

1 STATE OF ILLINOIS )  
 ) SS.  
2 COUNTY OF C O O K )

3  
4 IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
COUNTY DEPARTMENT, LAW DIVISION

5 IN THE MATTER OF: )  
 )  
6 WATER QUALITY STANDARDS AND )  
EFFLUENT LIMITATIONS FOR THE ) R08-9  
7 CHICAGO AREA WATERWAY SYSTEM AND ) (Rulemaking -  
THE LOWER DES PLAINES RIVER: ) Water)  
8 PROPOSED AMENDMENTS TO 35 Ill. )  
Adm. Code Parts 301, 302, 303 )  
9 and 304 )

10 TRANSCRIPT OF PROCEEDINGS held in the  
11 above-entitled cause before Hearing Officer Marie  
12 Tipsord, called by the Illinois Pollution Control  
13 Board, pursuant to notice, taken before Rebecca  
14 Graziano, CSR, within and for the County of Cook and  
15 State of Illinois, at the James R. Thompson Center,  
16 100 West Randolph Street, Room 9-040, Chicago,  
17 Illinois, on the 28th Day of January, A.D., 2008,  
18 commencing at 10:00 a.m.

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## 1 A P P E A R A N C E S

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## ILLINOIS POLLUTION CONTROL BOARD:

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

6

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## ILLINOIS ENVIRONMENTAL PROTECTION AGENCY:

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Ms. Stefanie Diers  
Ms. Deborah Williams  
9 Mr. Robert Sulski  
Mr. Scott Twait  
10 Mr. Roy Smogor  
Mr. Howard Essig  
11 Ms. Marcia Willhite

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## U.S. ENVIRONMENTAL PROTECTION AGENCY:

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Ms. Linda Halls  
Mr. Peter Swenson

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BY: MR. ALBERT ETTINGER  
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Appeared on behalf of ELPC, Prairie Rivers  
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1 MS. TIPSORD: Good morning. My name  
2 is Marie Tipsord, and I've been appointed by the  
3 Board to serve as hearing officer in this proceeding  
4 entitled Water Quality Standards in Effluent  
5 Limitations for the Chicago Area Waterway System and  
6 Lower Des Plaines River -- excuse me -- proposed  
7 amendments to 35 Il Admin Code 301, 302, 303, and  
8 304. The docket number is R08-9.

9 To my right is Dr. Tanner Girard.  
10 He's acting chairman of the Board and the lead Board  
11 member assigned to this matter. To my left is Anand  
12 Rao, Alisa Liu from our technical staff, and I  
13 believe member Melas will be joining us, Nicholas  
14 Melas.

15 This is the first hearing to be  
16 held in this proceeding. The purpose of today's  
17 hearing is to hear the pre-filed testimony of the  
18 proponent, the Illinois Environmental Protection  
19 Agency. After the Agency has introduced the  
20 witnesses, they will be sworn in. The testimony  
21 will be taken as if read, and we will proceed  
22 directly to questions.

23 The order of the hearing was the  
24 subject of a prehearing conference on Friday. As

1 discussed at the prehearing conference, we will  
2 begin by questioning the Agency's witnesses  
3 considering the more general aspects of the  
4 proposal.

5                               We will proceed today with those  
6 questions, and we will begin with the Illinois  
7 Environmental Regulatory Group. After IERG, we go  
8 to Midwest Gen -- Midwest Generation, LLC, excuse  
9 me. It's the first time on the record. I should  
10 give the full name. Flint Hills Resources, Joliet  
11 facility, Citgo Petroleum Corporation and PDB  
12 Midwest, LLC, Corn Products International, Inc.,  
13 Chemical Industry Counsel of Illinois, Metropolitan  
14 Water Reclamation of Greater Chicago, Stepan  
15 Company, Environmental Law Policy Center, Prairie  
16 Rivers Network and Sierra Club, Exxon Mobile Oil  
17 Corporation.

18                               We will address the more general  
19 questions pre-filed by each group, and then proceed  
20 with more specific questions for each witness. As I  
21 discussed off the record, this means that we will do  
22 them by general topic area as much as possible so  
23 that we can keep topics together so that the lead  
24 questioner may change from time to time.

1                   And that leads me to -- actually,  
2 I think I'm going to turn to Ms. Williams now about  
3 Mr. Yoder --

4                   MS. WILLIAMS: Sure

5                   MS. TIPSORD: -- who was also the  
6 subject of a prehearing conference.

7                   MS. WILLIAMS: I think on Friday we  
8 discussed the inconvenience to the parties of our  
9 expert witness being available only on Monday,  
10 Tuesday, and Wednesday of this week, and we were  
11 able to reach him on Friday in California, and while  
12 the March hearing would be very difficult for him,  
13 we have -- he was able to switch his schedule around  
14 to make himself available on Wednesday, Thursday,  
15 and Friday of this week, which, to us, seemed to  
16 accommodate even better, I think, the concerns that  
17 were expressed at the prehearing conference on  
18 Friday.

19                   MS. TIPSORD: Okay. Given that he  
20 will be available starting Wednesday, we will  
21 discuss tomorrow afternoon where we're at and  
22 whether we want to begin first thing Wednesday  
23 morning with Mr. Yoder, or where we want to begin,  
24 and at that time, we will take any objections or any

1 concerns that any of you might have about his  
2 limited availability.

3                   Okay. Anyone may ask a followup  
4 question. You need not wait until your turn to ask  
5 the question. For example, as I said off the  
6 record, many of you have posed questions concerning  
7 economics, and also the Environmental Protection Act  
8 language requiring consideration of the existing  
9 physical conditions. Please feel free to follow up  
10 after the question is initially asked, then when we  
11 get to your question, you can note the question was  
12 already asked and answered.

13                   I do ask that you raise your hand,  
14 wait for me to acknowledge you. After I have  
15 acknowledged you, please state your name and whom  
16 you represent before you begin your question.  
17 Please speak one at a time. If you're speaking over  
18 each other, the court reporter will not be able to  
19 get your questions on the record. Please also note  
20 that any question asked by a Board member or staff  
21 are intended to help build a complete record for the  
22 Board's decision, and not to express any  
23 preconceived notion or bias.

24                   Also, just a note before I begin,

1 the Environmental Law and Policy Center, et. al,  
2 when you filed your question, you filed along with  
3 it a motion to file the pre-filed questions. It's  
4 granted, obviously.

5                   To the right of the room, I have  
6 sign-up sheets for available service lists. If you  
7 wish to be on the service list, you will receive all  
8 pleadings and all pre-filed testimony in the  
9 proceeding, but you must also serve anything you  
10 file on the entire service list. Our service list  
11 in this, I believe, now is over 50 people. That's a  
12 huge service list. So I want you to think about it.  
13 Unless you really want your own very own copy, most  
14 things are scanned and linked, unless we have  
15 computer difficulties with the Board's office,  
16 almost immediately, and if it comes in  
17 electronically, literally almost immediately.

18                   So then in some cases it may be  
19 faster for you to go to the Board's web page than it  
20 would be for you to wait for it to come to you by  
21 U.S. mail. So please think about which list you  
22 want to be on. Notice lists gives you copies of all  
23 Board orders and all hearing officer orders, and if  
24 you have any other questions about which site --

1 which service list or notice list to sign up for,  
2 please talk to me at a break.

3 At this time, Doctor Girard.

4 MR. GIRARD: Thank you. Good morning.  
5 On behalf of the Board, I welcome everything to this  
6 rule making to consider changes in the water quality  
7 standards and effluent limits for the Chicago Area  
8 Water Waste System and the Lower Des Plaines River.

9 The Board appreciates the  
10 considerable time and effort already invested in  
11 this proceeding by the Illinois EPA, the  
12 stakeholders advisory committee, and all the groups  
13 that have pre-filed questions. We look forward to  
14 the testimony in questions this week that will make  
15 a better record for the Board's rule-making process.  
16 Thank you, and let's get to work.

17 MS. TIPSORD: Okay. Miss Williams,  
18 Miss Diers -- I'm sorry, is it Diers?

19 MS. DIERS: It is Diers. Marie, I  
20 just wanted to do a very brief opening statement, if  
21 that's okay.

22 MS. TIPSORD: Okay. You need to speak  
23 up, though, because the acoustics are really bad in  
24 here.

1 MS. DIERS: Okay. Thank you. My name  
2 is Stefanie Diers, and I'm assistant counsel with  
3 Illinois EPA. Sitting beside me is Miss Deborah  
4 Williams, also counsel with Illinois EPA.

5 First I would like to just give a  
6 brief overview of the Agency's proposal. The  
7 proposed amendment has three major components. One  
8 is the deletion of current use classifications for  
9 those waters that are listed in our proposal and  
10 replaced with six new used classifications that are  
11 intended to more accurately describe the actual  
12 aquatic life and recreational expectation within  
13 each segment.

14 MS. TIPSORD: Could you speak up,  
15 please?

16 MS. DIERS: Yes. Two, replace in its  
17 entirety the current secondary content in indigenous  
18 aquatic life standards found at 35 Illinois  
19 Administrative Code, Subtitle C Chapter 1, Part 302,  
20 Subpart D, with new standards that are more  
21 reflective of the new classifications proposed by  
22 the Agency, and three, the inclusion of the  
23 technology-based disinfect requirement for point  
24 sources discharging to the segment intended to

1 support recreational use.

2                                 These concepts are requested in  
3 the proposed regulatory language that was attached  
4 to our Statement of Reasons filed with the Board on  
5 October of 2007. On behalf of the Agency, we have  
6 four witnesses to present for these hearings, all of  
7 which have filed pre-file testimony.

8                                 Today with us we have Mr. Roy  
9 Smoger, who is sitting down at the very end there.  
10 Beside him we have Mr. Scott Twait, and on -- beside  
11 me is Mr. Rob Sulski.

12                                 MR. SULSKI: Sulski.

13                                 MS. DIERS: Sulski. Excuse me,  
14 sorry. Mr. Smoger can address questions related to  
15 aquatic life use designations and dissolved oxygen.  
16 Mr. Sulski can address questions related to the  
17 UAA's in general, the studies that were taken in  
18 account by the Agency in formulating this proposal,  
19 defining the proposed recreational and aquatic life  
20 uses, effluent and waterway management controls that  
21 would be necessary to achieve the designated use  
22 proposed by the Agency, and issues related to  
23 technical feasibility and economical reasonableness.

24                                 Mr. Twait can address questions

1 related to the Agency's decision in formulating its  
2 proposal to the Board for the set of comprehensive  
3 numeric standard necessary to protect the designated  
4 aquatic life and recreational uses proposed by the  
5 Agency and including the Agency's temperature  
6 proposal.

7                                 Finally, Mr. Yoder, as the hearing  
8 officer stated earlier, will be here on Wednesday,  
9 and he can address questions related to the report  
10 title, temperature criteria options for the Lower  
11 Des Plaines river, and the methodology it relies  
12 upon in questions also related to the updates made  
13 to the fish temperature model that was included with  
14 his pre-file testimony.

15                                 Also joining us to help assist in  
16 the panel is Mr. Howard Essig. He's in our Des  
17 Plaines regional office, and also behind me is Miss  
18 Marcia Willhite, the bureau chief for the Bureau of  
19 Water for Illinois EPA.

20                                 We'd also like to take the time to  
21 thank everybody that has been involved in this long  
22 process. It's been years coming, and we look  
23 forward to the hearings and questions ahead. With  
24 that being said, I think we're ready to proceed with

1 entering the testimony into the record.

2 MS. TIPSORD: Okay. Before we do  
3 that, I did forget one thing. Mr. Phil Taylor is  
4 it?

5 MR. TAYLOR: Yes.

6 MS. TIPSORD: Yes -- is here, and he's  
7 the reporter with what organization?

8 MR. TAYLOR: The Daily News Tracks.

9 MS. TIPSORD: He would like to know if  
10 anyone objects to him taking some photos during the  
11 hearing. Is there any objection?

12 MS. WILLIAMS: It's not video, right?

13 MR. ETTINGER: Will I have time to  
14 adjust my makeup?

15 MS. TIPSORD: I'm sorry?

16 MR. ETTINGER: Will I have time to  
17 adjust my makeup?

18 MS. TIPSORD: Yeah, and Mr. Safley's  
19 already indicated he has to take his best side.  
20 Please feel free, thank you. All right. Let's go  
21 ahead and have the witnesses sworn in.

22 (Witnesses sworn.)

23 MS. TIPSORD: Okay, then. Go ahead  
24 with the testimony.

1 MS. DIERS: I have -- do you want to  
2 do the formal practice of having them identified,  
3 or --

4 MS. TIPSORD: No. Let me just ask:  
5 There are no changes to his testimony in the  
6 testimony that was pre-filed?

7 MS. DIERS: That is correct.

8 MS. TIPSORD: Alisa, can you --

9 MS. DIERS: I don't have Mr. Yoder's,  
10 and didn't know if we wanted to do that when he  
11 comes, or --

12 MS. TIPSORD: No. Wait until Mr.  
13 Yoder's sworn in --

14 MS. DIERS: Okay. That's what I  
15 thought. Okay.

16 MS. TIPSORD: -- before we do it. All  
17 right. We will enter the pre-file testimony of Rob  
18 Sulski, correct?

19 MR. SULSKI: Yes.

20 MS. TIPSORD: As Exhibit  
21 No. 1 if there's no objection. Seeing none, it is  
22 Exhibit No. 1. The testimony -- pre-file testimony  
23 of Scott Twait will be admitted as Exhibit No. 2 if  
24 there's no objection. Seeing none, it is Exhibit

1 No. 2, and the pre-file testimony of Rob Smoger is  
2 admitted as Exhibit No. 3 if there's no objection.  
3 Seeing none, it is Exhibit No. 3.

4 With that, if you would like to go  
5 ahead.

6 MR. SAFLEY: Thank you, Miss Tipsord.  
7 Good morning. My name's Tom Safley. I'm with the  
8 law firm of Hodge Dwyer Zeman, and appearing today  
9 on behalf of the Illinois Environmental Regulatory  
10 Group. Sitting to my right is Monica Rios, also of  
11 the law firm of Hodge Dwyer and Zeman on behalf of  
12 IERG.

13 We appreciate the opportunity to  
14 ask questions of the Agency this morning, and as I  
15 think we've mentioned earlier, we'll leave it to the  
16 Agency's discretion in the panel its present as to  
17 who's the most appropriate person to respond to our  
18 questions, and I will skip two or three of our  
19 questions that are more specific and ask those later  
20 on in the hearing as appropriate, rather than  
21 getting to specifics right now.

22 But to proceed into our pre-filed  
23 questions, number one: In it's Statement of  
24 Reasons, the Agency sites federal requirements,

1 which the Agency refers to as UAA factors, in 40  
2 C.F.R. Section 131.10 (g) as requirements with which  
3 states must comply when developing use designations.  
4 That's the statement of record at Page 5. The first  
5 factor to be considered is whether naturally  
6 occurring concentrations prevent the attainment of  
7 the use.

8                                 Can you please discuss how the  
9 Agency considered the pollutant concentrations of  
10 the Chicago Area Waterway System, or CAWS, and the  
11 Lower Des Plaines River in developing the proposed  
12 rule?

13                                 MR. SULSKI: We considered all the  
14 information that's contained in the report as  
15 outlined in the Statement of Reasons. I really  
16 wanted to -- in reviewing these questions, wanted to  
17 put together, perhaps, a map or augment our map  
18 which says this factor applies, this factor applies  
19 here, and it's two different use designations,  
20 several different factors. I didn't have time to do  
21 that.

22                                 Knowing that it's within the  
23 record and the Statement of Reasons, you know, I  
24 invite you to look at that more thoroughly. If

1 somebody is adamant about it, we can certainly do  
2 the tech search throughout the documents to get that  
3 information to you.

4 MR. SAFLEY: And if I could just  
5 follow up real quickly to clarify, Mr. Sulski, when  
6 you say, "report," do you mean the Use Attainability  
7 Analysis, which were done for each of the --

8 MR. SULSKI: We used both Use  
9 Attainability Analysis, yes.

10 MR. SAFLEY: Okay. And then the  
11 Statement of Reasons you referred to?

12 MR. SULSKI: Yes.

13 MR. SAFLEY: Are there any other  
14 documents that are part of the Agency's filing that  
15 people could review on this particular issue?

16 MR. SULSKI: Various -- the various  
17 attachments, whether they say this is a UAA factor  
18 that was -- that applies in this, I'm not sure. But  
19 all of those documents support the entire action.  
20 So decisions were made based on those documents,  
21 those other documents.

22 MS. TIPSORD: Excuse me. If I may,  
23 just for the record, by "the Use Attainability  
24 Analysis," you're speaking of its Attachment, or

1 Attachments, A and B; correct?

2 MR. SULSKI: Yes.

3 MR. SAFLEY: Thank you. Is there any  
4 information that the Agency reviewed that is not  
5 contained in the Statement of Reasons or the  
6 attachments to the Statement of Reasons?

7 MR. SULSKI: Not with respect to this  
8 proposal.

9 MR. SAFLEY: The next question may get  
10 to what, Mr. Sulski, you were speaking of with  
11 regard to different waterways. The question is:  
12 What were the Agency's conclusions regarding the  
13 level of naturally occurring pollutant  
14 concentrations in the water bodies?

15 MR. SULSKI: Again, I have to give you  
16 the same answers as I just did.

17 MR. SAFLEY: Okay.

18 MR. SULSKI: That it's laced through  
19 the report, and its reached dependance. So to go  
20 through and follow retrieves would be fairly  
21 time-consuming, when I believe that we presented it  
22 in the reports.

23 MR. SAFLEY: Are any of the Agency's  
24 conclusions regarding pollutant concentrations in

1 the water bodies not reflected in the Statement of  
2 Reasons in the attachments?

3 MR. SULSKI: They are reflected in the  
4 Statement of Reasons in the record of the  
5 submission.

6 MR. SAFLEY: How did the Agency's  
7 conclusions regarding naturally-occurring pollutant  
8 concentrations affect or impact the development of  
9 the proposed ruling?

10 MR. SULSKI: They were taken into  
11 consideration when we had got -- when we proposed  
12 our --

13 MR. SAFLEY: Well -- and I guess I'd  
14 like to follow up on that. When you say they were  
15 taken into consideration, did the Agency consider  
16 them and decide that naturally occurring pollutant  
17 concentrations was not an issue? Did they decide it  
18 was an issue in some water bodies but not others?  
19 And, again, I realize that the specifics may be  
20 contained in the documents, but can you characterize  
21 in --

22 MR. SULSKI: In terms of factor one?

23 MR. SAFLEY: Yes, factor one.

24 MR. SULSKI: Factor one. To my

1 knowledge, I don't believe that we relied on factor  
2 one in any of the waterways.

3 MR. SAFLEY: So would it, then, be  
4 safe to say, or accurate, that as to none of the  
5 waterways, the Agency -- the Agency did not conclude  
6 as to any of the waterways that naturally occurring  
7 pollutant concentrations precluded the attainment of  
8 the uses proposed by the Agency?

9 MR. SULSKI: That's correct.

10 MS. TIPSORD: Excuse me. Again, and  
11 just to keep the record clear, factor one is factor  
12 -- in section 131.10 (g) one of 40 C.F.R.?

13 MR. SULSKI: Yes.

14 MR. SAFLEY: Then I'm going to move on  
15 to our question number two. UAA factor two is the  
16 consideration of whether natural, ephemeral,  
17 intermittent, low flow conditions or water levels  
18 prevent the attainment of the use.

19 Can you please discuss how the  
20 Agency considered the natural, ephemeral,  
21 intermittent, or low flow conditions in water  
22 bodies?

23 MR. SULSKI: I have to refer you back  
24 to my original answer, that to go reach by reach and

1 say which fact -- if this factor applied to this  
2 reach and for what designated use category we're  
3 talking about would take a long time. And, again, I  
4 would've put together a better map if I would've had  
5 the time. So it's in the record. It was  
6 considered. It's in the record how it was  
7 considered and where it applies in the proposal.  
8 I'm sorry.

9 MR. SAFLEY: No, that's fine. With  
10 regard to this second factor under the UAA factors,  
11 is there any information that the Agency considered  
12 that is not contained in the proposal in the  
13 attachments that were filed?

14 MR. SULSKI: The information is  
15 contained in the proposal.

16 MR. SAFLEY: And, Marie, I -- I'm  
17 going to withdraw, or get off the subject of my  
18 questions here a little bit. What I'm trying to  
19 decide is whether I want to ask Mr. Sulski to go  
20 through reach by reach and explain these factors,  
21 six factors, with all six reaches, or whether we  
22 want to do that kind of going forward. The goal of  
23 IERG's questions was to get more background  
24 information, and obviously that information is --

1 there is information, at least, on some of these  
2 factors that's contained in the record, but the  
3 point was to get some conversation about that.

4                   So I realize I can ask any  
5 questions I want, and I don't know if you have any  
6 thoughts on that, but the response that it will take  
7 a long time, may very well be true, but...

8                   MS. WILLIAMS: Do you think it would  
9 be best afterwards to ask which ones did we rely on?

10                   MR. SAFLEY: Well, I want to go  
11 through and make sure that some of it is clear on  
12 the record what was relied on. I know that with our  
13 factors it's not entirely clear. Let me -- let me  
14 make it through factor two, and if it turns out that  
15 was not an issue at all as of factor one, maybe I  
16 won't worry about that.

17                   With regard to factor -- UAA  
18 factor two, which, again, is the natural, ephemeral,  
19 intermittent, or low flow conditions or water levels  
20 present -- whether those conditions prevent the  
21 attainment of the use as to any of the water bodies  
22 or waterways that are the subject of this  
23 rulemaking, does the Agency conclude that factor two  
24 did prevent attainment to the use proposal?

1 MR. SULSKI: Yes, we did.

2 MR. SAFLEY: Okay. And can you tell  
3 me which water bodies those were?

4 MR. SULSKI: It pertained primarily to  
5 recreation. This is a flow based -- in general,  
6 it's a flow factor. So it pertained primarily to  
7 recreation and safety issues. For example --

8 MR. SAFLEY: And was that for all the  
9 water bodies, or just some of them?

10 MR. SULSKI: No, that was for the  
11 non-recreation.

12 MR. SAFLEY: So for any of the water  
13 bodies that the Agency has proposed as  
14 non-recreational?

15 MR. SULSKI: That's correct.

16 MR. SAFLEY: Okay. And the other two  
17 categories of recreational use, this -- the Agency  
18 concluded that for those water bodies, this --  
19 factor two was not an issue. Would that be correct?

20 MR. SULSKI: Not to my knowledge.

21 MR. SAFLEY: Okay. And you said  
22 "primarily as to recreation." Did the Agency find  
23 that factor two was an issue with use designations?

24 MR. SULSKI: We found that it was an

1 added condition, but not a primary. An added  
2 factor, but not a primary factor. So it went in  
3 concert with primarily the third and fourth factors.

4 MR. SAFLEY: Are any of the Agency's  
5 conclusions regarding factor two of the UAA factors  
6 not included within the record that the Agency has  
7 filed with before?

8 MR. SULSKI: They are included in the  
9 record.

10 MR. SAFLEY: UAA factor three is the  
11 consideration of whether human caused conditions or  
12 sources of pollution prevent the attainment of the  
13 use and cannot be remedied or would cause more  
14 environmental damage to correct than to leave in  
15 place.

16 Can you discuss how the Agency  
17 considers human cause conditions or sources of  
18 pollution, and whether such conditions or pollution  
19 sources cannot be remedied or would cause more  
20 environmental damage to correct and to leave into  
21 place -- leave in place.

22 MS. TIPSORD: And excuse me,  
23 Mr. Sulski. That's question number three.

24 MR. SAFLEY: I apologize, thank you.

1                   MR. SULSKI: Question number three in  
2 factor three?

3                   MR. SAFLEY: Yes.

4                   MR. SULSKI: Factor three was  
5 considered and applied in some of the reaches. I  
6 can't tell you exactly which reaches and where at  
7 this point without going through the report, but it  
8 was applied.

9                   MR. SAFLEY: Okay. Did the Agency  
10 conclude that factor three precluded any of these  
11 waterways from reaching the uses proposed?

12                   MR. SULSKI: Yes, we did.

13                   MR. SAFLEY: Okay. Can you tell me  
14 which reaches or which waterways those were?

15                   MR. ETTINGER: Excuse me. I don't  
16 believe the witness heard that question properly.

17                   MS. WILLIAMS: Yeah. Can you repeat  
18 the question?

19                   MR. SAFLEY: Yes. Did -- and I think  
20 I know which question you're asking me to repeat.  
21 Did the Agency conclude that factor three of the UAA  
22 factors precluded any of the waterways from being  
23 able to reach the uses proposed?

24                   MR. SULSKI: Yes. Oh, the uses

1 proposed?

2 MR. SAFLEY: Or --

3 MS. FRANZETTI: -- The Clean Water  
4 Act?

5 MR. SAFLEY: -- The Clean Water Act.  
6 I misspoke. The full use under the Clean Water Act.  
7 Let me rephrase it that way.

8 MR. SULSKI: Yes.

9 MR. SAFLEY: Okay. And my next  
10 question was: Did -- can you tell me which  
11 waterways those are sitting here right now?

12 MR. SULSKI: It varied between  
13 recreation and aquatic life, and I would have to go  
14 through the reports and point it out, and it's very  
15 clearly stated in those reports and the supporting  
16 attachments to the proposal.

17 MS. TIPSORD: And again, just for  
18 my -- we're using words like "reports" and stuff,  
19 and again, you're talking about Exhibits A and B to  
20 the Statement of Reasons?

21 MR. SULSKI: Yes.

22 MS. TIPSORD: Okay.

23 MR. SAFLEY: And is there any --

24 MS. WILLIAMS: Attachments. Can we --

1 we did try to say attachments --

2 MS. TIPSORD: Yes.

3 MS. WILLIAMS: -- so that we  
4 wouldn't --

5 MS. TIPSORD: I'm sorry.

6 MS. WILLIAMS: -- confuse on the  
7 record --

8 MS. TIPSORD: Attachments.

9 MS. WILLIAMS: -- that ours are  
10 attachments, whereas today we're doing the exhibits.

11 MS. TIPSORD: That's correct. Thank  
12 you for the correction.

13 MR. SAFLEY: Mr. Sulski, is there any  
14 information that the Agency reviewed on factor three  
15 that is not contained in the Agency's rulemaking  
16 proposal?

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

18 MR. SAFLEY: Now, the -- factor three  
19 has several parts to it, so I'd like to break it  
20 down a little bit, and this is the next question  
21 within my group, or IERG's group, of questions  
22 labeled three at the bottom of Page 2 of our  
23 pre-filed of questions.

24 Did the Agency determine that any

1 human caused conditions and sources of pollution  
2 impacting these water bodies cannot be remedied --  
3 remedied, I guess, is what I said.

4 MR. SULSKI: Yes.

5 MR. SAFLEY: Okay. As to which  
6 conditions or sources of pollution did the Agency  
7 make that determination?

8 MR. SULSKI: Primarily with respect to  
9 downtown areas and areas that have straight-walled  
10 channels that have involvement on them. It was  
11 concluded that it would be almost impossible and  
12 cause great environmental damage to remove buildings  
13 and plants, and in order to rip back slopes or  
14 whatever to create aquatic habitat.

15 MR. SAFLEY: Okay. Was --

16 MR. TWAIT: In addition to that, the  
17 other factor that was used was the removal of  
18 sediment.

19 MR. SAFLEY: Okay. And how was  
20 sediment an issue with regard to UAA factor three?

21 MR. TWAIT: Contained in our Statement  
22 of Reasons, we used -- we used this UAA factor to  
23 determine that cadmium could not be met in the  
24 waterways, and that was primarily due to sediment.

1                   MR. SAFLEY: Okay. And, Mr. Sulski,  
2 you mentioned the issue of the straight-walled  
3 channels in aquatic life. Did those same concerns  
4 affect the Agency's decisions regarding recreational  
5 uses of those waterways?

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

7                   MR. SAFLEY: Did the Agency --

8                   MR. SULSKI: Except for --

9                   MR. SAFLEY: Go ahead. Sure.

10                  MR. SULSKI: Except for access.

11                  MR. SAFLEY: Okay.

12                  MR. SULSKI: That was an issue.

13                  MR. SAFLEY: Okay. Did the Agency  
14 determine that any human caused conditions and  
15 sources of pollution would cause more environmental  
16 damage to correct than to leave in place?

17                  MR. SULSKI: We didn't make that  
18 determination.

19                  MR. SAFLEY: When you say you didn't  
20 make that determination, do you mean you looked at  
21 that but did not come to that conclusion, or the  
22 Agency did not consider that as an issue?

23                  MR. SULSKI: In the Lower Des Plaines,  
24 there was -- the Lower Des Plaines in the UAA

1 report, there was -- they looked at that issue and  
2 they couldn't come up with a conclusion on that.  
3 There wasn't -- I can't remember the exact train of  
4 reasoning in the lower, but in the upper -- or in  
5 the CAWS area, it wasn't -- we weren't able to look  
6 at it very well because of the limited amount of  
7 sediment data that we had.

8 MS. WILLIAMS: Do we want to say for  
9 the record that when we say CAWS, we mean Chicago  
10 Area Waterways System?

11 MS. TIPSORD: So it's actually an  
12 acronym, and not c-a-u-s-e?

13 MR. SULSKI: Correct.

14 MR. SAFLEY: Did the Agency consider  
15 that issue with regard to the straight-walled  
16 channels that you mentioned earlier?

17 MR. SULSKI: Yes.

18 MR. SAFLEY: And what was the Agency's  
19 conclusion?

20 MR. SULSKI: That it was next to  
21 impossible to rip out buildings and restore meanders  
22 through the city streets to establish aquatic  
23 habitat.

24 MR. SAFLEY: Are any of the Agency's

1 conclusions regarding these issues of fact not  
2 reflected in the Agency's rule making proposal?

3 MR. SULSKI: They're all reflected in  
4 the rule making.

5 MR. SAFLEY: UAA factor four is the  
6 consideration of whether dams, diversions, or other  
7 types of hydrologic modifications preclude the  
8 attainment of the use, and it is not feasible to  
9 restore the water body to its original condition or  
10 to operate such modification in the way that would  
11 result in the attainment of the use.

12 Can you please discuss how the  
13 Agency considered whether dams, diversions, or other  
14 types of hydrologic modifications to the water  
15 bodies preclude attainment -- and this question  
16 says, "of the use as proposed in the rule." It  
17 maybe should have said "preclude attainment of the  
18 full use under the Clean Water Act."

19 MR. SULSKI: The discussions of,  
20 especially this factor, are replete through the  
21 reports through the Statement of Reasons. You know,  
22 it's a similar -- similar as the factors we've just  
23 talked about. I mean, the information is there  
24 where we relied for what reach and for what reason.

1                   So, again, I would invite you to  
2 look at those reports more carefully. I think that  
3 if you did a tech search on factor, or factors, you  
4 would pinpoint it.

5                   MR. SAFLEY: And you -- you discussed  
6 a little bit earlier the issue of the impossibility  
7 of restoring some of the meanders in the city and  
8 things like that. The next question I have here in  
9 my -- in the pre-file questions is: Can you discuss  
10 how the Agency considered whether it is feasible to  
11 restore the water bodies to their original  
12 condition?

13                   Could you expand a little bit, go  
14 more broadly, than just the issue of the waterways  
15 and downtown and talk in general about that issue?

16                   MR. SULSKI: Well, the original  
17 condition was, you know, intermittent prairie  
18 streams running into Lake Michigan, and you see what  
19 we have now. So that seems like an obvious.

20                   MR. SAFLEY: And I don't mean to ask  
21 obvious questions, and I -- I mean, just to be  
22 clear, I have read the documents. I understand that  
23 some of these things are in here. The point of the  
24 questions is to try to foster some discussion on the

1 issues, and that's why I'm not asking you -- you  
2 know, I'm not asking you to turn -- you know, tell  
3 you to find a page on which the Chicago Sanitary  
4 Ship Canal was discussed with regard to factor two.  
5 You know, I don't want to make us go through that  
6 tedium. But if you can bear with me, I'm just  
7 trying to ask some general questions to make sure  
8 that we're all on the same page and we know the full  
9 extent of the information that the Agency considered  
10 and what the Agency's's conclusions were. I'm sure  
11 that I, and other people, will get more specific on  
12 specific portions of the Statement of Reasons or the  
13 exhibits to that.

14                               Then, just to finish out that  
15 question, and to make sure that the record is clear,  
16 would it be accurate to state that the Agency  
17 concluded it is not feasible to restore the cause of  
18 the Lower Des Plaines River that are subject to this  
19 -- subject to this rulemaking to their original  
20 state or original condition, I think, is the term  
21 that's used.

22                               MR. SULSKI: Their original condition,  
23 yes.

24                               MR. SAFLEY: Okay. Next question here

1 is: Can you discuss how the Agency considered  
2 whether it is feasible to operate the modifications  
3 to these water bodies in a way that would result in  
4 the attainment of the proposed uses of the water  
5 bodies?

6 MR. SULSKI: The system is operated in  
7 a particular way that includes locks and control  
8 structures, and they were all constructed for  
9 primarily navigation of flood control purposes.  
10 They continue to serve that as one of their  
11 functions. They're operated pretty much the same as  
12 they've always been operated, with some minor  
13 adjustments here and there. So the metropolitan  
14 area relies on that operation to remain safe.

15 MR. SAFLEY: Is it the Agency's  
16 conclusion that that operation that you just  
17 discussed with regard to locks and other issues can  
18 continue as it has been currently, and the proposed  
19 used in this rule can be attained with that  
20 continued operation?

21 MR. SULSKI: That's correct.

22 MR. SAFLEY: Is it -- with regard to  
23 factor four, is there any information that the  
24 Agency considered that is not contained in the

1 Agency's rulemaking proposal?

2 MR. SULSKI: It's contained in the  
3 rulemaking proposal.

4 MR. SAFLEY: And are there any  
5 conclusions of the Agency with regard to factor four  
6 that are not contained in the Agency's rulemaking  
7 proposal?

8 MR. SULSKI: They're contained in the  
9 proposal.

10 MR. SAFLEY: UAA factor five -- and  
11 this is question five. UAA factor five is the  
12 consideration of whether physical conditions related  
13 natural features of the water body, such as the lack  
14 of a proper substrate, cover, flow, depth, pools,  
15 riffles, and the like, unrelated to water quality,  
16 preclude attainment of the use.

17 Can you discuss how the Agency  
18 considered these characteristics and the features of  
19 the CAWS and Lower Des Plaines River in developing  
20 the proposed rule?

21 MR. SULSKI: That information is  
22 voluminous, and it's contained in the UAA reports  
23 and the attachments that went along with that.

24 MR. SAFLEY: Did the Agency make a

1 determination that UAA factor five precluded the  
2 ability of some or all of these waterways to  
3 preclude their ability to reach full use under the  
4 Clean Water Act?

5 MS. WILLIAMS: I would -- I would like  
6 to interrupt here for a second, because I think in  
7 this question there's a misquote --

8 MR. SAFLEY: Okay.

9 MS. WILLIAMS: -- of our Statement of  
10 Reasons on Page 6. When he quotes in the first  
11 sentence, "the UAA factor -- "

12 MS. TIPSORD: Mm-hmm.

13 MS. WILLIAMS: I believe there's a  
14 misquote here. Okay. At the -- it quotes "the  
15 factor -- physical conditions related to natural  
16 features of the water body, such  
17 as --" and then it says, "preclude --" at the end,  
18 "preclude attainment of the use in between -- "

19 MR. SAFLEY: Oh, I apologize.

20 MS. WILLIAMS: It should be "the use."  
21 The actual regulation says --

22 MR. SAFLEY: Yes.

23 MS. WILLIAMS: "-- attainment of  
24 aquatic life --"

1 MR. SAFLEY: Protection uses.

2 MS. WILLIAMS: "-- protection uses."

3 MR. SAFLEY: Yes. I apologize. Thank  
4 you. That's a typographical error. Then let me  
5 repeat the question with the proper language. Thank  
6 you.

7 Did the Agency conclude that any  
8 of the physical conditions related to the natural  
9 features of the water body as listed in UAA factor  
10 five precluded attainment of aquatic life protection  
11 uses in these waterways?

12 MR. SULSKI: In some, yes. In some,  
13 no.

14 MR. SAFLEY: And is -- as to the --  
15 the determination of -- by the Agency of which yes  
16 and which no, is that fully reflected in the  
17 Agency's rulemaking proposal?

18 MR. SULSKI: Yes, it sure is.

19 MR. SAFLEY: And I don't think that  
20 I've asked this question as to UAA factor five. Is  
21 there any information that the Agency considered on  
22 these physical conditions under UAA factor five that  
23 is not included in the Agency's rulemaking proposal?

24 MR. SULSKI: We did not -- neither the

1 consultants nor us delved deeply into this -- oh,  
2 we're still on five. I'm so sorry.

3 MR. SAFLEY: No, no, no, no. That's  
4 fine.

5 MR. SULSKI: Can you repeat it,  
6 please?

7 MR. SAFLEY: Sure, sure. Is there any  
8 information that the Agency considered with regard  
9 to UAA factor five that is not included in the  
10 Agency's rulemaking proposal?

11 MR. SULSKI: No. It's all included in  
12 the rulemaking.

13 MR. SAFLEY: Okay. Now, moving to  
14 question number six. UAA factor six is the  
15 consideration of whether controls more stringent  
16 than those required by Sections 301 (b) and 306 of  
17 the act, and it's here parenthesis "(CWA effluent  
18 standards)" closed parenthesis, would result in  
19 widespread economic and social impact.

20 Can you discuss how the Agency  
21 considered the economic and social impact of its  
22 proposed rule?

23 MR. SMOGOR: I think it's important,  
24 and perhaps helpful, to point out that going through

1 every six of the UAA factors is not actually  
2 required, even though the word "requirement" was  
3 used at the beginning of this line of questioning.  
4 I think it's helpful to point out that these are not  
5 required.

6                               So if you find at least one factor  
7 that applies, you have adequate information, or  
8 sufficient information, to me, suggesting a lower  
9 than Clean Water Act goal for that use. So, okay.  
10 Yeah. Actually, sorry. If you're -- if you're  
11 asked how -- if we can discuss how the Agency  
12 considered economic and social impact of its  
13 proposed rules, we did not consider that as much as  
14 the other factors.

15                               MR. SULSKI: I should say we did -- I  
16 shouldn't -- we shouldn't say that we didn't  
17 consider at all, but we only considered it in a few  
18 cases and in the very general framework.  
19 Specifically, we looked at whether it would be  
20 pursuant to treat every CSO prior to the completion  
21 of TARP. That was something we looked at the  
22 economics of.

23                               The other things were quite  
24 obvious, like ripping down whole city blocks and

1 that sort of thing. Those are economic  
2 considerations that are straightforward, and you  
3 don't need to add up in pennies and dimes and  
4 dollars.

5 MR. SAFLEY: And --

6 MR. SULSKI: So that's -- you know,  
7 while it was considered, we didn't go through a  
8 formal economic analysis.

9 MR. SAFLEY: And, Mr. Sulski, just to  
10 clarify for the record for the court reporter, by  
11 "CSO" you mean combined sewer overflow?

12 MR. SULSKI: Yes.

13 MR. SAFLEY: The Agency states in its  
14 Statement of Reasons that it relies on USEPA  
15 guidance, which it attaches as Appendix M when  
16 considering factor six. Although the Agency  
17 references Appendix M, it does not provide details  
18 on or whether it relied on Appendix M when  
19 evaluating factor six.

20 Did the Agency rely on Appendix M  
21 to its Statement of Reasons to determine the social  
22 and economic impact of the proposed rule?

23 MS. WILLIAMS: I think I'm going to  
24 take this one. I have to be sworn in, I'm assuming.

1 MS. TIPSORD: Swear in Miss Williams.

2 (Witness sworn.)

3 MS. WILLIAMS: With regard to  
4 Attachment C to our Statement of Reasons, the Agency  
5 provided for reference of the Board and all the  
6 participants in the rulemaking the framework that  
7 USEPA has provided for an analysis under facts which  
8 have a widespread socioeconomic impact.

9 The Agency, I believe, made clear  
10 for many years to the stakeholders that we felt we  
11 did not have the information to undergo that  
12 analysis, and where industry felt that that was a  
13 necessary or appropriate undertaking that they would  
14 need to present that information either to the  
15 Agency during the stakeholder process, or even  
16 possibly to the Board during this process. So  
17 that's why we provided that information in the  
18 record, but we did not rely on it in our --

19 MR. SAFLEY: Okay. I'd like to follow  
20 up, Ms. Williams, on that answer just a little bit.  
21 Does the Agency consider the economic and social  
22 impact UAA factor only to be something that's  
23 considered with regard to industry?

24 MS. WILLIAMS: Oh, no. Not -- by

1 "industry," you mean industrial discharges versus  
2 municipal discharges, no.

3 MR. SAFLEY: Well --

4 MS. WILLIAMS: If it would apply to  
5 any discharges -- are you asking if --

6 MR. SAFLEY: Well, you used the word  
7 "industries." That's why I was trying to --

8 MS. WILLIAMS: Yeah, sorry.

9 MR. SAFLEY: -- make sure I  
10 understood.

11 MS. WILLIAMS: Discharges.

12 MR. SAFLEY: Okay. Does the Agency  
13 consider widespread, economic, and social impact  
14 only to be an issue that's only looked at with  
15 regard to discharges?

16 MS. WILLIAMS: I can't answer that.  
17 We have never done an analysis under this  
18 regulation.

19 MR. SAFLEY: Okay.

20 MS. WILLIAMS: So I don't think I can  
21 answer more specifically than I just did.

22 MR. SAFLEY: Would the economic and  
23 social impact to the community at large or the  
24 Chicago area be something that the Agency feels

1 should be considered with regard to this rulemaking?

2 MS. WILLIAMS: It's my understanding  
3 that widespread socioeconomic impact, as that term  
4 is used in this language, is very broad.

5 MS. TIPSORD: That's the Code of  
6 Federal Regulations?

7 MS. WILLIAMS: Yes. I'm sorry. Under  
8 the Code of Federal Regulations. It's my  
9 understanding that the term is very broad, but I  
10 don't -- I can't answer any more than that.

11 Now -- and I probably should stop,  
12 but that is not to be confused by the technical  
13 feasibility and economic reasonableness, which we  
14 did consider and put in the process.

15 MR. SAFLEY: And if I wasn't clear, my  
16 question right now is only as to UAA factor six and  
17 whether it controls more stringent than those  
18 required would result in widespread, economic, and  
19 social impact.

20 Mr. Sulski, you mentioned some of  
21 the few things that the Agency did consider on that  
22 UAA factor six. Is any information that the Agency  
23 considered not included in the record that the  
24 Agency has filed with the Board?

1                   MR. SULSKI: No. There may be some  
2 discussions that were in some of the stakeholder  
3 meetings when those subjects came up, but in general  
4 they were translated into some portion of the  
5 proposal.

6                   MR. SAFLEY: Are any of the Agency's  
7 conclusions on UAA factor six not reflected in the  
8 Agency's rulemaking proposal?

9                   MR. SULSKI: No.

10                  MR. SAFLEY: I'm going to wait on our  
11 question seven, it's more specific, and move on to  
12 our question eight. Our question eight is pursuant  
13 to the --

14                  MS. TIPSORD: Excuse me. Before you  
15 do that, we do have a followup question --

16                  MR. SAFLEY: Oh, all right.

17                  MS. TIPSORD: If that's all right.

18                  MS. LIU: Good morning, Mr. Sulski. I  
19 do have a followup question. Earlier you mentioned  
20 that you were planning to put together a map maybe  
21 showing some of these factors in the regions where  
22 they apply, but you just didn't have time?

23                  MR. SULSKI: Correct.

24                  MS. LIU: Would that be something

1 you'd still be willing to do?

2 MR. SULSKI: Yup. Sure.

3 MS. LIU: Terrific. Thank you.

4 MR. SULSKI: We can modify this map  
5 that we have here.

6 MS. TIPSORD: And for the record, he's  
7 speaking about an enlargement of the map that is  
8 included in the Statement of Reasons.

9 MS. WILLIAMS: Attachment I.

10 MS. TIPSORD: Attachment I, I believe  
11 is correct. Yes. Mr. Safley, go ahead. I'm sorry,  
12 Mr. Ettinger.

13 MR. ETTINGER: I have a question. I  
14 guess it's probably for Ms. Williams.

15 MS. TIPSORD: You need to identify  
16 yourself for the record.

17 MR. ETTINGER: I'm sorry. I'm Albert  
18 Ettinger. I'll give you a card later. And my  
19 question, I believe, is to Miss Williams, although  
20 anyone could answer it here. Did the Agency also  
21 consider the water quality standards handbook that  
22 USEPA published in formulating its proposal?

23 MR. TWAIT: Yes.

24 MR. ETTINGER: Thank you.

1 MS. TIPSORD: Mr. Safley, if you'd  
2 like to go ahead.

3 MR. SAFLEY: Yes, ma'am. Moving on to  
4 our question eight: Pursuant to current  
5 regulations, if a receiving water does not meet the  
6 water quality standards that apply to it, no mixing  
7 zone is allowed for discharger to the water, see 35  
8 Illinois Administrative Code Section 302.102 (b)  
9 (9).

10 Does the Agency agree that as  
11 such, dischargers will not be allowed a mixing zone  
12 to aid and comply within many of the proposed  
13 standards?

14 MR. TWAIT: The waterway is currently  
15 meeting most of the proposed water quality  
16 standards. There are only a few that do not.

17 MR. SAFLEY: Okay. As to those that  
18 it's not currently meeting, does the Agency agree  
19 that as to those, dischargers will not be allowed a  
20 mixing zone to aid and compliance?

21 MR. TWAIT: Yes.

22 MR. SAFLEY: What is the Agency's  
23 basis for proposing standards that preclude the use  
24 of mixing zones?

1                   MR. TWAIT: The basis is the  
2 protection of aquatic life.

3                   MR. SAFLEY: As to those factors --  
4 I'm sorry. I'm moving on to question nine. Well,  
5 let me just ask as it's written. Is it the Agency's  
6 intent with this proposal to require facilities to  
7 comply with the proposed water quality standards at  
8 the quote "end of the pipe" closed quote?

9                   MR. TWAIT: No. In most cases, a  
10 mixing zone will be available.

11                   MR. SAFLEY: Okay. As to those --  
12 well, as to those parameters or mixing that will not  
13 be available, what are the economic and  
14 technological implications of requiring compliance  
15 at the end of the pipe?

16                   MS. WILLIAMS: I think, personally,  
17 this is starting to get into standard setting until  
18 we know what standards we're talking about.

19                   MR. SAFLEY: That -- I'm -- that's  
20 fine. I'm making an -- I'm making a determination  
21 on the fly here as to which ones are more available  
22 and which ones aren't. So I'm more than happy to  
23 put that off.

24                   Next question is ten. What period

1 of time will affected facilities be given to begin  
2 compliance with the proposed rules once they are  
3 adopted and become effective?

4 MR. TWAIT: A compliance period would  
5 be put into the NPDS permit, and the max would be  
6 three years. That's unless the dischargers suggest  
7 to the Board a different compliance period and the  
8 Board accepts.

9 MR. SAFLEY: To follow up on that  
10 response, Mr. Twait, would the Agency intend to  
11 immediately, upon promulgation that's ruled, reopen  
12 every -- the NPDS permit of each discharger to these  
13 water bodies in order to put the compliance periods  
14 in?

15 MR. TWAIT: On past history, I would  
16 say no, the Agency would not open up every NPDS  
17 permit on the waterway.

18 MR. SAFLEY: How, then, would the  
19 Agency insert the compliance periods into the NPDS  
20 permits?

21 MR. TWAIT: The Agency usually waits  
22 until the permit is either modified or renewed.

23 MR. SAFLEY: So until that happens,  
24 unless the Board, in promulgating the rule, includes

1 a compliance period in the rule, would immediate  
2 compliance be required until a discharger's NPDS  
3 permit came up for renewal and at that point, a  
4 compliance period would be issued?

5 MR. TWAIT: Could you restate that  
6 question?

7 MR. SAFLEY: Sure, sure. If a  
8 discharge of an NPDS permit is not up for renewal  
9 until two years after the rule becomes effective,  
10 and the rule becomes effective and the Agency's  
11 going to wait that two years to include a compliance  
12 period in their NPDS permit, would the discharger be  
13 required to comply with the rules in between the  
14 time that the rule's promulgated and their permit  
15 comes up for renewal?

16 MR. TWAIT: I believe what you're  
17 asking is if the Board puts a deadline for meeting  
18 the regulation, whether that would apply or not.

19 MR. SAFLEY: Or if the Board includes  
20 no deadline or the deadline is immediate.

21 MS. WILLIAMS: Can we clarify? Are we  
22 talking about numeric standard, are we talking about  
23 the use designation, are we talking about effluent  
24 requirements? I think the answer may be different

1 depending on what piece of the proposal we're  
2 talking about.

3 MR. SAFLEY: Well, let's stick now,  
4 since we're talking about NPDS permits, include  
5 anything that would be included with an NPDS permit.

6 MS. WILLIAMS: So an effluent  
7 standard? Okay.

8 MR. SAFLEY: If the compliance  
9 deadline set by the Board is before an NPDS permit  
10 comes up for renewal, what standards would apply to  
11 the discharge in between the compliance deadline and  
12 when the NPDS permit is modified?

13 MR. TWAIT: I'm not quite sure I know  
14 the answer to that.

15 MR. SAFLEY: Okay.

16 MR. RAO: May I make a followup?

17 MR. SAFLEY: Of course.

18 MR. RAO: Mr. Twait, you mentioned  
19 there'd be a three-year phase in the period to --  
20 compliance period that would be put in the NPDS  
21 permit?

22 MR. TWAIT: There's a three-year  
23 compliance period that could be put in to the NPDS  
24 permit.

1                   MR. RAO: Could be. Now, on what  
2 basis did the Agency come up with the time period?

3                   MR. TWAIT: Three years is the maximum  
4 allowed by federal law.

5                   MR. RAO: Okay. Thanks.

6                   MS. TIPSORD: Mr. Ettinger?

7                   MR. ETTINGER: Let me just get clear  
8 here. If the standard is -- standards change are  
9 approved and people have permits that are in effect,  
10 they will be expected to comply with those permits  
11 during the period until their permit is modified or  
12 changed or renewed?

13                  MR. TWAIT: Correct, unless the Board  
14 puts a drop-dead date in the permit rules.

15                  MR. ETTINGER: Is the Agency  
16 requesting the Board to put a drop-dead date in the  
17 rules that's prior that would interfere with the  
18 companies being allowed to use the full term of  
19 their current permits?

20                  MR. TWAIT: In one instance, yes, and  
21 that would be MWRD's disinfection.

22                  MR. ETTINGER: Thank you.

23                  MR. SAFLEY: Moving on to our  
24 pre-filed question number 11: How does the Agency

1 determine if a proposed rule is economically  
2 reasonable?

3 MS. WILLIAMS: I guess at this point I  
4 would object because this is a determination the  
5 Board makes, not the Agency.

6 MS. TIPSORD: Want to rephrase the  
7 question, Mr. Safley?

8 MR. SAFLEY: Sure. Does the Agency  
9 consider when it files a proposed rule with the  
10 Board whether it's economically reasonable for  
11 parties to comply with that rule?

12 MR. SULSKI: The Agency didn't do an  
13 economic analysis of this rule change. Only, as I  
14 spoke before, in general terms with the stakeholder  
15 groups. We invited those that would be affected by  
16 this rule to present information to the Board and to  
17 us if it could get done prior to our proposal.

18 MS. TIPSORD: Do you believe this rule  
19 is economically reasonable?

20 MR. TWAIT: Well, I'd like to add to  
21 that. We've got no formal methodology as to doing  
22 an economic analysis. We've provided the Board any  
23 economic data we had for -- the Agency really  
24 provides the economic analysis when there's a new

1 technology out, and in this case, we're not  
2 proposing any new technologies for any of the -- to  
3 meet water quality standards.

4 MS. TIPSORD: I'd like to follow up on  
5 that a little bit. It is the Board's determination.  
6 I would agree with Ms. Williams. The Board makes  
7 the determination it has to pursuant to Section 27  
8 of the act. However, you are the proponent, and my  
9 question is: Does the proponent believe the Board's  
10 economic rule reasonable as proposed?

11 MR. TWAIT: Yes.

12 MS. TIPSORD: Thank you.  
13 Mr. Ettinger?

14 MS. FRANZETTI: Can I -- do you mind?

15 MR. ETTINGER: No.

16 MS. TIPSORD: Identify yourself,  
17 please.

18 MS. FRANZETTI: Susan Franzetti,  
19 counsel for Midwest Generation. If the Agency did  
20 not do an economic analysis of the impact of the  
21 proposed rules other than on the limited basis,  
22 Scott, that you just described, then how can the  
23 Agency know what the economic impact is going to be  
24 of these proposed rules?

1                   MR. TWAIT: I made that statement  
2 based on the fact that disinfection, as one example,  
3 is required throughout the state. Another one would  
4 be that cooling towers are used extensively  
5 throughout the state to meet water quality  
6 standards.

7                   MS. FRANZETTI: And, if I may, one  
8 more. So based on the fact that disinfection exists  
9 at other facilities outside of the UAA area, based  
10 on the fact that cooling towers exist outside of the  
11 UAA area, that's the basis, that's the rationale,  
12 for the Agency's determination on the economic  
13 impact of its proposed rule. Did I understand you  
14 correctly?

15                   MR. TWAIT: Yes.

16                   MS. TIPSORD: Mr. Ettinger.

17                   MR. ETTINGER: About how long was this  
18 stakeholder process on this proposal?

19                   MR. TWAIT: I would say approximately  
20 seven years.

21                   MR. ETTINGER: During that seven  
22 years, was industry, the Water Reclamation District,  
23 and other businesses in the state invited to  
24 participate in that stakeholder process?

1 MR. TWAIT: Yes.

2 MR. ETTINGER: Did any industry or  
3 business tell you that they would be put out of  
4 business if the water quality standards were changed  
5 here?

6 MR. TWAIT: I don't believe so.

7 MR. ETTINGER: Did any industry or  
8 business give you any information as to the economic  
9 cost of upgrading these standards in the ways that  
10 were discussed?

11 MR. TWAIT: Yes.

12 MR. ETTINGER: And who was that?

13 MR. TWAIT: The District and  
14 Midwest --

15 MR. SULSKI: MWRDGC.

16 MS. WILLIAMS: By "the District" you  
17 mean --

18 MR. TWAIT: MWRDGC.

19 MS. TIPSORD: Metropolitan Water  
20 Reclamation District of Chicago.

21 MR. TWAIT: I'm sorry.

22 MS. TIPSORD: Of Greater Chicago.  
23 Sorry.

24 MR. TWAIT: And I believe Midwest

1 Generation also provided some data.

2 MR. ETTINGER: Did Midwest Generation  
3 ever give you any sort of study that actually said  
4 what would be necessary to reach various temperature  
5 standards?

6 MR. SULSKI: No.

7 MR. TWAIT: I don't believe so.

8 MR. ETTINGER: Thank you.

9 MS. TIPSORD: Mr. Andes, please  
10 identify yourself.

11 MR. ANDES: Sure. Fred Andes. I'm  
12 counsel for the MWRDGC. To follow up on that, the  
13 district submitted substantial documentation on the  
14 costs of compliance with disinfection. Am I right?

15 MR. SULSKI: Yes.

16 MR. ANDES: And the costs involved  
17 more than hundreds of millions of dollars?

18 MR. SULSKI: Yes.

19 MR. ANDES: And did the Agency make a  
20 determination of whether those costs were  
21 economically reasonable?

22 MR. SULSKI: We didn't do a thorough  
23 analysis on that.

24 MR. ANDES: Did you do any analysis on

1 that?

2 MR. SULSKI: We looked at the figures.

3 MR. ANDES: Yes or no.

4 MR. SULSKI: No.

5 MR. ANDES: Thank you.

6 MS. TIPSORD: Actually, let's start  
7 behind him.

8 MS. ALEXANDER: Ann Alexander with the  
9 Natural Resource Defense Counsel. Did you at any  
10 point in the course of the stakeholder process ever  
11 discuss with the Water Reclamation District the  
12 requirements and components of a factor six  
13 determination and ask whether they had information  
14 in regard to present concern in factor six?

15 MR. SULSKI: Yes.

16 MS. ALEXANDER: And what was the  
17 response?

18 MR. SULSKI: The response was that the  
19 way that they were structured, it was not -- it was  
20 not an appropriate means for them to determine  
21 factor six.

22 MS. TIPSORD: And for the record --  
23 excuse me, Ms. Alexander. For the record, now, when  
24 you're talking about factor six, you're back to the

1 UAA --

2 MS. ALEXANDER: Yes, that is correct.

3 MS. TIPSORD: -- which is different  
4 than what we're talking about?

5 MS. ALEXANDER: That is correct.

6 MR. SULSKI: And that, specifically --  
7 can I follow up? That specifically refers to the  
8 attachment that we put in the record regarding Clean  
9 Water Act guidance on performing an analysis that  
10 would be Attachment C, or Exhibit C.

11 MS. ALEXANDER: Thank you.

12 MS. TIPSORD: Ms. Franzetti?

13 MS. FRANZETTI: Yes. With respect to  
14 the seven-year long stakeholder process, at what  
15 point in that seven years did the Agency propose to  
16 the stakeholders, the participants, what the thermal  
17 standards were going to be for the various UAA water  
18 body segments?

19 MR. TWAIT: I believe the answer to  
20 that would be when we came up with our first draft,  
21 January 2007.

22 MS. FRANZETTI: So that was one year  
23 ago, correct?

24 MR. TWAIT: Yes.

1 MS. FRANZETTI: Okay. Have you since  
2 changed from your initial proposal in January 2007  
3 what your numeric proposed thermal standards are in  
4 this rulemaking?

5 MR. TWAIT: Yes.

6 MS. FRANZETTI: And when were those  
7 proposed?

8 MR. TWAIT: When we made the proposal  
9 to the Board.

10 MS. FRANZETTI: And that is in October  
11 of 2007, correct?

12 MR. TWAIT: Yes.

13 MS. FRANZETTI: So in effect, Industry  
14 has had about three months to review and determine  
15 what the impact is of these proposed thermal  
16 standards. Is that correct?

17 MR. TWAIT: The changes that we made  
18 in October are less stringent than they were for the  
19 January 2007.

20 MS. FRANZETTI: All right. Let me --  
21 I'll accept that, because I don't want to have this  
22 digress into the date.

23 MS. WILLIAMS: And I don't want to go  
24 into standards.

1 MS. FRANZETTI: Right. I'm trying not  
2 to. Would you agree that in order for Industry to  
3 conduct any economic analysis of the impact of a  
4 proposed standard, it needs to know what the  
5 proposed standard is?

6 MR. SULSKI: May I answer that?

7 MS. FRANZETTI: Sure.

8 MR. SULSKI: When we started the  
9 Chicago Area Waterways System UAA, we did a water  
10 quality assessment. We screened the waterways for  
11 various levels of various constituents, which we  
12 knew right off the bat would be our problem in the  
13 system.

14 For example, dissolved oxygen. We  
15 asked the district to look at three different levels  
16 of dissolved oxygen, not knowing what the final  
17 standard would be, but knowing about where it would  
18 be to hit certain levels to know what would be  
19 required to meet different levels of standards, and  
20 they proceeded.

21 When temperature was assessed, it  
22 was assessed and everything was assessed against  
23 secondary contact and general-use waterways.  
24 Through the stakeholder process, it became clear to

1 the stakeholders that some of these -- since most of  
2 the parameters were meeting general use standards,  
3 that dissolved oxygen temperature in areas that had  
4 sufficient aquatic habitat would be looking towards  
5 meeting those types of standards.

6                   So general-use standards at a  
7 minimum, it should've been apparent to the  
8 stakeholders, and I think that it was that that was  
9 the goal that we were looking for, and those are the  
10 numbers that should be evaluated. So, it was  
11 earlier on, much earlier on, in the process that  
12 targets were discussed.

13                   MS. FRANZETTI: With -- excuse me.  
14 With respect to the thermal standards that you have  
15 proposed, it is correctly, though, is it not, that  
16 they are more stringent than the existing  
17 general-use thermal standards; correct?

18                   MR. TWAIT: Yes.

19                   MS. FRANZETTI: Okay. And so if  
20 someone had given you economic information using  
21 Mr. Sulski's point that we should've known and based  
22 it on general-use thermal standards, that economic  
23 analysis would now not be full and complete because  
24 it's based on more lenient standards. Would you

1 agree with that?

2 MR. TWAIT: To a point I would agree  
3 with that. I think all -- I think meeting the  
4 general-use standard if -- that would be one cost,  
5 and I think that that would get you in the ballpark  
6 of meeting the existing standards.

7 MS. FRANZETTI: Now just the last one.  
8 I will --

9 MR. ETTINGER: Sorry. I just never  
10 know when she's finished.

11 MS. FRANZETTI: With -- and with  
12 respect to the economic impact information that  
13 Midwest Generation did provide to the Agency, did  
14 the Agency conduct any analysis -- excuse me -- to  
15 determine whether those economic impacts were  
16 economically reasonable?

17 MR. TWAIT: No.

18 MS. FRANZETTI: Did the Agency provide  
19 any feedback, any comment, back to Midwest Gen which  
20 represent to the economic information that it had  
21 submitted to the Agency?

22 MR. TWAIT: I'm not sure that I have  
23 an answer for that. Toby Frevert was involved in  
24 that also, and I don't know what communications he

1 had with Midwest Generation.

2 MS. FRANZETTI: That's fine. I  
3 understand. Other than Toby, did anyone provide  
4 feedback from Midwest Generation?

5 MR. TWAIT: I did not.

6 MS. FRANZETTI: Okay. Counsel?

7 MS. TIPSORD: Did you have a question?

8 MR. FORT: No, she covered it.

9 MS. TIPSORD: Okay. Thank you.  
10 Mr. Ettinger?

11 MR. ETTINGER: I gather it was  
12 contemplated from the beginning of this UAA process  
13 that one possibility was that the general use  
14 standards would be applicable to what's called in  
15 the proposal of the Upper Dresden Pool. Is that  
16 correct?

17 MR. TWAIT: Could you say that again?

18 MR. ETTINGER: During this seven-year  
19 process, was one of the possibilities contemplated  
20 that the general use that now -- designation that  
21 now stops at the I-55 bridge, that it would be  
22 extended up the Brandon Road lock and dam, which is  
23 what we -- what is called in the proposal, the Upper  
24 Dresden Pool.

1                   MR. TWAIT: I don't believe that we  
2 had anticipated that general use would be extended,  
3 although we wanted to use the most up-to-date  
4 standards for thermal water quality standards.

5                   MR. ETTINGER: Did Midwest Generation  
6 ever give you a dollar figure or an economic study  
7 of what it would cost it to meet the general use  
8 standard that's applicable in the rest of the state?

9                   MR. TWAIT: I'm not positive whether  
10 they did or not.

11                   MR. ETTINGER: Is -- I believe you  
12 testified that the proposal is more stringent than  
13 the general use standard applicable in the rest of  
14 the state. Is that correct?

15                   MR. TWAIT: Yes.

16                   MR. ETTINGER: In the rest of the  
17 state, is a portion of the temperature standards a  
18 requirement that the temperature not be raised more  
19 than five degrees above natural?

20                   MS. FRANZETTI: Hearing officer, I'm  
21 going to object at this point. I think we're  
22 getting far the field of what the economic issue was  
23 on this questioning.

24                   MR. ETTINGER: I'm just trying to

1 clarify his question -- his answer as to whether the  
2 standard being proposed is more stringent than the  
3 general use standard.

4 MS. TIPSORD: We'll let you answer  
5 this, and then we're gonna to move on.

6 MR. ETTINGER: I'm sorry. Could you  
7 read back his question? I'm not sure whether I did  
8 a good job or not, but I'm certain he can't  
9 remember.

10 (Whereupon, the record was read as  
11 requested.)

12 MR. TWAIT: Yes. That would be  
13 accurate.

14 MR. ETTINGER: Is that requirement  
15 applicable to this proposal?

16 MR. TWAIT: No.

17 MR. ETTINGER: Thank you.

18 MS. TIPSORD: All right. Mr. Safley,  
19 I think we're ready to go back to you, and some of  
20 your question may have been knocked off here.

21 MR. SAFLEY: I think so. I think that  
22 our questions 12 and 13 I don't need to go into any  
23 further.

24 MS. TIPSORD: Okay.

1                   MR. SAFLEY: Moving on to our question  
2 14 -- and I'll ask it as written, and then if I need  
3 to clarify it based on the experience of the last  
4 question, I'll be happy to. How does the Agency  
5 determine a proposed rule is technically feasible?

6                   MR. SULSKI: In the case of this  
7 proposal, we looked at, basically, four  
8 technologies, or three technologies, that are fairly  
9 widely used or we have enough experience with to not  
10 have to delve too far into whether they're feasible.  
11 I mean, they are feasible. They're used all over  
12 the place.

13                   So we're talking about cooling,  
14 which is used everywhere in the world to cool water.  
15 Disinfection. Disinfection has been successfully  
16 used for many, many years across many and through  
17 many applications, especially the wastewater  
18 treatment industry. In-stream aeration is another  
19 technology that the MWRD has a lot of experience  
20 with over the years and employs it in other -- in  
21 some of the waterways in CAWS, and then flow  
22 augmentation, which is -- it's pumping water that's  
23 not a -- it's not a NASA technology.

24                   MR. SAFLEY: The next question I have,

1 as I have it written here, is what factors are taken  
2 into consideration, and as -- I want to make sure I  
3 understand. As I understand your response, what the  
4 Agency was looking at is: Do technologies exist  
5 which can be used by dischargers to meet the  
6 proposed standards?

7 MR. SULSKI: That's correct.

8 MR. SAFLEY: Okay. Does the Agency  
9 consider anything beyond whether the technology  
10 existed on technical feasibility?

11 MR. SULSKI: On technical feasibility?  
12 That's the primary. That's the primary points.

13 MR. SAFLEY: Does the Agency consider  
14 whether dischargers have the room to construct --

15 MR. SULSKI: That was -- that was also  
16 considered.

17 MR. TWAIT: Yes, that would be more  
18 site-specific and not technically feasible.

19 MR. SAFLEY: Okay. Well, and that's  
20 what I'm talking -- I'm trying to make sure I  
21 understand how the Agency thinks about that, and  
22 what it considers on a site-specific basis, and  
23 whether those site-specific considerations go into  
24 the Agency's thinking on objective feasibility.

1                               So what I'm hearing, I think, is  
2 when the Agency thinks about the proposed rule and  
3 whether it's technically feasible for dischargers to  
4 comply, the Agency is not taking into account those  
5 site-specific issues at that stage. Is that  
6 correct?

7                               MR. TWAIT: That's correct.

8                               MR. SAFLEY: And then the next  
9 question is my number 15. You may have already  
10 answered it. What is the Agency's justification for  
11 the technical feasibility of this proposal? Would  
12 that be what we just discussed, your consideration  
13 of whether their technologies that are available?

14                              MR. SULSKI: Yes. They're available  
15 and widely used.

16                              MR. SAFLEY: Okay. Next question here  
17 under 15: Did the Agency perform any studies or  
18 conduct any research regarding the technical  
19 feasibility of the proposed rule?

20                              MR. SULSKI: No.

21                              MR. SAFLEY: And then my question 16  
22 -- and, again, we may have already answered this,  
23 but it will be quick to go through it. If no  
24 studies were performed by the Agency that addressed

1 the technical feasibility of the proposed rule, then  
2 what does the Agency base its technical  
3 justification of the proposed rule? Again, is that  
4 -- that's the availability of these technologies.

5 MR. SULSKI: It's off the shelf  
6 available technology is what we're looking at.

7 MR. SAFLEY: Okay. And --

8 MR. TWAIT: Also, the study performed  
9 by MWRD as opposed for flow augmentation.

10 MR. SAFLEY: With regard to the off  
11 the shelf technologies, what information has the  
12 Agency provided to the Board on which the Board can  
13 base its determination that compliance with the  
14 proposed rule is technically feasible?

15 MR. SULSKI: It's outlined -- this  
16 information is outlined very well by some of the  
17 studies that were submitted that MWRD undertook and  
18 submitted.

19 MR. SAFLEY: And those are included in  
20 the rulemaking?

21 MR. SULSKI: They are.

22 MR. SAFLEY: Is there anything beyond  
23 that that you would point to in the Agency's  
24 rulemaking proposal on the issue of technical

1 feasibility?

2 MR. SULSKI: No, no.

3 MR. SAFLEY: I'm going to wait on our  
4 question 17, 18, and 19, those are more specific  
5 questions, and move on to our last pre-filed  
6 question, which is 20.

7 MS. TIPSORD: Excuse me.

8 MR. SAFLEY: Yes. I'm sorry. I  
9 apologize.

10 MS. TIPSORD: All the way back of the  
11 room.

12 MR. SWENSON: Peter Swenson with EPA.

13 MS. TIPSORD: Could you come up,  
14 Peter? We can't hear you at all back -- from --  
15 either that or shout.

16 MR. SWENSON: Peter Swenson with EPA.  
17 EPA prepared a list of assessments of disinfection  
18 options. I was wondering if that was considered in  
19 the -- in your proposal?

20 MR. SULSKI: Yes.

21 MR. SAFLEY: Is that document included  
22 in the record that was submitted to the Board?

23 MR. SULSKI: I don't believe so.

24 MR. SAFLEY: Can we get a copy of that

1 document?

2 MR. SULSKI: Yes. We can -- we can  
3 submit it as an exhibit tomorrow.

4 MS. TIPSORD: Albert, you had a  
5 followup?

6 MR. ETTINGER: That was my question.

7 MS. TIPSORD: Then question number 20.

8 MR. SAFLEY: Yes, ma'am. If the  
9 proposed rule is adopted as drafted, how will the  
10 rule impact these charges that currently have  
11 regulatory relief from the current water quality  
12 standards for the CAWS and the Lower Des Plains  
13 River?

14 MS. WILLIAMS: Can you be more  
15 specific? How's that --

16 MR. SAFLEY: Well, I can try. I  
17 guess, to lay some ground work, am I correct that  
18 there are entities which discharge to the CAWS or  
19 the Lower Des Plaines who have received regulatory  
20 relief in one form or another, either a  
21 site-specific rule, an adjusted standard, or  
22 various, from the Illinois Pollution Control Board  
23 with regard to their discharge?

24 MR. TWAIT: I think some of the relief

1 that has been granted by the Board will no longer be  
2 necessary with the new water quality standards.

3 MR. SAFLEY: And why would that be?

4 MR. TWAIT: As an example for  
5 temperature, Midwest Generation has relief down to  
6 the -- at the I-55 bridge. I'm not -- I don't have  
7 the numbers in front of me. However, with the  
8 proposed standards being more stringent and general  
9 use, the relief that they currently have would --  
10 would not be -- would not be beneficial.

11 MR. SAFLEY: Okay. So when you --  
12 when you say "not necessary," you mean that the  
13 relief is from a standard, for example, temperature,  
14 which will no longer exist. Therefore, the relief  
15 doesn't -- wouldn't apply to the circumstances as  
16 they would exist after the proposed rules?

17 MR. TWAIT: No. What I'm trying to  
18 say is the proposed standard is more stringent than  
19 what the relief allows.

20 MR. SAFLEY: Okay. So if they're  
21 complying up to that regulatory relief, they would  
22 be in violation of the new standard?

23 MR. TWAIT: Yes.

24 MR. SAFLEY: Okay.

1                   MS. WILLIAMS: I -- can I follow up a  
2 little just to clarify?

3                   MR. SAFLEY: Of course.

4                   MS. WILLIAMS: I think that this is a  
5 confusing example in a way because the relief that  
6 you're talking about is actually not relief in the  
7 secondary contact waters. So they don't have  
8 relief, now, from a secondary contact standard, and  
9 Scott is describing the impact on their relief from  
10 a general use standard.

11                   MR. SAFLEY: Right.

12                   MS. WILLIAMS: You may -- if you have  
13 specific --

14                   MR. SAFLEY: Well, and again --

15                   MS. WILLIAMS: -- relief in this  
16 waterway you want us to address, then go ahead.

17                   MR. SAFLEY: Well and I -- you know,  
18 on behalf of IERG, I don't have any specific --  
19 specifics that I can throw out there. IERG is an  
20 entity. I'm representing parties across the state,  
21 not a discharger itself. So I don't have any  
22 specifics that I can throw out there.

23                   MS. WILLIAMS: Then I think the answer  
24 is we tried looking at the ones we were aware of and

1 we did not identify any significant concerns, but  
2 we, I think in the Statement of Reasons, flagged  
3 that as an issue to be brought out here if it was  
4 one or a specific party.

5 MS. TIPSORD: If I may -- have you  
6 proposed for repeal any of the  
7 site-specific --

8 MS. WILLIAMS: No.

9 MS. TIPSORD: So they would still be  
10 in effect?

11 MS. WILLIAMS: Correct.

12 MS. TIPSORD: So, if you have sited  
13 specifically somewhere else in the rule, that would  
14 still be what your standards would be even under  
15 this new rule.

16 MS. WILLIAMS: In the -- are you  
17 referring specifically to site-specific rule  
18 makings.

19 MS. TIPSORD: Yes.

20 MS. WILLIAMS: Okay.

21 MS. TIPSORD: If you have a  
22 site-specific rule that says you may discharge X, it  
23 doesn't matter what if you don't repeal that --

24 MS. WILLIAMS: Correct.

1 MS. TIPSORD: -- this rulemaking does  
2 impact the site-specific rule.

3 MS. WILLIAMS: Correct. I'm not --  
4 I'm not familiar with whether that answer was even  
5 saying for an adjusted standard or a variance, but  
6 that is -- I think that's the correct answer for a  
7 site-specific rule.

8 MS. TIPSORD: Okay.

9 MS. TIPSORD: Identify yourself.

10 MR. DIAMOND: Sure. This is Tom  
11 Diamond. Mayer Brown for Stepan and Company. This  
12 is a little out of order, Madam Hearing Officer, but  
13 if you'll indulge me.

14 Mr. Sulski, on some of your  
15 earlier answers to questions regarding the UAA  
16 factors, you pointed us to the UAA reports that were  
17 attached to the Statement of Reasons. The UAA  
18 report for the Lower Des Plaines River, if I recall  
19 correctly, is dated in 2003. Has the Agency had any  
20 internal considerations about the analysis of the  
21 UAA factors in that report since 2003?

22 MR. SULSKI: Yes.

23 MR. DIAMOND: What considerations have  
24 those been?

1                   MR. SULSKI: We received and we  
2 considered other data that we came by, and -- which  
3 was included in the record, and asked the question  
4 whether the Upper Dresden Isle Pool, for example,  
5 could attain a Clean Water Act goal, and based on  
6 the data, including a lot of the data in the report,  
7 but based on the wealth of information and the  
8 weight of evidence, we conclude that yes, it could  
9 meet the Clean Water Act goal aquatic life uses.

10                   MR DIAMOND: When did the Agency reach  
11 that conclusion?

12                   MR. SULSKI: Prior to putting together  
13 the proposals, so six months ago. Before or after  
14 the outreach. I don't know. I'm not -- I'm not  
15 sure exactly.

16                   MR. DIAMOND: What was the other data  
17 that's included in the record that you considered  
18 after 2003?

19                   MR. SULSKI: There's a number of  
20 studies listed in the proposal. There's an MBI,  
21 there's one of the resources, CAB is another  
22 resource. The attachments, Attachment R, 2004.  
23 Attachment S is 2006. Those are two that stand out  
24 right at the moment. Attachment U, and -- I mean,

1 there's a wealth of -- or a great number of  
2 documents that we looked at when formulating  
3 criteria that are listed as well.

4 MR. DIAMOND: When you mean  
5 "criteria," do you mean a numerical standard?

6 MR. SULSKI: Numerical standards, yes.

7 MR. DIAMOND: That's all I have.

8 MS. TIPSORD: Then if we're finished  
9 with IERG --

10 MR. SAFLEY: I just have one or two  
11 followup questions --

12 MS. TIPSORD: Okay.

13 MR. SAFLEY: -- with regard to  
14 question -- our question -- pre-filed question 20.  
15 We talked earlier a little bit about mixing zones  
16 and the fact that in some cases, the water bodies  
17 would be meeting the proposed rule, or appear, at  
18 least as this point, to be meeting the proposed  
19 rules, in other cases they don't, and how the mixing  
20 zone rule would apply in that circumstance.

21 Linking that to what we were  
22 talking about with regard to our Question 20 and  
23 parties that have regulatory relief, if a party has  
24 site-specific rule which authorizes them to

1 discharge a parameter into the water body of the  
2 level that -- that renders the water body in that  
3 location not in compliance with one of the proposed  
4 standards, and that noncompliance is still existing  
5 downstream of that discharger at a location where  
6 another party discharges, would that be an instance  
7 in which that downstream discharger would not be  
8 able to utilize a mixing zone with their discharge?

9 MR. ETTINGER: I'm going to object to  
10 that question.

11 MS. WILLIAMS: I'm not sure if I  
12 understand. I'm sitting here trying to figure out  
13 -- whether I think it's a background or standards of  
14 question.

15 MR. SAFLEY: Well, I was just trying  
16 to wrap up, because we talked about mixing zones  
17 earlier, and I think Scott Twait was nodding that he  
18 understood the question, and I apologize for -- for  
19 asking a long question.

20 What -- again, what our Question  
21 20 on behalf of IERG was trying to get to, is the  
22 impact of -- or the interrelation between the rule  
23 and regulatory relief, and I -- and bound up in  
24 that, at least to some extent, is the effect of

1 regulatory relief on other dischargers, and so that  
2 -- I was trying to pull that all together, and the  
3 question is, maybe to ask it more succinctly, if a  
4 water body is out of compliance for a parameter  
5 because of regulatory relief, and -- does another  
6 discharger discharging into that water body where  
7 it's out of compliance, are they precluded from  
8 utilizing a mixing zone?

9 MR. TWAIT: I don't know if we're  
10 aware of any of those instances.

11 MR. SAFLEY: Okay. Those are all my  
12 questions.

13 MS. TIPSORD: Okay. Mr. Harley has a  
14 followup.

15 MR. HARLEY: For purposes of the  
16 record, first Keith Harley, Chicago Legal Clinic  
17 representing the Southeast Environmental Task Force.

18 For purposes of clarifying the  
19 record, you've indicated that you refer to  
20 commonly-used, long-standing technologies already  
21 employed at facilities in Illinois in order to come  
22 to conclusions about technical feasibility. Is that  
23 correct?

24 MR. SULSKI: Yes.

1                   MR. HARLEY: And did you consider the  
2 duration of those uses, how long they've been used?

3                   MR. SULSKI: Yes.

4                   MR. HURLEY: And how widespread those  
5 uses are?

6                   MR. SULSKI: Yes.

7                   MR. HURLEY: I wanted to ask a few  
8 clarifying questions on those precise things  
9 relating to the four technologies you mentioned,  
10 starting with cooling towers. How common are  
11 cooling towers at coal-fire power plants in  
12 Illinois?

13                   MR. SULSKI: They're -- as far as I  
14 know, they're common.

15                   MR. HURLEY: And for how long have  
16 cooling towers been used at coal-fire power plans in  
17 order to control thermal discharges at those -- at  
18 those power plants?

19                   MR. SULSKI: Well, I can safely say at  
20 least 25 years is as long as I've been aware of  
21 them. I know that they're in regulating facilities  
22 throughout the Chicago Metropolitan area that have  
23 encountered cooling towers.

24                   MR. HURLEY: In the issue of

1 disinfection --

2 MR. TWAIT: Is that for coal-fire  
3 power plants?

4 MR. SULSKI: Coal-fire? Yes. You're  
5 specific on coal-fired power plants?

6 MR. HURLEY: Yes.

7 MR. SULSKI: Yes.

8 MR. HARLEY: That was my question. On  
9 the issue of disinfection, for how long had  
10 disinfection technologies been used in  
11 publicly-owned treatment works in Illinois?

12 MR. TWAIT: Probably 30 to 40 years.

13 MR. HARLEY: And what percentage of  
14 all of the operators of publicly owned treatment  
15 works in Illinois presently used disinfection  
16 technologies would you guess?

17 MR. DIAMOND: Objection. Calls for  
18 speculation.

19 MR. HARLEY: Do you --

20 MS. WILLIAMS: I don't -- I don't -- I  
21 mean I can -- I don't think it does call for  
22 speculation, because Scott grants disinfection  
23 exemptions. So if he knows, I think it's not  
24 speculative as to him. I'm not sure if he does

1 know, but...

2 MS. TIPSORD: You can answer the  
3 question.

4 MR. TWAIT: I'll try. Some facilities  
5 have disinfection exemptions and they do not  
6 disinfect at all. Some facilities, I'm going to  
7 say, just, you know, off the cuff number, 15 percent  
8 have seasonal disinfection exemptions, and they  
9 disinfect seasonally. There's also a portion that  
10 disinfect year-round.

11 MR. HARLEY: In terms of in-stream  
12 aeration, which you mentioned as another technology  
13 that is recommended by rule, for how long has  
14 Metropolitan Water Reclamation District aerate its  
15 wastewater?

16 MR. SULSKI: I don't know exactly. I  
17 want to say for approximately 20 years. Somewhere  
18 in that, plus or minus three or four years, although  
19 it may be earlier than that for certain technologies  
20 that they have.

21 MR. HARLEY: And in the issue of flow  
22 augmentation, for how long have flow augmentation  
23 technologies and techniques been required by the  
24 Agency as part of its permitting of individual

1 facilities?

2 MR. SULSKI: They haven't. This is  
3 the first situation where we identified a zone in a  
4 waterway that would meet an expectation through flow  
5 augmentation, and it's primarily because the  
6 dissolved oxygen -- you couldn't drive enough  
7 dissolved oxygen into that reach to make much of a  
8 difference unless you also added some flow. So  
9 that's -- so they go hand in hand.

10 MR. HARLEY: Is it fair to say that  
11 when you considered the technological feasibility  
12 and the common use of what you're recommending your  
13 rule, that this placed centrally into your  
14 conclusions about the economic reasonableness, of  
15 the rule.

16 MR. ANDES: Objection. Didn't he  
17 already say he didn't make any economic reasonables?

18 MS. TIPSORD: But I then asked as  
19 proponent if they believed the rule was economically  
20 reasonable, and they said yes. So they have  
21 concluded that they believe what they've proposed is  
22 economically reasonable, although it is ultimately  
23 the Board's decision. So your objection's  
24 overruled.

1 MR. SULSKI: Yes.

2 MR. HARLEY: Thank you.

3 MS. TIPSORD: Okay. With that, then,  
4 let's -- you got followup?

5 MS. FRANZETTI: Yeah. Just one.

6 MS. TIPSORD: Okay. That's okay.

7 MS. FRANZETTI: I'm trying not to --

8 MS. TIPSORD: That's quite all right.  
9 Go ahead.

10 MS. FRANZETTI: I will try very hard  
11 not to get us down into topics that we haven't  
12 really gotten into. But given all the questions  
13 about the commonly used technology of cooling towers  
14 at coal-fire generating stations, with respect to  
15 these stations that you were referring to in  
16 answering Mr. Harley's questions, how many of those  
17 were stations where they had been built without  
18 cooling towers, existing plans, and now need to be  
19 fully retrofitted with cooling towers?

20 MS. WILLIAMS: You're looking at  
21 Scott, but I just want to --

22 MS. FRANZETTI: Oh, Mr. Sulski.

23 MS. WILLIAMS: -- for the record that  
24 Rob answered the question.

1 MS. FRANZETTI: Whoever wants to  
2 answer it. Just trying to make a difference between  
3 retrofitting and existing plants and building a  
4 plant with cooling towers, which I think is what you  
5 were referring.

6 MR. TWAIT: To my knowledge, no plant  
7 has been retrofitted with cooling towers except for  
8 Midwest Generation's --

9 MS. FRANZETTI: Joliet?

10 MR. TWAIT: -- Joliet plant.

11 MS. FRANZETTI: Thank you.

12 MR. FORT: Madam Hearing Officer,  
13 Jeffrey Fort at Sonnenschein Nath and Rosenthal on  
14 behalf of Citgo.

15 We've had some discussions here  
16 about the common technologies. With respect to  
17 those technologies, have you been thinking about  
18 coal-fired power plants and wastewater treatment  
19 plants alone? Have you been considering other kinds  
20 of industrial applications with respect to your  
21 available technology?

22 MR. TWAIT: No. There's -- cooling  
23 towers are used at industrial facilities also.

24 MS. TIPSORD: So you have been

1 considering other types of -- not -- you haven't  
2 just looked at those two types of --

3 MR. TWAIT: Yes. Well, nobody else  
4 came forward, and to bring up this issue --

5 MR. FORT: I'm just asking.

6 MR. TWAIT: -- at a stakeholders  
7 meeting.

8 MR. FORT: I'm just asking the  
9 questions that you've answered that you've given  
10 very specific examples, and in answering those are  
11 you thinking about wastewater treatment plants, and  
12 coal-fired power stations in answering to give  
13 examples of those technologies? I'm not asking if  
14 that's all. Just answer that one first.

15 MR. SULSKI: Are we thinking about  
16 those two types of facilities? Yes, we are.

17 MR. FORT: Okay. Mr. Twait answered  
18 with respect to cooling towers are also used in  
19 industrial facilities. Do you know if cooling  
20 towers are used on biological treatment systems in  
21 order to achieve nitrification? Because those  
22 systems, of course, have to be heated up in the  
23 winter to keep the nitrifying bacteria going.

24 MR. TWAIT: I don't know if that would

1 be considered a cooling tower, would it?

2 MR. FORT: I'm talking about a cooling  
3 tower after a nitrification activity in a biological  
4 application.

5 MR. TWAIT: Not -- not that I'm aware  
6 of.

7 MR. FORT: Okay. Thank you.

8 MR. TWAIT: Although -- no. I'll just  
9 answer not that I'm aware of.

10 MR. FORT: Thank you.

11 MS. TIPSORD: All right. Yes.

12 MR. HYNES: I'm sorry, I just have a  
13 -- My name's Kevin Hynes. I'm with O'Keefe, Lyons,  
14 and Hynes on behalf of the Chemical Industry  
15 Council. I want to follow up on that question.

16 MS. TIPSORD: You're gonna have to  
17 speak up.

18 Mr. HYNES: Okay. I'm sorry.

19 MS. TIPSORD: We can't hear you at  
20 all.

21 MR. HYNES: My name's Kevin Hynes.  
22 I'm with O'Keefe, Lyons, and Hynes. I represent the  
23 Chemical Industry Council. I'm just looking for  
24 clarification. Is your statement, then, earlier

1 regarding economics that this is -- this proposal is  
2 economically reasonable? Is it reasonable, based on  
3 your understanding of MWRD and Midwest Gen, or are  
4 you considering this reasonable for all of those who  
5 discharge?

6 MR. TWAIT: At the stakeholders  
7 meetings, no one brought up the issue of industry  
8 facilities and their concerns about temperature. I  
9 would have to say that it's economically feasible  
10 just -- technically feasible and economically  
11 reasonable for cooling towers, just based on the  
12 fact that other industries throughout the state use  
13 it.

14 MR. HYNES: I don't know if that  
15 answers my question. I think the statement that was  
16 proposed to me earlier was the proposal in its  
17 entirety is economically reasonable. Was your focus  
18 solely on Midwest General -- the impact on Midwest  
19 Generation and MWRD, or all dischargers on this  
20 water system?

21 MR. SULSKI: We focused on the  
22 dischargers that we knew of that were -- basically  
23 dominated the system. The other dischargers that we  
24 know of, some attended the stakeholder meetings,

1 others we've reached out to the best we could to  
2 participate in the process, and as Scott said, none  
3 came forward to indicate a concern of impact on them  
4 that I'm aware of. Midwest Generation and MWRD did,  
5 so that was the primary focus -- that was our  
6 primary focus, plus the fact that they dominate the  
7 system in terms of flows. I mean, seriously  
8 dominate.

9 MS. TIPSORD: Okay. Let's -- I have  
10 about 20 to 12. It's probably -- let's just go off  
11 the record here.

12 (Whereupon, a discussion was had  
13 off the record.)

14 (Whereupon, a break was taken,  
15 after which the following  
16 proceedings were had.)

17 MS. TIPSORD: Thank you, everyone.  
18 Thank you, actually, for your promptness. Thank you  
19 very much. Go ahead.

20 MS. FRANZETTI: Hi. Susan Franzetti,  
21 counsel for Midwest Generation. And, if I may,  
22 before I start with my pre-file questions, I had a  
23 few followups on the first five, six questions of  
24 Mr. Safley for IERG in terms of the six UAA factors.

1 So if I may -- to go back and just finish up on that  
2 topic.

3                   With respect to the Agency's  
4 response that -- looking for what the Agency's  
5 findings are as to each of the five of the six UAA  
6 factors that it did utilize and apply in this  
7 proceeding, I wanted to make sure I understood  
8 correctly, and I'll break it down, first taking the  
9 UAA report for the Lower Des Plaines River, which I  
10 believe is Attachment A, to the Agency's Statement  
11 of Reasons.

12                   Am I correct in understanding the  
13 Agency's responses this morning that if I read that  
14 report and where it makes findings as to which of  
15 the UAA factors apply in the Lower Des Plaines  
16 segments, you are telling me that the Agency adopts  
17 all of the findings to that effect in that report,  
18 or do I need to start trying to compare what you  
19 said in the 2007 Statement of Reasons to what is  
20 said in the 2003 UAA report? Because I am not sure  
21 it's consistent

22                   MR. SULSKI: You would need to do  
23 that, and it's specified in the Statement of  
24 Reasons. It says that it summarizes the two UAA

1 reports, and then it says that in some cases that we  
2 differ with the opinion of the contractor, and it  
3 spells out exactly where that -- where we differ  
4 with the contractor's opinion on recreation, for  
5 example.

6 MS. FRANZETTI: Okay.

7 MR. SULSKI: So, yes. In answer to  
8 your question, yes. You would need to look at our  
9 Statement of Reasons and the reports, the UAA  
10 reports and contractors reports, and we spell out in  
11 the Statement of Reasons some differences.

12 MS. FRANZETTI: Do you know whether as  
13 you sit there, and you may not -- you may need to  
14 have to review it, whether you differed with the  
15 contractor on any of the Lower Des Plaines findings  
16 as to the UAA factors for aquatic life uses?

17 MS. WILLIAMS: Do you want to take  
18 that?

19 MR. TWAIT: Yeah. I think the answer  
20 would be yes, we disagree. The contractor was -- I  
21 don't -- I don't think we -- I don't think we used  
22 all his recommendations, but I'd have to -- we'd  
23 have to go back and look to find -- be more  
24 specific.

1                   MR. SULSKI: It's generally covered in  
2 that Statement of Reasons where we differed and why.

3                   MS. FRANZETTI: Okay. It may well be.

4                   MR. SULSKI: Okay.

5                   MS. FRANZETTI: I, frankly, have to  
6 admit that it isn't clear to me, and if I could make  
7 a request when the agents, as you have a moment to  
8 do this, if you could, for the aquatic life uses,  
9 take a look back and clarify where the Agency --  
10 whichever way it's easier for you, where you differ  
11 from the findings of the UAA report, and I will  
12 apply that to both the Lower Des Plaines UAA report  
13 on aquatic life uses and the CAWS UAA report,  
14 Attachment B, for aquatic life uses.

15                   MR. SULSKI: Okay.

16                   MS. FRANZETTI: Thank you. I  
17 appreciate it.

18                   MS. TIPSORD: Mr. Ettinger?

19                   MR. ETTINGER: I'm just making sure.  
20 When you say "the contractor" are you talking about  
21 the HAY and associates report at the lower UAA?

22                   MS. FRANZETTI: For the Lower Des  
23 Plaines, yes. Attachment A for Attachment B, the  
24 CAWS camp dresser.

1 MR. ETTINGER: Okay. Thank you.

2 MS. FRANZETTI: With respect to --  
3 still staying with UAA factors, with respect to the  
4 Upper Dresden Pool, do I understand the testimony  
5 this morning to be that for the Upper Dresden Pool  
6 of the five UAA factors that the Agency considered,  
7 it found that none of them apply to the Upper  
8 Dresden Pool. Is that correct?

9 MR. SULSKI: Correct. None of them  
10 applied to the extent that we would -- we would say  
11 that they couldn't meet Clean Water Act goals.

12 MR. TWAIT: However --

13 MS. FRANZETTI: Did -- Mr. Twait?

14 MR. TWAIT: However, we did use one of  
15 the factors for the cadmium water quality standard,  
16 but as Rob stated, we did not use it for the use.  
17 We just used it for the standard.

18 MS. FRANZETTI: Okay. Again, if I  
19 understand correctly, so the way the Agency is  
20 interpreting and applying the UAA regulation, is  
21 that it's a -- it's almost it's a two step process.  
22 First, one looks at those factors and determines  
23 whether or not one or more of them are applicable,  
24 and therefore preclude for that water body attaining

1 the Clean Water Act either fishable or swimmable  
2 goals. Correct?

3 MR. SULSKI: Correct.

4 MS. FRANZETTI: And then the Agency --  
5 so the Agency did that for purposes of what the  
6 appropriate use designation should be, but then it  
7 came back to this six UAA factors, or five in this  
8 case for the Agency. It came back to the five  
9 factors when it was doing the water quality  
10 standards derivation process, and at least for  
11 cadmium decided that one of the five UAA factors  
12 precluded attaining what would otherwise be the  
13 cadmium numerical water quality standard for a Clean  
14 Water Act fishable/swimmable segment?

15 MR. TWAIT: Only for cadmium did we do  
16 that, and that was based on the fact that we could  
17 not meet the national criteria for cadmium, and we  
18 used another -- what we considered a protective  
19 water quality standard for the use, which was the  
20 general use cadmium water quality standard.

21 MS. FRANZETTI: Which of the five  
22 factors -- which ones of the five UAA factors the  
23 Agency was using did you find applied for cadmium?

24 MR. TWAIT: I believe we cited in our

1 Statement of Reasons that we were using use number  
2 three, factor number three. Human caused conditions  
3 or sources of pollution prevent the attainment of  
4 the use and cannot be remedied or would cause more  
5 environmental damage to correct than leave in place.

6 MS. FRANZETTI: And, Mr. Twait, is  
7 that what you were referring to when you made  
8 reference earlier today to sediments being another  
9 reason on which the Agency relied for finding that  
10 factor three applied?

11 MR. TWAIT: Yes.

12 MS. FRANZETTI: All right. So it's  
13 the presence of contaminated sediments in the  
14 waterway that led the Agency to conclude that for  
15 cadmium, factor three of the UAA regulation applies?

16 MR. TWAIT: Yes.

17 MS. FRANZETTI: Now, can I go one more  
18 step for clarifications purposes? Which part of the  
19 waterway? Is it all parts for cadmium?

20 MR. TWAIT: We did it for all parts of  
21 the waterway.

22 MS. WILLIAMS: And I think I will add  
23 to that that the Agency is considering whether that  
24 was done appropriately for the Lower -- for the

1 Upper Dresden Island Pool. Given the use we are  
2 proposing, we may, as you proceed, develop, go back,  
3 revisit that if necessary.

4 MS. TIPSORD: Deb, I'm sorry. They  
5 couldn't hear you at all back there.

6 MS. WILLIAMS: I just wanted to add  
7 that we were re -- we were looking at whether we'd  
8 done that correctly for the Upper Dresden Island.  
9 He accurately restated what we've done, but we will  
10 probably, when we get to talking about standards, be  
11 prepared to look at whether that was done  
12 appropriately for the Upper Dresden Island Pool.

13 MS. TIPSORD: You faded off.

14 MS. WILLIAMS: I can't say -- I mean I  
15 don't know -- I can't say it back again in the same  
16 way.

17 MS. TIPSORD: "Done appropriately for  
18 the Upper Dresden Island Pool" was the finishing of  
19 that.

20 MS. FRANZETTI: Ms. Williams, can you  
21 clarify a little further in terms of which way is  
22 the Agency thinking is appropriate?

23 MS. WILLIAMS: We don't know. I just  
24 want to indicate that we are still looking at our

1 recommendation on cadmium.

2 MS. FRANZETTI: Okay. So we should  
3 view that as just a preliminary recommendation of  
4 what the numeric standard should be for cadmium?

5 MR. SULSKI: Yes.

6 MS. WILLIAMS: Yes.

7 MS. FRANZETTI: With respect to this  
8 morning, you were discussing factor number two of  
9 the UAA regulation, which deals with natural,  
10 ephemeral intermittent and low-flow conditions or  
11 water levels preventing the attainment of the use,  
12 and the testimony was that factor number two  
13 pertained primarily to recreation and safety issues,  
14 and that it was found to be an added factor, but not  
15 a primary factor, and I just did not understand the  
16 use of the terms "primary factor" with respect to  
17 the UAA factors and an added factor. Could you  
18 clarify what was intended or meant by that?

19 MR. SULSKI: I should say we  
20 considered sediments, and it's very difficult to  
21 make a determination on sediments because there's a  
22 limited data to make that determination for factor  
23 two.

24 MS. FRANZETTI: But as an added

1 factor, does the Agency mean, though, that it found  
2 that factor two did apply -- was satisfied based on  
3 the facts as you do know them?

4 MR. SULSKI: No.

5 MS. FRANZETTI: Was not satisfied?

6 MR. SULSKI: For sediments.

7 MS. FRANZETTI: Yeah.

8 MR. SULSKI: No.

9 MS. FRANZETTI: Then, I'm sorry. I'm  
10 still confused as to what an added -- what is meant  
11 by an added factor with respect to finding that  
12 factor number two does or does not apply. That's  
13 all I'm looking for clarification on. Does factor  
14 two --

15 MR. SMOGOR: I think this may help  
16 clarify. For number two, there are several  
17 conditions. There's natural, ephemeral,  
18 intermittent, or low flow. I think the low flow  
19 part of number two is where we keyed in on, and  
20 that's not necessarily mutually exclusive with how  
21 some of these other factors address flow as well.  
22 So I think that's the extent that factor two  
23 probably applied, probably overlapping with more  
24 direct factors that are further down the list.

1 MS. FRANZETTI: Okay. But still has  
2 -- factor two does still have applicability?

3 MR. SMOGOR: The -- to the extent that  
4 it addresses low-flow conditions, yes.

5 MS. FRANZETTI: If we can stay with  
6 sediments for one more moment, can the Agency  
7 explain whether -- no, let me rephrase that. Is the  
8 presence of contaminated sediments an issue that the  
9 Agency looked at for both the Chicago Sanitary and  
10 Ship Canal, and for the Upper Dresden Island Pool?

11 MR. SULSKI: Yes.

12 MS. FRANZETTI: Does the Agency  
13 believe there are contaminated sediments present in  
14 both of those water bodies?

15 MR. SULSKI: Yes.

16 MS. FRANZETTI: And, again, just  
17 finishing up, with respect to the upper Dresden  
18 Island Pool, given that the Agency has clarified  
19 that none of -- it found that none of the five UAA  
20 factors it looked at applied, then it would be  
21 correct to say that the Agency does not know whether  
22 or not factor six, the widespread economic and  
23 social impacts factor, may apply to Upper Dresden  
24 Island Pool; correct?

1 MR. TWAIT: Correct.

2 MS. FRANZETTI: All right. Thank you  
3 very much. That's finishes the followup questions  
4 from this morning. I'll start now with my pre-filed  
5 questions. Okay.

6 First topic is statutory basis and  
7 legal framework, Environmental Protection Act.  
8 Question number one: In its Statement of Reasons of  
9 page 2, the Illinois EPA references the following  
10 language from Section 27 A of the Illinois  
11 Environmental Protection Act, which identifies the  
12 criteria that the Board is required to take into  
13 account in this rulemaking, quote "the existing  
14 physical conditions, the character of the area  
15 involved, including the character of surrounding  
16 land uses, zoning classifications, the nature of the  
17 existing air quality, or receiving body of water as  
18 the case may be, and the technical feasibility, and  
19 economic reasonableness, of measuring or reducing  
20 the particular type of pollution." Citation 2, to  
21 the act, and quote "For the area encompassing the  
22 Chicago Sanitary and Ship Canal and downstream  
23 through the Upper Dresden Pool, please provide the  
24 following information: A, has the Illinois EPA

1 reviewed the character of the area involved, and if  
2 so, please provide the information the Agency has on  
3 the character of the area involved."

4 MR. SULSKI: Can you specify  
5 "character?" That's a pretty broad term.  
6 Character?

7 MS. FRANZETTI: No, it is a statutory  
8 term.

9 MR. SULSKI: Okay.

10 MS. FRANZETTI: I'm not sure I'm the  
11 expert on how it's interpreted. But I --

12 MR. SULSKI: I'll attempt to answer  
13 your question.

14 MS. FRANZETTI: Why don't you -- why  
15 don't you -- if you would like, you could preface  
16 your answer with how do you interpret it.

17 MR. SULSKI: Okay.

18 MS. FRANZETTI: And then tell us what  
19 information you have.

20 MR. SULSKI: All right. Well, the  
21 short answer is we generally characterized different  
22 aspects of these waterways, some more -- in more  
23 detail than others. For example, we did a more  
24 detailed characterization of who the land owners

1 were with respect to public access to waterways,  
2 where could the public get into the water ways, who  
3 would allow it, who wouldn't allow it, what were the  
4 factors there.

5                               As far as the land as well, we  
6 looked at what effects, as a metric for example, how  
7 the land would affect some of the indices in  
8 determining aquatic life potential.

9                               MS. FRANZETTI: Such as QHEI --

10                              MR. SULSKI: Correct.

11                              MS. FRANZETTI: -- IBI indices?

12                              MR. SULSKI: Such as QHEI. So habitat  
13 structure, shore line, and I guess another one that  
14 would come up would be that we looked at some of the  
15 anthropogenic factors that applied in the waterway,  
16 in terms of barge traffic and how waves would pound  
17 shoreline, or -- and what type of shoreline it was,  
18 and how that had an effect. So generally we did  
19 look at some of these things, more specifically in  
20 certain areas which I just described.

21                              MS. FRANZETTI: Mm-hmm. Did you also  
22 take into account in terms of the character of the  
23 area -- if you took it into account -- excuse me --  
24 that it is highly industrial in a lot of the

1 portions of the CSSC and the Upper Dresden Island  
2 Pool?

3 MR. SULSKI: With respect --  
4 industrial with respect to private property not  
5 allowing public access, that was a consideration.

6 MS. FRANZETTI: I know you took that  
7 into account. I'm asking, kind of, more generally.  
8 Did you take into account that so much of the  
9 properties adjacent to the CSSC and the Upper  
10 Dresden Island Pool are industrial properties?

11 MR. SULSKI: From an aquatic habitat  
12 standpoint, we looked at aquatic habitat indices,  
13 irrespective of whether a house was there or a  
14 company was there, so --

15 MS. FRANZETTI: Okay. Did you  
16 consider in that regard the generally highly  
17 urbanized nature of the area?

18 MR. SULSKI: Yes.

19 MS. FRANZETTI: All right. Did you --  
20 did you also consider the fact that due to that  
21 highly urbanized nature, there is the potential for  
22 contaminated storm water runoff into the waterway  
23 from these industrial properties? Did the Agency  
24 consider the non-point source nature of this area?

1 MS. WILLIAMS: So are we on Question E  
2 now?

3 MS. FRANZETTI: Well, if I'm covering  
4 it, I'll skip it when I get to it, so if it's the  
5 same, we can consider it Question E as well.

6 MR. SULSKI: We considered -- we did a  
7 water quality assessment and looked at dry and wet  
8 weather situations. So in as much as non-point  
9 contributed to that, it was evaluated in our water  
10 quality assessments, quality of the water.

11 MS. FRANZETTI: And those water  
12 quality assessments were primarily on a  
13 chemical-by-chemical or parameter-by-parameter --

14 MR. SULSKI: Correct.

15 MS. FRANZETTI: -- assessment? Has  
16 the Agency -- I'm moving on to B. As the Agency --  
17 has the Illinois EPA reviewed the quote "zoning  
18 classifications," end quote, and if so, please  
19 provide the zoning classification information the  
20 Agency has reviewed.

21 MR. SULSKI: No.

22 MS. FRANZETTI: No. Okay. C. Has  
23 the Illinois EPA reviewed the existing physical  
24 conditions in relation to habitat requirements

1 (e.g., substrate, spawning materials, migration  
2 access, dissolved oxygen levels, toxicants) of the  
3 species and life stages that are being used to  
4 establish the proposed thermal water quality  
5 standards, and if so, how was this done?

6 MS. WILLIAMS: I mean, do you agree  
7 this was one you've already asked in your followup.

8 MS. FRANZETTI: I didn't think I asked  
9 it with respect to the establishment of the proposed  
10 thermal water quality standards.

11 MS. WILLIAMS: Okay. So do you want  
12 him to answer it about the thermal quality?

13 MS. FRANZETTI: Mm-hmm.

14 MS. WILLIAMS: Then can we -- that  
15 would make it a standards question, then, right?

16 MS. FRANZETTI: Yeah, it would. Would  
17 you prefer I skip? It is that, Counsel, what you're  
18 asking? I mean, if you have a problem with me  
19 asking that question now, I can skip it and come  
20 back to it later.

21 MS. WILLIAMS: Well, I think it makes  
22 it a confusing question that is being asked about  
23 standard setting as opposed to use designation.

24 MS. FRANZETTI: Okay. We can skip it.

1    Going on, then, to D.  Has the Illinois EPA  
2    calculated the total cost (including capital, O&M,  
3    energy, and cross-media environmental cross) for  
4    point sources of reducing the particular types of  
5    pollution that will be subject to more stringent  
6    standards here if the Board adopts the current  
7    proposal?

8                   MR. SULSKI:  No.

9                   MS. FRANZETTI:  Has the Agency  
10    considered the contribution of a possible need for  
11    reductions by non-point sources?

12                  MR. SULSKI:  It was considered  
13    briefly.  We didn't focus our energies on that,  
14    because this is a -- this is an effluent dominated  
15    waterway.

16                  MS. FRANZETTI:  I'm sorry, Mr.  
17    Sulski --

18                  MR. SULSKI:  The effluent --

19                  MS. FRANZETTI:  -- by that, you're --  
20    are you telling me that in the Agency's opinion, the  
21    urban runoff, which is a non-point source to this  
22    waterway, is not a significant stressor to the  
23    waterway?

24                  MR. SULSKI:  It's insignificant

1 relative to the other inputs into this system, yes.

2 MS. FRANZETTI: Separate and apart  
3 from --

4 MR. TWAIT: Well, I think --

5 MS. FRANZETTI: -- relative ranking.

6 Is it on it's own? Is the urban runoff to this  
7 waterway a significant stressor to the waterway?

8 MR. TWAIT: We have not done a TMDL on  
9 this waterway to consider the reductions that would  
10 be needed.

11 MR. FORT: I'm sorry. I didn't hear  
12 that. The reductions that --

13 MS. FRANZETTI: That are needed, or  
14 may it needed? Are needed?

15 MR. TWAIT: We did not do a TMDL on  
16 those -- on the non-point source that may or may not  
17 be needed.

18 MR. ETTINGER: Excuse me. When we say  
19 "this waterway," are we talking about the Upper  
20 Dresden Pool or more?

21 MS. FRANZETTI: My questions -- this  
22 is all under the question that's prefaced with the  
23 Chicago Sanitary and ship Canal and the Upper  
24 Dresden Pool, Counsel.

1 MR. ETTINGER: Oh. Thank you.

2 MS. FRANZETTI: Moving on to F, has  
3 the Agency considered how those costs or any -- of  
4 any point -- that's a typo there -- of any point or  
5 non-point source controls will effect Illinois  
6 taxpayers and ratepayers, and the Illinois economy  
7 overall?

8 MR. SULSKI: No.

9 MS. FRANZETTI: Has it attempted to  
10 estimate what the social impacts of imposing any  
11 such costs will be?

12 MR. SULSKI: I don't see any such --  
13 no.

14 MS. FRANZETTI: Okay. I think G has  
15 been covered. Moving on to B, the Clean Water Act  
16 and Federal Regulations. The Statement of Reasons  
17 -- and I think that page citation is a typo, because  
18 I wouldn't go from 10 backwards to Page 7, so bear  
19 with me. Let's overlook that for the moment.

20 The Statement of Reasons describes  
21 the federal statutory provisions applicable to  
22 establishment of water quality standards. In  
23 particular, it notes that Section 101 (a) (2) of the  
24 the Clean Water Act establishes a quote "national

1 goal that, wherever attainable, an interim goal of  
2 water quality that provides for the protection and  
3 propagation of fish, shellfish, and wildlife," end  
4 quote, be achieved.

5                   It further notes that 303(c)(2)(A)  
6 requires states in setting standards to serve the  
7 purposes of the Clean Water Act, and to take into  
8 consideration the use and value of waters for inter  
9 alia propagation of fish and wildlife, industrial  
10 uses, and other purposes. It then describes U.S.  
11 EPA's water quality standards regulations as  
12 interpreting section 303(c)(2)(A) to mean that  
13 quote, "water quality standards wherever retainable  
14 provide water quality for the protection and  
15 propagation of fish, shellfish, and wild life."

16                   Is there -- my question --  
17 Question A is: Is there anything in the Clean Water  
18 Act or its implementing regulations that specifies  
19 what species or biological assemblage is to be  
20 protected?

21                   MR. SMOGOR: If you're referring to  
22 the Clean Water Act and implementing regulations,  
23 are you referring to 40 CFR 131 primarily?

24                   MS. FRANZETTI: What includes -- I'm

1 asking for anything. And, really, the point of the  
2 question -- and let me clarify, it may not be  
3 written as clearly as it could have been -- is:  
4 Isn't it true that the statute in its implementing  
5 regulations say you protect fish? It doesn't start  
6 further specifying what species of fish need to be  
7 protected, whether the most sensitive of all species  
8 needs to be protected 100 percent of the time.  
9 That's what I'm trying to understand, whether you  
10 agree with that.

11 MR. SMOGOR: Yeah. It doesn't really  
12 get into specifics to that level.

13 MS. FRANZETTI: Okay. The notion that  
14 every water body is supposed to have the same broad  
15 assemblage of fish protected is not in the statute.  
16 Would you agree with that?

17 MR. SMOGOR: Can you say that again,  
18 please?

19 MS. FRANZETTI: The concept, or the  
20 notion, that every water body is supposed to have  
21 the same broad assemblage of fish -- of species of  
22 fish protected is not in the statute. Isn't that  
23 correct?

24 MR. SMOGOR: I agree.

1 MS. FRANZETTI: Okay. Did B -- moving  
2 to B, are there any other Clean Water Act provisions  
3 that apply with respect to water quality standards  
4 for temperature? And, again, by way of  
5 clarification, with 20/20 hindsight, I don't mean  
6 for this to be an exam on the sections of the Clean  
7 Water Act. What we were intending to refer to there  
8 is sections like 303 G of the Clean Water Act, which  
9 says water quality standards relating to heat shall  
10 be consistent with the requirements of Section 316  
11 of this act, and I didn't see in the Statement of  
12 Reasons, nor do I think I saw it in the UAA reports  
13 any discussion of how 30 -- section 303 G's mandate  
14 was applied or utilized here by the Agency with  
15 respect to the thermal water quality standards it  
16 has proposed in this proceeding.

17 MS. WILLIAMS: I think you are correct  
18 that there's no discussion of those provisions of  
19 the act in our submittal.

20 MS. FRANZETTI: Did the Agency  
21 consider Section 303 G in promulgating the proposed  
22 thermal water quality standards?

23 MR. TWAIT: I'm not sure that I can  
24 answer that.

1 MS. FRANZETTI: Okay. Why? Why not?

2 MR. TWAIT: I think that might  
3 possibly be a -- it's a question that I'm not  
4 familiar with. However, Chris Yoder may be more  
5 familiar with it, and he may have an answer as to  
6 what he considered for his temperature report.

7 MS. FRANZETTI: Okay. I understand  
8 that. With that caveat, and as we all know  
9 Mr. Yoder couldn't be here today. But, Mr. Twait,  
10 can I ask you in terms of the internal Agency review  
11 and deliberation to come up with the proposed  
12 thermal water quality standards that have been filed  
13 with the Board. I understand they are based to some  
14 extent on Mr. Yoder's work, but in anything that the  
15 Agency did to review those standards or to modify  
16 whatever recommendations Mr. Yoder can give to you,  
17 did you go back to Section 303 G and consider  
18 whether or not what you were proposing to the Board  
19 was, quote "consistent with the requirements of  
20 Section 316 of this act."

21 MR. TWAIT: Not that I am aware of.

22 MS. FRANZETTI: Similarly, Section 316  
23 speaks to assuring a balanced indigenous population  
24 of fish, as well as shellfish and wildlife. Did the

1 Agency -- in deriving the thermal water quality  
2 standards it has proposed here, did it attempt to  
3 protect a balanced indigenous population of fish?

4 MR. TWAIT: I believe the  
5 representative of aquatic species that we used did  
6 attempt that.

7 MS. FRANZETTI: So that your list of  
8 representative aquatic species used for the  
9 respective aquatic life used designations, because  
10 they vary depending on the proposed use; correct,  
11 Mr. Twait?

12 MR. TWAIT: Yes.

13 MS. FRANZETTI: So what you're telling  
14 us, then, is that you believe that your RAS lists  
15 for each proposed use represents a balance  
16 indigenous population?

17 MR. TWAIT: I -- this is specifically  
18 for thermal, and I think my answer should have been  
19 specifically for the Upper Dresden Pool did we have  
20 a balanced aquatic life goal.

21 MS. FRANZETTI: Okay. So only for the  
22 Upper Dresden Pool did you believe by using your  
23 representative aquatic species list that you were  
24 trying to protect the balance indigenous population

1 of fish, correct?

2 MR. TWAIT: I believe that's correct.

3 MS. FRANZETTI: You didn't do that  
4 with respect to the proposed thermal standards for  
5 the Chicago Sanitary and Ship Canal. Is that  
6 correct?

7 MR. TWAIT: For the Chicago Sanitary  
8 and Ship Canal, we developed a standard based on the  
9 RAS species there, and that use fell short of the  
10 Clean Water Act goals of having a balanced  
11 indigenous aquatic life goal.

12 MS. FRANZETTI: Oh, okay. I'm sorry.  
13 I wasn't making that connection. So if I understand  
14 correctly, proposed -- and not to keep this  
15 theoretical, but the Chicago Sanitary and Ship Canal  
16 -- am I right that the proposed aquatic life use is  
17 B, correct?

18 MR. TWAIT: Yes.

19 MR. SULSKI: Yes.

20 MS. FRANZETTI: Okay. I think I'm  
21 right. You're scaring me.

22 MR. SMOGOR: It's A or B, one of  
23 those.

24 MR. TWAIT: It's B.

1 MS. FRANZETTI: I think for the  
2 purposes, I'm concerned with, it's B, and with  
3 respect to proposed aquatic life use B, what you're  
4 saying is that use does not meet the Clean Water Act  
5 goals, and therefore there's not a requirement under  
6 the Clean Water Act to maintain a balanced  
7 indigenous population; correct?

8 MR. SMOGOR: Yes.

9 MR. TWAIT: Yes.

10 MS. FRANZETTI: Okay. And basically  
11 the Agency found that a balanced indigenous  
12 population of fish cannot exist in those portions of  
13 the Chicago Sanitary and Ship Canal, for which you  
14 have proposed aquatic life B.

15 MR. SMOGOR: We judged that it cannot  
16 be attained in the foreseeable future.

17 MS. FRANZETTI: Okay. Okay. I was  
18 just checking to make sure I wasn't repeating  
19 questions, but I'm not. Number two. On Pages 5 to  
20 66 the Statement of Reasons, the Illinois EPA sites  
21 U.S. EPA's regulatory requirements for conducting  
22 use attainability analysis to evaluate potential  
23 changes in designated uses, specifically 40 CFR  
24 Section 131.10 G, what we've been referring to as

1 the UAA factors regulation.

2 My question is: Is it correct  
3 that this is the first UAA for any Illinois water  
4 body in which the Illinois EPA has applied and used  
5 the UAA regulation?

6 MR. TWAIT: This is the form -- this  
7 is the first formal UAA that we've done. We've had  
8 similar processes to our disinfection exemption  
9 program and to use assessments, but this is the  
10 first formal use attainability analysis.

11 MS. WILLIAMS: You know what --

12 MS. FRANZETTI: Hmm?

13 MS. WILLIAMS: Go ahead.

14 MS. FRANZETTI: I'm sorry, Counsel?

15 MS. WILLIAMS: I just want to clarify.

16 I mean, I think there's a sort of a slight  
17 misstatement in the question that I want to clarify.  
18 Can we clarify it maybe as well? It says that we  
19 site U.S. EPA's requirements for conducting  
20 attainability analysis --

21 MS. TIPSORD: Deb, they can't hear you  
22 at all in the back.

23 MR. SMOGOR: Yeah. I don't believe  
24 that conducting a use attainability analysis is a

1 requirement of the Clean Water Act.

2 MS. FRANZETTI: Oh, I agree. And  
3 the question isn't intended to say that --

4 MR. SMOGOR: Okay.

5 MS. FRANZETTI: -- but when you do  
6 conduct one --

7 MR. SMOGOR: Mm-hmm.

8 MS. FRANZETTI: -- there are  
9 requirements in the regulations that you must  
10 follow, correct?

11 MR. SMOGOR: As far as I know, how to  
12 do a UAA is still U.S. EPA guidance. So if you're  
13 saying -- if someone is performing a UAA, I don't  
14 think that strictly they're under any kind of  
15 regulatory -- any kind of regulations on how to do  
16 that.

17 MS. FRANZETTI: Okay. I understand  
18 what you're saying.

19 MR. SMOGOR: So maybe I'm  
20 misunderstanding.

21 MS. FRANZETTI: I think you're  
22 starting to answer the next question --

23 MR. SMOGOR: Okay.

24 MS. FRANZETTI: -- and that's fine.

1 For purposes of clarification, though, the  
2 regulation does prescribe six factors that would --  
3 that form the parameters that when you're doing a  
4 UAA, you are limited to those six factors if you are  
5 not going to propose a full fishable/swimmable use  
6 designation; correct?

7 MR. SMOGOR: Those are -- any one of  
8 those six factors, at least one is required to  
9 propose something short of the Clean Water Act  
10 aquatic life goal and recreational goal.

11 MS. FRANZETTI: And with respect to --  
12 understanding this is the first time, with respect  
13 to the application of those six UAA factors, and  
14 this is Question B, is there any published federal  
15 guidance on the way in which to apply those six  
16 factors that Illinois EPA tried to follow here or  
17 otherwise received in formal guidance from U.S. EPA  
18 that you can identify for us? Because I do agree  
19 that I there isn't a lot out there, but that's why  
20 I'm asking the question is what guidance did you --  
21 if any, did the Agency rely on in conducting the  
22 UAAs here?

23 MR. SULSKI: It's cited in the  
24 contractors reports. There are documents and

1 guidances that -- guidances for pursuing the  
2 process, going through the process.

3 MS. TIPSORD: Okay. Now we're using  
4 contractors reports.

5 MR. SULSKI: Okay.

6 MS. TIPSORD: We have to -- please.  
7 We have to be consistent.

8 MR. SULSKI: Yes.

9 MS. TIPSORD: If you're talking about  
10 the use and attainability --

11 MR. SULSKI: Yes. CDM and Novotany  
12 contain citations for that sort of guidance, whether  
13 --

14 MS. DIERS: Attachment A and B.

15 MS. TIPSORD: Thank you.

16 MR. SULSKI: Attachment A and B.

17 MS. TIPSORD: Thank you. Because we  
18 -- we keep referring to them as different things.

19 MR. SULSKI: Sorry.

20 MS. FRANZETTI: Mr. Sulski --

21 MR. SULSKI: Yes.

22 MS. FRANZETTI: -- I just need some  
23 clarification. That made -- that tells me the  
24 consultants looked at this -- looked at whatever

1 those documents are to some extent. Did the Agency,  
2 separate and independent from whatever a consultant  
3 may have done, and what is reference in their  
4 report, did they receive any guidance from U.S. EPA  
5 or look at any published U.S. EPA guidance?

6 MR. SULSKI: I, personally, looked at  
7 some of the documents that the CDM contractor  
8 utilized and ran through them to learn more about  
9 the process and to oversee the contract.

10 MS. FRANZETTI: Any informal guidance,  
11 any discussions with representatives of U.S. EPA  
12 with respect to how to perform this UAA and apply  
13 the six factors?

14 MR. SULSKI: Not that I can recall.

15 MS. FRANZETTI: Moving on to C,  
16 applicable Board regulations and regulatory history.  
17 On Pages 10 to 11 on the Statement of Reasons, it's  
18 noted that, quote, "In it's opinion in R72-4, the  
19 Board stated that --" another quote "-- the basis  
20 for the Board's decision to use the I 55 bridge as a  
21 boundary for the division of the Des Plaines river  
22 into restrictive and general use, is that the  
23 location of the bridge corresponds to changes in the  
24 physical environment characteristics of the area.

1 Citation R 72-4 slip opinion at 5, November 8,  
2 1973," end quote.

3 My question is: Does the Illinois  
4 EPA agree that the location of the I-55 bridge still  
5 corresponds today to the changes and the physical  
6 environmental characteristics of the area?

7 MR. TWAIT: The Agency didn't try to  
8 clarify that distinction.

9 MS. FRANZETTI: Mr. Twait, I'm not  
10 sure what that means. Does that mean you don't know  
11 whether --

12 MR. TWAIT: Well --

13 MS. FRANZETTI: -- it still  
14 corresponds today to where the physical environment  
15 changes?

16 MR. TWAIT: Yes. I would say that I  
17 don't know. We haven't tried to address that. The  
18 Agency did not reassess the appropriateness of the  
19 I-55 bridge as the boundary. The UAAs were  
20 evaluated for the secondary contact waters, which by  
21 default is the I-55 bridge as their ending point.  
22 The Agency did not reassess whether or not the I 55  
23 bridge changed the characteristics of the stream  
24 or --

1 MR. SULSKI: Began the changes.

2 MR. TWAIT: Yes.

3 MS. FRANZETTI: Okay. So in other  
4 words, the Agency accepted for purposes of the Lower  
5 Des Plaines UAA portion of this rulemaking that  
6 I-55, given it was the southern boundary the  
7 secondary contact existing use designation, that it  
8 would simply remain the southern boundary for  
9 purposes of this Lower Des Plaines UAA; correct?

10 MR. TWAIT: Yes.

11 MS. FRANZETTI: Without regard to  
12 whether that's appropriate or not appropriate?

13 MR. TWAIT: Correct.

14 MS. FRANZETTI: With respect to the  
15 next topic, D, history of thermal demonstrations and  
16 thermal adjusted standards in the Chicago Area  
17 Waterway Systems and Lower Des Plaines River.

18 Question 1: On Pages 13-14 of the  
19 Statement of Reasons, the Illinois EPA describes the  
20 1996 adjusted standard from the General Use thermal  
21 water quality standards, granted the Commonwealth  
22 Edison in AS 96-10, which is applicable at the I-55  
23 bridge on the Lower Des Plaines River, and later on  
24 March 16th, 2000, was transferred to Midwest

1 Generation.

2                                 With respect to this adjusted  
3 standard, please respond to the following questions:  
4 A, does the Illinois EPA agree that in the AS 96-10  
5 Board decision, the Illinois EPA and the Board found  
6 that Commonwealth Edison, hereinafter Com Ed,  
7 Midwest Generation's predecessor, had successfully  
8 demonstrated that the heat discharges from the  
9 Joliet station did not cause, nor could reasonably  
10 expected to -- be expected to cause significant  
11 ecological damages to the waters of the five-mile  
12 stretch, which is the Lower Des Plaines, below I-55.  
13 Does the Agency agree that that was the Board's  
14 decision?

15                                 MR. ETTINGER: We're asking the Agency  
16 whether it can read the Board decision?

17                                 MS. FRANZETTI: I am.

18                                 MS. WILLIAMS: I think that the  
19 standard that you're citing to cause significant  
20 ecological damage --

21                                 MS. FRANZETTI: Did not cause.

22                                 MS. WILLIAMS: Or to not cause,  
23 whatever. The standard of whether or not it caused  
24 significant ecological damage, as to my recollection

1 that's the standard the Board considers in the  
2 heated effluent demonstrations that were prior to  
3 the '96 hearing as opposed to the --

4 MS. TIPSORD: You're going to have to  
5 speak up.

6 MS. WILLIAMS: Okay.

7 MS. TIPSORD: You're speaking to them  
8 out there, not to Ms. Franzetti.

9 MS. WILLIAMS: It's my understanding  
10 that the standard significant ecological damage is  
11 the standard that the Board considers in the heated  
12 effluent demonstration, as opposed to the factors  
13 laid out in Section 28 of the act for an adjusted  
14 standard. So I'm not sure --

15 MS. FRANZETTI: So --

16 MS. WILLIAMS: -- that we can answer  
17 that question.

18 MS. FRANZETTI: -- you disagree that  
19 the Board decision included that finding? I'm  
20 trying to -- I'm trying to make sure -- because,  
21 obviously, I am going to be relying to some extent  
22 on the findings in that prior decision since they  
23 apply to this waterway, and I would like to know  
24 whether the Agency agrees with me in interpreting

1 what the Board found in that proceeding.

2 MS. WILLIAMS: I don't think we  
3 disagree that that's what the Board found. Is that  
4 the question?

5 MS. FRANZETTI: Okay. So with that --  
6 with that foundation -- but the next question is:  
7 If so, please explain whether the Illinois EPA's  
8 position regarding the lack of significant adverse  
9 and ecological impact from the Midwest Gen Joliet  
10 station has changed, and if so, explain the reasons  
11 for its change in position.

12 MR. TWAIT: The adjusted standard was  
13 for below I 55, and that's where the Board decided  
14 that it did not cause significant ecological damage.  
15 Our proposal is for the area above I 55.

16 MS. FRANZETTI: So, Mr. Twait, you do  
17 not think any aspect of that adjusted standard, in  
18 terms of what it allowed Midwest Gen to discharge  
19 from its plans, had any applicability to the area  
20 between where it discharged it and downstream at the  
21 I-55 bridge?

22 MR. TWAIT: I was not part of the  
23 rulemaking back at that point, but I do not believe  
24 that the Agency looked at ecological damage. It

1 looked at whether or not the water quality standard  
2 was being achieved. We did not look at whether the  
3 water quality standard was appropriate during that  
4 -- the secondary contact water quality standard was  
5 appropriate during that rulemaking.

6 MS. FRANZETTI: Moving on to B, the  
7 Statement of Reasons refers to Appendix A at 2-84  
8 for a description of the basis for the adjusted  
9 standard, and Appendix A at 2-84 states that, quote,  
10 "The Illinois EPA agreed that heat was not a factor  
11 limiting the quality of the aquatic habitat of the  
12 five mile stretch. Does the Agency -- does Illinois  
13 EPA agree that in the AS 96-10 proceeding the  
14 Illinois EPA agreed and the Board concurred that the  
15 temperature of the waters of the five-mile stretch  
16 was not a factor limiting its quality, and that  
17 other factors continued to override the effect of  
18 temperature in the waterway, such as loss of habitat  
19 due to channelization, disruption of habitat due to  
20 barge traffic, and the presence of heavy metals and  
21 other pollutants in the system."

22 MR. TWAIT: As it applies to the  
23 stream -- downstream of the I-55 bridge, I think  
24 that's correct. But the Agency's proposal does not

1 address below the I-55 bridge.

2 MS. FRANZETTI: And those are the  
3 waters of the five-mile stretch you're referring to,  
4 Mr. Twait, correct?

5 MR. TWAIT: Downstream of I-55, yes.

6 MS. FRANZETTI: Yes.

7 MS. TIPSORD: Point of clarification.  
8 You said Appendix A. You mean Attachment A?

9 MS. FRANZETTI: I think it referred to  
10 Appendix A. Let me just check. Oh, no. You're  
11 absolutely right. It's a typo. Attachment A.  
12 Sorry.

13 MS. TIPSORD: Just double checking.

14 MS. FRANZETTI: We'll get our  
15 attachments and appendix correct one of these days.  
16 Moving on to the next question, is it now the  
17 Illinois EPA's position that these factors have  
18 changed favorably, such that temperature has now  
19 become a limiting factor to improvements of the  
20 biological community of the waterway, and if so,  
21 please explain the factual basis for the change in  
22 the Illinois EPA's position.

23 MR. ETTINGER: You're talking about  
24 the area below the I-55 --

1 MS. FRANZETTI: The five-mile stretch.  
2 If it hasn't -- if the Agency's position hasn't  
3 changed, that's fine.

4 MR. SULSKI: We didn't evaluate that  
5 five-mile stretch in these UAA's.

6 MS. FRANZETTI: So the Agency hasn't  
7 changed its position with respect to the five-mile  
8 stretch?

9 MR. SULSKI: Well, I just have one --  
10 I don't mean to answer a question with a question,  
11 but in B at the end, you talk about other factors  
12 that override temperature, including loss of habitat  
13 and disruption of habitat and that sort of thing,  
14 heavy metals, et cetera, et cetera. I didn't read  
15 the adjusted standard word for word. Is this a  
16 citation? Are these words out of that --

17 MS. FRANZETTI: These are factors that  
18 were cited in the adjusted standard opinion.

19 MR. SULSKI: Okay. The -- again, the  
20 response is that we didn't evaluate below I-55. We  
21 evaluated the secondary contact portion of the  
22 waterway above I-55.

23 MS. WILLIAMS: Can I ask a redirect  
24 question at this point?

1 MS. TIPSORD: Sure.

2 MS. WILLIAMS: Mr. Sulski, did the  
3 Agency have an opinion on whether temperature is now  
4 an eliminating factor for the aquatic life in the  
5 area that you did study?

6 MR. SULSKI: Yes, we did.

7 MS. WILLIAMS: Do you have an opinion,  
8 or --

9 MR. SULSKI: Do I have an opinion on  
10 whether it is a factor?

11 MS. WILLIAMS: Right.

12 MR. SULSKI: My -- yes, I have an  
13 opinion. My opinion is, yes, it is a factor in  
14 effecting the aquatic life in the area that we've  
15 studied.

16 MS. FRANZETTI: What is that opinion  
17 based on, Mr. Sulski?

18 MR. SULSKI: It's based on -- all I  
19 have is a part of that, and Scott will help me  
20 answer other parts.

21 MS. FRANZETTI: Okay. Answer the part  
22 you can.

23 MR. SULSKI: In terms of habitat and  
24 what we believe the potential is, we determined that

1 that stretch above I 55 of the Upper Dresden Island  
2 Pool can sustain and has the potential of meeting  
3 Clean Water Act goals for aquatic life. It's based  
4 on the data that's in the reports, the habitat data,  
5 et cetera.

6                                 With that, we looked at -- we had  
7 a set criteria to protect those uses, and when you  
8 compare the criteria that we believe are needed to  
9 protect those uses compare to secondary contract  
10 criteria or the criteria that apply, it is our  
11 feeling that the temperature levels are affecting  
12 and preventing that waterway as a factor from  
13 obtaining Clean Water Act goal potential.

14                                 MS. FRANZETTI: All right. If I  
15 understand your answer correctly, because you came  
16 up with numbers for a thermal water quality standard  
17 that are lower than the ambient temperatures out  
18 there, you conclude the temperature is an inhibiting  
19 factor out there?

20                                 MR. SULSKI: That determination was  
21 made even before we came up with more restrictive  
22 standards. That -- that determination.

23                                 MS. FRANZETTI: That's what I'm asking  
24 you. What's the basis for your position? The

1 temperature is an inhibiting factor out there. What  
2 are you referring to now by saying it's things that  
3 you saw or heard before you came up with your  
4 proposed thermal water quality standards?

5 MR. TWAIT: Yes. In Attachment A of  
6 the Aqua Nova report, they stated in there that the  
7 secondary contact standards were lethal to fish, and  
8 we believe that was further corroborated by Chris  
9 Yoder's studies.

10 MS. FRANZETTI: So it is the Agency's  
11 position that the ambient thermal's temperatures in  
12 the Upper Dresden Pool today are lethal to the fish?

13 MR. TWAIT: The -- the ambient  
14 temperatures are probably lethal to some fish.

15 MS. FRANZETTI: Do you have any data  
16 of fish dying out there due to the ambient thermal  
17 temperatures?

18 MR. TWAIT: No, because fish have the  
19 ability to avoid warm water when they -- when they  
20 detect it.

21 MS. FRANZETTI: So based on the fish  
22 behavior called "avoidance," the temperatures aren't  
23 -- the temperatures aren't lethal out in the Upper  
24 Dresden Pool?

1                   MR. TWAIT: Okay. I think I'll just  
2 refer back to Novotany's report, the Aqua Nova  
3 report that said -- Attachment A, that the secondary  
4 contact water quality standard was lethal to fish.

5                   MS. FRANZETTI: Then, for the record,  
6 I would request that Mr. Novotany be brought to one  
7 of the future hearings, so that he can tell me what  
8 the basis is for the -- for the speculation that the  
9 temperatures out there are lethal to fish, when none  
10 of us are finding any fish kills going on out there.

11                   MS. WILLIAMS: I think we can get into  
12 this question sufficiently with Mr. Yoder at the end  
13 of the week.

14                   MS. FRANZETTI: Well, I don't think I  
15 found that conclusion in Mr. Yoder's report, but if  
16 you want to prepare him to try and defend  
17 Mr. Novotany's findings --

18                   MS. WILLIAMS: I think it's in his  
19 testimony, so I think we can talk about it.

20                   MS. TIPSORD: Mr. Fort, you have a  
21 followup?

22                   MS. TIPSORD: If I may. Jeffrey Fort  
23 for Citgo. Is your testimony there about lethality  
24 or lethality of temperatures, looking at the

1 requirements in your period average also, that  
2 essentially says that things have to be colder than  
3 they are otherwise? You know, have to be below 58  
4 degrees Farenheit or something like that? That  
5 that's something that the fish are -- is also lethal  
6 to fish, having warmer water than, say, 62 degrees  
7 or so?

8 MR. TWAIT: No.

9 MR. FORT: Okay. You're just focusing  
10 on the high end, the kind of -

11 MR. TWAIT: The lethal part was the  
12 daily maximum that we proposed.

13 MR. FORT: The upper bound of the  
14 temperatures? Warmness, not coldness?

15 MR. TWAIT: Yes.

16 MR. FORT: Okay.

17 MR. SMOGOR: If I may, the fact that  
18 some temperatures may be lethal to fish, life stages  
19 not even specified here, perhaps lethal to early  
20 life stages, does not necessarily mean that you will  
21 be able to see fish kills out there regularly. I'd  
22 just like to point that out. Not seeing fish kills  
23 does not necessarily mean that fish kills of some  
24 degree aren't happening out there.

1 MS. TIPSORD: Mr. Ettinger, you have a  
2 followup?

3 MR. ETTINGER: Yeah. I just want to  
4 clear up an ambiguity. I think --

5 MS. TIPSORD: Albert, you need to  
6 speak up.

7 MR. ETTINGER: I'm sorry. I think  
8 there are -- I want to try to clear up an ambiguity  
9 I see in the testimony. As I understand in the  
10 Novotany report, he speaks about the temperatures  
11 that are in the current secondary contact standards.  
12 Is that correct?

13 MR. TWAIT: Yes.

14 MR. ETTINGER: Did Mr. Novotany look  
15 at the temperatures that are actually present in the  
16 Upper Dresden Pool and determine that those  
17 temperatures are lethal to fish?

18 MR. TWAIT: I don't know that I can  
19 answer that.

20 MR. ETTINGER: Okay. So Mr. Novotany  
21 said that the temp -- the standards present now are  
22 not appropriate in his view, but he didn't  
23 necessarily say that the temperature is being put  
24 out or currently occurring are killing fish?

1                   MR. TWAIT: I think that would be  
2 accurate.

3                   MR. ETTINGER: So we don't -- he did  
4 not look at what temperatures were actually hit now  
5 in the Upper Dresden Pool?

6                   MR. TWAIT: There was a misconception  
7 that he had about the effluent temperature of  
8 Midwest Generation's facilities, which was not  
9 accurate, and I believe that he did not look at the  
10 temperatures in the river as being lethal. But,  
11 yes, I agree that he was addressing the water  
12 quality standard that existed.

13                  MR. ETTINGER: The fact that it's  
14 permitted to go up to a temperature under a standard  
15 doesn't force the dischargers to raise it to that  
16 temperature, does it?

17                  MR. TWAIT: No.

18                  MR. ETTINGER: Thank you.

19                  MS. FRANZETTI: Mr. Twait, since you  
20 mentioned it, would you mind, if you can, expanding  
21 upon -- what was the misconception that Mr. Novotany  
22 had about the temperature of Midwest Gen's  
23 discharges?

24                  MR. TWAIT: The misconception that he

1 had was based on the DMR reports that Midwest  
2 Generation sends to the Agency that would indicate  
3 their maximum temperature, and I believe that  
4 maximum temperature was taken at the beginning of  
5 the discharge canal, and did not take into account  
6 any -- any temperature attenuation in the Canal, nor  
7 did it take into account any use of the cooling  
8 towers.

9 MS. FRANZETTI: Thank you.

10 MR. TWAIT: And so in his report, he  
11 was saying that they were violating their permit, I  
12 believe, was his wording. That was not correct.

13 MR. ETTINGER: Miss Tipsord?

14 MS. FRANZETTI: Which actually brings  
15 up a point. Have those errors in the Lower Des  
16 Plaines UAA report Attachment A been corrected such  
17 that the one that was filed for the Board to review  
18 no longer contains such erroneous statements?

19 MR. TWAIT: I believe that most of the  
20 -- most of the -- most of the language has been  
21 removed, but I don't think that all of it had been  
22 removed, just because it was not all contained in  
23 one spot.

24 MR. ETTINGER: Miss Tipsord, may I ask

1 a question? Miss Franzetti's asked a lot of  
2 questions on a lot of different areas. Should we  
3 wait until she's done to follow up on all of that,  
4 or should we deal with some of the things that she's  
5 already raised now?

6 MS. TIPSORD: Well, I think if you  
7 have followup in the flow of her questions, then you  
8 should do them now. I think we are getting a little  
9 more detailed than we had wanted to here, but some  
10 of that has just been a product of the Agency's  
11 answers.

12 MR. ETTINGER: If I could go back,  
13 then, to one of her general, general, questions  
14 regarding the receipt of IEPA from guidance --

15 MS. TIPSORD: Can we finish at this  
16 point? I think she had a final -- did you have a  
17 final point on the errors in the report?

18 MS. FRANZETTI: Well, I was going to  
19 ask the Agency if there was a way that it could  
20 consider marking up, whether crossing out, whatever  
21 is easiest but effective, on Attachment A anything  
22 that, as you've just noted with respect to Midwest  
23 Gen, anything else that isn't accurate so that the  
24 Board is not mistakenly viewing those portions as,

1 in fact, accurate, or statements that the Agency  
2 agrees with.

3 MS. WILLIAMS: We -- I believe we  
4 attempted in our Statement of Reasons to consider  
5 that issue by identifying where we did and did not  
6 rely on findings from those reports in making our  
7 recommendations to the Board.

8 MS. FRANZETTI: Well --

9 MS. WILLIAMS: I'm not saying we won't  
10 consider that, but --

11 MS. FRANZETTI: Counsel, this is a  
12 different issue. If that report says that my client  
13 -- inaccurately says that my client was discharging  
14 in violation of the thermal limits in its NPDS  
15 permit, if it mistakenly says that my client's  
16 discharges were causing fish kills in lethal  
17 temperatures out there, I think that's a pretty  
18 important point we ought to get clarified.

19 MS. WILLIAMS: Absolutely. We can  
20 come back and comment and clarify that. I was just  
21 worried you were asking us to go through each line  
22 and clarify every sentence we did or did not  
23 completely agree with, and that, I think, is  
24 unreasonable. But it's fine --

1 MS. FRANZETTI: No, no. It's really  
2 inaccuracies. I mean, staying with what we were  
3 just talking about, if there are any others that  
4 weren't taken out in revising that report,  
5 Attachment A, that's -- even if it's as simple as  
6 just taking a copy of it and crossing them out and  
7 filing it as, you know, revised Attachment A.  
8 That's what I'm asking the Agency to consider, and I  
9 don't need an answer immediately if you need to --

10 MS. WILLIAMS: No, we'll try. I mean,  
11 we will do our best try.

12 MS. TIPSORD: Okay. Mr. Ettinger, you  
13 had a question, and then you.

14 MR. ETTINGER: Well, I have, kind of,  
15 two sets of questions. One had to do with the  
16 balanced indigenous life. Do you remember those  
17 sets of questions that Miss Franzetti asked, and I  
18 was going to ask whether the Agency had looked at  
19 the species of fish and other aquatic life that  
20 lived in waters, other than the ones under  
21 consideration, to see what sort of species you might  
22 be expected to find in this water body.

23 MR. TWAIT: I think that would be a  
24 question best addressed by Chris Yoder.

1 MR. ETTINGER: Okay.

2 MR. TWAIT: I believe he attempted to  
3 do that with his RAS species, representative aquatic  
4 life species.

5 MR. ETTINGER: Okay. Mrs. Franzetti  
6 also asked whether the Illinois Environmental  
7 Protection Agency had received any guidance from the  
8 United States Environmental Protection Agency or had  
9 any meetings with them regarding this. Mr. Sulski  
10 said he had not personally received such guidance or  
11 had such meetings. Did other members of the  
12 Illinois Environmental Protection Agency have  
13 meetings with U.S. EPA in which they received  
14 guidance or opinions regarding the use attainability  
15 analysis?

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

17 MS. WILLIAMS: I mean, I think I would  
18 say, generally, though that U.S. EPA region five  
19 funded for us the contractor reports that are  
20 included in Attachment A and B. So I am sure that  
21 that Mr. Frevort must have had discussions in  
22 developing those scope of work, and what have you,  
23 about what would be conducted with the resources  
24 they were given us. That's one thing I can think

1 of. I wasn't personally involved in, but --

2 MS. TIPSORD: And just to note, for  
3 the record, Mr. Frevort refired from the Agency --

4 MS. WILLIAMS: Yes. I don't like to  
5 talk about it.

6 MS. TIPSORD: -- at the end of the  
7 year, after this proposal applied. Mr. Frevort is  
8 no longer available to ask these questions. Mr.  
9 Andes, did you have a followup on that?

10 MR. ETTINGER: I'm sorry. I just have  
11 one more followup on myself here, and it involves  
12 our friend, Mr. Frevort. Do you know whether U.S.  
13 EPA sent comments to Mr. Frevort regarding the draft  
14 proposal that Illinois Environmental Protection  
15 Agency circulated at the beginning of 1990 -- 2007.  
16 I'm sorry. I've been on this job too long. 2007.

17 MR. SULSKI: Yes.

18 MR. ETTINGER: Yes. Were you able to  
19 review that letter and comment on the draft?

20 MR. SULSKI: Yes.

21 MR. ETTINGER: So you did receive that  
22 guidance in form of comments?

23 MR. SULSKI: They were comments on the  
24 final report.

1 MR. ETTINGER: Did -- well --

2 MR. TWAIT: Yes, I think they were  
3 comments on our proposal --

4 MR. SULSKI: Yeah, draft reports. I'm  
5 sorry.

6 MR. TWAIT: -- rather than the report.

7 MS. TIPSORD: Are those comments part  
8 of the Board's records?

9 MS. WILLIAMS: I don't think so, no.  
10 We can make them a part of the record if you like.

11 MR. ETTINGER: I'm not trying to make  
12 this a mystery. I have -- I happen to have here a  
13 list in my hand of 20 known communists in the state  
14 department. No, I have a -- I think the comments,  
15 and if it's with the Board's indulgence, could we  
16 show this to the Agency witnesses, now and we'll  
17 either make them a part of the record now, or wait  
18 until we have another authenticating witness.

19 MR. ANDES: Could you identify the  
20 date of the document?

21 MR. ETTINGER: Actually, I can't.

22 MS. DIERS: You wanted to know the  
23 date of the document?

24 MR. ETTINGER: For one, it's out of my

1 hand, and secondly, for some reason my copy is not  
2 dated on the top with the letter to Frevort.

3 MS. DIERS: The letter's not dated,  
4 but the comment side they have is dated  
5 January 18th, 2007.

6 MS. TIPSORD: That's the day of the  
7 draft that they reviewed --

8 MS. DIERS: The drafting. And --

9 MS. TIPSORD: Not the date of the  
10 document.

11 MR. ETTINGER: So I assume the letter  
12 was sent sometime after the date of the draft. Do  
13 you have a better draft?

14 MR. ANDES: You know what? I'm not  
15 sure mine is the final copy, but I think it's the  
16 same thing.

17 MS. TIPSORD: Yes, ma'am. We have  
18 someone in the back room?

19 MS. HALLS: Linda Halls from EPA. Do  
20 you want -- I mean, we have them --

21 MS. TIPSORD: U.S. EPA? Are you U.S.  
22 EPA?

23 MS. HALLS: Yeah U.S. EPA. We can  
24 bring our comments. We've sent several.

1 MS. TIPSORD: Okay. That would be  
2 wonderful.

3 MS. DIERS: The one that Albert handed  
4 us, we have a letter dated May 3rd, 2000 -- well,  
5 it's stamped May 3rd, 2007, and then it has attached  
6 and it's dated January 18th, 2007. So -- and they  
7 look similar to what I have.

8 MR. ETTINGER: Okay. If you'd like to  
9 offer that as an exhibit, then that could end the  
10 mystery here.

11 MR. SULSKI: Albert, can I add  
12 something to your question?

13 MR. ETTINGER: Yes, please.

14 MR. SULSKI: U.S. EPA attended the  
15 stakeholder meetings and provided comments all the  
16 way along like everybody did and on the draft  
17 reports. So if -- I don't know if you want to  
18 construe that as guidance, but they commented on  
19 elements of the process.

20 MS. TIPSORD: And I assume you're  
21 sending her out to make copies?

22 MS. WILLIAMS: Absolutely. And, you  
23 know, while we're talking about this subject,  
24 does -- do you guys have -- does U.S. EPA have

1 copies of the document we discussed this morning  
2 available the disinfection --

3 MS. HALLS: Yes.

4 MS. WILLIAMS: -- comments? I'm not  
5 100 percent sure we brought those from Springfield.  
6 But those --

7 MS. HALLS: Yeah, we have those too.

8 MS. WILLIAMS: -- we could make copies  
9 of those also if you could get us one. All right.

10 MS. TIPSORD: Okay. Go ahead, Mr.  
11 Andes.

12 MR. ANDES: Well, Albert stole my  
13 question.

14 MR. ETTINGER: I'm sorry.

15 MR. ANDES: But I'll follow up with  
16 it.

17 MS. TIPSORD: Please do.

18 MR. ANDES: I may have another  
19 question. First is -- all right. So if we have  
20 that document with draft EPA comments, and it sounds  
21 like there may be other EPA documents that were  
22 transmitted to Illinois EPA, my next question is:  
23 What was transmitted back from Illinois EPA to U.S.  
24 EPA are there written documents where -- for

1 example, with all these pages of concerns raised by  
2 U.S. EPA, is there a response from Illinois EPA, and  
3 sort of my question that that goes to that is: What  
4 basis do you have for believing that all of these  
5 issues raised by U.S. EPA have been addressed? It's  
6 not in the record anywhere as far as I can tell.

7 MS. WILLIAMS: We attempted to address  
8 all of those comments in our final proposal to the  
9 Board that was our effort. We have not communicated  
10 to them in any other informal way beyond the way we  
11 communicated to all the stakeholders that we tried  
12 to address our comments in our final proposal.

13 MR. ANDES: So you think that the  
14 Statement of Reasons with attachments addresses all  
15 of these issues?

16 MS. WILLIAMS: And changes that were  
17 made to the regulations between the first draft and  
18 what was submitted to the Board as well.

19 MR. ANDES: Okay. My second question  
20 was on a different topic to follow up on  
21 Ms. Franzetti. I think Mr. Twait said that the  
22 Agency has not gone to TNDL to figure out the  
23 non-point reductions that might be needed to attain  
24 the stamina. My question is, then, how do you know

1 the standards attainable if you haven't figured out  
2 what reductions are needed and how they can be  
3 attained?

4 MS. TIPSORD: Excuse me. For point  
5 clarification, I believe that question was about the  
6 Chicago Sanitary and Ship Canal, isn't that correct?  
7 It wasn't for the entire --

8 MS. FRANZETTI: That's right. It was  
9 at least the Chicago Sanitary and Ship Canal. I  
10 think also might have been Upper Dresden Pool. I  
11 believe both.

12 MR. TWAIT: I think -- I think one of  
13 the things there is --

14 MS. WILLIAMS: Could you repeat the  
15 question?

16 MR. SULSKI: Yeah, please.

17 MR. ANDES: If the Agency has not gone  
18 to TNDL to figure out the non-point reductions that  
19 would be needed to obtain the standard, how does the  
20 Agency know or believe that the standard is  
21 attainable?

22 MR. SULSKI: Well, it's -- the TMDL is  
23 a different process. When we did the water quality  
24 evaluation portions of these use attainability

1 analysis, we compared all the data that we had with  
2 what -- with general use standards. That was sort  
3 of what was -- what was the comparison point, and we  
4 found that the water quality met general use  
5 standards in almost all regards, except for a few  
6 parameters, which are in the report, temperature --

7 MR. TWAIT: D.O.

8 MR. SULSKI: -- D.O. bacteria, and  
9 then we looked at sources of those, and we found  
10 that the source of those were dominated, extremely  
11 dominated, by a few entities, CSOs, wastewater  
12 treatment plants, power plant discharges, and we  
13 didn't find reason to have to delve into the  
14 non-point issue because we believed that, for the  
15 most part, it would be addressed in dealing with  
16 these other sources, and that because they dominated  
17 the system so much that the small north fork, west  
18 fork, and east fork of the north branch, I mean,  
19 there were little trickles coming into this system.  
20 There were little trickles coming into the system  
21 relative to all the other, and we found that these  
22 other -- these major sources were really the ones  
23 that were causing situations that wouldn't allow us  
24 to meet our designated uses. So that's what was --

1 that's what the contractors concentrated on.

2 MR. ANDES: So then -- and not -- and  
3 I think you said "general use," but I think you're  
4 talking about your proposed uses, right?

5 MR. SULSKI: Yes.

6 MR. ANDES: So the Agency believes  
7 that.

8 MR. TWAIT: No -- I want to clarify  
9 that.

10 MR. ANDES: Okay.

11 MR. TWAIT: The contractors looked at  
12 whether or not the standards were meeting general  
13 use, and they were -- yes. The -- whether the  
14 streams were meeting general use water quality  
15 standards. Our proposal is using the most current  
16 water quality standards. In some cases, those are  
17 more stringent than general use. So I just wanted  
18 to make that clarification.

19 MR. ANDES: So the conclusion -- the  
20 conclusion is that controlling those sources would  
21 get to general use is separate and apart from  
22 whether fulfilling those uses will obtain the  
23 proposed uses, right?

24 MR. TWAIT: Yes.

1 MR. ANDES: Two different issues?

2 MR. SULSKI: Yes.

3 MR. ANDES: Okay. Thank you.

4 MR. ETTINGER: Sorry. Just to  
5 clarify, the Upper Des Plaines Pool now is generally  
6 meeting general use standards. Is that fair to say?

7 MR. TWAIT: For most topic parameters,  
8 the answer is yes.

9 MR. ETTINGER: And for what is the  
10 Upper Des Plaines Pool sometimes violating?

11 MR. SMOGOR: Are you referring to the  
12 Upper Dresden Isle?

13 MR. ETTINGER: I'm sorry. Upper  
14 Dresden Pool. I'm sorry. Upper Dresden Pool.

15 MR. TWAIT: I think its temperature --

16 MR. SULSKI: Dissolved oxygen --

17 MR. TWAIT: -- and dissolved oxygen.

18 MR. SULSKI: -- are the primary  
19 parameters.

20 MS. TIPSORD: Mr. Harley?

21 MR. HARLEY: Just to clarify,  
22 Ms. Franzetti, in reporting one of your questions,  
23 you --

24 MS. FRANZETTI: Am I on trial?

1                   MR. HARLEY: There was a phrase you  
2 used that said "none of us" have observed a fish  
3 kill, and I'm curious who "us" is within that  
4 question.

5                   MS. FRANZETTI: Well, it's me and  
6 everybody else I know. I guess I've seen no  
7 recorded evidence of it, Mr. Hurley.

8                   MR. HURLEY: All right. Well, have  
9 you been sworn as a a witness, Ms. Franzetti?

10                  MS. FRANZETTI: No, but you just asked  
11 me a question. Would you rather me tell you I'm not  
12 going to answer it?

13                  MR. HARLEY: I just want to make sure,  
14 just as you were, that the Illinois EPA's record be  
15 absolutely correct in terms of the work we can  
16 assert and not assert. I think it's equally  
17 important to you and the attorneys serving you can  
18 not assert, and for you to assert that none of us  
19 have seen a fish kill and to insert that into the  
20 record is inappropriate.

21                  MS. FRANZETTI: Mr. Harley, I  
22 respectfully disagree, but you have your right to  
23 your opinion.

24                  MS. TIPSORD: I think that --

1 remember, this is a rulemaking, and the Board is  
2 quite capable of understanding that Miss Franzetti  
3 was not asserting a fact that's not in the record.  
4 I think we're ready to proceed to your next  
5 question.

6 MS. FRANZETTI: I believe I was on  
7 subpart C.

8 MS. TIPSORD: That's where I have you.

9 MS. FRANZETTI: Okay. Good. Appendix  
10 A.

11 MS. DIERS: I just want to interrupt  
12 for a second. You mean Attachment A.

13 MS. FRANZETTI: Attachment A. I have  
14 a feeling that's going to be a perennial problem for  
15 me. Attachment A at 2-84 further states that quote,  
16 "The Board noted that the Agency, IEPA, concluded  
17 that as long as the Joliet station meets all the  
18 applicable standards at the point of discharge and  
19 in the downstream general use waters, the Agency did  
20 not view the Joliet station's thermal discharges as  
21 limiting aquatic diversity in the receiving waters."

22 It goes on to note that Midwest  
23 Generation's predecessor, Commonwealth Edison, then  
24 undertook a multi-year study of the effect of heated

1 effluents on the receiving stream, which was  
2 conducted by a reputable team of scientists from  
3 three universities and Edison ecological  
4 consultants.

5 Does the Illinois EPA agree with  
6 the Board's past findings, which were based on  
7 extensive study, that temperature is not a factor  
8 limiting aquatic diversity in the five-mile stretch  
9 downstream from the I-55 bridge?

10 MR. TWAIT: No.

11 MS. FRANZETTI: Please state the basis  
12 for your answer.

13 MR. TWAIT: Yeah. We did not evaluate  
14 the five-mile stretch downstream from the I-55  
15 bridge.

16 MS. FRANZETTI: So you neither agree  
17 nor disagree?

18 MR. TWAIT: That would be a better  
19 answer. I neither agree nor disagree.

20 MS. FRANZETTI: Pursuant to the terms  
21 of the adjusted standard granted by the Board in AS  
22 96-10, Commonwealth Edison, and since 2000, Midwest  
23 Generation, have conducted annual stream surveys on  
24 the Lower Des Plains River, and submitted the

1 results of those surveys to the Illinois EPA.

2                               Does the Illinois EPA agree that  
3 the results of those ongoing annual surveys of the  
4 fish community in the waterways adjacent to the five  
5 Midwest Gen electrical generating stations have  
6 shown that the thermal discharges from the five  
7 Midwest Gen electrical stations have not adversely  
8 effected the maintenance of a balanced indigenous  
9 aquatic population in the area at and downstream of  
10 the I-55 bridge?

11                           MS. WILLIAMS: This is where I feel  
12 like I'm confused about what you're asking us is the  
13 Board's finding, because earlier you had said the  
14 finding has caused significant ecological damage,  
15 and now we're saying "adversely affected" the  
16 maintenance.

17                           MS. FRANZETTI: It's a different --

18                           MS. WILLIAMS: It's a different --

19                           MS. FRANZETTI: It's a different  
20 point.

21                           MS. WILLIAMS: Okay.

22                           MS. FRANZETTI: This is based on all  
23 these years of annual surveys that have been  
24 conducted on the fish community out in the subject

1 waterway, and with respect to those surveys, which I  
2 think you agree they've been submitted to the Agency  
3 every year, asks does the Agency agree that the  
4 result of those annual fish surveys have shown that  
5 the thermal discharges of Midwest Gen have not  
6 adversely effected the maintenance of a balanced  
7 indigenous population in the area at and downstream  
8 of the I-55 bridge. I mean, we've given you those  
9 surveys every year. I'm really asking have you read  
10 them and what do you think.

11 MR. TWAIT: I've -- I've seen them,  
12 although I haven't read them to the point that I can  
13 actually answer this question at this time.

14 MS. FRANZETTI: Has anyone at the  
15 Agency read them and could answer the question?

16 MR. SULSKI: I don't know whether  
17 anybody has. That is not the section that we  
18 evaluated in these UAAs, so I didn't evaluate, you  
19 know, I didn't read them.

20 MS. FRANZETTI: Okay. So I think I  
21 know the answer to my next question. Does the  
22 Agency agree that the results of those annual fish  
23 studies have shown that the aquatic community has  
24 shown some improvement over the time since the

1 alternate standards have gone into effect? They  
2 don't -- you don't know the answer to that?

3 MR. TWAIT: I would not know the  
4 answer to that.

5 MS. FRANZETTI: And on the other hand,  
6 you don't disagree, because again, you haven't  
7 reviewed the fish studies. The answer is yes?

8 MR. TWAIT: Yes.

9 MS. FRANZETTI: Do you --

10 MR. ETTINGER: May I request that you  
11 send us the fish studies? We promise to read them.

12 MS. FRANZETTI: You're going to have a  
13 lot of catch up to do, Albert. It's years and years  
14 of stuff.

15 MR. ETTINGER: I've looked at the old  
16 ones. There's a lot of numbers and not much text.

17 MS. FRANZETTI: And recognizing that  
18 you haven't, for this proceeding, reviewed the  
19 five-mile stretch immediately downstream of Upper  
20 Dresden Pool, but do you know in what way and to  
21 what extent, if any, does the aquatic community in  
22 the five-mile stretch differ from the community in  
23 the Upper Dresden Island Pool? Now if we're trying  
24 to compare what's going on in the five-mile stretch

1 immediately downstream of Upper Dresden Pool versus  
2 Dresden Pool, with respect to the fish community,  
3 can you tell us is there much of any difference?

4 MR. SMOGOR: We don't really know,  
5 because we really didn't address what was going on  
6 in the five-mile stretch.

7 MS. FRANZETTI: If you can give me a  
8 moment, I want to -- I want to start reviewing the  
9 questions, because maybe --

10 MS. TIPSORD: Okay. You know, we've  
11 been at it for about an hour and 25 minutes.

12 MS. FRANZETTI: Oh great. Thank you.

13 MS. TIPSORD: With that, then, let's  
14 take about a ten minute break. Okay.

15 (Whereupon, a break was taken,  
16 after which the following  
17 proceedings were had.)

18 MS. TIPSORD: While we were at break,  
19 the Agency got copies of the U.S. EPA comments.  
20 Correct?

21 MS. DIERS: Correct. At this time we  
22 would like to enter in, I believe it will be  
23 Exhibit 4, the letter that Albert had referred to  
24 earlier as stated May 3rd, 2007, from U.S. EPA

1 region on five to the Illinois EPA to Toby Frevort,  
2 and attached to that letter is region five comments  
3 on Illinois EPA draft rules dated January 18th,  
4 2007. And we did put some copies back there on a  
5 table. I don't know if they're gone now or not, but  
6 if you need some let us know. We can make more.

7 MS. TIPSORD: If there's no objection,  
8 we'll mark this as Exhibit 4. Seeing none, it's  
9 Exhibit 4, and I think we're ready, then, to  
10 continue with Mrs. Franzetti.

11 MS. FRANZETTI: Thank you. Continuing  
12 with question roman one, capital D, one F. In the  
13 AS 96-10 Board decision regarding the issue of --  
14 I'm sorry. Let me start again. In the AS 96-10  
15 Board decision regarding the issue of environmental  
16 impact, the Board found that quote, "The upstream  
17 reach of the south branch of the Chicago River, the  
18 Chicago Sanitary and Ship Canal, and the Des Plaines  
19 River, is greatly modified by use of a shipping  
20 channel with habitat limited to deep pools without  
21 swallows, structure, ripples --" I think "of" is an  
22 "or" "-- or suitable substrate," end quote, and  
23 further found quote, "The waterways are very  
24 artificial and significantly modified waterway that

1 is limited in terms of habitat," end quote.

2                               Is the Illinois EPA's position  
3 that this habitat described in the AS-91-10 decision  
4 has changed, and if so, describe the stream survey  
5 data on which your position is based.

6                               MR. SMOGER: Not knowing -- not  
7 knowing the details of the habitat back at that  
8 time, during the AS 96-10, we really don't know if  
9 it's different from back then.

10                              MS. FRANZETTI: Do you know of any  
11 reason that the habitat would've changed since 1996?

12                              MR. SMOGOR: Not -- not off the top of  
13 my head.

14                              MS. FRANZETTI: Okay.

15                              MR. SMOGOR: I know that  
16 interpretations of what the habitat was could  
17 change, depending on what was looked at back then  
18 and what was looked at since then.

19                              MS. FRANZETTI: Moving on to G, in the  
20 AS 96-10 Board decision, the Board found that the  
21 area effected by the proposed (I 55 adjusted  
22 standard) is heavily developed with industries,  
23 including a refinery, a chemical plant, and a boat  
24 yard.

1                   Is it the Illinois EPA's position  
2 that these characteristics of the Upper Dresden Pool  
3 has changed, and if so, describe the data on which  
4 that position is based.

5                   MR. SULSKI: No.

6                   MS. FRANZETTI: Moving on to H, in the  
7 AS 96-10 Board decision, the Board found that quote,  
8 "Historical practices have caused substantial  
9 residual chemical contaminations to be present in  
10 the sediments of waterway," end quote. Is it the  
11 Illinois EPA's position that this condition has  
12 changed, and if so, describe the data on which this  
13 position is based.

14                  MR. SULSKI: We believe that the  
15 sediments are improving.

16                  MS. FRANZETTI: Based on what data?

17                  MR. SULSKI: It's not based on data,  
18 it's based on an explanation that I'd like to give  
19 you right now. Okay.

20                  MS. FRANZETTI: Sure.

21                  MR. SULSKI: And as certain experts  
22 know, it's difficult to evaluate, actually, the  
23 impacts of sediment. It's been a struggle for many  
24 years for standards, people, and everybody.

1    However, in terms of CAWS and the Lower Des Plaines  
2    in these waterways, we know that over a period of  
3    time, there's been less of a volume of sediments  
4    discharged to these waterways, because the tunnel  
5    sections have come on line, and we have actual  
6    measurements of the volumes that have been captured  
7    by the tunnel.  So we know that there's less volume  
8    of sediment going into the system.

9                            We also know that over time, the  
10   MWRDCGC has had a pretreatment program directed at  
11   indirect discharges, which discharge into the  
12   sewers, and they have tightened up on the levels of  
13   contaminants that go into the sewers, and that would  
14   then overflow out the CSO points, or in the old days  
15   would flow through the plants.  So we know that the  
16   -- not only the volume has reduced over time, but  
17   with the advent of pretreatment and the continuation  
18   of that program, the quality has improved over time.

19                           We also know that as time wears  
20   on, just like any stream, there's in situ treatment  
21   that goes on in terms of sediments.  As sediments  
22   get churned, and they get removed from the lower  
23   levels or get churned around, they get into the  
24   water column.  They have -- they are subject to the

1 same sorts of treatment mechanisms that we utilized  
2 in wastewater treatment plans. So as time wears on,  
3 these sediments get churned. They actually get  
4 treated and sit within the waterway. In addition to  
5 that, as new sediments, cleaner sediments, enter the  
6 system, they fall into any areas in different parts  
7 of the system, where they actually cap the old  
8 legacy sediments.

9                                 So taking into consideration those  
10 four points, that's the basis for the Agency's  
11 belief that the sediment quality is improving in the  
12 system. Again, asking for data is -- the data we do  
13 not have.

14                                 MS. FRANZETTI: Okay. I understand.  
15 But let me ask you a couple of followup questions on  
16 your explanation. I understand that you're saying  
17 cleaner sediments. Cleaner sediments are going into  
18 the waterway, and am I right, though, that even --  
19 that as to that impact, you don't have any data?  
20 You don't have sampling of --

21                                 MR. SULSKI: The cleaner sediments  
22 going into the waterway.

23                                 MS. FRANZETTI: Right, right.

24                                 MR. SULSKI: Correct.

1 MS. FRANZETTI: You believe they're  
2 cleaner based on, as you said, there has been  
3 pretreatment program requirements placed on point  
4 source dischargers that may have resulted in some  
5 reduction of levels of pollutants in their  
6 discharge; right?

7 MR. SULSKI: That would be indirect  
8 dischargers that --

9 MS. FRANZETTI: Okay.

10 MR. SULSKI: -- discharge into the  
11 sewers, yes.

12 MS. FRANZETTI: So, using legal  
13 jargon, basically what you're saying is, "I see  
14 circumstantial evidence."

15 MR. SULSKI: Correct.

16 MS. FRANZETTI: Because of things like  
17 pretreatment programs, because of things like -- I  
18 see just less amount of sediments in the funnels.  
19 That's what leads you to believe that the sediments  
20 are cleaner today in the waterway?

21 MR. SULSKI: Less amount of -- less  
22 amount of sediments going out into the waterways,  
23 because the frequency of CSOs has reduced as the  
24 tunnel system is expanding and is able to capture

1 more.

2 MS. FRANZETTI: All right.

3 MR. SULSKI: Yes.

4 MS. FRANZETTI: A couple of things  
5 with respect to that, though. It sounds like you  
6 would agree that we really don't know whether or not  
7 these newer sediments are not at all toxic in toxic  
8 amounts, correct? We don't know that for a fact?

9 MR. SULSKI: We don't. We don't know  
10 that with the in situ sediments.

11 MS. FRANZETTI: Oh, I agree with that.

12 MR. SULSKI: Yeah.

13 MS. FRANZETTI: And you don't know it  
14 with respect to --

15 MR. SULSKI: That's correct.

16 MS. FRANZETTI: -- these recurring  
17 discharges that continue to occur in the waterway.  
18 Okay. Moving on to I, in its submission in the AS  
19 96-10 proceeding, the Illinois EPA stated the Agency  
20 believes that it is technically feasible to reduce  
21 temperature of the effluence by the use of cooling  
22 towers and spray ponds. However, the Agency  
23 believes that the cost of providing this cooling may  
24 not be economically reasonable when compared to the

1 likelihood of no improvement in the aquatic  
2 community.

3                               What is the Agency's current  
4 position on the likelihood of any significant  
5 improvement in the aquatic community, and identify  
6 any scientific data that supports its position.

7                               MS. WILLIAMS: I would like to see if  
8 you'll agree to my clarification here. This is  
9 certainly an accurate quote from the Board's  
10 opinion, and I have no reason not to believe that  
11 the Board's opinion accurately quotes what the  
12 Agency submitted at the time, but I don't know, and  
13 I'm assuming you don't know for sure, when we say  
14 the "Illinois EPA stated," can we agree that the  
15 Board stated that the Illinois EPA stated? Okay.  
16 In it's submission. I didn't go back and at the  
17 original petition to the Board at this time, and if  
18 you did, I would --

19                               MS. FRANZETTI: Oh, I -- I'll -- I'll  
20 -- I'm more than happy. We'll go back and try and  
21 pull that out for you. The Agency did support that  
22 position.

23                               MS. WILLIAMS: But can we agree,  
24 though, to ask the witness based on the Board that

1 stated this is what the Agency had?

2 MS. FRANZETTI: Right. But understand  
3 my question is simply granted with that background,  
4 but with that background just to establish that at  
5 least the -- I believe the Agency believed this to  
6 be the case that the cost of providing this cooling  
7 may not be economically reasonable when compared to  
8 the likelihood of no improvement in the aquatic  
9 community.

10 I'm asking, though, today what is  
11 the Agency's current position on the likelihood of  
12 any significant improvement in the aquatic  
13 community?

14 MR. SMOGOR: Based --

15 MS. FRANZETTI: If you know, if you  
16 know. I mean, you may not know.

17 MR. TWAIT: Well, based on the Aqua  
18 Nova report, they stated that secondary contact  
19 standard is lethal. Based on MBI's report, the  
20 temperature is also lethal to fish. So it's the  
21 Agency's opinion that the current secondary contact  
22 standards are too high.

23 MS. FRANZETTI: I understand.

24 MS. TIPSORD: I'm sorry. I didn't

1 catch all of that. The current --

2 MR. TWAIT: The Agency believes that  
3 the current secondary contact thermal standard is  
4 too high.

5 MS. TIPSORD: Thank you.

6 MS. FRANZETTI: Mr. Twait, does the  
7 Agency have a position on what the degree of  
8 likelihood is for significant improvement in the  
9 aquatic community if the industrial dischargers who  
10 can't meet your proposed thermal standards start  
11 putting in cooling towers, et cetera, anything else  
12 that the Agency has described as being technically  
13 feasible?

14 MR. ETTINGER: I'm going to object  
15 here. Because we're bouncing back and forth between  
16 the '96 petition and findings, which dealt with the  
17 five-mile stretch between the I-55 bridge, and then  
18 we're asking questions about the Upper Dresden Pool,  
19 which deals with the area above the I-55 bridge. I  
20 don't mind Miss Franzetti going back in this  
21 history, but we can't ask questions and bounce  
22 between these two areas and expect the record not to  
23 be confused as to which stretch the witnesses are  
24 being asked about.

1                   MS. FRANZETTI: Well, I didn't want to  
2 go into this because I thought that the Agency's  
3 entitled to their opinion on what the scope was of  
4 the adjusted standard in AS 96-10 proceeding, and,  
5 in fact, to say it was limited to the five-mile  
6 stretch is plainly inaccurate.

7                   And so, yes, my questions do deal  
8 with areas beyond just the five-mile stretch,  
9 because as you can see from simply some of the  
10 statements that the Board made back then, they were  
11 talking about the upstream reach of the south branch  
12 of the Chicago River. They were talking about the  
13 Chicago Sanitary and Ship Canal and the Des Plaines  
14 river. This was not limited to just looking at the  
15 five-mile stretch.

16                   MR. ETTINGER: Portions of it were. I  
17 think we have to look at the record itself.

18                   MS. FRANZETTI: Portions of it were.  
19 I agree with you. Portions of it were --

20                   MR. SULSKI: So what's the question.

21                   MR. ETTINGER: Okay. What's the  
22 question.

23                   MS. FRANZETTI: -- but the entire  
24 preceding wasn't, and I think I'm entitled to know

1 what's changed in ten years from when the Agency  
2 agreed that the more lenient standards that are more  
3 lenient than what it is proposing today, which are  
4 very strict standards, what has changed to make the  
5 Agency think today those much stricter standards are  
6 necessary, and I'm going to lead to any  
7 significant --

8 MR. ETTINGER: All I'm asking,  
9 counsel, is you be clear in each question which  
10 stretch you're asking about, because I don't think  
11 the record will be clear otherwise.

12 MS. FRANZETTI: I will try to do that,  
13 counsel.

14 MS. TIPSORD: With that, is your  
15 objection withdrawn? Or should I -- let me this:  
16 With your objection noted on the record, I think  
17 that will help the Board to know and the record to  
18 reflect, that we are not always talking about above  
19 I-55. Sometimes we are a he talking about below  
20 I-55, and we'll look very carefully at that.

21 MR. ETTINGER: Thank you.

22 MS. TIPSORD: But we'll go ahead and  
23 proceed with the questions.

24 MS. FRANZETTI: I don't think I have

1 his answer to --

2 MS. DIERS: I think -- can you  
3 repeat --

4 MS. FRANZETTI: Again, if the Agency  
5 knows. I'm really not trying to be difficult. I  
6 don't know whether, you know, your positions have  
7 changed or not. So it's just: What is the Agency's  
8 current position on the likelihood of any  
9 significant improvement in the aquatic community,  
10 and if you do believe there will be the basis, any  
11 scientific data that supports that position.

12 MR. SMOGOR: For the Upper Dresden  
13 Island Pool, the Agency's opinion is that  
14 temperature is one of the factors limiting it from  
15 attaining what we have proposed as the aquatic life  
16 use for the Upper Dresden Island Pool.

17 We've proposed a temperature  
18 standard that would, in effect, cool the Pool, and  
19 therefore we believe that a cooling of the  
20 temperature in Upper Dresden Island Pool would be a  
21 necessary condition for attainment of the proposed  
22 aquatic life use, but perhaps not sufficient alone.  
23 In other words, there are other factors.

24 MS. FRANZETTI: All right. I --

1                   MR. SMOGOR:  If you fix the  
2 temperature, the aquatic life use may not show a  
3 response, because there are other factors, then,  
4 that kick into place.

5                   MS. FRANZETTI:  And such as.  Which  
6 are the other -- can I say more significant factors  
7 in preventing attainment?

8                   MR. SMOGOR:  I wouldn't be comfortable  
9 calling them "more significant."  I think if you  
10 identify more than one factor that's limiting  
11 aquatic life use --

12                   MS. FRANZETTI:  Okay.

13                   MR. SMOGOR:  -- all factors, for lack  
14 of a better term, have to be fixed in order to see  
15 the aquatic life use respond.

16                   MS. FRANZETTI:  Okay.  Then without --  
17 I won't ask you to prioritize them or rank them --

18                   MR. SMOGOR:  Okay.

19                   MS. FRANZETTI:  -- but what are those  
20 factors, other than temperature, that have to  
21 change, that have to be fixed, whatever words you'd  
22 like to use, in order to allow Upper Dresden Pool to  
23 attain the Clean Water Act Aquatic Life used?

24                   MR. SULSKI:  Temperature and D.O.

1                   MR. SMOGOR: Dissolved oxygen was the  
2 other one?

3                   MR. SULSKI: Yes. Temperature and  
4 dissolved oxygen.

5                   MS. FRANZETTI: That's all? No  
6 settlement issues? No habitat improvement needed?  
7 No flow changes?

8                   MR. SULSKI: The habitat data that we  
9 have suggests that it can support a Clean Water Act  
10 goal fisheries. The same applies to the south  
11 branch. Not -- I don't mean to say that the south  
12 branch can attain a Clean Water Act goal, but the  
13 south branch can attain a certain --

14                   MS. FRANZETTI: Right.

15                   MR. SULSKI: -- level of aquatic life,  
16 and temperature and dissolved oxygen are interfering  
17 with that use as well.

18                   MS. FRANZETTI: Okay. So both  
19 temperature and D.O. levels have to achieve the  
20 proposed water quality standards in this proceeding  
21 for Upper Dresden in order for it to attain the  
22 Clean Water Act Aquatic Life use goal?

23                   MR. SULSKI: Both are identified as  
24 the major stressors. If you take care of one and

1 don't take care of the other, or take -- you know,  
2 vice versa, I don't know -- I can't tell you today  
3 which level is -- how close it's going to get, but  
4 they're both significant factors, and they both are  
5 not necessarily additive too. They play on each  
6 other. As you increase temperature, you lower the  
7 amount of oxygen that can be held in the water, et  
8 cetera, et cetera. I mean, I can elaborate on that,  
9 but --

10 MS. FRANZETTI: That's okay. I'm  
11 going to ask you to hold off on that  
12 because --

13 MR. SULSKI: Yeah, I know.

14 MS. FRANZETTI: -- we're trying not to  
15 get too into the water quality standards themselves.  
16 But I know you said -- you just said those are the  
17 two major stressors. The whole purpose of these  
18 questions is to just -- is to get it out for all of  
19 us to understand any other stressors that impact the  
20 ability or effect the ability of Upper Dresden Pool  
21 to attain the Clean Water Act Aquatic Life use goal.

22 MR. SULSKI: Those are the ones that  
23 we identified.

24 MS. FRANZETTI: Are there any others

1 that you think apply out there?

2 MR. SULSKI: I think those two eclipse  
3 the rest.

4 MS. FRANZETTI: But what are the rest?  
5 I understand you may think they eclipse or trump.  
6 What other stressors do you believe are out there?

7 MR. SULSKI: Those are the ones -- we  
8 don't know. Those are the ones that were  
9 identified.

10 MS. FRANZETTI: Okay. Okay. The "we  
11 don't know" is fine. That's what I'm trying to  
12 establish is are those the ones, are there some  
13 others, although you may think they're secondary.  
14 But these are the only ones. Okay.

15 With respect to the Chicago  
16 Sanitary and Ship Canal, what prevents it from  
17 attaining the Aquatic Life use goals of the Clean  
18 Water Act?

19 MS. WILLIAMS: Is this a followup? I  
20 just want to make sure we haven't moved on to  
21 another --

22 MS. FRANZETTI: Yeah. This is a  
23 followup. I just want to --

24 MR. SULSKI: It would be the same.

1 MS. FRANZETTI: When we moved to  
2 Chicago Sanitary and Ship Canal, because that's when  
3 we start getting into UAA factors that you've  
4 identified is what prevents that part of the  
5 waterway from meeting the aquatic life use goal?

6 MR. SULSKI: Yes.

7 MS. FRANZETTI: Okay. Moving on to --

8 MR. TWAIT: I think -- I think when  
9 Rob said that they're the same deal in temperature,  
10 I think we also want to include sediment.

11 MS. FRANZETTI: For Upper Dresden  
12 Pool?

13 MR. TWAIT: Not for the Upper Dresden  
14 Pool, but for the Sanitary and Ship Canal.

15 MS. FRANZETTI: Well, with respect to  
16 the Sanitary and Ship Canal, when you say we also  
17 want to include sediment, he was already including  
18 it, I thought, by referencing what we've already  
19 gone over was --

20 MR. TWAIT: Okay.

21 MS. FRANZETTI: -- the UAA factors you  
22 found to apply, correct?

23 MR. TWAIT: Okay. I just --

24 MS. FRANZETTI: I understand, I

1 understand. Moving on to J. If the Board were to  
2 adopt the Illinois EPA's proposed thermal water  
3 quality standards for the Upper Dresden Pool, how  
4 would this affect the continuance to the AS 96-10  
5 adjusted standard granted to Midwest Gen?

6 MS. WILLIAMS: I think Scott tried to  
7 answer this earlier. Do you want him to try again?

8 MS. FRANZETTI: Well, I don't know if  
9 he really did, so I would like him to answer it  
10 specifically.

11 MS. WILLIAMS: I -- do you think it's  
12 he answered -- it's been answered already?

13 MS. TIPSORD: I -- no, I don't.

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

15 MR. TWAIT: It's the Agency's belief  
16 that Midwest Generation would not need the relief of  
17 AS 96-10 since they would need to meet the water  
18 quality standard within their mixing zone, and  
19 therefore, they would already be meeting the  
20 proposed -- or the existing relief granted at the  
21 I-55 bridge.

22 MS. FRANZETTI: Okay. And for  
23 clarification, your reasoning is that because the  
24 proposed thermal water quality standard for Upper

1 Dresden Pool is stricter than the general use --

2 MR. TWAIT: Yes.

3 MS. FRANZETTI: -- water quality  
4 standard, which you believe is was AS 96-10  
5 addresses, that that has to be met at the I-55  
6 bridge. That, therefore, because the standards that  
7 apply upstream of I-55, as you propose them for  
8 thermal, are going to be stricter. We won't need  
9 the adjusted standard granted in 96-10, correct?

10 MR. TWAIT: Yes.

11 MS. FRANZETTI: So, in effect, it's  
12 going to be worthless, I guess would be another way  
13 to say it?

14 MS. WILLIAMS: I prefer moot.

15 MS. FRANZETTI: Moot. Okay. Nicer  
16 word. I was going to move into roman two,  
17 regulatory proposal purpose and effect. If any --  
18 unless anyone has some followups they want to jump  
19 in with? Okay. I'll keep going.

20 Roman two A one. At Page 14 of  
21 the Statement of Reasons, the Illinois EPA states  
22 quote, "With the urban development of the Chicago  
23 metropolitan area, CAWS and Lower Des Plaines river,  
24 through an importance as a storm water management

1 system," end quote.

2                               The question is: Does the CSSC  
3 portion of the Chicago Area Waterway System and the  
4 Upper Dresden Pool of the Lower Des Plains River, do  
5 those two areas still serve today as a storm water  
6 management system?

7                               MR. SULSKI: Yes. I mean, all  
8 waterways, to some extent, serve as storm water  
9 management.

10                              MS. FRANZETTI: Do they serve in the  
11 same way --

12                              MR. SULSKI: Bodies.

13                              MS. FRANZETTI: -- that all waterways  
14 do, Mr. Sulski?

15                              MR. SULSKI: In urban areas versus  
16 non-urban areas, no.

17                              MS. TIPSORD: Would you -- excuse me.  
18 Would you say that they, then, are similar to used  
19 as storm water management similar to what they would  
20 be in, say, Rockford or Peoria?

21                              MR. SULSKI: Yes.

22                              MS. FRANZETTI: Okay. Moving on to B,  
23 description in the secondary contact and indigenous  
24 aquatic life use designations. At the bottom of

1 Page 19 of your Statement of Reasons, it begins --  
2 well, the Illinois EPA states that -- or lists the  
3 following characteristics of the Chicago Area  
4 Waterway System in the Lower Des Plaines that  
5 existed in the 1970s and were the basis of their  
6 designation as secondary contact waters for purposes  
7 of the use designation. Do you want me to read all  
8 of these? Or should I just assume everyone can see  
9 them? Maybe a short reference. It deals with  
10 routinely dredged and maintained channels including  
11 deep sided cross sections designed to accommodate  
12 barge traffic and optimize flow. Significant sludge  
13 deposition, the entire system is minimum slowed and  
14 consequently low-velocity stagnant flow conditions.  
15 Diversion of Lake Michigan waters kept low as  
16 possible. Urban stress is significant within the  
17 entire drainage area. Good physical habitat in the  
18 main channel was non-existent due to the impact the  
19 commercial and recreational watercraft use of the  
20 system as well as sludge deposition. In addition to  
21 the above human made -- human made an irretrievable  
22 modification, the Chicago Area Waterway System also  
23 carries a massive wastewater load, including CSOs,  
24 during wet weather.

1                   Question is: Isn't it correct  
2 that all of these characteristics still exist today  
3 in the Chicago Sanitary and Ship Canal and the Upper  
4 Dresden Pool portion of CAWS in the Lower Des  
5 Plaines River?

6                   MR. TWAIT: All of these  
7 characteristics do exist. However, they are much  
8 less stressful to the aquatic life due to the large  
9 amount of money spent by the district, NWRDGC, for  
10 TARP and improve wastewater treatment.

11                   MS. TIPSORD: Could you -- TARP for  
12 record, please.

13                   MR. TWAIT: Tunnel and Reservoir  
14 Project.

15                   MS. TIPSORD: Thank you.

16                   MS. FRANZETTI: Mr. Twait, would you  
17 limit that, though, to only certain of these  
18 factors?

19                   MR. TWAIT: Yes.

20                   MS. FRANZETTI: Which ones?

21                   MR. TWAIT: Number two, significant  
22 sludge deposition. I think that's been reduced by  
23 TARP. Number five, where you talk about sludge  
24 deposition, I think that's been reduced by TARP, and

1 that has an effect on physical habitat, and the last  
2 one, massive wastewater load, including CSOs during  
3 wet weather. This now is much lower due to TARP and  
4 increased wastewater treatment.

5 MS. FRANZETTI: It is much lower?

6 MR. TWAIT: I think that would be  
7 accurate.

8 MS. FRANZETTI: What's that based on,  
9 Mr. Twait?

10 MR. TWAIT: It would be lower. It  
11 would be lower.

12 MS. WILLIAMS: Can we clarify? By  
13 "it" do you mean the mass of wastewater load or the  
14 CSOs during wet weather?

15 MS. FRANZETTI: Are you asking me or  
16 Mr. Twait?

17 MR. SULSKI: Okay. Well, let's assume  
18 that "it" means the waste -- the massive wastewater  
19 loads, and with the completion of the tunnel portion  
20 of TARP, the waste loads have gone down.

21 MS. FRANZETTI: Such that they're no  
22 longer massive wastewater loads?

23 MR. TWAIT: Define "massive."

24 MR. SULSKI: Right. Relative to what

1 they were, they have substantially reduced. MWRD  
2 can treat 2 billion gallons a day. The tunnels --  
3 and before the TARP came in, anything in excess of  
4 that went into the waterways. The TARP system had  
5 hold to an additional 2 billion gallons. That's a  
6 significant amount.

7 MS. FRANZETTI: Okay.

8 MR. SULSKI: Whether it --

9 MS. FRANZETTI: I understand.

10 MR. SULSKI: Where it puts it on the  
11 mass of continuum, I don't know.

12 MS. FRANZETTI: But aren't you  
13 speaking to CSO events and the effect of TARP on  
14 those?

15 MR. SULSKI: Yes.

16 MS. FRANZETTI: That -- doesn't the  
17 district continue to discharge wastewater into this  
18 waterway, and isn't it an effluent-dominated  
19 waterway?

20 MR. SULSKI: Well, we're squabbling on  
21 what the word "load" means, because when we look at  
22 the word "load," it means in addition to what a  
23 stream can simulate, okay? So I'm thinking of a  
24 pollutant load, a raw sewage, load.

1                   MR. TWAIT: I think it's fair to say  
2 that the CSO -- the number of CSOs has also been  
3 reduced, but the wastewater load 30 years ago,  
4 MWRDGC did not nitrify at their facility, and they  
5 are now nitrifying.

6                   MS. FRANZETTI: Okay.

7                   MR. TWAIT: And so that's greatly  
8 reduced -- that's reduced the amount of ammonia in  
9 the system.

10                  MS. FRANZETTI: All right. So it  
11 sounds like the things that you believe have  
12 changed, at least to some extent, have to do with  
13 CSOs, the levels, or the quality, of the wastewater  
14 that does dominate the waterway, the amount of  
15 sludge that is getting deposited in it; correct?

16                  MR. SULSKI: Yes.

17                  MS. FRANZETTI: Have I accurately  
18 summarized? It appears, therefore, you do agree  
19 that in this time, the channels, for example, still  
20 are there, and include the steep-sided cross  
21 sections designed to accommodate barge traffic and  
22 optimized flow, correct? That hasn't changed?

23                  MR. TWAIT: Yes.

24                  MR. SULSKI: Yes.

1 MS. FRANZETTI: They're routinely  
2 dredged and maintained? That hasn't changed?

3 MR. TWAIT: Correct.

4 MS. FRANZETTI: The entire system has  
5 minimum flow, and consequently, low velocity  
6 stagnant flow conditions. That hasn't changed?

7 MR. SULSKI: On the stagnant flow  
8 conditions, I mean, there is flow through the  
9 system. We have a couple of reaches that have  
10 arisen over time that are more stagnant than they  
11 used to be.

12 MS. FRANZETTI: They're more stagnant  
13 than they used to be?

14 MR. SULSKI: Or a couple of reaches.

15 MS. FRANZETTI: Okay.

16 MR. SULSKI: I wouldn't use the word  
17 "stagnant" to describe the entire system.

18 MS. FRANZETTI: Okay. Mm-hmm. And  
19 urban stress is still significant within  
20 the -- within the UAA area?

21 MR. TWAIT: I don't know if it's  
22 significant or not.

23 MS. FRANZETTI: Okay. The Agency  
24 doesn't know if they would consider it significant.

1 All right. And lastly, then, you would agree that  
2 good physical habitat for aquatic community in the  
3 main channel was nonexistent and still is  
4 nonexistent -- I'm sorry -- due to the impact of  
5 commercial and recreational water craft use. That  
6 hasn't changed, has it?

7 MR. SMOGOR: I don't believe it -- I  
8 don't know if it has changed or not, but impressions  
9 and interpretations of the quality of physical  
10 habitat may be different now than what they were in  
11 1970. We don't really know what was used to come to  
12 that opinion that was nonexistent. I can speak for  
13 the Upper Des Plaines -- or I'm sorry, the Upper  
14 Dresden Island Pool. There are portions of what we  
15 believe are good physical habitat.

16 MS. FRANZETTI: Mm-hmm.

17 MR. SMOGOR: So I would not agree with  
18 this Statement for the Upper Des Plaines -- or the  
19 Upper Dresden Isle Pool, sorry.

20 MS. FRANZETTI: Okay. So you wouldn't  
21 agree because you feel there are some portions of  
22 the Upper Dresden Pool that have good habitat?

23 MR. SMOGOR: I believe there are some  
24 portions of habitat in the Upper Dresden Island Pool

1 to the extent that we've judged that the Upper  
2 Dresden Island Pool can attain the Clean Water Act  
3 Aquatic Life goal.

4 MS. FRANZETTI: By that you mean you  
5 think there are enough good portions --

6 MR. SMOGOR: Yes.

7 MS. FRANZETTI: -- of habitat that it  
8 can attain?

9 MR. SMOGOR: Yes.

10 MS. FRANZETTI: Okay. With -- with  
11 respect to question two, moving on, question two, if  
12 the Illinois EPA maintains that one or more of the  
13 above characteristics no longer applied to the CSSC  
14 in the Upper Dresden Pool, then describe the factual  
15 data and information that supports the Agency's  
16 position. I'll save you the time in terms of citing  
17 to two. I think you mentioned earlier Attachment R  
18 to the ranking and report or the DMDI CABD report to  
19 your Statement of Reasons would that be one of the  
20 things you say support your prior answer?

21 MR. TWAIT: Well, I think my answer to  
22 this question would be that we agreed that they all  
23 still apply.

24 MS. FRANZETTI: Oh, okay. I'm sorry.

1 I thought at least, perhaps, with respect to some of  
2 the others. Fine, fine. I'll move on.

3 MR. TWAIT: I think they're reduced.

4 MS. FRANZETTI: Right. Okay.

5 MR. TWAIT: But still all the factors  
6 are there.

7 MS. FRANZETTI: They're reduced, but  
8 they still apply. Moving on to number three --

9 MS. DEXTER: Can I ask a follow up?

10 MS. FRANZETTI: Oh, I'm sorry.

11 MS. TIPSORD: I'm Jessica Dexter at  
12 ELPC.

13 MS. TIPSORD: You need to speak up.  
14 They can't hear you in the back.

15 MS. DEXTER: Sorry. Jessica Dexter at  
16 ELPC. Would it be accurate to say that this is the  
17 first time these factors have been thoroughly  
18 analyzed to your use attainability analysis?

19 MS. WILLIAMS: We should clarify  
20 "factors."

21 MS. DEXTER: The character --

22 MS. WILLIAMS: You mean by the UAA  
23 factors --

24 MS. DEXTER: The characteristics that

1 you've been discussing in the last two questions.

2 MR. SULSKI: This is the most  
3 comprehensive evaluation of this system that we know  
4 of.

5 MS. DEXTER: All right. Thank you.

6 MS. FRANZETTI: Okay. Where am I?

7 MS. TIPSORD: Question three.

8 MS. FRANZETTI: Number three. Is the  
9 Chicago Area Waterway System achieving current water  
10 quality standards, or is it listed as impaired under  
11 Section 303 D of the Clean Water Act?

12 MS. WILLIAMS: I think this was one  
13 for Howard. Did we -- I'm not sure if he was sworn  
14 in, though.

15 MS. TIPSORD: Okay. She'll swear him  
16 in just to be on the safe side.

17 (Witness sworn.)

18 MR. ESSIG: Now, not all the segments  
19 in the CAWS are impaired. Some of them are meeting  
20 water quality standards.

21 MS. FRANZETTI: Would you be able to  
22 describe for us the ones that are impaired and  
23 listed on the Section 303 D list, or I'm also open  
24 if that's too tough to do, off the top of your head

1 that if the Agency would please provide that  
2 information.

3 MR. ESSIG: I think it would be easier  
4 for me to provide it, just because it would be -- if  
5 you wanted me to tell you which segments were  
6 impaired and also list the causes, that could go on  
7 quite a bit. I can bring in the information  
8 tomorrow.

9 MS. FRANZETTI: Great. I think along  
10 with the map you were talking -- the Agency was  
11 already talking about earlier, I think as well a map  
12 that shows the segments that are impaired, they're  
13 on the 303 D list, and just as you're suggesting the  
14 causes of the impairments would be very helpful.  
15 Because it is hard to work with --

16 MR. ESSIG: I could mention a few of  
17 them, if you --

18 MS. FRANZETTI: Sure. Go ahead.

19 MR. ESSIG: Hopefully I have this  
20 correct, but there are 16 segments in the CAWS water  
21 shed, and of those 16, 11 of them are not meeting  
22 water quality standards. The Sanitary Ship Canal --  
23 there's three segments in the Sanitary Ship Canal,  
24 and they're not meeting standards for dissolved

1 oxygen.

2 I should preface this was based on  
3 the 2006 integrated report, so it was based on data  
4 through 2003. But the Sanitary Ship Canal,  
5 primarily it's dissolved oxygen. I think there was  
6 one segment that ionized ammonia was listed as a  
7 cause. The -- one segment on the Cal Sag Channel  
8 was listed as impaired due to dissolved oxygen,  
9 iron, total phosphorus, total nitrogen, and  
10 suspended follows.

11 The other segment on the Cal Sag  
12 Channel is in full use. Just to -- yeah. That -- I  
13 think that's probably enough, because otherwise it's  
14 going to get too repetitive. Unless there are --  
15 unless there's --

16 MS. FRANZETTI: No, no, no. I think  
17 we'll let you provide the information to us  
18 tomorrow, or as soon as you can, I guess I should  
19 say. Can you -- can you go on and tackle the next  
20 question of: Will the proposed designated use  
21 changes in any way affect the sources of impairments  
22 to the extent you're aware of them? I'm kind of  
23 jumping over A because you're going to address that  
24 in what you're going to prepare for us, and can you

1 tackle how changing these use designations affects  
2 the whole 303 D and impairments with the causes of  
3 impairments?

4 MR. ESSIG: Well, I'm not quite sure  
5 -- you've got -- you've indicated here sources.

6 MS. FRANZETTI: Yeah.

7 MR. ESSIG: I'm assuming you're  
8 talking about CAWS, which are the actual pollutants  
9 that are causing the problem.

10 MS. FRANZETTI: Yeah. I should change  
11 it to that, and then we might want to also talk  
12 about, then, the sources of those causes of the  
13 impairments, but let's take the causes of the  
14 impairments. Anything that could change by changing  
15 the proposed used designations?

16 MR. SULSKI: The sources of impairment  
17 won't change by simply changing the use designation.  
18 Does that answer your question?

19 MS. FRANZETTI: Yes.

20 MR. SULSKI: Okay. Then I'll stop  
21 there.

22 MS. FRANZETTI: No. It answers it,  
23 but then of course there's that followup. Why don't  
24 you go ahead, Mr. Sulski, and finish what you were

1 going to say.

2 MR. ESSIG: Okay. Once the uses are  
3 assigned or designated --

4 MS. FRANZETTI: Right.

5 MR. ESSIG: There will be water  
6 quality standards attached to there. If those water  
7 quality standards are met, there wouldn't be a  
8 cause. If those standards are still being exceeded,  
9 then they would be listed as a cause.

10 MS. FRANZETTI: Well, what I'm trying  
11 to establish, which I think is the case, is if you  
12 already have impairment under the existing use  
13 designations, and to the extent which is, for the  
14 most part, in this proposed rulemaking, you're  
15 proposing to elevate those use designations to  
16 higher uses. Isn't it -- doesn't it follow that all  
17 of these will continue to exist and/or others be  
18 added?

19 MR. ESSIG: No, not necessarily.

20 MS. FRANZETTI: Okay. Explain to me  
21 why that is.

22 MR. ESSIG: First it's the Sanitary  
23 Ship Canal. The iron standard is being changed, I  
24 think, to dissolve, and it currently had the total

1 dissolved standard, which I believe is the secondary  
2 contact in the vision of Aquatic Life.

3 MS. TIPSORD: You need to speak up.

4 MR. ESSIG: Excuse me. Sorry. The  
5 dissolved oxygen standard for the Sanitary Ship  
6 Canal presently is at four milligrams per liter.  
7 The new standard, I believe, is three and a half,  
8 but there will be a seven-day meet of daily  
9 minimum --

10 MR. SMOGOR: There will be additional  
11 pieces to that standard.

12 MR. ESSIG: So it might -- it might  
13 beat that standard, it might not. I don't know for  
14 sure. But in the case of the Sanitary Ship Canal,  
15 it's still going to be given the lowest use, use B,  
16 as far as the Chicago Area Waterways and Lower Des  
17 Plaines.

18 MS. FRANZETTI: I guess maybe I -- if  
19 I can, I should ask that basic question. Is use B  
20 for aquatic life use meant to be a higher use  
21 designation than the current secondary contact  
22 designation for aquatic life purposes?

23 MR. ESSIG: I think so, yes.

24 MS. FRANZETTI: It is meant to be

1 about the same. Okay. All right. Then that makes  
2 sense. Do you know whether the Chicago Area  
3 Waterway System is impaired for temperature? I'm  
4 sorry, I moved on to question four.

5 MR. ESSIG: No.

6 MS. FRANZETTI: You don't know, or it  
7 is not impaired for temperature?

8 MR. ESSIG: It was not listed as being  
9 impaired for temperature as of 2002.

10 MS. FRANZETTI: All right. If it's  
11 all right with you, Madam Hearing Officer, I think I  
12 should skip five --

13 MS. WILLIAMS: Can I ask a followup?

14 MS. FRANZETTI: Excuse me?

15 MS. WILLIAMS: Can I ask a followup?

16 MS. TIPSORD: Sure. Go ahead.

17 MS. WILLIAMS: Do you know how that  
18 waterway was evaluated?

19 MR. ESSIG: Yes. We were using data  
20 from MWRDGC, and also one of our ambient water  
21 quality stations, and those sites are always sampled  
22 once a month for temperature. So there may be  
23 excursions, we don't know for sure. There may not  
24 be, but once a month really isn't bad.

1 MR. ETTINGER: May I ask --

2 MS. FRANZETTI: What did the -- I'm  
3 sorry, Albert, can I just say this?

4 MR. ETTINGER: Sure.

5 MS. FRANZETTI: What did the once a  
6 month sampling -- I mean, a lot of times you don't  
7 even have that. The monthly sampling from two  
8 locations and none of them --

9 MR. ESSIG: There were three locations  
10 -- I'm just -- right now I'm just talking about the  
11 Sanitary Ship Canal.

12 MS. FRANZETTI: Uh-huh.

13 MR. ESSIG: There are other monitory  
14 sites on some of the other waterways also, but once  
15 a month for something like temperature, depending  
16 what time of day you're collecting it, it's first  
17 thing. You don't know if you're getting the daily  
18 maximum.

19 MS. WILLIAMS: And Mr. Essig, what  
20 daily maximum would you be looking at for  
21 determining?

22 MR. ESSIG: It'd be 37.8.

23 MS. WILLIAMS: Can you translate that  
24 for Farenheit for us also?

1 MR. ESSIG: 90 -- I'm not to sure. 93.

2 MS. WILLIAMS: Okay.

3 MR. SULSKI: Those are the secondary  
4 contact standards.

5 MS. FRANZETTI: Mm-hmm.

6 MS. TIPSORD: Albert?

7 MR. ETTINGER: Yeah. That was my  
8 question. When you say something was "not impaired  
9 for temperature," you mean it's not violating the  
10 secondary contact standards?

11 MR. ESSIG: Correct.

12 MR. SULSKI: Correct.

13 MR. ETTINGER: Right. Also, I believe  
14 Mr. Sulski related to this earlier. There's a  
15 relationship between temperature and dissolved  
16 oxygen concentration, isn't there?

17 MR. SULSKI: Yes.

18 MR. ETTINGER: And what is that?

19 MR. SULSKI: Well, as temperature  
20 increases in a fluid, it can hold less gas, in this  
21 case oxygen. So as you increase the temperature,  
22 the amount of oxygen the water can hold is reduced.

23 MR. ETTINGER: So, if you reduce the  
24 temperature in the system, you would have a higher

1 dissolved oxygen concentration?

2 MR. SULSKI: You would have the  
3 ability to have a higher oxygen, yeah. Within the  
4 waters, yes.

5 MR. ETTINGER: Thank you.

6 MS. FRANZETTI: Now, Mr. Sulski, I  
7 think you need to explain a bit more what you said  
8 about the ability. It's not a distinct correlation,  
9 is it? I mean, what Mr. Ettinger's trying to say is  
10 if Midwest General lowers the temperature of its  
11 effluent discharges, your D.O. levels are going to  
12 go up in that water way. It's a given. Do you know  
13 that for a fact?

14 MR. SULSKI: I'm just -- I'm speaking  
15 in terms of the amount of oxygen that can be held in  
16 the water of different temperatures. That's it.

17 MS. FRANZETTI: Right.

18 MR. SULSKI: We have addressed that  
19 situation in other parts of this proposal in getting  
20 more D.O. into the system, as you know.

21 MS. FRANZETTI: Right.

22 MR. SULSKI: Okay.

23 MS. FRANZETTI: Right.

24 MR. SULSKI: Well, in order to get

1 the -- you can get more D.O. into the system if you  
2 have lower temperatures.

3 MS. FRANZETTI: And you believe you  
4 can get more D.O. into the system?

5 MR. SULSKI: Based on the information  
6 that we've seen, yes.

7 MS. FRANZETTI: Moving on to question  
8 six.

9 MS. TIPSORD: We're going to hold  
10 five, correct?

11 MS. FRANZETTI: Yeah, right. Does the  
12 Agency plan to develop a TMDL for the Chicago Area  
13 Waterway System to address the impairments that  
14 exist out there?

15 MR. SULSKI: Yes. It'll be around new  
16 uses. It'll -- that's sort of --

17 MS. FRANZETTI: Part of the reason for  
18 this question --

19 MR. SULSKI: Mm-hmm.

20 MS. FRANZETTI: -- is at a conference  
21 late last -- late -- second half of last year, I  
22 believe that the Lower Des Plaines and the Chicago  
23 Area Waterway System were on an Agency list of  
24 proposed 2008 TMDL projects. Can you explain why,

1 at the time of proposing changed used designations,  
2 you're going to move ahead with a TMDL?

3 MS. WILLIAMS: I'm not sure any of us  
4 are aware of that. Are you --

5 MR. SULSKI: I'm aware that --

6 MS. FRANZETTI: I think Marcia may be  
7 aware.

8 MR. SULSKI: I'm aware that TMDLs are  
9 going forward on certain reaches, and why the timing  
10 is such, that I'm not aware.

11 MS. WILLHITE: Hold on a second. I've  
12 got a list of the TMDLs report. If you want to move  
13 on a little bit, I'll see if I can find that.

14 MS. FRANZETTI: Sure.

15 MS. WILLHITE: It might be for a  
16 factor that's unrelated to the subject of the use  
17 designations and standards.

18 MS. TIPSORD: Marcia, I don't believe  
19 we have you sworn in. That's okay. We can do it  
20 now.

21 (Witness sworn.)

22 MS. WILLIAMS: Do you want us to move  
23 on for a minute?

24 MS. FRANZETTI: Yeah. I'm gonna move

1 on.

2 MS. WILLHITE: Move on until tomorrow,  
3 because I left them in my office.

4 MS. FRANZETTI: Okay. Moving on to  
5 number seven what are the bio accumulative risks to  
6 humans or wildlife from fish tissue containing  
7 persist organic pollutants, such as PCBs and  
8 mercury, if you know?

9 MR. TWAIT: It's toxic -- it's  
10 toxic -- it's detrimental to too many PCBs. That's  
11 why we have fish advisories.

12 MS. FRANZETTI: And aren't there fish  
13 advisories that are applicable to the entire UAA  
14 waterway?

15 MR. TWAIT: There are fish advisories  
16 that are applicable state wide.

17 MS. FRANZETTI: Are there any --

18 MR. ESSIG: There are specific for the  
19 Chicago Area Waterways and the Lower Des Plaines.

20 MS. FRANZETTI: Thank you. Could you  
21 please describe what those are?

22 MR. ESSIG: For PCB's?

23 MR. SMOGOR: Or particular species?

24 Yes, probably.

1 MS. TIPSORD: You guys are going to  
2 have to speak up.

3 MR. SMOGOR: Fish advisories are  
4 typically species-specific, and even some of them  
5 are -- I think H. H -- or, I'm sorry. Size-class  
6 specific, and then to water body-specific as well,  
7 but I don't know the details beyond that.

8 MS. FRANZETTI: Okay.

9 MR. SMOGOR: Sorry.

10 MS. FRANZETTI: But would you agree  
11 that the entire UAA is under a fish consumption  
12 advisory for PCBs?

13 MR. ESSIG: Yes.

14 MS. TIPSORD: Excuse me. You said the  
15 entire UAA?

16 MS. FRANZETTI: Mm-hmm. Waterway.

17 MS. TIPSORD: Okay.

18 MS. FRANZETTI: And as you noted, I  
19 think, not to say this is only the UAA waterway, but  
20 also for mercury, correct?

21 MR. ESSIG: It's a state-wide mercury  
22 advisory.

23 MS. FRANZETTI: Has the Agency  
24 considered the ecological and human health risks

1 associated with upgrading beneficial use  
2 designations?

3 MS. WILLIAMS: I don't think -- does  
4 any -- do you understand the question?

5 MR. SMOGOR: Yeah we -- we're having a  
6 little difficulty linking fish consumption, which  
7 wasn't a use considered in our Statement of Reasons,  
8 or in the associated UAA's. The uses that were  
9 considered were primarily human contact uses and  
10 aquatic life uses. So we're kind of confused about  
11 the questioning.

12 MS. FRANZETTI: Even for Upper Dresden  
13 Pool?

14 MR. SMOGOR: Oh, all right. I might  
15 be mistaken then. Sorry.

16 MR. TWAIT: We didn't designate a use,  
17 however we did put in water quality standards for  
18 PCBs and mercury to protect human health, and those  
19 are based on fish consumption.

20 MS. FRANZETTI: Mr. Twait, I'm sorry.  
21 Can you explain that a little further? I'm not sure  
22 I fully followed that

23 MR. TWAIT: We designate -- we -- we  
24 set the water quality standards for these waters at

1 the same level as general use water quality  
2 standards for protection of human health for fish  
3 consumption for mercury -- let me check to see what  
4 the other -- I'm sorry. It was mercury and benzine  
5 that we set for protection of human health, and  
6 that's through fish consumption. That's in our  
7 Statement of Reasons on Page 73.

8 Q. Does that address the fact that there  
9 is a specific, for example, PCB consumption advisory  
10 that applies?

11 MR. TWAIT: No. I was mistaken. This  
12 had nothing to do with PCBs, it was only for mercury  
13 and benzine.

14 MS. FRANZETTI: So the proposed  
15 upgrading of the Upper Dresden Pool use will protect  
16 as a use -- fish consumption with an Upper Dresden  
17 Pool when those fish may not be safe to eat. I'm  
18 not asking whether it makes sense --

19 MS. WILLHITE: Yes.

20 MS. FRANZETTI: -- I'm just asking  
21 whether that's the case.

22 MS. WILLHITE: You put the standards  
23 in place to protect the use, but the fish  
24 consumption advisories are advice beyond that use

1 designation. It's advice to the public concerning  
2 the potential for contaminated fish in the water  
3 body limiting their consumption in order to better  
4 protect health. They're kind of -- they're related,  
5 but they're not the same thing.

6 MS. FRANZETTI: Okay. Moving on to  
7 roman three, use attainability analysis for the  
8 CAWS. Capital A, lack of attainment of Clean Water  
9 Act goals. On Page 9 of the camp dresser McGee, UAA  
10 report for the CAWS, which is Attachment B, CDM  
11 determined that quote, "None of the water bodies  
12 could achieve Clean Water Act goals due to  
13 limitations described in the six UAA factors," end  
14 quote. CDM also concluded that several waterway and  
15 effluent management controls would need to be  
16 implemented before the CAWS could achieve all of its  
17 recommended uses.

18 At Page 16 in the CDM report, it  
19 is acknowledged that these conditions quote, "Are  
20 not reversible in the foreseeable future." Question  
21 A: Given that none of these management controls  
22 have begun and there is no time table for  
23 implementing them, why does the Illinois EPA believe  
24 that more restrictive thermal water quality

1 standards are necessary for the CAWS?

2 MR. TWAIT: In order to --

3 MS. WILLIAMS: I'm not sure I  
4 understand the question.

5 MS. FRANZETTI: Does Mr. Twait  
6 understand it?

7 MR. SULSKI: I think I understand it.

8 MR. TWAIT: As I --

9 MS. FRANZETTI: I'll try to explain it  
10 further, but, I mean, the consultant concluded that  
11 you're going to have to do a lot more out there with  
12 waterway management controls, effluent management  
13 controls, before the CAWS can achieve full aquatic  
14 life use goals of the Clean Water Act, and it's due  
15 to at least one or more of the six UAA factors, and  
16 at the same time -- and it says that these things  
17 are not reversible in the foreseeable future. But  
18 at the same time you're proposing more stringent  
19 thermal water quality standards. We don't  
20 understand why you feel that's necessary.

21 MR. SULSKI: Let me try to explain.

22 MS. WILLIAMS: Why don't you let Scott  
23 first?

24 MR. SULSKI: Go ahead, Scott. You try

1 first, then I'll --

2 MR. TWAIT: For waters in the CAWS,  
3 the A and B waters were not proposing Clean Water  
4 Act goals. We don't think they can meet them, and  
5 we are putting more restrictive thermal limits to  
6 protect the existing aquatic life.

7 MR. SULSKI: And D.O. We're attacking  
8 them both, the D.O. and the temperature for what's  
9 there.

10 MS. FRANZETTI: Then how do you  
11 explain making the D.O. standards more lenient?

12 MR. SULSKI: In Aquatic B waters, new  
13 information.

14 MS. FRANZETTI: That's what I thought  
15 we were just talking about was from Aquatic life B  
16 waters, and you --

17 MR. SMOGOR: I'm going to -- sorry,  
18 just to clarify, I'm not sure that you can say that  
19 the new D.O. standards are more stringent or more  
20 lenient because the new standards are in a form that  
21 differ so much from the existing standard that it's  
22 kind of an apples and oranges comparison there.

23 MS. FRANZETTI: Okay.

24 MR. ETTINGER: Can I just --

1 MS. TIPSORD: Albert.

2 MR. ETTINGER: Yes. Did -- some of  
3 you participated in the dissolved oxygen standard  
4 that the Board's been through for about four years  
5 now?

6 MS. WILLIAMS: Only Roy did.

7 MR. ETTINGER: Only Roy did. Okay.

8 MR. SMOGOR: I try to forget it.

9 MR. ETTINGER: We're all trying to  
10 forget it, but I still remember it a little, and did  
11 we -- in that process of that proceeding revise the  
12 dissolved oxygen standards for the whole state?

13 MS. WILLIAMS: It's actually not done  
14 yet.

15 MR. ETTINGER: Well --

16 MS. TIPSORD: Yes, it is.

17 MS. WILLIAMS: Oh, it is done? Oh,  
18 sorry.

19 MR. SMOGOR: We made recommendations  
20 to a proposal so our recommendations is what we --

21 MR. ETTINGER: So and -- so there were  
22 -- we -- we reviewed and the Board reviewed that the  
23 dissolved oxygen standard comprehensively for the  
24 whole state.

1                   MR. SMOGOR: It addressed on waters  
2 that are currently designated, or were currently  
3 designated, as general use waters. That was -- that  
4 was the the realm of that proposal, general use  
5 waters.

6                   MR. ETTINGER: And then the course of  
7 that proceeding, we developed standards designed to  
8 protect both adult fish and young fish during the  
9 breeding period. Is that correct?

10                  MR. SMOGOR: Yes. "Early life  
11 stages," I think, was the terminology used.

12                  MR. ETTINGER: Did the Agency use the  
13 information that was developed in the course of  
14 dissolved oxygen proceeding in order to formulate  
15 its proposal for the dissolved oxygen standards  
16 applicable in this proceeding?

17                  MR. SMOGOR: To the extent that we  
18 wanted the dissolved oxygen standards proposed in  
19 this proceeding to be as consistent as possible with  
20 those recommended in the prior proceeding, yes. We  
21 did consider that.

22                  MR. ETTINGER: Thank you.

23                  MS. FRANZETTI: I think what I'm  
24 struggling with is that the CAWS, because of

1 irreversible things, or because of things that  
2 aren't going to change for the long haul foreseeable  
3 future, you're not really changing the use  
4 designation for aquatic life purposes, as I just  
5 heard. Secondary -- the secondary contact  
6 indigenous use is same or very similar to what  
7 you're proposing, and yet there is a significant  
8 drop in the thermal standard --

9 MS. WILLIAMS: I object. I don't  
10 think that's consistent at all with we just said. I  
11 didn't hear that.

12 MS. FRANZETTI: Well, all right.  
13 Then, I heard wrong. But I thought I asked the  
14 question of isn't the secondary contact use  
15 designation that applies out there now --

16 MS. WILLIAMS: Okay.

17 MS. FRANZETTI: Similar to, same as,  
18 your proposed aquatic life use B designation, and I  
19 thought Mr. Twait said yes.

20 MR. TWAIT: I don't know that I  
21 would've answered that question.

22 MS. FRANZETTI: All right. Well, then  
23 go ahead and answer it. I think that's one of the  
24 fundamental things we have to be clear on here, is

1 what's the difference between the existing use  
2 classifications for aquatic purposes, and your  
3 proposed aquatic life use B use?

4 MR. SMOGOR: The aquatic life uses  
5 proposed in this hearing for Brandon Pool plus B  
6 waters and for the Chicago Area Waterway System A  
7 waters do not represent attainment of the Clean  
8 Water Act Aquatic Life, nor did -- nor does the  
9 existing secondary contact end indigenous aquatic  
10 life use.

11 To that extent, they are similar.  
12 They all fall short of being able to attain that  
13 Clean Water Act Aquatic Life goal. Obviously,  
14 they're not exactly the same, because we have  
15 changed the wording. I think there have been  
16 additional considerations. One could say they're  
17 similar, but one can say they're not similar  
18 100 percent.

19 MR. FORT: Can I ask --

20 MS. FRANZETTI: Yes.

21 MR. FORT: I was -- I thought I  
22 understood it before, but now I don't.

23 MR. SMOGOR: Sorry.

24 MR. FORT: Let's take it one at a

1 time. What is the difference in uses, recognized  
2 uses, recommended uses, whatever you want to say,  
3 the uses in your proposal for which you are calling  
4 the use B waters, Chicago Sanitary and Ship Canal  
5 and part of the Lower Des Plaines, if I said it  
6 right. What are the differences between use B waters  
7 and today's secondary contact use designation?

8 MS. WILLIAMS: Can I maybe think of  
9 another way to phrase that question?

10 MR. FORT: No, I like my phrasing.

11 MS. WILLIAMS: Well, let me try mine,  
12 and if that doesn't answer yours -- do any of the  
13 Agency witnesses know what the current secondary  
14 contact aquatic life standard means?

15 MR. SMOGOR: Actually, there are no --

16 MS. WILLIAMS: I mean, I'm not sure --  
17 does it --

18 MR. SULSKI: I don't know.

19 MS. WILLIAMS: Was an analysis  
20 undertaken in 1970 to explain that?

21 MR. SMOGOR: Not that I'm aware of.

22 MR. FORT: Well, the words I think --

23 MS. FRANZETTI: Now, I don't mean to  
24 interrupt, but you are sitting there as the State

1 Environmental Agency with a use designation that's  
2 been on the books for over 30 years, and you are all  
3 telling me you don't understand it? You don't know  
4 what it means?

5 MR. ETTINGER: They're all young  
6 people.

7 MS. WILLHITE: Well, I think what it  
8 means is that -- my interpretation would be that  
9 indigenous aquatic life means the conditions that  
10 are present and the aquatic life that has adapted to  
11 those conditions would remain the same.

12 That's what I believe indigenous  
13 aquatic life protection means. It means that  
14 whether there was a detailed analysis done or not,  
15 one presumed that species that are adapted to the  
16 conditions that exist now, those conditions will be  
17 maintained, and those aquatic life -- yeah 1970,  
18 "now" means 1970 -- those conditions will be  
19 maintained in order to maintain the indigenous  
20 population.

21 MR. FORT: Okay. And was is the --

22 MS. FRANZETTI: Now back to Mr. Fort.

23 MR. FORT: Okay. Thank you.

24 MS. FRANZETTI: What are the new uses

1 you trying to achieve?

2 MR. FORT: What's the difference --  
3 what's the difference between your use B water use  
4 designations and the existing indigenous aquatic  
5 life -- indigenous aquatic life designation from  
6 before, in practical terms?

7 MS. WILLHITE: Waiting for the  
8 technical experts to formulate an answer.

9 MR. SMOGOR: Can you ask that again,  
10 please? Sorry.

11 MR. FORT: Would you read that back,  
12 please?

13 (Whereupon, the record was read as  
14 requested.)

15 MR. SMOGOR: Okay so you're sticking  
16 just to aquatic life here? We're not addressing  
17 other uses? In your question, you're interested in  
18 just focusing on aquatic life?

19 MR. FORT: Yeah, I was talking about  
20 the difference as it exists today versus the use B  
21 designation in the proposed regulation.

22 MR. SMOGOR: And I can -- I can only  
23 address the use -- one of -- there's a difficulty  
24 here. The current standards, which are called

1 secondary contact and indigenous aquatic life use,  
2 really address two separate and very distinct uses.  
3 Secondary contact use, which is a human health  
4 issue, and indigenous aquatic life, which is an  
5 aquatic life issue, I can only address the  
6 indigenous aquatic life portion of that for today  
7 for the current existing standard.

8 MR. FORT: Okay. So do that.

9 MR. SMOGOR: And I can try to do that,  
10 and the -- they don't differ to the extent that both  
11 of them represent a biological condition that is  
12 below or less than attainment of the Clean Water Act  
13 aquatic life goal. So that -- they're similar in  
14 that regard.

15 The difference is they are  
16 dissimilar, because well, we've defined them  
17 differently. We've probably considered -- again,  
18 that's hard to say. I can't say how much -- how  
19 many aspects and how many things were considered  
20 back then when indigenous aquatic life use -- or  
21 actually I think it was restricted use is what it is  
22 called. I really don't have a good grip on what was  
23 actually considered in terms of the aquatic life  
24 component of that. Sorry.

1 MR. FORT: Well, when I --

2 MR. TWAIT: I think that when the  
3 secondary contact standards were originally set up,  
4 they were -- there was very few organisms that could  
5 survive in these waters, and now we're seeing a lot  
6 more aquatic species, and from our language, I  
7 believe we're protecting the --

8 MR. SULSKI: The tolerant.

9 MR. TWAIT: The tolerant individuals  
10 in aquatic life use B waters, and for the aquatic  
11 life use A waters, we're protecting the tolerant and  
12 intermediate tolerant individuals.

13 MR. FORT: Okay. So in the use B  
14 waters, you are trying to protect those that can --  
15 those aquatic species that can adapt to poor or very  
16 poor habitat conditions, correct?

17 MR. SMOGOR: Yeah. That's --

18 MR. FORT: And you're calling it the  
19 non-recreation use, because that takes into account  
20 the heavy barged traffic and big commercial water  
21 vehicles that use the Sanitary and Ship Canal?

22 MR. SULSKI: That varies by region.

23 MR. TWAIT: Well, that -- that is --

24 MR. SMOGOR: Kind of separate issue.

1                   MR. TWAIT: We're talking about  
2 aquatic life use here. The non-recreational is to  
3 our recreational water quality proposal. The  
4 non-recreational is for potential bacteria standards  
5 and none --

6                   MR. FORT: Non-recreational use is  
7 only significant for the bacterial standards, not  
8 for other things?

9                   MR. TWAIT: Yes.

10                  MR. FORT: Okay. Thank you.

11                  MR. SMOGOR: But, if I might add,  
12 there's another way -- and I didn't capture this at  
13 first, and I'm glad Scott said that. Another way to  
14 think of it is: If you're going to protect -- back  
15 in 1970, if you're going to protect, even though we  
16 all recognize it's below the Clean Water Act Aquatic  
17 Life goal, we're still going to try to protect for  
18 best attainable. What can this water be? And back  
19 in 1970, recognized that that best attainable  
20 biological condition was a lesser biological  
21 condition than at best attainable biological  
22 condition can be today, given that best attainable  
23 today for those waters is still below the Clean  
24 Water Act Aquatic Life Goal. Does that help?

1                   MR. FORT: Well, what I hear you  
2 saying now is that you're actually increasing the  
3 standard in terms of the aquatic use. Is that  
4 right?

5                   MR. SMOGOR: In terms of absolute  
6 biological condition, yes. We're expecting -- we're  
7 expecting more with this proposed standard than the  
8 indigenous aquatic life standards in 1970.

9                   MR. FORT: In terms of the uses?

10                  MS. WILLHITE: Yeah.

11                  MR. SMOGOR: In terms of the Aquatic  
12 Life use, yes?

13                  MR. ANDES: And that's for use B?  
14 That's for B?

15                  MS. WILLIAMS: Correct.

16                  MR. SMOGOR: Yeah, sorry.

17                  MS. WILLHITE: Well, I was just going  
18 to say -- because when we went through all those  
19 factors that were listed, and we went through a  
20 discussion of what things have changed or what  
21 things may have improved, because of those types of  
22 improvements in the system, we have higher  
23 expectations, and we're talking about a very small  
24 scale here. A higher expectation is what a system

1 can achieve for Aquatic Life protection.

2 MS. TIPSORD: Miss Willhite, when  
3 you're talking about going through the factors, are  
4 you talking about the UAA factors?

5 MS. WILLHITE: Oh, I'm sorry. I was  
6 referencing the Question B 1 that we discussed of  
7 Midwest Generation's questions.

8 MS. TIPSORD: Okay. The factors of  
9 Page 19.

10 MS. WILLHITE: Thank you. That was  
11 it.

12 MR. FORT: Where was that?

13 MS. TIPSORD: Page 19 in the Statement  
14 of Reasons.

15 MR. FORT: Got it.

16 MS. TIPSORD: 19 on to 20.

17 MS. FRANZETTI: We don't want to go  
18 back over. There were few things there that were  
19 noted as having some improvement. Okay. Am I on 1  
20 B, or did I already ask --

21 MS. TIPSORD: No.

22 MR. FORT: I think you were --

23 MS. FRANZETTI: Okay. Given the  
24 constraints and structures identified in the CAWS

1 UAA report, why does Illinois EPA believe the  
2 aquatic community in the CAWS will respond  
3 positively to more restrictive thermal water quality  
4 standards?

5 MR. SULSKI: Well, we're not just  
6 looking at thermal, we're looking at dissolved  
7 oxygen as well. So we're looking at a combination  
8 of those, and based on the habitat and improvement  
9 in those in those chemical conditions, it's our  
10 overall feeling that the aquatic habitat will  
11 improve.

12 MS. FRANZETTI: Okay. And when you  
13 make reference to habitat, you are, though, at least  
14 conceding that it's poor habitat?

15 MR. SULSKI: Yes.

16 MS. FRANZETTI: Okay. Can you provide  
17 us any quantification of to what extent you think  
18 you are get -- going to get an improved aquatic  
19 community in the proposed aquatic life use B waters?  
20 Can you give us some sense of where you think it's  
21 going to be significant, how many more species do  
22 you think you're going to see out there than you see  
23 today, a bit more specific about other than just "we  
24 think it's going to improve with lower temperature

1 and better D.O. levels."

2 MR. SULSKI: Well, I'd like to look at  
3 -- or I invite you to look at the CAWS report, where  
4 -- where they look -- Attachment B -- where they  
5 compared existing habitat values and existing IBI  
6 scores, and saw where the IBI fell in relationship  
7 to the habitat, and saw where there was some room  
8 for improvement, and then through the UAA process  
9 looked at the stressors that may be interfering with  
10 those improvements and on and on. That's what the  
11 UAA process is. So where there's a disparity  
12 between habitat on aquatic life, there's room for  
13 improvement for -- you know.

14 MS. FRANZETTI: But that's what's  
15 confusing. You're agreeing the habitat's poor. So  
16 -- and there's no -- you know, that was the point of  
17 these questions that your consultant's saying that's  
18 not going to change in this area of the CAWS from  
19 the -- for which you proposed aquatic life use B.  
20 So how does the aquatic community improve if your  
21 habitat isn't going to change at all?

22 MS. WILLIAMS: By "this area," are you  
23 talking about just use B waters?

24 MS. FRANZETTI: Yeah.

1 MS. WILLIAMS: Or the whole CAWS?

2 Okay.

3 MS. FRANZETTI: No.

4 MR. TWAIT: The proposed thermal  
5 standards were based on the protection of a  
6 representative species list with eight species, and  
7 so we think we're protecting the existing aquatic  
8 life.

9 MS. FRANZETTI: So, Mr. Twait, that's  
10 what it goes back to? I mean, because that's now --  
11 that's now I think the second time that when I'm  
12 pressing for the why, why is it gonna get better out  
13 there aquatically, when no habitat's going to get  
14 any better, which is a main driver for your aquatic  
15 life, we keep coming back to this representative  
16 aquatic species list, and that's Mr. Yoder's work;  
17 correct?

18 MR. TWAIT: Yes.

19 MS. FRANZETTI: All right. And so  
20 that's -- I think what I'm getting at is I think  
21 perhaps I should hold further pursuit of this  
22 question until questioning Mr. Yoder on his whole  
23 methodology, because it sounds like you're telling  
24 me a lot of your beliefs about what's going to

1 happen in the future based on these proposed uses  
2 and proposed water quality standards for thermal  
3 comes down to Mr. Yoder's methodology. Is that  
4 correct?

5 MR. TWAIT: Yes, along with my  
6 interpretation of his work.

7 MS. FRANZETTI: Okay.

8 MS. TIPSORD: Mr. Ettinger?

9 MR. SULSKI: Could I add to that? You  
10 know, we're still talking about D.O. as a stressor?

11 MS. FRANZETTI: Mm-hmm.

12 MR. SULSKI: Okay. And we've measured  
13 it. We've measured against secondary contact  
14 standards, against general use standards, which we  
15 did in these reports, and D.O. is depressed and it  
16 is a stressor. It's a stressor, along with  
17 temperature, and temperature and D.O. have a  
18 stressor interaction, which makes them probably more  
19 than additive.

20 So we're improving both of those  
21 -- we're suggesting improving both of those  
22 situations so that that system can meet its aquatic  
23 potential. If you keep those stressors knocking  
24 down, you know, it's kind of like going into a crowd

1 with a stick and waiving it, you know, and if  
2 there's a hornet's nest nearby, poking the hornet's  
3 nest. It's not just -- it's all these factors.  
4 You're just keeping them away. So --

5 MS. FRANZETTI: I guess, Mr. Sulski,  
6 the part I struggle with understanding is if they've  
7 got no place to live, there is no good habitat, it's  
8 poor --

9 MR. SULSKI: It's -- it's --

10 MS. FRANZETTI: -- how significantly  
11 can it improve out there?

12 MR. SULSKI: The habitat is based, on  
13 a large part, where they can spawn, where they can  
14 have full life reproduction abilities, and we've --  
15 we've acknowledged that in aquatic life B waters,  
16 CAWS B waters, that there isn't a lot of habitat for  
17 raising families there, but we still have the  
18 ability to allow for fish growth and other factors  
19 that can occur in whatever is there.

20 MR. ETTINGER: Well, that's my  
21 question. Are there fish there now? Are there now  
22 fish in the Sanitary --

23 MR. SULSKI: Yes.

24 MR. ETTINGER: And the -- your reports

1 studied the fish aquatic life that is now in the  
2 Sanitary --

3 MR. SULSKI: Yes.

4 MR. ETTINGER: -- Ship Canal. So  
5 despite this lack of habitat, there is a range of  
6 fish that are living there now?

7 MR. SULSKI: Yes.

8 MR. ETTINGER: And those fish, that  
9 aquatic life now, is at least potentially -- we'll  
10 argue about it later -- being effected by the  
11 dissolved oxygen and heat levels present in the  
12 system now. Is that correct?

13 MR. SULSKI: Yes, potential.

14 MR. ETTINGER: Thank you. Also, I  
15 just want to clarify another point here. We say --  
16 keep talking about changing the standard and what  
17 effect that will have. Does changing the standard  
18 cause the water to get clean in and of itself?

19 MR. FORT: Are you talking about the  
20 standard --

21 MR. SULSKI: You mean the use?

22 MR. FORT: The use.

23 MR. ETTINGER: Yeah. What is changing  
24 -- well, actually, the use is part of what we call

1 water quality standards, but does changing the use  
2 designation in itself change the water quality?

3 MR. TWAIT: No.

4 MR. ETTINGER: So we're looking down  
5 the road at doing something different in terms of  
6 our operations in order to attain that use. Is that  
7 correct?

8 MR. TWAIT: Correct.

9 MR. ETTINGER: Okay. And that will  
10 have to be worked out in terms of future NPDS  
11 permits and other issues like that. Is that  
12 correct?

13 MR. TWAIT: Yes.

14 MR. ETTINGER: Thank you.

15 MS. FRANZETTI: Is the point of those  
16 questions to say that it's -- that I did not see any  
17 delayed effective date proposed for either the  
18 thermal or the D.O. standards in this proposed  
19 rulemaking. Is there one?

20 MR. TWAIT: At this time, I don't  
21 believe so.

22 MS. FRANZETTI: So these are going --  
23 if adopted by the Board, these are immediately  
24 effective; correct?

1 MR. TWAIT: Unless a delayed effect of  
2 data is --

3 MS. FRANZETTI: Right.

4 MR. TWAIT: -- submitted to the Board.

5 MS. FRANZETTI: Which you have not  
6 proposed?

7 MR. TWAIT: We have not.

8 MS. FRANZETTI: Do you intend to  
9 propose one D.O. and/or thermal standards?

10 MR. TWAIT: I would think it's  
11 probably necessary.

12 MS. FRANZETTI: Okay. I'm sorry. I  
13 did not expect that answer. I'll be very candid.  
14 Because I would've thought it would have been  
15 somewhere in the proposal.

16 MR. TWAIT: Well, the Agency did not  
17 want to give a particular date for achieving these  
18 two water quality standards until someone suggested  
19 to the Agency or the Board what an appropriate  
20 amount of time is.

21 MS. FRANZETTI: I have a suggestion,  
22 and I go with about 30 years.

23 MR. ETTINGER: Or until they close  
24 their plants.

1 MS. WILLIAMS: The Agency's opening  
2 hearings will be done within 30 years, so...

3 MR. ETTINGER: The NPDS permit writing  
4 process has provisions for allowing variances, does  
5 it not?

6 MR. TWAIT: Compliance schedules, yes.

7 MR. ETTINGER: Right. And that could  
8 be a number of years, could it not?

9 MR. TWAIT: It can be a maximum of  
10 three.

11 MR. ETTINGER: Correct. And there's  
12 also a possibility of site-specific relief. Is that  
13 true?

14 MR. TWAIT: Yes.

15 MR. ETTINGER: Thank you.

16 MR. ANDES: Just to follow up, you  
17 said that -- I think you said earlier that federal  
18 law allows no more than three years for a compliance  
19 schedule?

20 MS. FRANZETTI: It does not.

21 MR. ANDES: This is an earlier  
22 statement.

23 MR. TWAIT: It allows three years for  
24 a compliant schedule that's put into an NPDS permit.

1                   MR. ANDES: Okay. Since I know that's  
2 not accurate -- I'm sorry, but can you give me an  
3 authority for that? Other states -- the Illinois  
4 discharges and the great lake spacing can have up to  
5 five years. Are you aware of that?

6                   MR. TWAIT: No, I was not.

7                   MR. ANDES: And EPA in law provides  
8 ten years compliance schedules in California.

9                   MR. TWAIT: In NPDS permits?

10                  MR. ANDES: Yes.

11                  MR. TWAIT: I did not know that.

12                  MR. ANDES: Okay. Well, we can get  
13 EPA up there at some point to talk about compliance  
14 schedules. I think we might need to do that at some  
15 point.

16                  MS. FRANZETTI: And I'm sorry. I  
17 don't mean beat a dead horse, but I want to make  
18 sure I understand this important concept.  
19 Basically, the Agency wants people -- the parties  
20 that are participating in this proceeding, and, I  
21 guess, I imagine the Board as well, can propose to  
22 delay the effectiveness of the thermal and D.O.  
23 standards for aquatic life use B, assuming we can  
24 support that with some logic. You are open to that

1 is what I think I hear you saying, but I want to be  
2 sure.

3 MR. TWAIT: I think we expected that  
4 as an outcome, but we did not propose it.

5 MS. FRANZETTI: Why did you expect it  
6 as an outcome?

7 MR. TWAIT: Just because I don't think  
8 that the district can increase the D.O. overnight,  
9 and nor do I think that the generation facilities or  
10 industrialists could put cooling towers or other  
11 types of things to reduce heat over night.

12 MS. FRANZETTI: Okay. So basically,  
13 Mr. Twait, what you're saying -- what you're saying  
14 is you think it would be reasonable in order to  
15 allow time to comply to delay the effective date?

16 MR. TWAIT: I think an appropriate  
17 amount of time could be -- could be found, and that  
18 would probably be somewhere more than a year and  
19 less than 30.

20 MS. FRANZETTI: Okay. All right.

21 MR. TWAIT: But I --

22 MS. FRANZETTI: But if I understand  
23 correctly, are you also influenced by the fact in  
24 saying that? Are you also influenced by the fact

1 that you do have these irreversible-type conditions  
2 in the use B, the proposed use B, waters like the  
3 Sanitary and Ship Canal?

4 MR. SULSKI: With respect to the last  
5 question?

6 MS. FRANZETTI: Yeah. What I'm trying  
7 to understand is the fact that you feel it should be  
8 considered not to make the proposed thermal and D.O.  
9 standards immediately effective, influenced by the  
10 nature of the waterway, as well as how much time it  
11 may take --

12 MR. SULSKI: No.

13 MS. FRANZETTI: -- the district or  
14 Midwest Gen to comply. No.

15 MR. SULSKI: No. The UA -- no. Are  
16 you happy with that?

17 MS. FRANZETTI: Yeah. I'm looking for  
18 clarity in trying to understand why the Agency  
19 didn't propose delayed effective dates for either of  
20 those two standards, but now it's telling us it  
21 expected them, and I'm just trying to understand  
22 why. Okay.

23 MS. TIPSORD: All right. We have a  
24 question in the back room.

1 MS. HALLS: I have a comment on the  
2 delayed standards. This is Linda Halls from EPA.

3 MS. TIPSORD: If you have a comment, I  
4 have to swear you in. You have to ask a question.

5 MS. FRANZETTI: Can we hold comments  
6 for --

7 MS. TIPSORD: You don't want to be  
8 sworn in?

9 MS. HALLS: No. I mean, never mind.

10 MS. TIPSORD: Okay. Go ahead, Mr.  
11 Diamond.

12 MR. DIAMOND: This is Tom Diamond  
13 again. Mr. Twait --

14 MS. TIPSORD: You need to speak up,  
15 please.

16 MR. DIAMOND: Earlier you said that  
17 the reason for the temperature standards in the CAWS  
18 use B reaches, you said it comes back to Yoder's  
19 testimony in your interpretation of his work. What  
20 is your interpretation of his work?

21 MR. TWAIT: When -- when MBI was  
22 tasked to perform a -- or to give us temperature  
23 standards, he came up with different options, and  
24 gave the Agency latitude to use those options in

1 developing its thermal water quality standard. He  
2 didn't -- yeah. He did not recommend a specific  
3 standard for a specific water body, and that's  
4 detailed in the MBI report.

5 MR. DIAMOND: So, again, I'm not -- so  
6 what was -- what interpretation did you apply to his  
7 report? Can I have -- could we ask that the witness  
8 be allowed to answer the question without always  
9 being coached by counsel for the Agency?

10 MS. TIPSORD: Keep in mind that Mrs.  
11 Williams has also been sworn in, and I think they're  
12 conferring, not consulting.

13 MR. DIAMOND: Well, then let -- she  
14 can speak and answer the question if she thinks that  
15 she can answer better than Mr. Twait. It's his  
16 interpretation that I'm trying to understand.

17 MR. TWAIT: Sure. And that's in my  
18 testimony, and one of the things that Mr. -- or that  
19 the MBI report did was suggest representative  
20 aquatic life -- aquatic species, and he had several  
21 categories. Some he considered what he called  
22 general use with 40-some representative species.  
23 There was another one that had 27 species, and there  
24 was another category that had eight species, and he

1 called that secondary contact. Now, we didn't  
2 necessarily -- those actual -- the language of that  
3 didn't actually apply. We used the eight species,  
4 regardless of what he called it, for the aquatic  
5 life B use, and also in -- part of that was for the  
6 summer daily maximum temperatures and monthly  
7 average temperatures, and he also had procedures for  
8 coming up with non-summer limits.

9 MR. DIAMOND: So your interpretation  
10 was as to what groups of species were appropriate  
11 for which waters?

12 MR. TWAIT: That was one of our  
13 options, is to decide which species were applicable.

14 MR. DIAMOND: And then the other  
15 interpretation was how you adjusted temperatures for  
16 certain times of the years to other times of the  
17 years?

18 MR. TWAIT: His methodology used a  
19 representative background site. One of our options  
20 was to look at which site to use, and also how to  
21 determine the monthly average and daily max during  
22 the non-summer months.

23 MR. DIAMOND: Were there any other  
24 interpretations that you applied to his work?

1                   MR. TWAIT: I think those were the  
2 interpretations that -- that we -- that we used.

3                   MS. TIPSORD: Can I ask a followup?  
4 Mr. Twait, just to be clear, you -- these  
5 interpretation, as as you said, most you do discuss  
6 them in your testimony. Are there anything -- was  
7 there anything you used or interpreted from his  
8 report that you used to do in the proposed rule that  
9 you did not discuss in your testimony?

10                  MR. TWAIT: It's either in my  
11 testimony, or it's in his report.

12                  MS. TIPSORD: Okay. We're ready to go  
13 back to Ms. Franzetti.

14                  MS. FRANZETTI: Okay. I think we're  
15 on roman --

16                  MS. TIPSORD: Four.

17                  MS. FRANZETTI: Four. Right. Four A,  
18 highly use attainability analysis for the Lower Des  
19 Plains, and the issue is a highly modified water  
20 body. Question one: On change 22 of the Statement  
21 of Reasons, the Illinois EPA states it is clear from  
22 the UAA that the Lower Des Plaines River continues  
23 to be a highly-modified water body that does not  
24 resemble its pre-urbanized state.

1                   What is the intended meaning of  
2 the phrase "highly modified water body" as used by  
3 the Agency?

4                   MR. SULSKI: The answer to that is  
5 relative to the its predevelopment state.

6                   MS. TIPSORD: Would that --  
7 pre-urbanized?

8                   MR. SULSKI: Pre-urbanized would work,  
9 too.

10                  MS. FRANZETTI: Can you list the key  
11 aspects of the Lower Des Plaines River that you're  
12 referring to as highly modified? You know, is it  
13 flow, is it the channelization of it, is it -- can  
14 you -- what -- you know, what is meant by a "highly  
15 modified water body?"

16                  MS. WILLIAMS: We would like the  
17 witness to refer to the quote that's being cited in  
18 the question, if that's okay.

19                  MS. FRANZETTI: Sure. It's on Page 22  
20 of the Statement of Reasons. It's the first full  
21 paragraph.

22                  MS. DIERS: I've got it. I'm looking  
23 in Novotany's report.

24                  MR. SULSKI: Oh, it's taken from

1 Dr. Novotany --

2 MR. SULSKI: Yeah. It's a quote from  
3 Aqua Nova.

4 MS. FRANZETTI: Oh, okay.

5 MS. DIERS: And that's what I just  
6 want to clarify.

7 MS. FRANZETTI: Okay.

8 MR. SULSKI: In his report, that's  
9 what I meant by "predevelopment state." That's what  
10 the report says on --

11 MS. DIERS: Attachment A.

12 MR. SULSKI: In Attachment A on page  
13 one at the top. Would you like me to read that?

14 MS. FRANZETTI: Why don't you, yes.

15 MR. SULSKI: It says, "it's clear that  
16 the Lower Des Plains River is a highly-modified  
17 water body that does not resemble its predevelopment  
18 status.

19 MS. FRANZETTI: And we're not sure  
20 exactly what doctor Novotany meant by "a highly  
21 water -- modified water body?"

22 MR. SULSKI: That's correct.

23 MS. FRANZETTI: Okay. So I guess  
24 we'll move on, and I don't know that I can get an

1 answer to my next question, then, because it's kind  
2 of based on the explanation of the meaning of the  
3 "highly modified nature of the Lower Des Plaines  
4 River."

5 MS. WILLIAMS: It also seems to ask  
6 for an interpretation of the law, so can we just --

7 MS. FRANZETTI: Okay.

8 MS. WILLIAMS: Agree to --

9 MS. FRANZETTI: All right. I'm going  
10 to agree to skip it at this point. Moving on to  
11 number two, Page 20 -- again, page 22 of the  
12 Statement of Reasons, the Illinois EPA states quote,  
13 "While there has been improvement and potential  
14 exists for additional improvement, the UAA did not  
15 find the Lower Des Plaines River to be capable of  
16 full attainment of the aquatic life and recreational  
17 bowls of the Clean Water Act for un impacted water  
18 -- waters in the foreseeable future."

19 Conversely on Page 52 of the  
20 Statement of reasons, the Illinois EPA states quote,  
21 "Upper Dresden Pool is capable of maintaining a  
22 biological condition that minimally meets the Clean  
23 Water Act's Aquatic Life goal." On Page 13 of  
24 Mr. Sulski's pre-file testimony, it is stated that

1 Illinois EPA is recommending three levels, a  
2 biological, potential and CAWS, and the Lower Des  
3 Plains River, and two of the three levels do not  
4 meet the Clean Water Act's Aquatic Life goal.

5 I think we've now established  
6 this, although it was confusing in your Statement of  
7 reasons, but what is the Illinois EPA's position on  
8 the level of aquatic life use that the Upper Dresden  
9 Pool is capable of attaining, and what's the basis  
10 for that position, because you -- as this question  
11 says, you say in here that "the UAA did not find the  
12 Lower Des Plains River to be capable of full  
13 attainment of the aquatic life goals."

14 MR. TWAIT: The -- to clear up the  
15 conflict in statement there, Page 22 of the  
16 Statement of Reasons referring to Appendix A and --

17 MS. WILLIAMS: Attachment A.

18 MR. TWAIT: I'm sorry. Attachment A  
19 for the Aqua Nova report. That was based on his  
20 interpretation. The other two interpretations are  
21 the Agency's, which are on Page 52 of the Statement  
22 of reasons, and Page 13 of Rob's pre-filed  
23 testimony.

24 MS. FRANZETTI: Okay. If we

1 understand correctly, what you're saying is the  
2 Agency's UAA consultant for the Lower Des Plaines,  
3 Dr. Doctor Novotany, concluded that Upper Dresden  
4 was not capable of fully achieving the Clean Water  
5 Act's aquatic goals; correct?

6 MR. TWAIT: That would be correct.

7 MS. FRANZETTI: All right. And  
8 somewhere since Dr. Novotany's Attachment A UAA  
9 report, the Agency concluded it disagreed with Dr.  
10 Novotany; correct?

11 MR. SULSKI: Well, we looked --

12 MS. FRANZETTI: I'm just asking to  
13 clarify.

14 MR. SULSKI: This talks about Lower  
15 Des Plaines. We have two distinct areas of the  
16 Lower Des Plaines. That's the Brandon Pool part,  
17 and the Upper Dresden Island part. So we made  
18 distinctions in our analysis, and I know that he did  
19 as well, but the -- I guess the bottom line is that  
20 our review of his report and the other information  
21 that we had lead us to conclude that Upper Dresden  
22 Island Pool could minimally attain Clean Water Act  
23 goals, and that's the bottom line.

24 MS. FRANZETTI: If I may, I was at the

1 March 2007 public meeting, and I sat and heard Toby  
2 Frevort at that time, but some of you were also  
3 sitting there, and you didn't disagree with him.  
4 Explain that the proposed Upper Dresden Pool use was  
5 something in between general use and the lower  
6 aquatic life use you were proposing at that time.  
7 I'm not sure if you called it use B at that time,  
8 but clearly as of March, Upper Dresden was not  
9 proposed to meet the Clean Water Act aquatic goals.  
10 That was March, these were filed in October.

11 Can't you tell us what changed to  
12 shift the Agency's position in finding to that it  
13 does meet the Clean Water Act goals, albeit  
14 minimally?

15 MR. SMOGOR: I don't think I was at  
16 that meeting, but if it was said that the proposed  
17 aquatic life use for Upper Dresden Island Pool is  
18 not the same as general use, that's not the same as  
19 saying it can't attain the Clean Water Act aquatic  
20 life goal. There are various levels of attainment  
21 once you're above that goal, so it's quite possible  
22 that "general use" could be interpreted as a higher  
23 level of attainment than the proposed aquatic life  
24 use for Upper Dresden Island Pool, and of both of

1    them represent something that meets the Clean Water  
2    Act aquatic life goal.

3                   MS. FRANZETTI:  Okay.  I understand,  
4    but does anyone up there know whether it was the  
5    Agency's position in March that Upper Dresden did  
6    not meet the Clean Water Act aquatic life goals?

7                   MR. SMOGOR:  I don't know.

8                   MR. SULSKI:  Not mine.  I don't know  
9    -- I don't know that any of the Agency people said  
10   that it can't meet the Clean Water Act goal.

11                   MS. FRANZETTI:  Did any of the Agency  
12   people at that time say it could?  I mean, I'm just  
13   trying to understand.  To the audience, things  
14   changed in those six months.  Maybe we all  
15   misunderstood you.  Fine.  If that's the case, tell  
16   us that?

17                   MR. ETTINGER:  Is there a transcript  
18   of this meeting in March or something?  What are we  
19   -- what are we testifying about?

20                   MS. FRANZETTI:  I am simply trying to  
21   establish did the Agency newly come to this  
22   conclusion that Upper Dresden minimally meets the  
23   Clean Water Act aquatic life goals, or didn't it.

24                   MS. WILLIAMS:  I'm not sure any of us

1 can answer that question, but what I could say to  
2 add to what's been said is that as a result of  
3 comments received at that meeting, from comments  
4 that we have entered as Exhibit 4 to other comments  
5 that were made, we did go back internally and flesh  
6 out what we meant by the use designation definitions  
7 in this proposal.

8                                 So we probably did not use the  
9 same terminology at that meeting as we used in our  
10 final proposal, because we had not very thoroughly  
11 fleshed out how these uses were to be defined, which  
12 was one of the significant comments from  
13 stakeholders on all sides that we got back at that  
14 time.

15                                 MS. DIERS: Can I just add to clarify  
16 for the record that when you refer to the March --  
17 you're talking about when we had our stakeholders  
18 meeting in March. Is that correct?

19                                 MS. FRANZETTI: The public meeting.

20                                 MS. DIERS: The public, exactly.

21                                 MS. FRANZETTI: And it was more than,  
22 I think, necessarily stakeholders.

23                                 MS. DIERS: I just wanted clarify.  
24 March was on outreach meeting that we had with a

1 proposal where a draft that we had done in January  
2 was presented to various people.

3 MS. TIPSORD: Mr. Andes.

4 MR. ANDES: To clarify the comment  
5 just a minute ago in terms of two different uses  
6 that are to some degree above the clean water goal,  
7 it sounds like what we're now saying -- and I'm  
8 pretty sure this is the first time we've heard this  
9 -- is that perhaps the new proposed use is a little  
10 bit above the goal, and then general use is a little  
11 bit higher than that. Is that -- that sounds like  
12 what I'm hearing.

13 MR. SMOGOR: That's a reasonable  
14 interpretation I think.

15 MR. ANDES: Is there anywhere in a  
16 documentation that lays out where those three --  
17 where those three lay in relation to each other, the  
18 goal, the proposed standards, and the General use  
19 standards so that we can understand the differences?

20 MR. SMOGOR: In our -- in our  
21 Statement of Reasons, I don't think we mentioned how  
22 they compare to the existing general use expectation  
23 of aquatic life. I don't think we did address  
24 explicitly in the Statement of Reasons.

1                   MR. ANDES: Okay. Well, then we'll be  
2 asking you to do so as we go forward.

3                   MS. FRANZETTI: Okay.

4                   MR. ETTINGER: Can I just ask one  
5 question? Are there species that you are not  
6 protecting for in the Upper Dresden Pool that are  
7 present in Illinois waters?

8                   MR. TWAIT: For temperature, the  
9 answer would be yes.

10                  MR. ETTINGER: Thank you.

11                  MS. TIPSORD: What about dissolved  
12 oxygen?

13                  MR. SMOGOR: Can you say that again  
14 please, Albert? I'm sorry.

15                  MS. TIPSORD: No. I asked about  
16 dissolved oxygen.

17                  MR. SMOGOR: I know, but I'm -- with  
18 reference to his question?

19                  MS. TIPSORD: Right. Are there  
20 species of fish --

21                  MR. SMOGOR: I'm sorry.

22                  MS. TIPSORD: -- in the Dresden Pool  
23 that are -- exist in other waters in Illinois that  
24 you're not protecting for in the Dresden Pool for

1 dissolved oxygen?

2 MR. SMOGOR: Are there species in the  
3 -- sorry. I'm trying to wrap my brain around this.  
4 I guess I'm still not understanding it fully. Could  
5 you try it one more time, please? Sorry.

6 MS. TIPSORD: Are there fish located  
7 in the Dresden Pool area that are not protected that  
8 exist -- that are not protected for dissolved oxygen  
9 that exist in Illinois, that are indigenous to  
10 Illinois? I mean, we've been told repeatedly that  
11 temperature and dissolved oxygen were the two  
12 problems in that area, and the answer for  
13 temperature was what Mr. Twait said.

14 MR. SULSKI: Let me try a sort answer  
15 here.

16 MR. SMOGOR: Sorry. I'm just not  
17 understanding that.

18 MR. SULSKI: The answer to your  
19 question is yes, but I -- the -- we -- there are  
20 species that exist in Lake Michigan, for example, so  
21 that -- you know. But we're not talking about Lake  
22 Michigan.

23 MS. TIPSORD: Right.

24 MR. SULSKI: We're talking about

1 Inland waterways and warm water aquatic habitats.  
2 In our D.O. standard, we considered the species that  
3 we found in that system, and they're protected  
4 for --

5 MR. SMOGOR: Just giving --

6 MR. RAO: In that system you're  
7 talking about the Dresden Pool. Is that correct?

8 MR. SULSKI: Yes.

9 MR. RAO: And the species considered  
10 by the Board and the reason dissolved oxygen  
11 rulemaking, that was a more comprehensive list of  
12 species than what you consider as a rule?

13 MR. SMOGOR: I can -- I think I  
14 understand now. Got to help clarify. I'm sorry.  
15 There are species that occur elsewhere in the state  
16 that do not occur in the Dresden -- Upper Dresden  
17 Island Pool right now that we have proposed more  
18 protection for in terms of the D.O. standards. Does  
19 that address your question?

20 MS. TIPSORD: Okay.

21 MR. SMOGOR: Thank you. Sorry it took  
22 me to long to figure that out.

23 MS. TIPSORD: I think we're on  
24 question three.

1 MS. FRANZETTI: Three. Yeah. I was  
2 just reading it to myself to see whether it's been  
3 answered. I think it has been.

4 MS. TIPSORD: Okay.

5 MS. FRANZETTI: Well, no. I don't  
6 think it has been. On Page 94 of the Statement of  
7 Reasons, the Illinois EPA states that its  
8 consultants recommended the adoption of a reduced  
9 biotic integrity status for the Upper Dresden Pool,  
10 and that its proposed use designation is consistent  
11 with the consultants recommendation.

12 So if the consultant recommended  
13 the adoption of a reduced biotic integrity status  
14 for Upper Dresden Pool, does this mean that the  
15 proposed Upper Dresden Pool aquatic life use  
16 designation is, in fact, something less than the  
17 Clean Water Act's aquatic life goal?

18 MR. SULSKI: No.

19 MS. FRANZETTI: Why not? Maybe it has  
20 to do with what's meant by "reduced biotic integrity  
21 status." What does that mean? Maybe that's the  
22 problem.

23 MR. SMOGOR: I've referred to  
24 something called biological condition, and that is

1 across the gradient, and there are more than one  
2 level of biological condition or biological  
3 integrity status. I think those can be used  
4 interchangeably. There's more than one level of  
5 those above attaining the Clean Water Act goal.

6 So you can actually reduce your  
7 biological or biological integrity from point A to  
8 point B -- and I should probably say from point 1 to  
9 point 2 not to confuse A and B here -- from point 1  
10 to point 2, and still be above or in attainment of  
11 the Clean Water Act aquatic life goals. Is that --

12 MS. FRANZETTI: Yeah. I do understand  
13 that.

14 MR. SMOGOR: Okay.

15 MS. FRANZETTI: Are we starting to get  
16 into IBI QHEI numbers --

17 MR. SMOGOR: When you mentioned --

18 MS. FRANZETTI: As a way to give that  
19 some specificity and clarity?

20 MR. SMOGOR: Yes, yes.

21 MS. FRANZETTI: All right. Can the  
22 Agency tell us for Upper Dresden Pool to have met,  
23 in your opinion, at least minimally, the Clean Water  
24 Act aquatic life goal, what -- using IBI, QHEI

1    sporing, what -- you know, what did it meet, in your  
2    opinion, that caused you to conclude that?

3                   MR. SMOGOR:  We're -- again, we're  
4    addressing the proposed uses as biological  
5    potential.

6                   MS. FRANZETTI:  Right.

7                   MR. SMOGOR:  So existing biological  
8    condition, in terms of say the fish index or biotic  
9    integrity, that gives you the existing condition,  
10   but it doesn't necessarily reflect potential.  We  
11   interpreted the habitat information in part the  
12   quality of the habitat valuation of the index  
13   scores.

14                   MS. FRANZETTI:  That's the QHEI.

15                   MR. SMOGOR:  QHEI.

16                   MS. FRANZETTI:  Okay.

17                   MR. SMOGOR:  As a measure of one of  
18   the indicators of biological potential, and there is  
19   an interpretation in the published scientific  
20   literature of those scores, and if you score above  
21   -- in general, in a typical situation, if you score  
22   a 45 or above, that -- let me say if you score lower  
23   than a 45, typically that represents an inability to  
24   attain the Clean Water Act aquatic life goal.

1                           Above 45 represents the  
2 possibility of attaining the Clean Water Act aquatic  
3 life goal, and, if I may, between 45 and 60 is kind  
4 of a gray area. Depending on additional  
5 information, you may come to the conclusion that it  
6 either can't -- can attain or cannot attain.

7                           MR. ANDES: Can I ask --

8                           MR. SMOGOR: So the score itself --  
9 the score itself in the range of 45 to 60, you  
10 really can't make a clean call on.

11                          MS. FRANZETTI: Okay.

12                          MS. TIPSORD: Mr. Andes, you have a  
13 followup?

14                          MR. ANDES: Can I ask is that -- those  
15 numbers, is there a basis for that in Illinois for  
16 regulations or guidance in terms of those dividing  
17 lines?

18                          MR. SMOGOR: No, not -- not -- I don't  
19 know of that.

20                          MR. ANDES: Where is it?

21                          MR. SMOGOR: We made our  
22 interpretations based on the QHEI scientific  
23 literature.

24                          MR. ANDES: Okay. So there's no

1 regulatory basis?

2 MR. SMOGOR: Not in Illinois that I'm  
3 aware.

4 MS. TIPSORD: Mr. Fort.

5 MR. FORT: Then in terms of your  
6 proposal here, in terms of the scores, if a water  
7 body has something below 45, 30 or so, that, in your  
8 understanding, would say it does not have a habitat  
9 that it can attain in any realistic scenario, the  
10 Clean Water Act goals?

11 MR. SMOGOR: I wouldn't -- I wouldn't  
12 say in all in 100 percent of the cases when you  
13 score below 45, you cannot attain the Clean Water  
14 Act goal, but as a general rule in most cases,  
15 probably even go in a large majority of those cases,  
16 less than a 45 represents the inability to attain  
17 the Clean Water Act aquatic life goal.

18 MR. FORT: Well, and that was part of  
19 your conclusions to say the Chicago Sanitary and  
20 Ship Canal was poor, very poor, not going to attain,  
21 met three of UAA factors?

22 MR. SMOGOR: Is that correct?

23 MR. SULSKI: That's correct.

24 MR. FORT: Okay. Thank you.

1                   MR. SULSKI: Not attain the Clean  
2 Water Act goal.

3                   MR. FORT: Got it.

4                   MS. FRANZETTI: Would you mind going a  
5 little further and explaining to us, because this  
6 is, I think, an important point to understand.

7                   MS. WILLIAMS: It's also -- aren't  
8 there a lot of questions, maybe, on some of these  
9 points later?

10                  MS. FRANZETTI: Yeah, but this is more  
11 fundamental. I'm not going to go -- I'm not going  
12 to go into those specific questions yet, but when  
13 one use -- when one talks about a QHEI score of 45  
14 or above or 45 to 60, what I'm not sure I totally  
15 understand is: Is that four -- and let's use Upper  
16 Dresden Pool. Let's stay with a specific example.  
17 Does Upper Dresden Pool get an QHEI score as a pool?

18                                 In other words, it came in at 46,  
19 or is it under QHEI that you will -- depends on  
20 where you sample. You know, depends on what parts  
21 you go out and look at, and you score specific  
22 locations, and then you get various scores per  
23 location, and you have a range.

24                   MR. SMOGOR: Yeah.

1 MS. FRANZETTI: Is that --

2 MR. SMOGOR: A QHEI score is specific  
3 to a location.

4 MS. FRANZETTI: Okay. So depending  
5 upon the locations, you go out to how  
6 representatively you cover Upper Dresden Pool, when  
7 attempting to establish QHEI scores, that directly  
8 determines how representative the QHEI scores are of  
9 Upper Dresden Pool?

10 MR. SMOGOR: Can you say that again?

11 MS. FRANZETTI: Well, let me simplify.

12 MR. SMOGOR: All right.

13 MS. FRANZETTI: If I just went out  
14 there and went to one location --

15 MR. SMOGOR: Mm-hmm.

16 MS. FRANZETTI: -- and I found a score  
17 of 70.

18 MR. SMOGOR: Mm-hmm.

19 MS. FRANZETTI: -- and came running  
20 back to you and said, "It meets the -- fully meets  
21 the Clean Water Act goals," you would say to me --

22 MR. SMOGOR: That's --

23 MS. FRANZETTI: One location doesn't  
24 do it.

1 MR. SMOGOR: Right, right.

2 MS. FRANZETTI: At some point, you've  
3 got to hit a representative number of locations for  
4 the particular water body you're trying to evaluate  
5 for QHEI purposes; correct?

6 MR. SMOGOR: I think you have to make  
7 an interpretation for more than one location. I'm  
8 not quite exactly sure what you mean by  
9 representative, but in judging the obtainability of  
10 the biological condition of an area, I'm not sure  
11 that if you have a few key habitat areas, that may  
12 be enough to help the animals, the aquatic life in  
13 that pool meet the needs and obtain a particular  
14 level of biological condition.

15 MS. FRANZETTI: Okay.

16 MR. SMOGOR: I don't think you can  
17 compare, you know, does 51 percent or more of the  
18 tested area score at this level?

19 MS. FRANZETTI: Mm-hmm.

20 MR. SMOGOR: So I don't think you can  
21 draw those types of lines.

22 MS. FRANZETTI: All right. You're  
23 telling me it's not just a numbers game.

24 MR. SMOGOR: Right.

1 MS. FRANZETTI: Got it. Okay.

2 MR. ETTINGER: Just --

3 MS. TIPSORD: Mr. Ettinger.

4 MR. ETTINGER: Just want to follow up  
5 with that. If there are a few areas where fish can  
6 breed in a system, and the system's not cut off by a  
7 damn or something, that would enable fish to breed  
8 in the whole pool; wouldn't it?

9 MR. SMOGOR: Yes, for those fish that  
10 move to do their breeding.

11 MR. ETTINGER: Fish swim, right?

12 MR. SMOGOR: Yes.

13 MR. ETTINGER: Thank you.

14 MS. FRANZETTI: Okay. Moving on to  
15 question four. On Page 8 of Mr. Sulski's pre-filed  
16 testimony, it is stated that the consultant Aqua  
17 Nova recommended aquatic life use for the Upper  
18 Dresden Island Pool recognized reduced biotic  
19 integrity due to impoundment.

20 If you could please explain the  
21 meaning of the phrase "reduced biotic integrity due  
22 to impoundment," and identify the relevant criteria  
23 in Section 27 of the act, for which this information  
24 applies, if you can.

1 MS. WILLIAMS: I think this is kind of  
2 a compound question. Can we start with the first  
3 part?

4 MS. FRANZETTI: Why don't we just  
5 start with -- right. Explain the meaning of the  
6 phrase, "reduced biotic integrity due to  
7 impoundment," as applied to the Upper Dresden Island  
8 Pool.

9 MR. SULSKI: Right. And I'm just  
10 having a difficulty with Novotany saying "reduced  
11 biotic integrity due to impoundment." I -- you  
12 know, I'm not sure.

13 MS. FRANZETTI: I'm sorry. It's in  
14 your testimony. I can't help you.

15 MR. SULSKI: Well, I cited it out of  
16 his report --

17 MS. FRANZETTI: But you didn't know  
18 what it meant?

19 MR. SULSKI: -- that this is what he  
20 said. Okay. And then if I go back to the Statement  
21 of Reasons -- and this is on page 22.

22 MR. SMOGOR: Rob?

23 MR. SULSKI: Yes?

24 MR. SMOGOR: Do you mind if I try to

1 address this?

2 MR. SULSKI: Not at all.

3 MR. SMOGOR: In the Attachment A  
4 report, I believe that Aqua Nova was saying because  
5 Upper Dresden Island Pool has some level of impact,  
6 it will --

7 MS. FRANZETTI: Impact or impoundment?

8 MR. SMOGOR: Well, impoundment as an  
9 example of different types of human impacts. I'm  
10 just talking about impact in general, impoundment  
11 being one of them mentioned specifically. Because  
12 of that, you can't -- he reduced the biological  
13 integrity. Level of -- biological integrity in its  
14 simplest interpretation is how much human impact has  
15 occurred relative to natural conditions? So a  
16 reduced -- if you -- if you put impoundment into a  
17 system by -- almost by definition, you're going to  
18 reduce the biological integrity. I think that's  
19 pretty much all he was saying in that context.

20 MS. FRANZETTI: Okay. All right.  
21 With respect to impoundment as used for upper  
22 Dresden Island Pool, is it right to envision it as  
23 like a bathtub? I mean can you clarify for us a bit  
24 what constitutes an impoundment in terms of Upper

1 Dresden Island?

2 MR. SMOGOR: I don't know how the  
3 author of this report was interpreting that, but  
4 there is a --

5 MS. FRANZETTI: No I don't care about  
6 -- so much about how he interpreted it --

7 MR. SMOGOR: There's a dam downstream  
8 that affects the flow, or influences -- it changes  
9 the flow from what it would've been had the dam not  
10 been there.

11 MS. FRANZETTI: And is there a dam  
12 upstream? In other words, is there a dam at both  
13 ends of Upper Dresden Pool?

14 MR. SMOGOR: Yes, yes.

15 MS. FRANZETTI: So can I think of it  
16 as a kind of bathtub where, depending upon what  
17 you're doing up here at the damn above and down here  
18 at the damn below, I may fill -- if I keep them both  
19 closed, I'm just going to kill the water in the  
20 bathtub?

21 MR. SMOGOR: I'm sorry, but you asked  
22 "can you think of this as a bathtub." I --

23 MS. FRANZETTI: You would tell me not  
24 to?

1                   MR. SMOGOR: No, I'm not going to tell  
2 you how to think.

3                   MS. FRANZETTI: I don't mind.

4                   MR. SMOGOR: I, personally --  
5 personally, I wouldn't think of it as a bathtub. I  
6 don't know how else to address that. Sorry.

7                   MS. FRANZETTI: I'm trying -- I'm  
8 trying to understand. I guess there is no more to  
9 understand than simply the amount of water in Upper  
10 Dresden Pool and how it flows through it is  
11 artificially controlled?

12                   MR. SMOGOR: Yes, yes.

13                   MS. FRANZETTI: Okay.

14                   MR. ETTINGER: I don't want to ask --  
15 I don't want to tell Miss Franzetti how to think,  
16 too, but are you aware of the Kankakee river?

17                   MR. SMOGOR: Yes.

18                   MR. ETTINGER: Okay. Is it connected  
19 to the Upper Dresden Pool above the Dresden lock and  
20 dam?

21                   MR. SMOGOR: Yes.

22                   MR. ETTINGER: Thank you.

23                   MS. FRANZETTI: Moving on to number  
24 five, I don't think it has been answered. On Page 8

1 of Mr. Sulski's pre-filed testimony, it is stated  
2 that --

3 MR. SMOGOR: I'm sorry.

4 MS. FRANZETTI: No, no. If you need  
5 to confer, go ahead. I can give you --

6 MR. SMOGOR: I need to learn how to do  
7 it quietly.

8 MS. FRANZETTI: All right. Okay. Let  
9 me try again. Question five. On Page 8 of  
10 Mr. Sulski's pre-filed testimony, it is stated that  
11 quote, "Illinois EPA took into account additional  
12 habitat and aquatic life data not available at the  
13 conclusion of the Aqua Nova's contract obligations  
14 towards the Lower Des Plaines UAA. The additional  
15 data is found in attachments, MM, R and S of the  
16 Statement of Reasons.

17 Question A: Did the Illinois EPA  
18 review of the cited additional habitat and aquatic  
19 life data result in any changes to the findings  
20 concerning the aquatic life use potential of the  
21 Upper Dresden Pool? Yes, Mr. Sulski?

22 MR. SULSKI: There is -- the answer is  
23 no, we had one finding. It was based on the UAA  
24 reports and the additional data that we cite here

1 and included in record. So we didn't change a  
2 finding. We formulated a finding from all the  
3 information that we looked over.

4 MS. FRANZETTI: So the finding --  
5 you're -- what you're telling me is the finding  
6 concerning the aquatic life use potential of the  
7 Upper Dresden Island Pool did not change from the  
8 time of your consultant's work and findings to your  
9 findings as presented in this rulemaking? No  
10 difference?

11 MR. SULSKI: Illinois EPA's findings,  
12 which is the basis of this whole proposal, is one  
13 finding, and we utilized contractors work and we  
14 utilized other information, as we say in our  
15 Statement of Reasons, to come up with a finding, and  
16 the finding is reflected in the proposal.

17 MS. FRANZETTI: Yeah. On Page 10 of  
18 Mr. Sulski's pre-filed testimony, it is stated that  
19 additional habitat and aquatic life data were  
20 generated by MBI and EA Engineering Science and  
21 Technology, referring to Attachments S and double M  
22 of the Statement of Reasons. Did the Illinois EPA  
23 retain MBI to generate the additional data contained  
24 in Attachment S?

1 MR. SULSKI: No.

2 MS. FRANZETTI: All right. If not,  
3 how did the MBI additional data come to be  
4 collected, and how did the Illinois EPA receive it?

5 MR. SULSKI: We received it. I can't  
6 remember if it was an email, but I'm not sure on --  
7 I'm not sure the mechanism that went into the extra  
8 collection of that data.

9 MS. FRANZETTI: How did you get it? I  
10 mean, who'd you get it from in the email,  
11 Mr. Sulski?

12 MR. SULSKI: I may have gotten in from  
13 U.S. EPA, I may have gotten it directly through  
14 Howard.

15 MR. ESSIG: I received it from U.S.  
16 EPA.

17 MR. SULSKI: Okay.

18 MS. FRANZETTI: Thank you. Okay.

19 MR. SULSKI: Yeah.

20 MS. FRANZETTI: So Attachment S came  
21 from U.S. EPA. You received -- the Illinois EPA  
22 received it by email. We've got that much going.  
23 When did you get it?

24 MR. ESSIG: May 9th, 2007.

1 MS. FRANZETTI: Did you circulate it  
2 to any of the stakeholders at the time you received  
3 it?

4 MR. ESSIG: No.

5 MR. SULSKI: Not that I can recall.

6 MS. FRANZETTI: Did you circulate  
7 Attachment S to any of the stakeholders at any time  
8 prior to the filing of this proposed rulemaking?

9 MR. ESSIG: I did not, I don't know if  
10 anybody else did.

11 MS. FRANZETTI: Can someone tell me  
12 why that the decision was made not to share the  
13 Attachment S information prior to this proposed  
14 rulemaking?

15 MS. WILLIAMS: Well, this definitely  
16 would've been a Toby question if he was here, but I  
17 think the answer would be that in addition to the  
18 comments that we received at the March stakeholders  
19 meeting about the substance of our proposal, we had  
20 a comment period after for written comments, and I  
21 believe several several of the environmental groups  
22 did sign a letter commenting that we should proceed  
23 to hearing, that they didn't want any further delay,  
24 any more meetings, that it was time to get this

1 proposal before the Board, and we took that into  
2 account in taking the comments that had come in, and  
3 just proceeding with finalizing our proposal at that  
4 time and whatever we had available at that time.

5                   So when he said it came in in May,  
6 it came in after that period when we were in the  
7 process of finalizing our proposal and after we had  
8 decided not to go to further outreach.

9                   MS. FRANZETTI: Okay. Because by the  
10 time you got it, you had decided no more outreach  
11 was going to occur, even if it just meant forwarding  
12 it on to the stakeholders you've been working with,  
13 as you said, for seven years correct.

14                   MS. WILLIAMS: We didn't --

15                   MS. FRANZETTI: Specifically trying to  
16 establish --

17                   MS. WILLIAMS: We didn't -- yeah. We  
18 did not specifically consider with Attachment S as  
19 to whether or not the Board to the stakeholders or  
20 not, specifically, but...

21                   MS. FRANZETTI: Moving on to D, can  
22 you explain how the IEPA took the EA engineering  
23 data in Attachment double M into account in  
24 determining the aquatic life use for Upper Dresden

1 Pool?

2 MR. SULSKI: The information was  
3 pooled with all the other information that we  
4 received and had in our hands, and it was considered  
5 with everything else.

6 MS. FRANZETTI: Was any of that  
7 information given greater weight than any other?

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

9 MS. FRANZETTI: Moving on to E, based  
10 on the Illinois EPA's review of the MBI Attachment S  
11 data and the EA engineering Attachment double M  
12 data, did it find that the data was consistent, or  
13 were there inconsistencies between these two data  
14 sets?

15 MR. SMOGOR: We did not go back to  
16 that EA 2004 report and compare it directly to the  
17 day we got it from 2006 from Midwest Biodiversity  
18 Institute.

19 MS. FRANZETTI: All right. But you  
20 reviewed them both for purposes of coming up with  
21 your proposal, correct?

22 MR. SULSKI: Yes.

23 MS. FRANZETTI: Okay. But not enough  
24 to say whether the data that was contained in them

1 was consistent?

2 MR. SMOGOR: It was -- we didn't make  
3 those direct comparisons in part because measures of  
4 the two studies differed. For instance, Midwest  
5 Biodiversity Institute's information in 2006  
6 provided qualitative habitat evaluation index  
7 scores. I'm not aware that qualitative habitat  
8 evaluation index scores are in attachment MM, the EA  
9 2004 report.

10 MS. FRANZETTI: Okay. So you think  
11 QHEI data scores are in MBI 2006, which is  
12 Attachment S --

13 MR. SMOGOR: Mm-hmm.

14 MS. FRANZETTI: Not in the EA  
15 Attachment double M?

16 MR. SMOGOR: Yes.

17 MS. FRANZETTI: All right.

18 MR. SMOGOR: And I didn't -- we had  
19 raw fish data from Midwest Biodiversity Institute in  
20 2006, and I did not compare the raw fish data that  
21 they -- when I say "raw fish data," I'm sorry --

22 MS. FRANZETTI: You don't literally  
23 mean "raw fish," do you?

24 MR. SMOGOR: No, no, no. I'm sorry.

1 That's jargon, that's jargon. We had information  
2 about the species of fish that occur at various  
3 sites and their relative numbers of individuals of  
4 each of those species, and we did not compare that  
5 in the MBI information to the similar fish  
6 information in the EA 2004 report. Again, our focus  
7 was on biological potential, not necessarily  
8 existing biological conditions.

9 MS. FRANZETTI: I understand. I'm  
10 just trying to understand -- I just really am asking  
11 whether there were inconsistent dates between the  
12 2004 and the 2006.

13 MR. SMOGOR: Not that I'm aware of --

14 MS. FRANZETTI: Got it.

15 MR. SMOGOR: -- but I didn't really  
16 look that closely doing those types of comparisons.

17 MS. FRANZETTI: Okay. Madam Hearing  
18 Officer, if I can digress for a moment, because with  
19 respect to Attachment S, it just starts at the top  
20 appendix -- or appendix one. There's no report with  
21 it. It's summary-type data. Many weeks ago before  
22 the end of the year, not that long after seeing the  
23 Agency's filing, we, Midwest Gen, submitted a  
24 question to the Illinois EPA for any report that was

1 done to which this Attachment S is an appendix, any  
2 raw data, underlying data, with respect to which  
3 Attachment S is a summary.

4 I was told about ten days ago by  
5 counsel for IEPA that they had some information that  
6 was responsive to my request, and what they had  
7 would be brought to the hearing and given to us. I  
8 see a box under the desk. Can we just cut to the  
9 chase? Did you bring anything today?

10 MS. DIERS: Actually, we do have  
11 stuff, but I was waiting for Chris to be here so the  
12 record was clear that we would -- but, I mean, if  
13 you want it, that's fine. My thought was wait until  
14 Chris was here, because it was a document that Chris  
15 Yoder had to change, correct, so we made sure we  
16 have the correct document here. But if you want it  
17 now, we can introduce it now, I can wait until Chris  
18 is here so he can go through the process --

19 MS. FRANZETTI: No. That's --

20 MS. DIERS: -- of him explaining the  
21 changes.

22 MS. FRANZETTI: So he will be able --  
23 he'll be able to --

24 MS. DIERS: So that's why I didn't do

1 it now.

2 MS. FRANZETTI: -- explain any  
3 mistakes that me made in Attachment S. But first,  
4 we'd like to see the rest of Attachment S --

5 MS. DIERS: I think we have that.

6 MS. FRANZETTI: Its mistakes and  
7 everything.

8 MS. WILLIAMS: Can you give us a  
9 minute?

10 MS. FRANZETTI: Oh, absolutely. I've  
11 given you about ten weeks. I can give you a few  
12 more minutes.

13 MS. TIPSORD: We'll get this admitted  
14 the to the record, and we'll -- we can go off the  
15 record.

16 (Whereupon, a discussion was had  
17 off the record.)

18 MS. DIERS: I have marked as Exhibit 5  
19 a corrected appendix table one of the QHEI metric  
20 scores for station samples in the Illinois and Des  
21 Plaines River during 2006. Do you all need a copy?

22 MS. TIPSORD: Yeah, we all need a  
23 copy. Okay. And, Stefanie, don't put the exhibit  
24 things on --

1 MS. DIERS: Sorry.

2 MS. TIPSORD: -- because I have to  
3 mark them a different way for --

4 MS. DIERS: Sorry.

5 MS. TIPSORD: -- rulemaking.

6 MS. FRANZETTI: Yeah. If I understand  
7 you correctly, this is now a corrected version of  
8 the portion of Attachment S that contained errors,  
9 correct?

10 MS. DIERS: Correct.

11 MS. FRANZETTI: Okay. You had -- you  
12 had told me that you also received a quap, right?  
13 Do you have that?

14 MS. WILLIAMS: We have three.

15 MS. DIERS: Yes, I'm still going.

16 MS. FRANZETTI: Oh, I'm sorry.

17 MS. TIPSORD: All right. If there's  
18 no objection, we will mark as Exhibit 5 Appendix  
19 Table 1, QHEI scores for station's samples in the  
20 Illinois Des Plains rivers during 2006. That's  
21 first page of -- the second page is --

22 MS. DIERS: Okay. You know --

23 MS. TIPSORD: You know what? For  
24 purposes, I'm going to mark the second page as

1 exhibit 6. We'll try to keep in clean. The second  
2 page is table two, QHEI scores and metric values for  
3 sites sampled in the Des Plaines and Illinois river  
4 by MBI in 2006. If there's no objection, I will  
5 mark those as Exhibits 5 and 6. Seeing none,  
6 they're Exhibits 5 and 6.

7 MS. DIERS: Exhibit 7 would be a  
8 document from MBI. It's the qualitative habitat  
9 evaluation index field sheets, and we're going to  
10 put copies back there for everyone else.

11 MS. TIPSORD: If there's no objection,  
12 I'll mark what has been handed me MBI Qualitative  
13 Habitat Evaluation Index Field Sheet QHEI score as  
14 Exhibit No. 7. Seeing none, it's Exhibit No. 7.

15 MR. ETTINGER: Off the record.

16 (Whereupon, a discussion was had  
17 off the record.)

18 MS. DIERS: For Exhibit 8, would be  
19 the Qualitative Assurance Project Plan for Fish  
20 Assemblies of the Lower Des Plaines River. It's  
21 effective date is July 1st, 2006.

22 MS. TIPSORD: If there's no objection,  
23 I'll mark that as Exhibit 8. Seeing none, it's  
24 Exhibit 8. Is that everything?

1 MS. DIERS: I believe so.

2 MS. TIPSORD: Okay. All right. Then  
3 before we go off the record for the end of the day,  
4 is there anything else? All right. We'll start  
5 morning with Midwest Gen and get through the last --

6 MS. FRANZETTI: Few questions.

7 MS. TIPSORD: -- five or six questions  
8 and go on to Citgo. 9:00 o'clock tomorrow morning  
9 in this room. On Wednesday, we're in 2025, but  
10 9:00 o'clock tomorrow here. Thank you. Thank you  
11 very much.

12 (Whereupon, a discussion was had  
13 off the record.)

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1 STATE OF ILLINOIS )  
 ) SS.  
2 COUNTY OF WILL )

3

4 I, REBECCA A. GRAZIANO, CSR, do  
5 hereby state that I am a court reporter doing  
6 business in the City of Chicago, County of Cook, and  
7 State of Illinois; that I reported by means of  
8 machine shorthand the proceedings held in the  
9 foregoing cause, and that the foregoing is a true  
10 and correct transcript of my shorthand notes so  
11 taken as aforesaid.

12

13

14 \_\_\_\_\_  
REBECCA A. GRAZIANO, CSR  
15 Cook County, Illinois

16

SUBSCRIBED AND SWORN TO  
17 before me this \_\_\_ day  
18 of \_\_\_\_\_, A.D., 2004.

19

\_\_\_\_\_  
Notary Public

20

21

22

23

24