factors come into play. The primary
9 issue is rail access; however, other issues include
10 suitability of the overburden for slope and production,
11 economics of conveyer lengths and their relationship to
12 reserve configuration, availability of power lines, and
13 proximity to roads."

14 Q. Do you recall whether you had any follow-up
15 discussions with Mr. Fry about those issues or those
16 points?

17 A. I thought I did, and I -- my recollection
18 also was that I talked to the staff to make sure this
19 information was accessible to them and in the record, but

20 I -- that's my recollection.

21 Q. Can you look at the record that you have in
22 front of you at page 586 and which Mr. Ettinger brought
23 to your attention earlier? This is part of the
24 responsiveness summary under Effluent Discharge Limits,

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1 number one.

2 A. Okay.

3 Q. See where we are?

4 A. Yep.

5 Q. That's got Georgetown Lake listed as
6 impaired. What is the Illinois 303(d) list?

7 A. It's actually a, a submittal to U.S. EPA
8 required under the Clean Water Act that periodically
9 states assess the surface waters of their states and
10 identify those waters that are impaired or not meeting
11 the goals of the Clean Water Act.

12 Q. How often is that done?

13 A. Right now that's under discussion. U.S. EPA
14 is in the process of amending, revisiting their
15 regulations. I believe historically it's been
16 approximately a two-year cycle.

17 Q. Do you know when it was last done?

18 A. I should. I think -- I believe we submitted
19 our list in 1999, and it was approved in the year 2000.

20 Maybe it was -- no, it was 1998 submittal, and it was
21 approved -- I believe it took them over a year to review
22 and approve that list. So, it's the most recent list we
23 have.

24 Q. I'm going to ask you in a moment to look at a

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1 document that is entitled Clean Water Act, Section 303(d)
2 list, Illinois submittal for 1998. It is listed -- it's
3 dated April 1, 1998. It is identified as being a
4 document prepared by the Illinois Environmental
5 Protection Agency, Bureau of Water, Division of Water
6 Pollution Control Planning Section, and it bears
7 identification of IEPA/BOW/97-023. And I'm going to show
8 that to you. And my question is, is that the Illinois
9 303(d) list that's referenced in paragraph B, response to
10 paragraph one on page 586 of the record?

11 A. Yes.

12 Q. You haven't seen it yet. You can't agree
13 with me yet. Have to look at it first.

14 MR. BLANTON: May I approach the witness?

15 MR. ETTINGER: The one with the Little League
16 kids on the front?

17 HEARING OFFICER: Yes.

18 BY MR. BLANTON:

19 Q. Is that what it is?

20 A. My answer stands.

21 Q. Okay. Can you look at table one? And do you
22 see Lake Georgetown listed at number 48?

23 A. Yes, I do.

24 Q. There is a code over to the right that says

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1 why it's impaired, and it has numbers and letters. Do
2 you understand that code?

3 A. I might have to take the Fifth on that one.
4 Yes.

5 Q. Can you look at the reference in table one to
6 Georgetown and the column that says, basically,
7 Impairment Reasons. And first read into the record what
8 the letters and numbers are. I think it starts with 5S,
9 and then there's something H; there's some others. First
10 read what the code is and then explain what it means.

11 A. This is the column with the heading Causes.
12 That's our monitoring program; it's assessment of the
13 likely reasons or basis that they're saying there may be
14 some impairment in these water bodies. They listed five
15 specific categories of causes, a 05S, an 11H, a 12S, a
16 20S, and a 21H.

17 Q. What do those mean?

18 A. I would have to go to the reference table.

19 Q. That would be fine. At least you know where
20 it is; I don't.

21 A. I don't know. I'll find it. I usually have
22 staff to do this for me.

23 MR. ETTINGER: Imagine how the public feel.

24 MR. SOFAT: Can I help him?

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1 MR. MOORE: Do you want me to find it for
2 you, Toby?

3 MR. BLANTON: No.

4 HEARING OFFICER: Mr. Sofat, let the witness
5 find it himself, please.

6 THE WITNESS: Don't --

7 MR. BLANTON: This was not an effort to
8 impeach you, Mr. Frevert.

9 Q. Can you look right after the list, see if it
10 might be there?

11 HEARING OFFICER: My warning to Mr. Sofat
12 applies to you, Mr. Blanton. If the witness can't find
13 it, I want that on the record.

14 Sir, if you don't know where it is, let us
15 know; we'll move on.

16 THE WITNESS: I found it.

17 BY MR. BLANTON:

18 Q. Okay. What's the code mean?

19 A. The code means the types of impairments. 05S
20 means slight -- that's a slight swimming impairment. The
21 siltation impairment is another impairment identified;

22 it's rated as high. The organic enrichment rating is
23 slight. The taste and odor problem -- that would be
24 associated with its use as a drinking water -- is slight.

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1 And there's the perception of the rating that at certain
2 times the suspended solids content is found.

3 Q. What is the next column in table one? I
4 think it says Sources?

5 A. Yes. That's --

6 Q. Are you familiar with those codes?

7 A. That's our original perception or estimate of
8 possible contributors to the impairments that are
9 categorized as causes.

10 Q. Can you interpret those codes for us also,
11 the way you just did for the --

12 A. I won't interpret them, but I can read them
13 to you. There's two, four, six, eight potential sources.

14 Q. And they are what?

15 A. 02S, 10S, 11S, 14S, 40S, 80S, 85S, and 90S.

16 Q. And what are those?

17 A. It appears that virtually all of those
18 sources in and of themselves are considered slight. 2 is
19 a municipal point source category which is treated
20 domestic wastewater. 10 is agriculture in general, I
21 believe. 11 is nonirrigated agriculture. 14 is pasture

22 drainage or pasture land use. There's some slight
23 contribution from urban storm water runoff; that's
24 category number 40. Category number 80, everybody loves,

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1 is Other. Within that category is in-place contaminants
2 which, translation in common terminology, would be
3 sediments. And then we got a slight contribution from
4 unknown sources.

5 Q. On --

6 MR. BLANTON: May I approach the witness?

7 HEARING OFFICER: Yes. Mr. Ettinger, do you
8 have something?

9 MR. ETTINGER: No, I was --

10 HEARING OFFICER: Okay.

11 BY MR. BLANTON:

12 Q. Mr. Frevert, I put before you a document
13 marked as BBCC 15. Do you recognize that as the draft
14 permit?

15 A. I believe that's what it is, yes.

16 MR. BLANTON: This appears in the record at
17 pages 759, 765. I would offer it at this time.

18 MR. ETTINGER: No objection.

19 MR. SOFAT: No objection.

20 HEARING OFFICER: It's admitted.

21 (Whereupon, BBCC Exhibit Number 15 was marked
22 for identification.)

23 BY MR. BLANTON:

24 Q. Can you please look at page three, the third

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1 page of the document which is 761? Look at the sulfates
2 daily maximum concentration in that document. What is
3 it?

4 A. It's 3500.

5 Q. That was changed to 1,000 in the final
6 permit, right?

7 A. That's correct.

8 Q. 3500 is the number that comes from the
9 Subtitle D regulations, isn't it?

10 A. That's correct.

11 Q. Do you know why it was changed for the final
12 permit?

13 A. Yes. We lowered that number to a number that
14 we believe was reasonably achievable based on performance
15 of related facilities with similar operating parameters.
16 There's a presumption in Subtitle D that these numbers
17 are consistent with typical technology, and in this case
18 we believe the technology could do better.

19 Q. Do you know where that presumption is found
20 in Subtitle D?

21 A. I don't remember the specific section, no,
22 but it's part of the mining regulations of Subtitle D.

23 Q. And the presumption has two parts, doesn't
24 it? One is that it's achievable, and the other

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1 assumption is that it will be protective of water
2 quality, isn't it?

3 A. I believe that's the language in Subtitle D,
4 yes.

5 Q. Under Subtitle D, that shall be the limit
6 unless -- well, the presumption applies generally, and it
7 is only when an applicant seeks a higher limit that there
8 must be a showing of actual known impairment; isn't that
9 right? That's how Subtitle D works generally?

10 MR. ETTINGER: I'm going to object to this as
11 a question of law.

12 MR. BLANTON: I'm asking how the permits are
13 written generally and how you apply the regulations.

14 HEARING OFFICER: Is that your only objection,
15 Mr. Ettinger?

16 MR. ETTINGER: Yes.

17 HEARING OFFICER: I'm going to overrule that
18 one then.

19 Sir, you can answer the question.

20 A. That's my general understanding, yes.

21 Q. And in this case, Black Beauty wasn't asking
22 for a limit higher than 3500, were they?

23 A. I don't believe they asked me for a higher

24 limit than 3500, no.

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1 Q. While we're on the subject of changes between
2 the draft and the final permit, there wasn't anything in
3 the draft permit regarding a 3:1 mixing requirement
4 from -- as between the receiving waters and discharge,
5 was there?

6 A. No, there was not.

7 Q. Be pretty hard to develop an operations plan
8 for complying with that if it's not part of the permit
9 you're considering, is it?

10 A. Yes, I agree with that.

11 Q. And the first time that Peabody was -- or,
12 excuse me, that Black Beauty was under an obligation to
13 have a 3:1 dilution ratio was in the terms of the final
14 permit issued December 27, 2000, right?

15 A. That's correct.

16 Q. It would be impossible for them to have an
17 operations plan before they even had the requirement,
18 wouldn't it, the way your system works?

19 A. It would be impractical. It would be -- I
20 believe our agency would view that as an unreasonable
21 delay in carrying out our duties.

22 Q. Coming back to the topic that you raised a
23 couple of times in response to your questions posed by

24 others, how long did you say you had been with the agency

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1 in doing this sort of permitting?

2 A. Way too long. 30 years.

3 Q. Are you generally familiar with the process
4 by which the Subtitle D regulations were developed?

5 A. I'm very familiar with Illinois's regulatory
6 adoption process, yes. The specific details of, of the
7 mining regulations, how they were developed in prior
8 decades I have some familiarity with.

9 Q. You mentioned that mines -- coal mines in
10 Illinois are generally treated differently than other
11 sources in that they're not generally subject to the 302
12 and 303 regs, right?

13 I'm sorry, let me withdraw that question.
14 That's not an accurate statement. I won't ask you to
15 agree with that.

16 It is not uncommon for NPDES permits for coal
17 mines to be written that do not require compliance with
18 the water quality standards under Subtitle C; is that
19 right?

20 A. I don't know that I can give you a yes or no
21 answer to that.

22 Q. Are there mines that don't have, as a
23 requirement, compliance with the water quality standards
24 of Subtitle C?

1 A. My response is that there are specific
2 directives in Subtitle D from the Board telling us how we
3 should administer the NPDES program and establish
4 discharge limitations for mining activities.

5 Q. And one of the things those directions are is
6 the Board told you that if an operator opts to fall under
7 Section 406.203 of Subtitle D then you do not apply the
8 water quality standards of Subtitle C, right?

9 A. I believe that's a fair interpretation.

10 Q. Can you look at the record that you have in
11 front of you, page 649?

12 A. I'm there.

13 Q. Look at paragraph twelve, please. Is that
14 where -- first of all, I should have asked you to start
15 -- can you look at the document that starts on page 647?
16 It's entitled General Review of Vermilion Grove mine, OMM
17 Permit Number 342. Do you know what that document is
18 that begins there and includes the page I directed you
19 to? I believe the document covers page 647 to 652. Are
20 you familiar with that document in its entirety?

21 A. Probably not its entirety as of today, no.

22 Q. Do you recognize what type of document it is?

23 A. I believe it's a, a review guidance document
24 that our mining people use to review permit applications.

1 Q. And is that sort of review done generally
2 with NPDES permit applications by coal mines?

3 A. Yes, I believe so.

4 Q. So, in the ordinary course of processing a
5 permit application like the one under consideration
6 today, this document would come to your agency, right?

7 A. That's correct.

8 Q. And when it came to your agency, one of the
9 things your folks will do is look at the section of the
10 document like this to see whether the permittee had
11 requested 406.203 to apply, right?

12 A. That's correct.

13 Q. And Black Beauty did that in this case,
14 right?

15 A. Yes.

16 Q. And in the ordinary case, once they did that,
17 all of these issues about water quality standards under
18 Subtitle C, including the antidegradation provisions of
19 302.105 would not have applied to that permit, right, in
20 the ordinary course of events?

21 A. In the ordinary course of events, that's
22 correct.

23 Q. Do you know if any other NPDES permit for a
24 coal mine where the permittee -- where the permit

1 applicant requested the TDS-related conditions of 35 IAC
2 406.203, that Illinois EPA and/or U.S. EPA required
3 provisions like those in this permit that says, despite
4 your requests, you will be subject to the water quality
5 standards of Subtitle C?

6 A. I'm not currently familiar with another
7 example of that, no.

8 Q. Would it be fair to say then that this permit
9 as issued by the agency, in fact, goes beyond what your
10 understanding is of the requirements of Illinois law on
11 this subject?

12 A. I believe there are provisions in this permit
13 that were motivated by federal law and federal
14 requirements that were probably not necessary under
15 strict interpretation of Illinois regs, state
16 regulations, yes.

17 Q. And what would those be?

18 A. Some of the information related to water
19 quality standards reviews, some of the requirements that,
20 that went into the permit directly related to things
21 like -- well, our reviews consider some alternatives and
22 some enhancement materials, some of the concepts in that
23 antidegradation. We do address those concepts in our
24 traditional review. We don't address them in the context

1 or in the past maybe of specific adherence to the
2 antidegradation standard historically.

3 In this case, we, we reviewed water quality
4 standards, application of all water quality standards
5 that applied to the Little Vermilion River and its
6 tributaries the same way we would a normal NPDES permit
7 holder.

8 Q. That is a noncoal mine permit handler?

9 A. That is a noncoal mine.

10 Q. Who in the past had a 406.203 technical
11 standards, correct?

12 A. Yes.

13 MR. BLANTON: That's all I have for
14 Mr. Frevert at this time.

15 HEARING OFFICER: Excuse me, Mr. Blanton.

16 Mr. Ettinger, do you have a -- well, before we
17 get started into whether or not you have a cross of
18 Mr. Sofat's witness -- a recross, I should say, how long
19 do you think it would take you?

20 MR. ETTINGER: I really only got --

21 HEARING OFFICER: If it goes much past five,
22 we're going to do it tomorrow.

23 MR. ETTINGER: No, no, we're not going to go
24 much past five unless I just --

1 HEARING OFFICER: Do you want to go off the
2 record for a second?

3 MR. ETTINGER: Sure.

4 (A discussion was held off the record.)

5 HEARING OFFICER: Let us go back on the
6 record. Mr. Ettinger, you have a recross of Mr. Sofat's
7 witness?

8 MR. ETTINGER: Right.

9 RECROSS-EXAMINATION

10 BY MR. ETTINGER:

11 Q. During Mr. Blanton's questioning, he asked
12 you about an BBCC Exhibit Number 14 which was a response,
13 I believe, by Mr. Fry to you dated November 3rd, 2000.
14 My question is, did you have any subsequent responses
15 from anyone connected with Black Beauty Coal Company
16 regarding this permit?

17 A. My recollection is that in addition to that,
18 there was also some correspondence submitted for the
19 record regarding economics and alternatives. There was
20 certainly the Advent study that was submitted. Those are
21 two documents that stand out in my mind as specific
22 written documents that came out of this process.

23 Q. Were they after November 3rd, 2000? Do you
24 know if there were -- I guess, why don't you look at

1 this. I'm just asking you, was there any more after this
2 that related to the permit that you got from the company?

3 HEARING OFFICER: Excuse me, Mr. Ettinger.
4 What is he looking at?

5 MR. ETTINGER: He's looking at Black Beauty
6 Coal Company Exhibit Number 14.

7 HEARING OFFICER: Thank you.

8 A. I don't remember. I think this is dated 11/3
9 which would have been after the close of the comment
10 period. I thought something came in before this, but I
11 apologize; it's strictly my memory at this point.

12 Q. Well, yeah. Do you know -- do you recall if
13 you got anything after that?

14 A. I don't recall.

15 Q. Okay. Mr. Sofat asked you with regard --
16 regarding, I think, one of the special conditions in the
17 permit, I think it was special condition twelve, whether
18 there was any other permits that had conditions like
19 that. Are you familiar with a proposed permit for the
20 Freedom United Coal Company Industry Mines?

21 A. I vaguely remember the name.

22 Q. I take it from that then that you're not
23 familiar with the specific conditions of that permit?

24 A. I may have been consulted regarding

1 conditions of that permit at the time it was being
2 developed, but I don't remember much more than that
3 today.

4 MR. ETTINGER: Thank you. I have no further
5 questions.

6 HEARING OFFICER: Mr. Sofat, do you have a
7 re-redirect?

8 MR. SOFAT: No.

9 HEARING OFFICER: Thank you, sir. You can
10 step down.

11 MR. BLANTON: Oh.

12 HEARING OFFICER: No. Mr. Blanton, you want
13 to speak again?

14 MR. BLANTON: Could I have leave to ask
15 another question to clear up a clarification?

16 HEARING OFFICER: Explain to me why you need
17 to do that when this would be beyond the scope as there
18 was no re-redirect.

19 MR. BLANTON: Well, it's not beyond the scope.
20 Mr. Ettinger asked if he received other items from Black
21 Beauty. There is an item in the record. I just want to
22 show where it was.

23 HEARING OFFICER: Let me give you my point of
24 view. I think it is beyond the scope because this is

1 Mr. Sofat's witness, and this is redirect. You have
2 crosses. I don't think it's beyond the scope of
3 Mr. Ettinger's questions. However, I don't think that's
4 the issue. The issue is whether or not it's beyond the
5 scope of the re-redirect.

6 Is there an objection to allow Mr. Blanton to
7 go forward?

8 MR. ETTINGER: I would be willing to let
9 Mr. Blanton go forward as long as he's quick.

10 HEARING OFFICER: It's actually Mr. Sofat's
11 witness. Do you have an objection, sir?

12 MR. SOFAT: No.

13 HEARING OFFICER: All right. Then we'll let
14 it go forward.

15 RE-CROSS-EXAMINATION

16 BY MR. BLANTON:

17 Q. Mr. Frevert, could you please look at the
18 record again, page 933 through 937?

19 A. I'm on page 933.

20 Q. What is found there?

21 A. I believe this is a submittal from Eric Fry
22 on behalf of Black Beauty Coal Company to the agency's
23 hearing officer in the case of this particular mine
24 permit application.

1 Q. And is this the written response that you
2 referred to when you answered Mr. Ettinger that you
3 thought there was a written response?

4 A. Yes, it is.

5 MR. BLANTON: That's all I got.

6 HEARING OFFICER: Now we have to go through
7 here again. Mr. Ettinger, I'm going to allow both you and
8 Mr. Sofat the chance to --

9 MR. ETTINGER: Off the record.

10 HEARING OFFICER: Do you want to go off the
11 record for a second?

12 MR. ETTINGER: I just want to look at the
13 document. I'm sorry.

14 HEARING OFFICER: Let's go off while he does
15 that.

16 (A discussion was held off the record.)

17 REXCROSS-EXAMINATION

18 BY MR. ETTINGER:

19 Q. I'll just ask you about this document which
20 Mr. Blanton just pointed out and ask you about a stamp
21 which is on the document, and seems to say, Received
22 December 7, 2000. Do you recognize that stamp?

23 A. That would be our community relations group
24 which coordinates and does the setup and sort of the

1 administrative support for things that go through the
2 hearing process.

3 Q. Okay. Now, the document is dated October 30,
4 2000?

5 A. That's correct.

6 Q. Do you believe that's -- do you have any
7 reason to believe that's not when it was created?

8 A. No, I do not. I notice there's a long lag
9 time between the day of its creation and the date it was
10 received in the community relations. I don't know
11 whether that's an original or a copy. Bill Seltzer does
12 not work with community relations, though, so this may
13 have been a copy sent to the community relations group.

14 Q. Okay. Was October 31 after the close of the
15 public comment period?

16 A. I believe traditionally we allow a 30-day
17 comment period. It's not unusual to extend them a few
18 days for one reason or another. I don't recall whether
19 this particular record was extended beyond the 30-day
20 period or not. But the date of the memo is beyond thirty
21 days past the actual hearing date.

22 MR. ETTINGER: Thanks. No further questions.

23 HEARING OFFICER: Mr. Sofat, any
24 re-re-redirect?

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1 MR. SOFAT: No, sir.

2 HEARING OFFICER: Okay. Then I'm going to
3 close this down. Thank you, sir.

4 Anybody from the public who has weathered the
5 whole day's worth of testimony wish to provide public
6 comment at this point in time?

7 Ma'am, we will be coming back tomorrow if you
8 do want to wait till tomorrow.

9 MS. HAYWARD: Okay. I hate to keep everyone
10 here any longer.

11 HEARING OFFICER: Well, nobody else has had
12 that concern, ma'am, so please feel free to -- if you want
13 to do it today, I'd be more than welcome to -- more than
14 happy to stay, and you would be more than welcome to speak
15 your peace today, or we will be here tomorrow as well.

16 MS. HAYWARD: Well, I'll be working tomorrow.
17 I have thirty seconds.

18 HEARING OFFICER: That would be fine. Why
19 don't you come up here and sit in that chair and give us
20 your name, and we'll swear you in.

21 MS. HAYWARD: If I make a comment now, can I
22 also make a written comment?

23 HEARING OFFICER: Yes, you may. In fact, you
24 can make as many written comments as you would like; if

1 you think of something after the first one, feel free to

2 keep sending them in. Don't run. Take your time.

3 MS. HAYWARD: I'm tired.

4 HEARING OFFICER: Your name, ma'am?

5 MS. HAYWARD: Jean Hayward, J-e-a-n,
6 H-a-y-w-a-r-d.

7 HEARING OFFICER: Okay. Have a seat there
8 please.

9 (Whereupon, Ms. Hayward was duly sworn by the
10 court reporter.)

11 HEARING OFFICER: Miss Hayward, you can
12 provide your comment at this point.

13 MS. HAYWARD: Okay. I've been listening, and
14 it's been a very interesting process; I have never
15 witnessed anything like this. But I do want to make a
16 comment, and I've been writing all this information down.
17 The comment I would like to make is regardless of the
18 information that I've heard today from EPA and from the
19 counsel for Black Beauty, I continue to question the
20 suitability of a coal mine at the Vermilion Grove
21 location. I am very concerned with the adverse effects
22 that the coal mine will have on the groundwater and the
23 quality of water that is currently the makeup of the
24 Little Vermilion River.

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1 Common sense will dictate that whenever there
2 is a disruption of the magnitude that follows a

3 construction and operation of a coal mine, there is,
4 without question, a huge disruption to the environment.

5 And on a personal note, I would like to add
6 that we cannot blindly go through life following decisions
7 set by a select few of people unquestioning their
8 recommendations, recommendations that will affect our
9 environment, our lives, our children's lives. And to do
10 so, I believe, would jeopardize our very quality of life.

11 HEARING OFFICER: Is that it, ma'am?

12 MS. HAYWARD: That's it.

13 HEARING OFFICER: Thank you very much. You
14 have to sit there for a second. We have to make sure none
15 of these attorneys have questions for you, starting with
16 the petitioner?

17 MR. ETTINGER: No.

18 HEARING OFFICER: Mr. Sofat?

19 MR. SOFAT: I have no questions.

20 HEARING OFFICER: Mr. Blanton?

21 MR. BLANTON: No questions.

22 HEARING OFFICER: Ma'am, thank you very much.
23 The Board will accept your public comment and give it the
24 weight it deserves. Thank you very much.

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1 Anybody else wishing to speak today before we
2 close it up? I see no hands, and that's it. We'll be

3 back here at nine a.m. tomorrow. Thank you all very much.

4 (The proceedings were adjourned at 5:20

5 o'clock p.m.)

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2 STATE OF ILLINOIS :

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3 COUNTY OF PEORIA :

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6 I, JENNIFER E. JOHNSON, Certified Shorthand
7 Reporter, do hereby certify that the foregoing transcript
8 of proceedings is true and correct to the best of my
9 knowledge and belief;

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11 That I am not related to any of the parties
12 hereto by blood or marriage, nor shall I benefit by the
13 outcome of this matter financially or otherwise.

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