

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 Smith Business and Tech
16 Center, 1215 Houbolt Road, Room T-000, Joliet,
17 Illinois, on the 10th Day of March, A.D., 2008,
18 commencing at 2:00 p.m.

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

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3 ILLINOIS POLLUTION CONTROL BOARD:

4

5 Ms. Marie Tipsord, Hearing Officer

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7 Ms. Alisa Liu, P.E., Environmental Scientist

8

9 Mr. Anand Rao, Senior Environmental Scientist

10

11 Mr. Tanner Girard, Acting Chairman

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13 Mr. Nicholas Melas

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15 Mr. Thomas Johnson

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17 Ms. Andrea Moore

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19 ILLINOIS ENVIRONMENTAL PROTECTION AGENCY:

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21 Ms. Stefanie Diers

22 Ms. Deborah Williams

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24 Mr. Robert Sulski

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26 Mr. Scott Twait

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28 Mr. Roy Smogor

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30 Mr. Howard Essig

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1 MS. TIPSORD: Go ahead, Mr. Diamond.

2 MR. DIAMOND: Thank you. Tom Diamond
3 with Mayer Brown for Stepan Chemical Company.

4 Our next question is: Does the
5 Upper Dresden Island Pool currently meet the highest
6 level of biological potential? If not, then
7 according to your testimony, what are the
8 foreseeable improvements in its conditions that will
9 make the Upper Dresden Island Pool habitable by all
10 types of aquatic life populations? And I think for
11 clarification, we used the phrase "highest level of
12 biological potential" because that was used, at
13 least in part, in Mr. Smoger's pre-filed testimony.
14 But, you know, we understand that that's relative to
15 the other designations that are applied in this
16 proceeding.

17 MR. SMOGER: For the first question,
18 "Does the Pool currently meet the highest level of
19 biological potential," no. In terms of what
20 Illinois EPA believes are foreseeable improvements
21 for Upper Dresden Island Pool, that would be
22 improvements in water temperature and associated
23 improvements with improvements in dissolved oxygen.

24 MR. DIAMOND: And how did you

1 determine what improvements are foreseeable?

2 MR. SMOGER: I'm just pretty much
3 going on what was in the Use Attainability Analysis
4 from the Lower Des Plaines River Attachment A. I'm
5 not exactly sure how the term "foreseeable" was
6 defined or if it was defined in specific terms. Do
7 you guys know?

8 MR. SULSKI: Well, "foreseeable" has
9 often been used in the next -- within the next ten
10 years. That's plus or minus a couple years.

11 MR. DIAMOND: When you made the
12 proposal, did you foresee that you would need to
13 make improvements in other areas of the Lower Des
14 Plaines River to enable the Upper Dresden Island
15 Pool to reach the highest level of biological
16 potential?

17 MR. SMOGER: I don't know to what
18 extension that was considered.

19 MR. DIAMOND: Questions three through
20 five under the heading of Mr. Smoger's testimony we
21 will hold until later, and all of our questions
22 designated for Mr. Twait, we will hold until later.
23 Our questions of Mr. Yoder have been asked, so I'm
24 moving to our questions under the heading of

1 "General Questions."

2 MS. TIPSORD: And that's on Page 9 of
3 your pre-file testimony?

4 MR. DIAMOND: Yes. Question No. 1:
5 Did the Illinois EPA consider the effect of
6 increased recreational use on the disturbance of
7 river sediment and the degradation caused by this
8 disturbance in setting or in proposing the aquatic
9 and recreational use designations?

10 MR. SULSKI: Not that I know of.

11 MR. DIAMOND: Second question is: The
12 Statement of Reasons on Page 10 refers to the 1972
13 Board decision to designate the area from Lockport
14 to the I 55 bridge as restricted use waters because
15 of heavy industrialization, barge traffic, dyking of
16 the shore line, and dredging. What has changed to
17 make those conditions different now?

18 MS. WILLIAMS: I would suggest at this
19 point that I think two and three are issues that we
20 went into in some detail last time. So if you feel
21 it's necessary to get some background on the record
22 again, but I think that --

23 MS. TIPSORD: Could you tell me where
24 you think you answered those questions? Because I

1 don't recall.

2 MS. WILLIAMS: I think it was Susan
3 who went into some detail about how the issues in
4 the original Board opinion changed, and I think we
5 went through each one in particular. Does that
6 sound right?

7 MS. FRANZETTI: I'm not sure if it was
8 exactly the same question. I'm trying to quickly
9 turn to it.

10 MR. DIAMOND: I don't recall this
11 being addressed, and the question -- number --
12 Question No. 3 I was, frankly, intending on holding
13 until, you know, we start talking about water
14 quality standards on disinfection. Question No. 2
15 really relates to how are conditions different today
16 than they were in 1972 when the Board first set up
17 this designation. And if that question has been
18 addressed, I have to say I just don't recall it.
19 And that's my question. How are things different
20 today than in the early 1970s?

21 MS. WILLIAMS: Did you want to say
22 something, Susan?

23 MS. FRANZETTI: Well, I don't think
24 that specific question was asked.

1 MS. WILLIAMS: Okay. Thank you.

2 MR. SULSKI: I had thought that Scott
3 had addressed that, but I'm willing to do it again,
4 and that is that the water quality has improved
5 dramatically since the 70s for nearly every
6 parameter except temperature and perhaps D.O. and
7 the -- we've had conversations about how sediments
8 -- it's reasonable to believe that sediments have
9 improved over that period of time based on those
10 factors I spoke about, less sediments, cleaner
11 sediments, et cetera.

12 MR. DIAMOND: Well --

13 MR. TWAIT: I think it's also fair to
14 say that the district has spent a lot of money on
15 their facility improvements at their wastewater
16 treatment plants. They spend a lot of money on TARP
17 to reduce CSO events, and they spent money on SEPA
18 stations to bring up the dissolved oxygen in
19 sections of the river.

20 MR. DIAMOND: Earlier today -- and I
21 don't remember -- I think it was you, Mr. Sulski,
22 but it could've been anyone on the panel, you know,
23 you referenced the idea that sediment coming out of
24 the District is cleaner today than it was 30 years

1 ago, but that doesn't change the contaminants that
2 were already in the sediments in the 1970s, does it?

3 MR. SULSKI: Well, not necessarily,
4 except in the case where these cleaner sediments
5 have buried some of those sediments. However, in
6 the case of areas where they haven't been buried,
7 they keep getting resuspended. They keep getting
8 resuspended, they keep getting exposed to the water
9 column, and they're undergoing, basically, in situ
10 treatment as time goes on and flowing further
11 downstream.

12 MR. DIAMOND: Did the Use
13 Attainability Analysis by Heye and Associates
14 compare sediment quality from the 1970s to sediment
15 qualities today?

16 MR. SULSKI: There was a very large
17 gap in the sediment data that either Heye or CDM
18 were able to make conclusions from.

19 MR. DIAMOND: What do you mean "a
20 large gap?"

21 MR. SULSKI: A large gap in what was
22 needed. For example, sediment analysis in the early
23 days were collected in regions that were expected
24 presupposed to have very contaminated sediments. So

1 the early sediment analysis were done to answer
2 questions like dredging and disposal. So it's
3 limited to bulk chemistry in areas where they have
4 to dredge or in areas where they know there's severe
5 -- or they expect severe contamination with the idea
6 of dredging and having to dispose of these
7 materials. So right there you bias the universe of
8 what the sediment is out there if you're going for
9 just what you think is the most contaminated. And
10 what you think is most contaminated really may not
11 have anything to do with what is actually
12 contaminated with respect to aquatic life. So those
13 are a couple of instances where, you know, there's
14 just gaps in the data. There's not enough
15 information to make determinations.

16 MR. DIAMOND: Okay. So what you're
17 saying -- so you aren't saying that there's a gap in
18 terms of these sediments have gotten better, you're
19 just saying that the gap in the data you can't test?

20 MR. SULSKI: To evaluate that,
21 correct.

22 MR. TWAIT: As a point of
23 clarification, also, I want to mention that the
24 Lower Des Plaines UAA, which is Attachment A, it

1 does talk about a historic perspective on sediment
2 quality starting on 3-1, but at the -- and
3 continuing on to 3-2 and 3-3, but it was decided
4 that that sediment data from the 1970s was way too
5 old to include as part of the analysis for the UAA
6 from the 1970s, because Haye and Associates was not
7 in charge with looking at whether or not it's
8 improved.

9 MR. ESSIG: There were data that were
10 selected by MWRD that were analyzed in this report
11 on Page 2-18 and 3-19.

12 MR. DIAMOND: Was that in the Upper
13 Dresden Island Pool?

14 MR. ESSIG: Both in the Brandon Pool
15 and the Dresden Island Pool.

16 MR. DIAMOND: And which pages did you
17 say that was at?

18 MR. ESSIG: 3-18 and 3-19.

19 MS. TIPSORD: Attachment A?

20 MR. ESSIG: Yes. And this was data
21 that was collected between 1989 and 2000, and it
22 does appear to show some improvement in some of the
23 metal parameters.

24 MR. DIAMOND: Going back to my

1 question, the area along the Upper Dresden Island
2 Pool is still heavily industrialized today, is it
3 not?

4 MR. TWAIT: Yes.

5 MR. DIAMOND: And the Upper Dresden
6 Island Pool still gets a substantial amount of barge
7 traffic, correct?

8 MR. TWAIT: Yes.

9 MR. DIAMOND: It's still got dyking of
10 the shore line in all portions of the segment?

11 MR. TWAIT: Is that accurate, Rob?

12 MR. SULSKI: Portions, yes.

13 MR. DIAMOND: And it's still subject
14 to periodic dredging, right?

15 MR. SULSKI: I don't know what the
16 dredging frequency is there.

17 MS. TIPSORD: I'm sorry. I
18 didn't hear. I apologize. I didn't hear all of it.

19 MR. SULSKI: I don't know what the
20 dredging frequency is. I didn't -- I don't think --
21 I haven't seen that information.

22 MR. DIAMOND: Questions three, four,
23 and five we'll hold until criteria-specific
24 questions are asked. Question No. 6: In the

1 Statement of Reasons, Illinois EPA indicates that
2 80 percent of the flow to the Brandon locks comes
3 from wastewater treatment plants. How much flow in
4 the upper Dresden Island Pool is attributed to
5 wastewater treatment plant discharges?

6 MR. SULSKI: It's roughly the same.

7 MR. DIAMOND: Question No. 7: The
8 Statement of Reasons on Page 33 states "because most
9 of the CAWS and Lower Des Plaines River is
10 artificially channelized, it is also routinely
11 subject to unavoidable moderate to severe water
12 craft passage-related disturbances such as sediment
13 scouring weight formation that is dangerous to small
14 water craft and disrupts shore line habitat for
15 aquatic life."

16 Isn't Illinois EPA's proposal to
17 expand use designation to the Lower Des Plaines
18 River inevitably going to result in more incidents?

19 MR. SULSKI: Incidents of what,
20 please.

21 MR. DIAMOND: Of accidents between
22 barge traffic and recreational users.

23 MR. SULSKI: Well, in the first part
24 of your question, we've got to divide the Lower Des

1 Plaines up into the Upper Dresden Island Pool and
2 the Brandon Pool. So in the Brandon Pool, we're not
3 -- we're not protecting for incidental contact uses.
4 In the Lower Des Plaines we are, and we believe that
5 there's enough areas within that pool for recreators
6 to utilize without getting themselves in trouble
7 with barges. In other words, barge traffic and
8 incidental contact recreation are not mutually
9 exclusive in that Upper Dresden Island Pool.

10 MR. DIAMOND: And what's the basis for
11 that conclusion?

12 MR. SULSKI: Well, you can just look
13 at a map and see that the Upper Dresden Island Pool
14 has areas away from the shipping channel that are
15 available for use.

16 MR. TWAIT: I think it's also fair to
17 say that we're not promoting the use, but we're
18 protecting the existing use. We don't necessarily
19 know that more people will recreate on these waters
20 because of the use designation.

21 MR. DIAMOND: Could you read that
22 answer back for me?

23 (Whereupon, the record was read as
24 requested.)

1 MR. TWAIT: That's not quite accurate,
2 but we're not promoting the use of these waters, but
3 we're protecting the existing use and we know people
4 are -- recreate out there.

5 MR. DIAMOND: But if you change the
6 use designation to protecting, isn't that going to
7 promote the activity? I mean, you can't do one
8 without the other, can you?

9 MR. TWAIT: Well, I'm not -- I'm not
10 suggesting that we open up a beach there. That
11 would be promoting the use. We're protecting the
12 existing use, which is -- we have people recreating
13 there.

14 MR. DIAMOND: Sub part B has been
15 asked and answered. Question No. 8: The Statement
16 of Reasons on Page 34 states, quote, "Each of the
17 reaches possesses some physical limitations to human
18 contact recreation, ranging from deep-draft,
19 steep-walled channels to gradual-slope manicured
20 banks. Such limitations are irreversible in the
21 foreseeable future, but in combination with other
22 factors prescribed preclude any activities from
23 occurring in these reaches other than those that
24 currently exist." If this is the case, why change

1 the current standards?

2 MR. SULSKI: Well, because the
3 existing uses are not being protected by the
4 existing standards.

5 MR. DIAMOND: What do you mean by
6 that? I mean, if the uses already exist, how are
7 they not being protected?

8 MR. SULSKI: We reevaluate the
9 secondary contact waterways. We started from
10 scratch. We dumped secondary contact. We just
11 evaluated these waterways on their face. We
12 established uses existing/attainable, and then we
13 set criteria to protect for those uses. So we
14 cannot go back from existing. That's the bottom
15 line. If it exists, we have to protect for it.

16 MR. DIAMOND: Questions nine through
17 one we will hold until more specific water quality
18 criteria questions are asked. Questions 13 through
19 15 have been asked and answered, so I'm on to
20 Question 16. Section 302.403 of 35 Illinois
21 Administrative Code refers to unnatural sludge, and
22 Page 55 in the Statement of Reasons says the Agency
23 recognizes the history of sediment pollution in the
24 CAWS in the Lower Des Plaines River. It also says

1 that historic sediment pollution presents an
2 attainability concern to some types of aquatic life
3 in these waters. What type of aquatic life, and
4 what are the conditions and analysis of the
5 sediment?

6 MR. SULSKI: For now, it's the aquatic
7 life that we -- that's what we have deemed as the
8 potential aquatic life for this -- for these
9 waterways, and the only thing that we've been able
10 to conclude in so far as sediments that it
11 contributes to a habitat metric. It's basically --
12 it's physical structure, the physical structure of
13 the sediment.

14 MS. WILLIAMS: And can I -- I mean, I
15 guess I would like to clarify a little bit as well
16 here as far as what was intended in this paragraph.
17 It was not so much intended to address aquatic life
18 use per se, but to explain the nature of the
19 existing narrative standard and our recognition that
20 historic sediment is technically a violation of that
21 existing language to just have any type of unnatural
22 sludge or bottom deposits is prohibited by this
23 existing language.

24 MR. DIAMOND: By the

1 currently-existing regulations that are applicable
2 in the CAWS in the Upper Dresden Island Pool?

3 MS. WILLIAMS: Correct.

4 MR. DIAMOND: So, Mr. Sulski, when you
5 said the potential aquatic life of the waterways,
6 does that get back to the tolerant and intolerant
7 species descriptions?

8 MR. SULSKI: Correct.

9 MR. DIAMOND: Okay. Items -- general
10 Questions 17 through 22 we'll hold until we have
11 water quality criteria-specific questions. I'm on
12 to the questions under the heading "use
13 designations," Item Number 1. We tried to eliminate
14 some of these that maybe have already been
15 addressed. I think 1 A has been asked and answered.
16 I think B has been asked and answered. Item C:
17 Given the Agency's statements regarding the
18 significance of combined sewer overflows, urban
19 runoff and industrial discharges, is the Lower Des
20 Plaines River still subject to significant sludge
21 composition?

22 MR. SULSKI: I don't know what you
23 would mean by "significant." What does that mean?
24 Can you please clarify?

1 MR. DIAMOND: Well, is it -- let's
2 just say is it still subject to sludge deposition?

3 MR. SULSKI: It is likely subject to
4 some sludge deposition, nowhere near what occurred
5 in the 70s.

6 MR. DIAMOND: Have you analyzed
7 whether or not the continuing sludge deposition from
8 combined sewer overflows, urban runoff, and
9 industrial discharges continues to impact the
10 viability of the habitat?

11 MR. SULSKI: The habitat was taken
12 into consideration when the habitat measurements
13 were made, yes.

14 MR. DIAMOND: Has there been any
15 significant change in the slope or flow conditions
16 of the Lower Des Plaines River between the early
17 1970s and the present?

18 MR. SULSKI: Not that I know of,
19 except, perhaps, there's less Lake Michigan water
20 diversion.

21 MR. DIAMOND: Are the waters of the
22 Lower Des Plaines River still subject to urban
23 stresses?

24 MR. SULSKI: I need you to clarify

1 what you mean by "urban stresses." It was a term
2 used back in the 70s. Can you be more specific?

3 MR. DIAMOND: Well, if you know that
4 it was a term used back in the 70s, you probably
5 know more what it meant than I do.

6 MR. SULSKI: Well, let's see, I was a
7 sophomore in high school in the 70s. Well, I can
8 give you an answer, but the answer is going to be
9 how we believe conditions have improved over that
10 period of time, which we've been doing and providing
11 that information in other questions, but I can run
12 through it again.

13 MR. DIAMOND: Well, population has
14 increased in the area, has it not?

15 MR. SULSKI: Yes, it has.

16 MR. DIAMOND: Doesn't that present the
17 potential for even greater urban stresses?

18 MR. SULSKI: Well, we have better --
19 we have dealt with urban stresses in a far more --
20 in a far better way and efficient way than we did in
21 the 70s. So, you know, I can go on with wastewater
22 treatment plant expansions and TARP and that sort of
23 thing and storm water permit programs and BNP's and
24 et cetera, et cetera. Those are ways that we've

1 been better dealing with --

2 MS. TIPSORD: Excuse me. Can I ask
3 you this question --

4 MR. SULSKI: Yes.

5 MS. TIPSORD: Is there more effluent
6 being discharged into these?

7 MR. SULSKI: There is more effluent
8 being discharged, yes, with a population expansion.

9 MS. TIPSORD: Thank you.

10 MR. SULSKI: But, yeah, it's better
11 quality.

12 MS. TIPSORD: Yeah, yeah. I
13 understand that, yeah.

14 MR. TWAIT: Well, is that
15 necessarily --

16 MR. SULSKI: True?

17 MR. TWAIT: I was thinking that --
18 well, that's what I was going to say. I was
19 thinking that the state water survey when they redid
20 the 7210 maps, they deviated -- there's less --

21 MR. SULSKI: That was -- it was an
22 incorrect map to begin with.

23 MR. TWAIT: Okay. Okay. Sorry.

24 MR. SULSKI: They corrected a map.

1 MR. DIAMOND: I'm just going to waive
2 on my second question here, because it's sort of
3 been answered or more obviated, but I do have a,
4 sort of, related question to it and that's this:
5 The Agency has indicated in several instances that
6 it did not conduct a UAA factor since economic
7 impact analysis, and the Agency has indicated that
8 it, you know, offered stakeholders the opportunity
9 to provide information on that topic, and it
10 received some information but not all. Isn't it
11 true that no stakeholder by itself has all the
12 economic information that would be necessary to do a
13 factor six analysis?

14 MR. SULSKI: I don't know. The
15 stakeholder would have to look at that guidance
16 document and make that determination and then if
17 that information wasn't available, I -- you know,
18 let us know.

19 MR. DIAMOND: Well, but if factor six
20 is supposed to be based on an overall economic
21 impact to, you know, on a household by household
22 basis, that's a lot of information that an
23 individual stakeholder simply doesn't have and would
24 be more appropriate for -- you know, it would take

1 the resources of a government agency to gather,
2 wouldn't it?

3 MR. SULSKI: I think that the analysis
4 could be broken down into parts that could be
5 handled by various, you know, groups, and then that
6 could be put together for the sake of the Board or
7 whoever's making the final determination on what the
8 bigger picture is.

9 MR. DIAMOND: The third question
10 related to the statement that was on Page 24 of the
11 Statement of Reasons, and I'll read it in its
12 entirety even though I didn't put it in the
13 prewritten questions. The statement is: These uses
14 and standards are intended to reflect the best and
15 most up-to-date information available and are
16 intended to outlast the existing General use
17 designation and standards currently applicable in
18 the rest of the state. When the Board is faced with
19 a proposal to update the one size fits all aquatic
20 life use designations for the rest of the state, the
21 Illinois EPA expects there to be no need to reopen
22 these uses and standards designed to apply
23 specifically to these waters.

24 And the question is: Does the

1 Agency intend the uses and standards proposed this
2 proceeding to possibly be applied to waters outside
3 the Lower Des Plaines River in the CAWS?

4 MS. WILLIAMS: No.

5 MR. SULSKI: Not at this time.

6 MR. DIAMOND: I believe number four
7 and number five have been asked and answered. I'm
8 going to go to my next set of questions under the
9 heading "facilities likely to be impacted." Did the
10 Agency seek information from industrial dischargers
11 into the Lower Des Plaines River as to the thermal
12 quality of their discharges and their ability to
13 meet the proposed water quality standards without
14 construction of cooling towers or other cooling
15 systems?

16 MR. TWAIT: No, I don't believe we
17 did.

18 MR. DIAMOND: How many facility does
19 the Agency expect will be impacted by the proposed
20 new thermal standards for the Upper Dresden Island
21 Pool?

22 MR. TWAIT: I don't know exactly, but
23 it's probably less than ten in the order of -- order
24 of probably five or six.

1 MS. TIPSORD: Can I ask out of how
2 many potential facilities would that be? How many
3 facilities would be impacted at a thermal standard
4 or discharged warm water at this point?

5 MR. SULSKI: I think --

6 MR. TWAIT: Five or six.

7 MS. TIPSORD: I'm sorry. You had four
8 people answering at once. Mr. Twait, could you
9 answer the question, please?

10 MR. TWAIT: I think the answer is five
11 or six.

12 MS. TIPSORD: So 100 percent of the
13 people discharging will be impacted?

14 MR. TWAIT: No.

15 MS. TIPSORD: That's what I'm trying
16 to get at.

17 MR. TWAIT: I don't know how many
18 facilities are discharging there.

19 MS. TIPSORD: Okay.

20 MR. TWAIT: I would say guessing it
21 would probably be 40 percent.

22 MS. TIPSORD: Okay. Thank you.

23 MR. DIAMOND: Three, I believe, has
24 been asked and answered, but let me just clarify.

1 The Agency has not considered the costs of
2 industrial discharges on the Upper Dresden Island
3 Pool to comply with proposed thermal standards, have
4 you?

5 MR. TWAIT: No.

6 MR. DIAMOND: Four has been asked and
7 answered. Number five: Has the Agency's bureau of
8 water consulted to the bureau of air as to the
9 likely increase and particulate matter emissions
10 that would result from the construction of cooling
11 towers to meet the proposed new thermal standards?

12 MR. SULSKI: I had a question on what
13 particular matter emissions you're talking about.

14 MR. DIAMOND: Mr. Sulski, you said
15 "particular." I tried to say "particulate."

16 MR. SULSKI: Yeah. What particular
17 particulate matters are you talking about?

18 MR. DIAMOND: Well, I think for the
19 technically inclined, it's generally understood that
20 cooling towers result in particulate matter
21 emissions.

22 MR. SULSKI: I can't answer the
23 question. I was -- I thought it was in terms --
24 when you put the word "construction" in here, I

1 thought it was in terms of construction.

2 MR. DIAMOND: Well, the construction
3 and the operation of the cooling towers.

4 MR. TWAIT: Well, the --

5 MR. DIAMOND: The simple question is:
6 Have you consulted with the bureau of air on that
7 topic?

8 MR. TWAIT: The answer is no, we have
9 not.

10 MR. DIAMOND: Question No. 6: If the
11 Agency has not conducted these inquiries, how can it
12 conclude that the proposed use designation does
13 cause more environmental damage than leaving the
14 current use designation in place referencing UAA
15 factor three for the Lower Des Plaines River from
16 Brandon Road locks to the I 55 bridge?

17 MR. TWAIT: Well, I'm not real sure
18 how much particulates are discharged by cooling
19 towers, so I can't really answer that question.

20 MS. TIPSORD: Is that information that
21 you might be able to get if you did consult with the
22 bureau of air?

23 MS. WILLIAMS: We can see what we can
24 find out. This is the first we've heard. We

1 assumed they were talking to construction. This is
2 the first we've heard that cooling towers released
3 particulate matter. That was not an assumption that
4 we had.

5 MS. TIPSORD: Mr. Harley, you have a
6 followup?

7 MR. HARLEY: Keith Harley with Chicago
8 Legal Clinic on behalf of the Southeast
9 Environmental Task Force. In undertaking that
10 analysis, would you please also ask the bureau what
11 other -- what the impact would be of offsets that
12 would need to be required as part of any
13 construction activities, which -- would more than
14 likely more offset particulate matter emissions
15 regionally than would result from the construction
16 of an individual source?

17 MS. WILLIAMS: Okay.

18 MR. JARRETT: Alan Jarrett, Corn
19 Products International, and adding to that question,
20 if offsets are not available, then economically what
21 is the alternative to -- because the offsets may not
22 be practically available.

23 MS. WILLIAMS: Can you repeat that,
24 please, about the part about if offsets are not

1 available. I'm trying to understand what we're
2 trying to find out.

3 MR. JARRETT: Well, there's a
4 presumption in the question that offsets are
5 available to generate them they have to be cost
6 incurred.

7 MS. WILLIAMS: So you're asking us
8 to --

9 MR. JARRETT: They may not be readily
10 available. We don't know if there are offsets.

11 MS. WILLIAMS: So you're asking us to
12 ask the bureau if there are not offsets, what would
13 the cost be?

14 MR. JARRETT: What would you do if
15 there are no offsets?

16 MS. WILLIAMS: In the context of
17 permitting --

18 MR. JARRETT: Yes.

19 MS. WILLIAMS: -- cooling towers for
20 an air permit? Okay.

21 MR. JARRETT: Yes, because in the
22 absence of available offsets then construction is
23 prohibited, and then there's no viable means to
24 build a cooling tower.

1 MR. DIAMOND: In other words, you're
2 telling -- the bureau of water is telling us to
3 build cooling towers, and the bureau of air is
4 telling us "no, you can't." It ends up being a
5 little bit of a problem for industry. Item
6 number seven: Has the Agency's bureau of water
7 considered whether cooling towers or other cooling
8 systems are capable of being permitted under
9 regulations of air emissions given the associated
10 particulate matter emissions?

11 MR. TWAIT: I think the answer to that
12 would be no.

13 MR. DIAMOND: The next set of
14 questions is on thermal standards, and we will pass
15 those until later, and likewise with the questions
16 on dissolved oxygen. Our next set of questions is
17 on stakeholder involvement.

18 MS. TIPSORD: That's on Page 14?

19 MR. DIAMOND: Page 14. I believe
20 number one referencing temperature standards that
21 were discussed with the stakeholders has been asked
22 and answered, and that number two has been asked and
23 answered. Number three, in some ways, has a
24 predicate to it, but let me just ask the question:

1 Why did the Agency propose the current regulations
2 without another review with the stakeholders
3 advisory group, in particular with regard to the
4 thermal standards?

5 MR. TWAIT: The changes to the thermal
6 standards after our last meeting were making it less
7 stringent, I believe.

8 MR. ETTINGER: We're really offended.

9 MR. TWAIT: And those were based on
10 comments.

11 MS. WILLIAMS: And to complete the
12 thought, the Environmental Group had specifically
13 asked us not to have another stakeholder meeting,
14 but to take our proposal to the Board, which
15 would've been the likely group that would've wanted
16 to comment on a less stringent --

17 MR. DIAMOND: Who were the
18 environmental groups that asked you to go straight
19 to the Board?

20 MS. WILLIAMS: There's a ladder that I
21 believe was in the record that was signed by several
22 groups. I can't recite them off the top of my head,
23 but I do think it's already somewhere. If it's not
24 in the record, would you like us to put it in the

1 record? I thought it was, but I can't point to it
2 now.

3 MR. DIAMOND: I'm not -- I mean, it
4 could be, but I'm not aware of it. I mean, that
5 would be fine. And it's correct that the
6 temperature standards that have been proposed to the
7 Board were not presented to the stakeholders
8 advisory group, correct?

9 MR. TWAIT: The only changes made were
10 less stringent than what was provided to the
11 stakeholder advisory group.

12 MR. DIAMOND: Item Number 4: On what
13 basis did the Agency change the proposed temperature
14 standards between the last proposal to the
15 stakeholders advisory group and what was proposed to
16 the Board?

17 MR. TWAIT: It was based on comments,
18 and I can't remember specifically what was changed.
19 So I don't know that I'd be able to answer that
20 offhand.

21 MS. FRANZETTI: If I may?

22 MS. TIPSORD: Yes, Ms. Franzetti.

23 MS. FRANZETTI: Mr. Twait, can you
24 just expand on when you said "based on comments."

1 Comments within the Agency, from outside of the
2 Agency? Can you give us just a little more
3 definition of what you mean?

4 MR. TWAIT: I don't remember all the
5 changes that were made, so I can't be more specific.
6 I don't have a copy of what was proposed to the
7 stakeholder groups.

8 MS. TIPSORD: With you or at all?

9 MR. TWAIT: With me.

10 MR. DIAMOND: The fifth question is:
11 Did the Agency have any meetings or other
12 communications with any stakeholders regarding the
13 temperature criteria, use designations, or other
14 matters addressed in this rule making after
15 January of 2007?

16 MS. TIPSORD: Excuse me, Mr. Diamond,
17 before you ask that question --

18 MS. WILLIAMS: Sure.

19 MS. TIPSORD: The Agency needs to
20 answer Question No. 4 in writing then. You guys had
21 these pre-filed questions. Let's go off the record
22 for just a second.

23 (Whereupon, a discussion was had
24 off the record.)

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

3 MS. WILLIAMS: I don't think it's
4 necessary to answer in writing what I was looking
5 for, but I don't have enough space to get to all my
6 boxes if we've prepared enough copies of what went
7 out to the stakeholders group for submittal as an
8 exhibit if you would like to have it entered as an
9 exhibit so it had to be held up again --

10 MS. TIPSORD: That's still -- that's
11 still not answering the question. That's giving us
12 two things for us to then compare. The question was
13 asked of you to explain the difference, and like I
14 said, you had these questions for a while. And like
15 I said, I've let you get by with "Well, I didn't
16 understand that's what you were asking." But we're
17 not going to get anywhere if you don't answer the
18 pre-filed questions. Mr. Diamond's Question 5,
19 could you read it back for us, please?

20 (Whereupon, the record was read as
21 requested.)

22 MS. WILLIAMS: So Mr. Diamond, in
23 January of 2007, just to be clear that this question
24 is clear for the record, we sent a hard copy --

1 well, by electronic mail we sent a copy of what we
2 expected to propose to all the stakeholders. Then
3 in March of 2007, we had meetings that were open to
4 anyone who wanted to attend one in Chicago and one
5 in Joliet where we took oral comments from anyone
6 who wanted to make them on the proposal. So that
7 would be after January, 2007.

8 Subsequent to those March
9 meetings, we accepted written comments for a period
10 of time, which were taken into account in adopting
11 our final proposal before the Board.

12 MR. DIAMOND: And are the written
13 comments one of the attachments to the Statement of
14 Reasons?

15 MS. WILLIAMS: I don't believe so. I
16 don't think we've received very many. The letter
17 I'm referring to is one, and if there are any
18 others, we can submit those as well.

19 MR. DIAMOND: We would ask that you
20 do. So it was the March of 2007 meetings in Chicago
21 and Joliet, it was the written comments, and as best
22 as you can recall, that it's after January of '07?

23 MS. WILLIAMS: That's all.

24 MR. DIAMOND: All right. On to the

1 next heading on questions regarding the Lower Des
2 Plains River Use Attainability Analysis Final
3 Report. Number one: Why did the Agency not ask the
4 authors of the UAA Final Report to address the
5 economic impact of the changes and use designation?

6 MR. SMOGER: Illinois EPA doesn't
7 believe that the Use Attainability Analysis as
8 defined in 40 CFR 131.3 G absolutely requires
9 addressing economic impact. In fact, the definition
10 at 40 CFR 131.3 G mentions, quote, "Use
11 Attainability Analysis may include physical,
12 chemical, biological, economic factors as described
13 in Section 131.10 G," end of quote.

14 MR. DIAMOND: Does the Agency agree
15 with the Statement in the UAA Final Report, that's
16 Page 2-102, that such a study is quote, "crucial?"

17 MR. SMOGER: If crucial means
18 required, then no.

19 MR. DIAMOND: Well, the Aqua Nova and
20 Heye and Associates were the Agency's chosen
21 contractors to prepare the UAA Report, correct?

22 MR. SMOGOR: Yes.

23 MR. DIAMOND: So, if Heye and
24 Associates -- if Aqua Nova and Heye and Associates

1 called it crucial, I assume that that terminology is
2 something the Agency agreed with, because you -- I
3 mean, you approved the final report, didn't you?

4 MR. SMOGOR: I don't know if it was
5 formally approved or not, but I would say if Aqua
6 Nova -- if the Lower Des Plaines River UAA is
7 stating that an economic impact analysis is a
8 requirement of Use Attainability Analysis, then I
9 would say that our Agency disagrees with that.

10 MR. DIAMOND: And so I take it your
11 answer to -- my last question is: If not, what is
12 the Agency's legal justification for ignoring one of
13 the UAA factors set forth at 40 CFR Section 131.10
14 G, and I guess your answer is that you just don't
15 think you have to.

16 MR. SMOGOR: Yes, that's one way to
17 put it.

18 MR. SULSKI: Well, I don't think that
19 we ignored it, either.

20 MR. DIAMOND: You didn't --

21 MR. SULSKI: It's not something that
22 was ignored. It's something that both the
23 contractors believed a lot of information was needed
24 to make such a determination, and without that

1 information, it was beyond theirs or anybody's
2 ability. And the stakeholders were asked to provide
3 that type of information, especially those who would
4 be effected by the proposed standards, mainly MWRDGC
5 and Midwest Generation. One for dissolved oxygen
6 and flow augmentation and disinfection, and the
7 other for temperature.

8 MS. TIPSORD: Back up. Mr. Sulski,
9 you said MWRD --

10 MR. SULSKI: GC.

11 MS. TIPSORD: GC. Okay. You were --

12 MR. SULSKI: Greater Chicago.

13 MS. TIPSORD: Right. It sounded like
14 you were saying two different entities when you said
15 it. That's why I was double-checking.

16 MR. DIAMOND: The bottom line: You
17 didn't have your consultant conduct the analysis,
18 did you?

19 MR. SULSKI: They couldn't. That's
20 what they told us, we can't. We don't have the
21 information, and we didn't disagree with them.

22 MR. DIAMOND: Well, they wouldn't have
23 had the information on the QHEI or anything else if
24 they wouldn't have gone out and done their study,

1 would they?

2 MR. SULSKI: QHEI was paid for by
3 USEPA midstream because it was crucial to make
4 decisions. But that was information that somebody
5 came forward with and said "We'll give you a
6 contract to go out and collect that information."

7 MR. DIAMOND: Second question is:
8 Despite admitting that it did not analyze one of the
9 UAA factors, the UAA Final Report concluded that the
10 existing thermal standards should be replaced at
11 Page 2-103. How could the authors of the UAA Final
12 Report legitimately reach that conclusion when they
13 had not analyzed a UAA factor deemed crucial?

14 MR. ETTINGER: I want to note one
15 objection, just the form of these questions. They
16 make a lot of legal presumptions. I don't agree
17 with these legal presumptions. He can ask his
18 questions, but I don't want it to be understood that
19 we believe that the law is what Mr. Diamond's
20 questions presume that it is.

21 MR. TWAIT: The contractor made that
22 determination by looking at the current thermal
23 standard and determining that 100 degrees Fahrenheit
24 was lethal to fish. So he determined that it should

1 be replaced with something.

2 MR. DIAMOND: But the question is: If
3 the contractor says that there's a factor that ought
4 to be considered that is crucial, how can they reach
5 a determination without considering a factor that
6 they consider to be crucial? I guess I would also
7 note for the record that I don't think my question
8 presumes anything about the law. It's just relying
9 upon what's said in the report and what the
10 contractor said.

11 MR. TWAIT: The contractor was using
12 "crucial" to help determine -- saying that the study
13 is crucial if you don't want to use general use.
14 But unless you use the socioeconomic impact
15 analysis, then you'd have to use general use
16 standards for thermal. So he's basically saying
17 that it's crucial if you don't want to use general
18 use.

19 MS. TIPSORD: And just to be clear,
20 Mr. Twait, you're looking at Page 2?

21 MR. TWAIT: 2-102.

22 MS. TIPSORD: 2-102 of Attachment A?

23 MR. TWAIT: Yes.

24 MR. DIAMOND: Questions three and four

1 I think have been asked and answered. Number five:
2 Does the Agency agree with the statements in the UAA
3 Final Report of Page 4-12 the vegetation in the UDI
4 Pool is indicative of a disturbed community and the
5 industrial development exists along much of the UDI
6 Pool, the Upper Dresden Island Pool segment of the
7 Lower Des Plaines River?

8 MR. ESSIG: We don't believe that the
9 presence of disturbed riparian vegetation and the
10 presence of some industry makes the habitat
11 unsuitable for aquatic life.

12 MR. DIAMOND: But that doesn't answer
13 the question. I mean, the question is: Do you
14 agree with the statements in the report that the --

15 MR. ESSIG: Okay.

16 MR. DIAMOND: -- vegetation in the
17 Upper Dresden Island Pool is indicative of a
18 disturbed community and that industrial development
19 exists along much of the Upper Dresden Island Pool
20 segment?

21 MR. ESSIG: Yes, there is industry in
22 the segment. As far as disturbed vegetation, I
23 don't know.

24 MR. SULSKI: I disagree with his --

1 what he means by "disturbed vegetation." He goes
2 ahead and describes "Cottonwoods, Green Ash, Elms,
3 various shrubs." It looks like a pretty good
4 community to me that you would expect to find in an
5 environment like that. So in answer to your
6 question, I'll disagree with his determination.

7 MS. DIERS: Rob, when you say "he,"
8 are you referring to Novotany?

9 MR. SULSKI: Novotany.

10 MS. DIERS: And what are you reading
11 from?

12 MR. SULSKI: I'm reading right from
13 the report.

14 MS. DIERS: Okay. Attachment A?

15 MR. SULSKI: Attachment A.

16 MS. DIERS: And what page are you
17 reading from?

18 MR. SULSKI: Page 412.

19 MS. TIPSORD: Thanks.

20 MR. DIAMOND: So you're rejecting the
21 conclusions of the contract that the Agency hired to
22 do the UAA analysis?

23 MR. SULSKI: In this regard, yes.

24 MR. DIAMOND: Did you -- did the

1 Agency offer that comment to Aqua Nova and Heye at
2 the time the report was prepared?

3 MR. SULSKI: I don't know whether we
4 did or didn't.

5 MR. DIAMOND: Did the Agency review
6 the report and give comments on it before it was
7 finalized?

8 MR. SULSKI: Yes.

9 MR. TWAIT: Yes.

10 MR. DIAMOND: And apparently, whatever
11 comments you gave, you didn't ask them to change
12 this statement in the report. Is that correct?

13 MR. SULSKI: If I would've seen this
14 comment -- and I don't recall seeing it until
15 relatively recently -- yes, I would've objected to
16 that, the inclusion of that statement.

17 MR. DIAMOND: That wasn't the question
18 I asked. The Agency did not -- apparently did not
19 object to that statement being in the final report.
20 Isn't that correct?

21 MR. SULSKI: I don't know whether they
22 did or didn't.

23 MR. DIAMOND: Well, the statement
24 ended up in the final -- are there any statements in

1 that report that ended up in the final report that
2 the Agency objected to?

3 MR. TWAIT: I think "objected" is a
4 strong term. There was -- well, yes, there's some
5 statements in there that I don't think that we asked
6 to be removed, but it was -- they stayed in based
7 upon the contractor's determination. The Agency
8 didn't get every comment that we asked for.

9 MR. DIAMOND: Is that why we don't
10 have the authors of this report before us at the
11 proceeding?

12 MR. TWAIT: I don't believe we have
13 them because we don't have -- they're not on
14 contract.

15 MR. DIAMOND: The UAA Final Report on
16 Pages 4-32 to 4-33 states that, quote, "Navigation
17 is listed as a typical and protected use," end
18 quote. In 40 CFR, Part 131, and is a multimillion
19 dollar industry of the Lower Des Plaines River.
20 Does the Agency agree with those statements?

21 MR. TWAIT: I think that sounds
22 reasonable.

23 MR. DIAMOND: I think seven has been
24 addressed in the questions that we've asked on the

1 QHEI score and how it's used. The UAA Final Report
2 states that Page 4-33 that two habitat categories
3 measured by the QHEI, quote, "could be improved
4 through artificial management," end quote. What
5 does that mean?

6 MR. ESSIG: That means that basically
7 the two metrics in question were in stream cover and
8 repairing zone. With in stream cover, you could add
9 things like boulders along the shore line, you could
10 improve the vegetation along the shore lines, or
11 repairing another road. Those are all things that
12 are manageable.

13 MR. DIAMOND: Okay. Mr. Essig, when
14 you say "you" could improve these, who is the "you"
15 who would do that?

16 MR. ESSIG: That is to be determined.

17 MR. DIAMOND: Is the Agency intending
18 on doing that?

19 MR. ESSIG: No plans that I'm aware
20 of.

21 MR. DIAMOND: And that obviates Part
22 C, so I am done with my general questions.

23 MS. TIPSORD: Then if we can move to
24 the Environmental Law and Policy Center.

1 MS. DEXTER: I think we'll just stay
2 here. So our questions are going to change a bit
3 and go back to the recreational use designations.

4 MS. TIPSORD: You need to speak up and
5 slow down.

6 MS. DEXTER: Sorry. So we're going to
7 begin with Question 8. The first are either
8 answered or they're more specific.

9 MS. WILLIAMS: I'm sorry. Could you
10 repeat that?

11 MS. DEXTER: The first seven are
12 either answered, or they're more specific. So we're
13 starting with Question 8. So Question 8 is: What
14 analysis did IEPA use to decide which recreational
15 activities would be considered primary recreation,
16 which incidental contact recreation, and which
17 noncontact recreation?

18 MR. SULSKI: I -- it was performed in
19 a stakeholder setting with guidance from USEPA's
20 stakeholder members, guidance documents, the
21 opinions, and interactions of the stakeholders. So
22 it wasn't any one source. It came out of the
23 stakeholder process geared towards these waterways,
24 and what became primary contact -- considered

1 primary contact recreation would be those
2 recreational activities where the head goes under
3 the water, and you have a chance of directly
4 ingesting water. Incidental contact recreation, the
5 recreational activities that we observed that would
6 put you in direct contact with the water would
7 potentially result in maybe a hand-to-mouth oral
8 transfer of waters or whatever was if them.
9 Noncontact, that would be not where body comes in
10 contact with the waters. So riding up in a boat,
11 speeding along. I think that covers the three.

12 MS. DEXTER: Okay. Question 9: On
13 Page 25 of the Statement of Reasons and Page 11 of
14 the Sulski pre-filed testimony, incidental contact
15 recreation is defined as, quote, "Any recreational
16 activity in which human contact with the water is
17 incidental and in which the probability of ingesting
18 appreciable quantities of water is admissible." How
19 did IEPA determine the probability of water
20 ingestion is minimal to start out with the water
21 scaling? That doesn't -- did you say water scaling
22 is a primary contact?

23 MR. SULSKI: Yes.

24 MS. DEXTER: Okay. How about jet

1 skiing?

2 MR. SULSKI: It's based on the
3 observed uses that we saw in CAWS, and jet skiing --
4 jet skis were used primarily to get from one point
5 to another, another mode of transportation but
6 closer to the water. I can only think of one
7 instance out of all the jet skiers we saw where
8 somebody was hot dogging around and could possibly
9 fall off of a jet ski and go into the water. Other
10 than that, it is moving from point A to point B.

11 MS. DEXTER: So it's -- no formal
12 probability analysis was done?

13 MR. SULSKI: That's correct.

14 MS. DEXTER: It was sort of based on
15 observations? What would you consider an
16 appreciable quantity of water?

17 MR. SULSKI: I don't know what the
18 answer to that is.

19 MR. TWAIT: I think it would be
20 similar to what you would expect to get while you
21 were swimming.

22 MS. DEXTER: With your head
23 underwater?

24 MR. TWAIT: With your head below

1 water.

2 MS. DEXTER: All right. Question 10:

3 Did IEPA analyze the risk of capsize for the

4 following small craft recreational boating

5 activities: Rowing, kayaking or canoeing?

6 MR. SULSKI: No. Only to the extent

7 that it would be potentially dangerous to somebody

8 who capsized in a deep, steep walled shipping

9 channel without exit points.

10 MS. DEXTER: If -- I was more -- my

11 question was more pointed to the probability of one

12 of these things capsizing, that no analysis was done

13 on --

14 MR. SULSKI: No.

15 MS. DEXTER: Okay. Did IEPA analyze

16 the probability of ingesting water in the event of a

17 kayak capsize?

18 MR. SULSKI: No.

19 MS. DEXTER: Or rowboat, or canoe?

20 Any of these?

21 MR. SULSKI: No.

22 MS. DEXTER: Okay. The footnote on

23 Page 43 of the Statement of Reasons states that

24 kayaking and jet skiing have some likelihood of

1 water ingestion, but participants in those
2 activities are not as likely to ingest water as
3 swimmers, for example. Are you aware of any studies
4 of data that support this conclusion?

5 MR. SULSKI: I don't know of any data
6 or studies -- well, I don't know of any studies.
7 The data that we have is based on our personal
8 observations and the contractors' observations of
9 how those watercrafts were used within the waterways
10 that we've -- that we're looking at here.

11 MS. DEXTER: Okay. Question 13: Did
12 IEPA explore creating an intermediate recreational
13 designation between incidental contact and primary
14 contact?

15 MR. SULSKI: Not -- no, we didn't.
16 Not -- it wasn't brought up in the stakeholder
17 process.

18 MS. DEXTER: Okay. I'll move on to
19 Question 14. In the analysis of UAA factor four on
20 Page 34 of the Statement of Reasons, IEPA states
21 "The physical attributes of the regions designated
22 incidental contact range from deep draft,
23 steep-walled channels to gradual, sloped, manicured
24 banks." What regions, or portions thereof, can be

1 described as having gradual, sloped, manicured
2 banks?

3 MR. SULSKI: There are some areas that
4 are privately owned along the north branch up to the
5 shore that have some. It's very limited, by the
6 way. There are some manicured banks in -- along the
7 Cal Sag Channel in the area of Worth of development
8 down there, or maybe that's Palos. But it's -- it's
9 a relatively rare sort of bank line.

10 MS. DEXTER: Can you explain how this
11 physical attribute precludes primary contact
12 recreation?

13 MR. SULSKI: I'm sorry. I was
14 distracted. Please --

15 MS. DEXTER: How gradual, sloped,
16 manicured banks are a physical attribute that
17 precludes primary contact recreation, under the
18 assumption that you're using this as a factor in
19 downgrade?

20 MR. SULSKI: Well, I --

21 MR. ESSIG: I think that --

22 MR. SULSKI: Yeah, go ahead, Howard.

23 MR. ESSIG: I believe that that was
24 more than a general statement describing the range

1 of conditions within those waterways. It wasn't
2 meant to indicate that those areas that had
3 manicured banks were also areas that had physical
4 limitations for recreational content.

5 MS. WILLIAMS: But it's confusing the
6 way it was written, correct?

7 MR. ESSIG: Yes.

8 MS. DEXTER: Okay. Question 15: The
9 descriptions of physical attributes of all three
10 recreational use designations, non-recreational,
11 noncontact recreation, incidental contact recreation
12 on Page 33 and 34 of the Statement of Reasons states
13 that certain reaches are deep-draft, steep-walled
14 waterways. What thresholds must be met to fit this
15 description? Is there a definition? I guess we've
16 covered that part of it.

17 MR. SULSKI: I think if it's over your
18 head, and the walls are vertical.

19 MS. DEXTER: The water level --

20 MR. SULSKI: The water level is over
21 your head and the walls are vertical, that's a
22 pretty good description.

23 MS. DEXTER: Okay. Was there evidence
24 of existing recreational use found in any of these

1 areas?

2 MR. SULSKI: Yes.

3 MS. DEXTER: What did you find?

4 MR. SULSKI: We found some power
5 boating, paddle boating in some of these areas. Not
6 all of them, but some of them. But when they did
7 occur in these areas, they were generally planned
8 events that were worked out in other stakeholder
9 groups that involved water use, recreational users,
10 or watercraft users. There was the Port Development
11 Safety Counsel, which has routine meetings, and
12 these sort of events need to be worked out through
13 them. So those -- they did occur in those areas.
14 They were generally special events. They were
15 worked out in a stakeholder format because of safety
16 issues.

17 MS. DEXTER: Question 16: On Page 34
18 of the Statement of Reasons on Page 11 of the Sulski
19 pre-filed testimony, you state that the physical
20 limitations described are irreversible. Can you
21 explain what you mean by "irreversible?"

22 MR. SULSKI: Well, irreversible means
23 that it can't or very likely won't change.

24 MS. TIPSORD: Could you give us an

1 example?

2 MR. SULSKI: Sure. I was waiting for
3 that. Well, you can't stop navigation to protected
4 use. You can't allow buildings to fall into the
5 waterways, so you can't rip out shore lines and
6 revetments and sheet-piling walls. You can't allow
7 invasive species to get into Lake Michigan from the
8 Lower Illinois River and vice versa. It's very
9 difficult to relocate rock, vertical rock walls.
10 You don't -- we don't have the authority to declare
11 a no-wake zone across the entire system. We can't
12 force public access. You can't allow Lake
13 Michigan's water to flow uncontrolled into the
14 system. You can't allow river water during storm
15 events to flow uncontrolled out to the lake. Those
16 are things that you can't or won't do. That's what
17 -- those are some examples.

18 MS. TIPSORD: We have a followup in
19 the back of the room.

20 MS. BERKLAND: Tracy Berkland. Are
21 there examples of changes to the physical
22 limitations within this system that are a result of
23 natural courses that over time nature might lead to
24 changes in the physical limitations?

1 MR. SULSKI: Well, we spoke about
2 sediment improvement over time, sediment quality
3 improvement over time.

4 MS. BERKLAND: If the walls, for
5 example, are age-deteriorated, is there anyone
6 activity fixing or repairing those walls and keeping
7 them in the -- I guess in the form that they were
8 originally constructed in?

9 MR. SULSKI: That depends on whose
10 walls they are or what -- you know, what they're
11 protecting. I mean, if it's an existing facility
12 and they're utilizing that facility, they're going
13 to repair them to continue their operations or
14 whatever. The other extreme is in the case of --
15 well, they maintain navigation. Anything outside of
16 that is up for grabs, I guess.

17 MS. BERKLAND: Thank you.

18 MS. DEXTER: I'll move on to Question
19 17. On Page 42 of the Statement of Reasons, IEPA
20 concluded that portions of the Sanitary and Ship
21 Canal and the Brandon Pool cannot attain secondary
22 contact recreational uses. Is it possible that you
23 meant "incidental contact."

24 MR. SULSKI: Yes, and I apologize for

1 using that term "secondary contact." We are
2 replacing that use, and I did mean incidental and
3 noncontact.

4 MS. DEXTER: Okay. Question 18: On
5 Page 23 of the Statement of Reasons, it is stated
6 that the UAA was undertaken -- it is stated that the
7 UAA was undertaken to determine the existing and
8 potential uses of the CAWS. Can you please explain
9 how you evaluated the potential uses.

10 MS. WILLIAMS: Is it fair, here, to
11 limit -- to assume your questions are looking at
12 recreational use?

13 MS. DEXTER: Yes.

14 MR. SULSKI: Oh, you're just on
15 recreational use?

16 MS. DEXTER: Just --

17 MR. SULSKI: Okay. Recreational use
18 analysis involved first identifying existing uses
19 through the surveys that were conducted. In
20 addition, outreach to determine if there were any
21 uses beyond the existing uses that were identified
22 that were planned for the foreseeable future. And
23 based on the response from that, we determined that
24 the existing uses are the uses that are occurring in

1 the system. They're the attainable uses, and so
2 that's how we settled for -- that's how we settled
3 the attainability issue.

4 MS. DEXTER: You didn't do any
5 analysis beyond what's been planned for already to
6 see if anything beyond that is attainable?

7 MR. SULSKI: We didn't do anything
8 beyond what is planned for the foreseeable future,
9 making that inquiry.

10 MS. DEXTER: Question 19: Is IEPA
11 aware of water skiing taking place any where on the
12 CAWS or the Lower Des Plains?

13 MR. SULSKI: I'm aware of one incident
14 that I observed.

15 MS. DEXTER: Where was that?

16 MR. SULSKI: That was on the Calumet
17 Sag Channel somewhere around the Little Calumet,
18 where the Little Calumet River starts. One incident
19 that I saw. I'm not aware of any others.

20 MS. DEXTER: Question 20: In the
21 analysis of habitat conditions -- I'm sort of
22 changing gears here -- for aquatic life on Page 50
23 and 51 of the Statement of Reasons and in the Sulski
24 pre-filed testimony at Page 15, 16, and 17, it is

1 stating that habitat conditions are irreplaceable.
2 Is this the same -- are these the same sense of --
3 are they irreversible for the same reasons that you
4 described before?

5 MR. SULSKI: Yes. Well, in the
6 Statement of Reasons, the text on Page 58 and 17
7 talk about irreversible. The text on Page 51, 15,
8 and 16 talk about not reversible in the foreseeable
9 future. And so in the first case, the irreversible
10 are the things that I talked about. You're not
11 going to allow buildings to slump into the water.
12 And the second case not reversible in the
13 foreseeable future is where we talked about no one
14 has plans to upgrade the habitat to levels, you
15 know, that would be beyond what they are today that
16 we know of in the foreseeable future, or no one has
17 plans to install, you know, diving piers in the
18 Brandon Pool in the foreseeable future. So there is
19 a distinction there, and I hope that answered your
20 question.

21 MS. DEXTER: I think that's it.

22 MS. TIPSORD: All right. Let's take a
23 ten-minute break, and we'll go back on the record
24 with Exxon Mobil.

1 (Whereupon, a break was taken,
2 after which the following
3 proceedings were had.)

4 MS. TIPSORD: Several people have
5 asked me what time we're starting tomorrow. We're
6 going to start at 9:00 a.m., and we'll only go until
7 about 5:00 tomorrow. They do have a class in there
8 at 6:00 tomorrow night, and we'll have to carry all
9 this stuff out. So we'll probably need to wrap it
10 up a little after five.

11 And we're ready with Exxon Mobil.

12 MR. SAFLEY: Thank you, madame hearing
13 officer. My name is Tom Safley on behalf of Exxon
14 Mobil. And before getting into the questions, I do
15 need to correct a typo on the first page of our
16 pre-filed questions. It refers to the Upper Brandon
17 Island Pool segment, which would've been the Upper
18 Dresden Island Pool segment. I apologize for that.
19 At pages two and three of our pre-filed questions,
20 those questions have been asked and answered, so I'm
21 going to start on Page 4, Roman numeral two,
22 Question A1. And I'll -- in the interest of time --
23 try to move through these pretty quickly.

24 Question No.1: The Agency's

1 Statement of Reasons -- and I'll adhere at Page 16
2 -- states here that the Lower Des Plaines River was
3 modified from its original configuration to
4 accommodate shipping traffic and increased flow for
5 the Chicago Area Waterway System. Did the Agency --
6 this is expanding a little bit on the questions that
7 are written here. Did the Agency consider the
8 effect of its proposed water quality and
9 recreational use standards on shipping in the Lower
10 Des Plaines River?

11 MR. SULSKI: Did we consider it, yes.

12 MR. SAFLEY: Okay. Is the -- are the
13 Agency's conclusions based on those considerations
14 contained in the rulemaking proposal that was filed
15 with the Board?

16 MR. SULSKI: Well, our considerations
17 recognize that shipping is a use, that navigation
18 shipping is a use. So that's distributed through
19 all portions of the records. You know, if you want
20 I can maybe come up with a summary for you, but not
21 right at the moment.

22 MR. SAFLEY: Well -- and specific to
23 the Lower Des Plaines River, did the Agency conclude
24 that its proposed water quality standards or

1 recreational use standards would effect shipping in
2 the Lower Des Plaines River?

3 MR. SULSKI: We do not believe that
4 shipping will be impacted by our proposed standards.

5 MR. SAFLEY: Okay. And what's the
6 basis for that conclusion of yours?

7 MR. SULSKI: None of the water quality
8 standards or criteria that we're proposing would
9 have any bearing on ships or shipping or that.

10 MR. SAFLEY: What about recreational
11 uses?

12 MR. SULSKI: Recreational uses, we
13 propose uses that we believe will commence with the
14 types of navigation that occur in the various
15 reaches.

16 MR. SAFLEY: And I wanted to followup
17 on that point a little bit, specifically with regard
18 to some of the questions and answers when Stepan
19 Company's questions were going on earlier. And the
20 Agency testified -- my recollection is that the
21 Agency does not believe that recreation in the Lower
22 Des Plaines River will be adversely affected by the
23 shipping that also goes on in that channel. Is that
24 correct?

1 MR. SULSKI: That's correct for the
2 Upper Dresden Island Pool.

3 MR. SAFLEY: For the Upper Dresden
4 Island Pool.

5 MR. SULSKI: Yes.

6 MR. SAFLEY: Pardon me, for the Upper
7 Dresden Island Pool. And the Agency -- again, my
8 recollection is stated that at least part of the
9 reason for that conclusion was that there's a
10 shipping channel in the middle of the river, but
11 there are areas in the Upper Dresden Island Pool
12 that are not part of that shipping channel. Is that
13 correct?

14 MR. SULSKI: That's correct.

15 MR. SAFLEY: Did the Agency consider
16 the docking of barges when it was considering the
17 issue of the effect on recreation? Was it only
18 considering the traffic in the middle of the river?

19 MR. SULSKI: No, it's recognized that
20 fleeting and barging operations, floating,
21 off-loading, occur. But when I made the statement
22 that there appears to be sufficient areas for people
23 to recreate, I meant excluding those spots as well.

24 MR. SAFLEY: Okay. And that may have

1 been where I was unclear on your early testimony.
2 And just for the record, can you explain what you
3 mean by "fleeting operations?"

4 MR. SULSKI: Fleeting operations is
5 where a ship pulls up to load or offload materials.

6 MR. SAFLEY: What about -- what if --
7 what happens if a barge comes up the river prepared,
8 you know, with the intent of unloading and it can't
9 unload at that time because there's already
10 unloading occurring at whatever particular
11 facility's dock it's heading to, what happens to the
12 barge?

13 MR. SULSKI: I assume they wait until
14 they have space.

15 MR. SAFLEY: Okay. Did the Agency
16 consider that waiting with regard to all those in
17 analyzing the effect of shipping on recreation in
18 the Upper Dresden Island Pool?

19 MR. SULSKI: Well, that analysis
20 wasn't done specifically. However, I would go back
21 to my first statement that there are those
22 sufficient areas that would allow for recreation to
23 occur. I don't envision a barge waiting in an area
24 that's three or four feet deep in a tail water or

1 behind an island.

2 MR. SAFLEY: Would you agree that when
3 barge fleeting or loading is going on, barges are
4 moving outside the shipping channel that's running
5 down the middle of the river?

6 MR. SULSKI: I'm not sure how deep
7 exactly they -- what kind of depth they need to
8 maintain their float, maintain their --

9 MR. SAFLEY: Okay. And then would you
10 have the same answer if I was to reference the
11 assembly of barges into fleets? You know, to a
12 number of barges after loading or unloading is
13 completed to head back down the river? Would it be
14 the Agency's position that there still is sufficient
15 recreational area?

16 MR. SULSKI: Yes.

17 MR. SAFLEY: Despite needing room for
18 those activities?

19 MR. SULSKI: Yes.

20 MR. SAFLEY: Okay. Moving on to
21 Question B1, which is on Page 4. I think that some
22 of this question has been answered, but I'm going to
23 move to the last couple of lines of the question,
24 which references the percentage of shoreline in the

1 Upper Dresden Island Pool that is owned by industry
2 or city ownership versus public access land. Does
3 the Agency have any information on the percentage of
4 shoreline for the Upper Dresden Island Pool as far
5 as ownership between industrial owners, municipal
6 owners, private owners?

7 MR. SULSKI: Well, I don't have --
8 unless Scott can correct me if I'm wrong, but we
9 don't have it broken down into percentage of
10 shoreline owners. However, access doesn't
11 necessarily have to be from shore there. There's a
12 very large boat ramp and dock at I 55, and there's
13 no -- people aren't prohibited from going upstream
14 or getting into some of these side channels and
15 other waters that we talked about.

16 MR. SAFLEY: So you mean access for
17 boating in that circumstance?

18 MR. SULSKI: Correct.

19 MR. SAFLEY: Access for waiting might
20 be --

21 MR. SULSKI: Access for waiting is
22 possible. If you pull up into an area with a boat,
23 you can get out of the boat.

24 MR. SAFLEY: I think that our

1 Questions 2 from 4 to 5 has been answered. I'll
2 move on to Page 5, Question C1. And also on Page 6,
3 Question three at the bottom is a related question.
4 And again, trying to move through these quickly, has
5 the Agency -- well, let me just ask the question in
6 one, rather than trying to paraphrase it. Why is
7 the Upper Dresden Island Pool recreational use being
8 proposed as incidental contact recreation rather
9 than noncontact recreation? That's really the heart
10 of those two questions.

11 MR. SULSKI: We're just going --
12 you're not asking the question out of this, you're
13 just asking a question --

14 MR. SAFLEY: Well, I just -- I took
15 the last sentence of our C1, instead of trying to --
16 I'm trying to, in the interest of time, move forward
17 here. I can read the setup if it would be helpful.

18 MR. SULSKI: No, it's okay. I'm
19 sorry.

20 MR. SAFLEY: I'm just trying to...

21 MR. TWAIT: That was based on the
22 configuration of the waterway. As Rob said, there's
23 places to get small boats, and the availability of
24 the boat launch relative to the waterway.

1 MR. SAFLEY: And by the boat launch,
2 you mean the boat launch downstream --

3 MR. TWAIT: Downstream of the I 55
4 bridge.

5 MR. SAFLEY: On the other water bodies
6 in this rulemaking that are being designated as
7 noncontact recreation as opposed to incidental
8 contact, what is -- what different characteristics
9 are present in those other water bodies?

10 MR. SULSKI: In the noncontact
11 waterways?

12 MR. SAFLEY: Yes, the noncontact water
13 bodies.

14 MR. SULSKI: The noncontact -- the
15 only noncontact water body we have is the upper
16 reach of the Calumet River from Florence Avenue to
17 the lake.

18 MR. SAFLEY: Right.

19 MR. SULSKI: That's straight wall to
20 sheet-piling areas, all private property. Boats --
21 power boats just run up and back from the lake down
22 to the Little Calumet River through that zone.
23 There's not a boat launch that I know of like there
24 is on the Little Calumet, for example, or I 55.

1 MR. SAFLEY: Okay. But boats can
2 access that waterway in a similar way that they
3 access the Upper Dresden Island Pool, right?

4 MR. SULSKI: Boats can access that
5 waterway, but they can't wade there. It's a
6 deep-draft shipping channel.

7 MR. SAFLEY: At all locations?

8 MR. SULSKI: Vertical wall. That I'm
9 aware of, yes.

10 MR. SAFLEY: Okay. Our Question C2 is
11 more specific, and we'll hold that until the
12 specific questioning. I think our Question 3 at the
13 bottom of Page 5 and Page 6 was answered just a
14 little bit ago with regard to the statement on
15 Page 24 of the Agency's Statement of Reasons. So
16 moving on to our question, Roman numeral three,
17 Question 1 on Page 6, I'll read it in its entirety.
18 Incidental contact recreation. The Agency's
19 Statement of Reasons indicate that recreational use
20 surveys and other forms of research were conducted
21 during the UAA process to determine which specific
22 activities were taking place on the waterways and
23 need to be protected. How is this analysis
24 performed with regard to the Lower Des Plaines

1 River?

2 MR. TWAIT: This was -- I'd have to
3 refer to Attachment A, Page 7-22 through 47.

4 MR. SAFLEY: I'm sorry. Page 7 --

5 MR. TWAIT: 7-42 -- or 7-22 through
6 47.

7 MR. SAFLEY: And does that contain all
8 of the data on which the Agency relied with regard
9 to the -- this issue in the Lower Des Plaines River?

10 MR. TWAIT: Yes. The Agency did not
11 do any surveys like we did in the CAWS UAA.

12 MR. SAFLEY: Okay. And the Agency's
13 Statement of Reasons at Page 25 cites to Attachment
14 B at Page 111. Would the Agency agree that that
15 discussion does not relate to the Lower Des Plaines
16 River, it only relates to the Chicago Area Waterway
17 System?

18 MR. TWAIT: Yes. That's Attachment B?

19 MR. SAFLEY: Right.

20 MR. TWAIT: Yes.

21 MR. SAFLEY: Okay. We had some
22 trouble trying to -- just from the way it was
23 phrased in trying to figure out what the Agency
24 meant at that point. And I'm scrolling here --

1 pardon me -- to 7-22 to make sure I see what you
2 mean. Does this section at 7-22 to 7-47 include all
3 information on the dates and time that observations
4 regarding recreational use in the Lower Des Plaines
5 River were made?

6 MR. TWAIT: I don't believe we had any
7 additional information, so, yes.

8 MR. SAFLEY: Okay. So if the Agency
9 has the information about dates and times, it's
10 going to be in this document?

11 MR. TWAIT: I believe so.

12 MR. SAFLEY: And you're not aware of
13 any observation sheets or other notes that were
14 taken by observers that were within, you know, the
15 information was called from those and placed in the
16 document?

17 MR. TWAIT: No. Well, I take that
18 back. We did do -- the consultant talked to the
19 core of engineers and they talked about lockage of
20 recreational boats. But I do believe he talks about
21 that in here, but I don't know that I could site to
22 a specific page.

23 MR. ESSIG: It's 7-36.

24 MR. TWAIT: It's 7-35 and 36.

1 MR. SAFLEY: I'm just getting there.
2 Okay. And the table at 7-30 -- on Page 7-36, table
3 7-5 it's titled "Boat and Barge Passages to the
4 Illinois Waterway Locks in 2001." Does the Agency
5 have any information for any years, other than 2001,
6 on that, on the issue of lockage?

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

8 MR. SULSKI: We may have some
9 information upstream in Lockport in the CAWS UAA.

10 MR. SAFLEY: Okay.

11 MR. SULSKI: Or as part of the record
12 for the CAWS UAA. Part of the record. There is a
13 number of lockage data that was submitted and
14 included.

15 MR. SAFLEY: But as far as with regard
16 to the Lower Des Plaines River, the Agency doesn't
17 have anything beyond --

18 MR. SULSKI: Well, if they're coming
19 through Lockport, then --

20 MR. SAFLEY: Right. I understand
21 that. I think that our question, Roman numeral
22 three, number two on Page 6 has been asked and
23 answered. I think Question 3 has been asked and
24 answered. Question 4 on Page 7 begins: Security.

1 At Page 36 of its Statement of Reasons, the Agency
2 notes that recreational uses of the waterways and
3 issue in this rulemaking may be effected by special
4 homeland security issues that may apply to port
5 district properties. Has the Agency considered the
6 impact of security measures in place at facilities
7 in the Lower Des Plaines River would have on the
8 recreation in the waterway?

9 MR. SULSKI: We considered the issue.

10 MR. SAFLEY: And what was your
11 conclusion?

12 MR. SULSKI: Well, we considered it
13 with a meeting of the safety folks for which there
14 is a summary of that meaning in one of these
15 attachments. If somebody could find which
16 attachment that is while I finish the question, I'd
17 appreciate it. And these issues would apply
18 throughout the inland waterways.

19 MR. SAFLEY: Would -- I'm sorry. I
20 didn't mean to interrupt. Go ahead.

21 MR. SULSKI: No, that's all right.
22 The issues with respect to the Lower Des Plaines
23 would also apply in CAWS. That's why I'm making
24 that relationship. Although we didn't have a

1 specific meeting on the Lower Des Plaines, we did
2 have one in the CAWS UAA and the results would apply
3 to the Lower Des Plaines.

4 MR. SAFLEY: And that's what I was
5 going to follow up with. It was my understanding
6 that that meeting was regarding the Chicago Area
7 Waterway System.

8 MR. SULSKI: Yes, but a lot of the
9 discussions would involved the whole inland waterway
10 and involve the Coast Guard, et cetera.

11 MR. SAFLEY: And when you say the
12 "safety folks," who do you mean?

13 MR. SULSKI: Just let me tell you
14 that --

15 MR. SAFLEY: Sure.

16 MR. SULSKI: -- attachment JJ is the
17 minutes of the meeting at those safety posts. So
18 we're talking about the Coast Guard, Corp of
19 Engineers, Chicago Police Marine Unit, International
20 Port District. You'd have to look at the list of
21 individuals in attendance at that meeting.

22 MR. SAFLEY: Were facility
23 representatives with responsibility for security at
24 particular facilities along the water bodies invited

1 to the meeting?

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

3 MR. SAFLEY: Was a separate meeting
4 held with those security personnel?

5 MR. SULSKI: Not that I'm aware of.
6 If they were members of the SACK group, the results
7 of the safety meeting would've been brought to the
8 SACK group.

9 MR. SAFLEY: Moving on to our Question
10 5 on Page 7, the Agency notes that Page 37 of its
11 Statement of Reasons that existing recreational uses
12 in CAWS and Lower Des Plaines River were determined
13 from one, waterway surveys performed by UAA
14 contractors and stakeholders, two public input at
15 UAA and other public meetings, and three input or
16 numerous phone, letters, email, UAA website, and
17 other meeting inquiries. Has the Agency in its
18 rulemaking proposal -- or I would add separately
19 since the rulemaking began -- provided all written
20 documentation that resulted from these activities?

21 MR. SULSKI: I believe we have.

22 MR. SAFLEY: Okay. Would some of that
23 be some of the documents that were provided between
24 the last hearing and today?

1 MR. SULSKI: Yes.

2 MR. SAFLEY: Okay. Could we identify
3 those, which of those documents and admit them in
4 the record?

5 MR. SULSKI: Yes. While they're
6 looking, let me also tell you that I have listed
7 there Attachments A, B, J, K, L, and N as having
8 information pertinent to your question.

9 MR. SAFLEY: Great. And I'd just like
10 to clarify for the record which of the documents
11 that were admitted since the last hearing would fall
12 under these categories.

13 MS. WILLIAMS: There are -- in the
14 motion or the cover page that was submitted, they're
15 numbered eight, nine, and ten. Recreational surveys
16 to local government units and responses recreational
17 information pertaining to boat launches and other
18 recreational information, and recreational data from
19 2005 from the MWRD boat crew. Those are the last
20 three documents under IEPA's responses.

21 MR. SAFLEY: Okay. So then we'd be
22 correct that once -- now that we have those
23 documents, we have the body of written documentation
24 that was at the Agency's disposal?

1 MR. SULSKI: I believe so.

2 MR. SAFLEY: Thank you. Our Question
3 6 is more specific. We're going to hold on that and
4 actually all the way through Page 8, Page 9, of our
5 testimony -- pardon me -- of our questions. Up to
6 the top of Page 10 and Question 15 and all of that's
7 more specific and we'll hold that until later. I'm
8 going to start then with Roman numeral 4, Question
9 1, other questions relating to the proposal.

10 Question 1: On June 6, 2002, and July 18, 2002, the
11 Three Rivers Manufacturing Association, or TRMA,
12 submitted letters to the Agency regarding its
13 members' concerns related to the initial UAA process
14 and the state's effort to change the Lower Des
15 Plaines Waterway from secondary contact use to
16 general use.

17 Did the Agency ever respond to
18 these letters? And I think we established during
19 the last hearings that those letters are part of the
20 attachments to Attachment A to the Statement of
21 Reasons.

22 MS. WILLIAMS: Appendixes to the --

23 MR. SAFLEY: The appendixes to
24 Attachment A to the Statement of Reasons.

1 MS. TIPSORD: And we also -- I believe
2 we had admitted one of them as Exhibit 10 --

3 MR. SAFLEY: We also admitted one of
4 them as a separate exhibit and I don't recall the
5 number.

6 MS. TIPSORD: Exhibit 10.

7 MR. SAFLEY: Okay. Now that we've
8 identified those letters, did the Agency provide a
9 response to those letters?

10 MR. TWAIT: I don't know if the Agency
11 ever provided a written response to those letters.
12 The issues raised were taken into account, and if
13 any issues remain, I'm sure we can address any of
14 those.

15 MR. SAFLEY: And I didn't want to take
16 the time to go through each of the three letters
17 here in -- you know, in detail. But rather, you
18 know, to address them as they, kind of -- as issues
19 kind of come up throughout the rulemaking. But that
20 was the next question here. If the Agency is not
21 responsive to those letters, can the Agency provide
22 a response to the issues raised in these letters.
23 And what I'm hearing from you, Mr. Twait, is the
24 Agency did take them into account, or at least your

1 understanding is the Agency took the letters at
2 least to some extent into account in formulating the
3 rulemaking proposal, but did not ever provide any
4 kind of written response to that your aware of?

5 MR. TWAIT: That I'm aware of, yes.

6 MR. SAFLEY: Okay.

7 MR. TWAIT: However, a letter could've
8 gone out under Toby's name. I don't know.

9 MR. SAFLEY: Okay. So you don't have
10 any copies of any written response to those? Okay.
11 Our Question No. 2 is more specific, and we'll hold
12 it until later.

13 MS. WILLIAMS: Can --

14 MR. SAFLEY: I'm sorry.

15 MS. WILLIAMS: Can we -- in the
16 interest of being able to respond to that question
17 when we get back to it, can we ask in that Question
18 2 what is a --

19 MR. SAFLEY: Yeah, that's -- and
20 pardon me, that is a typographical error. That
21 should have been Illinois Association of Wastewater
22 Agencies, IAWA. I apologize. I should've made that
23 correction.

24 MS. WILLIAMS: That's okay.

1 MR. SAFLEY: And I think our Questions
2 3, 5, and 6 have been asked and answered. Four may
3 or may not be too specific. I guess I can go ahead
4 and ask it we can decide whether it falls within the
5 scope of what we're doing now or whether it should
6 be addressed later when we're getting into specific
7 waiter quality standards.

8 And the question as written is:
9 Other than Midwest Generation and the MWRDGC, has
10 the Agency in its rulemaking proposal discussed the
11 economic impact to dischargers to the CAWS in the
12 Lower Des Plaines and how long it may take for those
13 dischargers to obtain, install, and test control
14 equipment necessary to comply with these rules.

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

16 MR. SAFLEY: And I realize we've
17 talked about the economic impact already to some
18 extent. Does the -- did the Agency take into
19 consideration or analyze at all the time? Again,
20 how long it would take for dischargers to obtain,
21 install, and test controls?

22 MR. TWAIT: No. The only -- based on
23 a proposal, the only entity that commented on
24 needing additional time was MWRD.

1 MR. SAFLEY: Okay.

2 MR. TWAIT: So we did not build it in
3 anywhere else.

4 MR. SAFLEY: Okay. I think those are
5 all of our general questions right now. Thank you.

6 MS. TIPSORD: Then we start to the
7 more specific, and that starts, again, with you,
8 Mr. Safley, and IERG.

9 MR. SAFLEY: Yes, ma'am. Let me flip
10 through those questions, please.

11 MS. TIPSORD: More specific being now
12 we're going to start talking about the standards and
13 that type of stuff. And please, if you have a
14 question that goes in with where we're at, you don't
15 have to wait for your opportunity or your chance.
16 You can ask it so that we can keep -- like, if we're
17 talking about disinfection, let's talk about
18 disinfection all at once. If we're talking about
19 thermal, let's talk about thermal all at once, if
20 possible.

21 MR. SAFLEY: Again, Tom Safley on
22 behalf of the Illinois Environmental Regulatory
23 Group, and the majority of our questions were
24 general, and/or have already been asked and answered

1 in the course of other questioning. And actually, I
2 think there are only two questions left of IERG's
3 pre-filed questions that have not been asked and
4 answered. The first would be Question 7 on Page 5,
5 and I'll just read the question as written. It is
6 our understanding that significant portions of the
7 CAWS and Lower Des Plaines River currently may not
8 meet the proposed thermal and dissolved oxygen water
9 quality standards. Has the Agency evaluated the
10 water bodies to determine whether they currently
11 meet the proposed thermal and dissolved oxygen water
12 quality standards?

13 MR. TWAIT: Yes. I believe they do
14 not meet the proposed standards.

15 MR. SAFLEY: Okay. And would that be
16 true of the entire area -- pardon me -- the entire
17 area of these water bodies that the Agency has
18 proposed be affected by this rulemaking?

19 MR. TWAIT: I don't have specific --
20 well, could you be more specific?

21 MR. SAFLEY: Well, you just made the
22 broad statement that you do not believe that these
23 water bodies meet the thermal and dissolved oxygen
24 limits that the Agency has proposed. My first

1 question in response to that was, you know, that's a
2 pretty broad statement. Do you mean all of the
3 water bodies from the North Shore to the I 55
4 bridge, or are there exceptions to that conclusion?

5 MR. TWAIT: I'm sure there are
6 exceptions to that.

7 MR. SAFLEY: Do you have any specific
8 information on which water bodies the Agency's
9 concluded are or are not in compliance with the
10 proposed standards?

11 MR. ETTINGER: Excuse me, Counsel, I
12 think it would be helpful in regard to this question
13 to break down thermal and dissolved oxygen.

14 MR. SAFLEY: Sure.

15 MR. ETTINGER: Because I think
16 different segments violate different things.

17 MR. SAFLEY: That will be perfectly
18 fine.

19 MR. SULSKI: And we're going to have
20 to tag team between Scott and myself.

21 MR. SAFLEY: Sure. And I apologize, I
22 should've stated. I -- whomever of the Agency
23 employees who would like to answer the question, I
24 certainly don't mean to restrict. Let's just --

1 let's start with thermal.

2 MR. SULSKI: Well, I think that we
3 have to limit it to what was asked -- how the
4 waterways were assessed.

5 MR. SAFLEY: And that --

6 MR. SULSKI: That's in accordance with
7 general use standards and sometimes secondary
8 contact standards. That's how the original
9 assessment was done. The contractors looked at how
10 these waterways meet general use, or in some cases
11 secondary contact standards. And that's how the
12 assessment was done.

13 MR. SAFLEY: Okay. And that is
14 important. My -- you know, the question is -- that
15 we had asked was: Has the Agency evaluated the
16 water bodies to determine whether they currently
17 meet the proposed standards, not whether they meet
18 the secondary contact standards or the general use
19 standards. So has the Agency undertaken an
20 evaluation of these water bodies with reference to
21 the standards that are proposed in this rulemaking?

22 MR. SULSKI: And the simple answer
23 would be no.

24 MR. SAFLEY: Okay. Might there be

1 situations with the information that the Agency has
2 that it can draw conclusions based on the
3 evaluations it has done, even though those
4 evaluations were not specifically targeted to the
5 proposed standards?

6 MR. SULSKI: Yes.

7 MR. SAFLEY: Okay. And does the
8 Agency have any information where -- or
9 documentation or statements, you know, that reflect
10 how it might -- may have drawn those conclusions?

11 MR. SULSKI: Yes, and here's where
12 Scott and I will tag team.

13 MR. SAFLEY: Okay.

14 MR. SULSKI: Let's start with
15 temperature in the CAWS system.

16 MR. SAFLEY: Great.

17 MR. SULSKI: There's an indication
18 that there's temperature limitations in the south
19 branch of the Chicago River and the Upper reach to
20 the Chicago Sanitary Ship Canal.

21 MR. SAFLEY: And when you say --
22 pardon me. When you say there are temperature
23 limitations, you mean that currently it's your
24 understanding those water bodies do not comply with

1 the proposed rules?

2 MR. SULSKI: It's my guess that they
3 wouldn't comply with the proposed temperature
4 standards.

5 MR. SAFLEY: Okay. And that's based
6 on these other surveys that were conducted, albeit
7 under a different standard, but there is some
8 information there.

9 MR. SAFLEY: Correct.

10 MR. SAFLEY: Okay. And, Mr. Twait,
11 did you want to add to that?

12 MR. TWAIT: Yes. Exhibit 15 has some
13 appendix, table two, that lists different stations
14 on Cicero Avenue, Lockport, and Jefferson Street
15 that give you -- or that give some statistics on
16 temperature.

17 MR. SAFLEY: Okay.

18 MR. TWAIT: And you could make some
19 references from that.

20 MR. SAFLEY: So that would be part of
21 the information that you're talking about that you
22 could draw from to try to evaluate whether the water
23 -- whether at least the water bodies that were
24 referenced in that exhibit meet -- currently meet

1 the proposed standards?

2 MR. SULSKI: Correct.

3 MR. SAFLEY: Okay. Is there any
4 information that the Agency has on these surveys
5 that's not contained, either at that location in the
6 record or at other locations in the record?

7 MR. SULSKI: Not that I am aware of.

8 MR. SAFLEY: Okay.

9 MR. TWAIT: There's some additional
10 information at the I 55 bridge that Midwest
11 Generation generates. I don't believe that any of
12 that is part of the record.

13 MR. SAFLEY: Is it information that
14 the Agency has in its possession?

15 MR. TWAIT: I do believe we have quite
16 a bit of it.

17 MR. SAFLEY: Is that something the
18 Agency intends to put into the record?

19 MS. WILLIAMS: We could. Do you want
20 to describe how many pages you think we're talking
21 about?

22 MR. TWAIT: Each year a report is
23 generated, and I'm guessing it's an inch thick. Is
24 that accurate?

1 MS. FRANZETTI: I think you're right,
2 yeah.

3 MR. SAFLEY: Are those reports
4 something that the Agency reviewed in the context of
5 this rulemaking?

6 MR. TWAIT: No, I do not believe that
7 we reviewed it for compliance of the proposed
8 standard.

9 MS. FRANZETTI: And Mr. -- if I can
10 just interject?

11 MR. SAFLEY: Sure.

12 MS. FRANZETTI: Those reports are
13 submitted to show that we are staying in compliance
14 with the adjusted standard that is applicable at the
15 I 55 bridge or there is a compliance point --

16 MR. SAFLEY: Right.

17 MS. FRANZETTI: -- among others that
18 we have to meet at the I 55 bridge.

19 MS. TIPSORD: And, Ms. Franzetti, I'm
20 sure you're asking the Agency if that's correct.

21 MS. FRANZETTI: Yes. Does the Agency
22 agree with that?

23 MS. WILLIAMS: Sounds good.

24 MR. SULSKI: Go ahead, Scott.

1 MR. TWAIT: The Lower Des Plaines
2 report, I'm told, did use the data from the I 55
3 bridge, and I believe the dates were from '89 to
4 2000.

5 MR. ESSIG: '99 to 2000.

6 MR. TWAIT: '99 to 2000.

7 MR. SAFLEY: Okay. So part of that
8 data would be there. But if you wanted to compare
9 it to more recent data, we'd have to get ahold of
10 more recent reports. Okay. And I'll -- I'm not
11 necessarily asking right now, I just ask if the
12 Agency intended to put it in. I'll have to think
13 about whether it's something that I want to ask for.

14 MS. WILLIAMS: Not at this time.

15 MR. SAFLEY: Okay. That's fine. And
16 we're on the issue of temperature, and we talked --
17 we were talking about the Chicago River and the
18 Upper Chicago Sanitary and Ship Canal. Moving along
19 from those locations, I guess let's head -- keep
20 heading downstream to the lower part of the Chicago
21 and Sanitary Ship Canal. Does the Agency have any
22 information on whether that area currently meets or
23 would be in violation of the proposed temperature
24 standard?

1 MR. TWAIT: As I said before, it's --
2 some of the monetary data can be found in
3 Exhibit 15.

4 MR. SAFLEY: Okay. So that would
5 encompass that area as well?

6 MR. TWAIT: Yes.

7 MR. SAFLEY: Okay.

8 MR. TWAIT: There's -- there are
9 several stations that the Agency looked at that is
10 compiled in that attachment.

11 MR. SAFLEY: Okay. And I'm sorry,
12 what's the number for that again?

13 MR. TWAIT: Exhibit 15.

14 MR. SAFLEY: Exhibit 15.

15 MS. TIPSORD: The attachment to
16 Mr. Yoder's testimony that we put in as an exhibit.

17 MR. SAFLEY: Okay.

18 MS. TIPSORD: Attachment 2 to
19 Mr. Yoder's testimony.

20 MR. SAFLEY: Well, I don't have that
21 right in front of me.

22 MS. FRANZETTI: Do you need it? I
23 have it.

24 MR. SAFLEY: Yeah, if you have it.

1 I'll move on. Moving on to dissolved oxygen --

2 MS. TIPSORD: I'm sorry. Mr. Harley
3 has a follow up.

4 MR. HARLEY: Before moving on to
5 dissolved oxygen, for purposes of this question I'd
6 like to refer to the Calumet River, the Grand
7 Calumet River, the Little Calumet River, and the Cal
8 Sag Channel, collectively as the Calumets. On the
9 issue of temperature, is there any evidence that
10 you're aware of of thermal exceedances or potential
11 thermal exceedances in the Calumets?

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

13 MR. HARLEY: So we can basically take
14 thermal issues and put them aside for purposes of
15 the Calumets at this time?

16 MR. SULSKI: To my knowledge, yes.
17 You know, I'd have to run through the CAWS UAA
18 report Attachment B, but to the best of my
19 knowledge, right now the temperature was not a
20 factor that they identified in the Calumets, as you
21 described them.

22 MR. HARLEY: Okay. Thank you.

23 MR. ETTINGER: Can I just follow up on
24 that? Is it safe to say that temperature's not a

1 factor under the current proposal anywhere where the
2 temperature's not being effected by Midwest
3 Generation discharges?

4 MR. ANDES: Can you say that a little
5 louder?

6 MR. ETTINGER: Why don't we read the
7 question back because I'm not sure I can say it the
8 same way I read it the first time.

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

11 MR. TWAIT: There are some other heat
12 sources out there, like, such as the refineries and
13 some other cooling towers. Downtown Chicago they
14 have some cooling towers, but I don't know that -- I
15 don't know how much effect they have on the
16 receiving stream.

17 MR. ETTINGER: Okay. Unfortunately,
18 the names don't allow me to compact them into
19 something as cute as the Calumets, but looking at
20 the North Shore Channel, is there any reason to
21 believe that the North Shore Channel would violate
22 the thermal standard that's proposed?

23 MR. SULSKI: Not that I am aware of.

24 MR. ETTINGER: Looking, now, at the

1 north branch of the Chicago River, is there any
2 reason to believe that that would violate the
3 thermal standard that's proposed?

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

5 MR. ETTINGER: And looking at what you
6 call the Chicago River is there any reason to
7 believe that it would violate the thermal standard
8 that you've proposed?

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

10 MR. ETTINGER: Okay. Then the south
11 branch of the Chicago River receives the Midwest
12 Generation fixed discharge. Looking at that portion
13 of that that's north of the fixed discharge, is
14 there any reason to believe that that area would
15 violate the thermal standard that you proposed?

16 MR. SULSKI: Well, potentially,
17 because in -- perhaps in low-flow conditions where
18 water's not moving either way and there's a thermal
19 low going in both directions. And we haven't
20 quantified what the total loading is in the downtown
21 area from all the building -- office building
22 cooling systems.

23 MR. ETTINGER: Thank you.

24 MS. FRANZETTI: Just a followup

1 question on that. Were all of your answers also
2 based on considering your winter thermal proposed
3 standards as well as your summer?

4 MR. TWAIT: I believe so, since we
5 took into account the District's effluent
6 temperature of the Calumet facility and the north
7 side facility.

8 MS. FRANZETTI: Okay. And by took
9 into account, you mean the standards are based on
10 the effluent temperatures of the District plant?

11 MR. TWAIT: We based our background on
12 the Route 83 Cal Sag -- or no, Sanitary and Ship
13 Canal facility and also the effluent temperature of
14 the District, and chose the least restrictive of the
15 two.

16 MS. TIPSORD: Okay. Mr. Safley.

17 MR. SAFLEY: Sure. Then moving on to
18 dissolved oxygen, are there portions of any of the
19 water bodies affected by this -- or proposed to be
20 affected by this rulemaking that the Agency believes
21 are -- would not currently comply with the proposed
22 dissolved oxygen standards?

23 MR. SULSKI: Yes, there are waterways.

24 MR. SAFLEY: Okay. And which ones are

1 those?

2 MR. SULSKI: They would include the
3 North Shore channel -- now, I'm speaking from memory
4 from what I know, the CAWS UAA. And that would be
5 the north shore channel, the north branch, the
6 Chicago River south branch, Sanitary -- Chicago
7 Sanitary and Ship Canal. There are not issues that
8 we know of in the Calumet River or Lake Calumet
9 anywhere upstream of the O'Brien lock. We would --
10 there may or may not be issues in the Little Calumet
11 River and in the Grand Calumet River. There may be
12 some short-lived issues in the Cal Sag Channel,
13 Calumet Sag Channel, although we'd have to evaluate
14 that with respect to the new standards or the
15 proposed standards. That's about as far as I can
16 take you.

17 MR. SAFLEY: Okay. And before I move
18 on to the rest, you mentioned the UAA for the CAWS.
19 Is that where any data on dissolved oxygen --

20 MR. SULSKI: Yes.

21 MR. SAFLEY: -- would be located?

22 MR. SULSKI: Yes.

23 MR. SAFLEY: Is there any data the
24 Agency has on dissolved oxygen levels in those water

1 bodies that's not contained in that UAA?

2 MR. SULSKI: There probably is that is
3 just submitted as a routine matter by the District
4 to us as a part of other reporting or agreement
5 requirements on the ambient water quality
6 monitoring, for example. However, I don't think any
7 of that data would paint a different picture than is
8 already presented in the reports in the data that is
9 part of the record.

10 MR. SAFLEY: Would that other data
11 have been something that the Agency reviewed in
12 connection with this rulemaking?

13 MR. SULSKI: Only if it was included
14 in --

15 MR. SAFLEY: Okay. And then moving on
16 -- oh, I'm sorry. I didn't mean to interrupt.

17 MR. HARLEY: As to dissolved oxygen,
18 you used the terms "short-lived" in reference to the
19 Cal Sag channel. Could you describe a little bit
20 more what you meant by "short-lived?"

21 MR. SULSKI: Well, what I meant by
22 short-lived is frequency in duration. Frequency --
23 or not frequency, but duration of the exceedance, or
24 in this case, the -- falling below the limit.

1 Mostly associated with storm water, storm events.

2 In general, the DO is good except when we have storm
3 events.

4 MR. ETTINGER: You --

5 MR. HARLEY: And is that also true in
6 the Little Calumet and Grand Calumet?

7 MR. SULSKI: Yes.

8 MR. HARLEY: Thank you.

9 MR. ETTINGER: I'm just extending that
10 to the other CAWS waters that you spoke of. Could
11 you characterize what degree that's an ongoing
12 condition, or something that just happens as a
13 result of CSO events and the other CAWS regions that
14 you mentioned.

15 MR. SULSKI: Besides the Calumet, the
16 North Shore channel and that. We have two unique --
17 relatively unique water bodies in CAWS, which would
18 include the Upper North Shore Channel, and the south
19 -- work of the south branch, which are channeled by
20 limited or no flow. So the D.O. problems are
21 exacerbated in those two regions. Other than that,
22 once you get downstream of the wastewater treatment
23 plants, the D.O. is generally good until we have a
24 storm event and the sewers start to overflow and

1 then we get a drop, sometimes to zero, and then it
2 recovers in a couple of days or so. Depending on
3 the weather, it may take one or two or three days to
4 recover.

5 MR. SAFLEY: And we've been discussing
6 the Chicago Area Waterway System. Who should I ask
7 about the dissolved oxygen in the Lower Des Plaines
8 River?

9 MR. TWAIT: The contractor -- we were
10 comparing it to the general use standard, and the
11 contractor compared it to the general use standard,
12 and we're not proposing the general use standard, so
13 I haven't looked at the data very extensively. But
14 it looks like it would attain the proposed standard.

15 MR. SAFLEY: And you --

16 MR. TWAIT: And I'm basing that on
17 looking at the graph on 2-65 and the figure on 2-70
18 of Attachment A.

19 MR. SAFLEY: And would that apply to
20 both the Upper Dresden Island Pool and the Brandon
21 Pool?

22 MR. TWAIT: Yes.

23 MR. SAFLEY: And with regard to the
24 Upper Dresden Island Pool and the Brandon Pool, is

1 there any information that the Agency reviewed
2 regarding dissolved oxygen concentrations that's not
3 contained either in the UAA or elsewhere in the
4 Agency's rulemaking proposal?

5 MR. TWAIT: No, I don't believe
6 there's -- well, no. Once again, we have some D.O.
7 generation from the Midwest Generation reports, and
8 those are in the same documents with the
9 temperature.

10 MR. SAFLEY: Okay.

11 MR. TWAIT: But other than that, no.

12 MR. SAFLEY: Okay. That, I think,
13 concludes my Question 7. The only other question
14 that may not have been fully answered is Question 19
15 on Page 7, and I'll just read it as written: Does
16 the Agency have field data that it collected whether
17 it was provided by dischargers, relating to fish
18 populations and/or water temperature in the Chicago
19 Area Waterway System?

20 MR. SULSKI: Yes.

21 MR. SAFLEY: Okay. Have we discussed
22 all that?

23 MS. WILLIAMS: Can we please break
24 this -- I would like to break this question down,

1 though, because I'm not sure that --

2 MR. SAFLEY: Okay. Sure.

3 MS. WILLIAMS: Because of the and/or.

4 MR. SAFLEY: Sure that's fine. Fair
5 enough. How about relating to fish populations in
6 the Chicago Area Waterway System, have we discussed
7 all of the information that the Agency has on that
8 issue?

9 MR. SULSKI: We have -- the answer to
10 the question is yes, we have field data relating to
11 fish populations and/or water temperature in the
12 CAWS. We didn't collect the data ourselves.

13 MR. SAFLEY: Okay. But you have data
14 that was supplied to you?

15 MR. SULSKI: So that breaks up your
16 question. But we've been supplied data, correct.

17 MR. SAFLEY: Okay. And is there any
18 of that data that either -- that's not included in
19 the rulemaking proposal or that we haven't otherwise
20 discussed that -- essentially that we don't know
21 about?

22 MR. ESSIG: The Illinois Department of
23 Natural Resources.

24 MR. SAFLEY: Okay.

1 MR. ESSIG: They have fish data for
2 2006.

3 MR. SAFLEY: I'm sorry, Miss Diers is
4 opening the box and I can't hear you.

5 MS. DIERS: Sorry.

6 MR. ESSIG: I'm sorry. From the
7 Illinois Department of Natural Resources, we did
8 look at the data for 2006.

9 MR. SAFLEY: Okay. And that data is
10 not contained in the Agency --

11 MR. ESSIG: We do have it with us. I
12 think we brought it today.

13 MR. SULSKI: When we spoke about the
14 MWRD data earlier.

15 MR. SAFLEY: Right, right.

16 MR. SULSKI: Yeah.

17 MR. SAFLEY: And that's what I was
18 trying to figure out. For example, the IDNR data,
19 what data might the Agency had had at its disposal
20 that we were not aware of previously, or had not
21 been discussed previously. If we could introduce
22 that as an exhibit.

23 MS. TIPSORD: Oh, man, it's too late
24 in the day for this little print.

1 MS. WILLIAMS: But it's on one page.

2 MS. TIPSORD: It's on one page. I
3 have the Illinois Department of Natural Resources
4 Lake Michigan Tributary Fish Population Survey,
5 July 27 through 31st, 2006, which I will mark as
6 Exhibit 31 if there's no objection. Seeing none, it
7 is Exhibit 31. Get out the magnifying glasses.
8 Mr. Safley, go ahead.

9 MR. SAFLEY: Sure. I'm just trying to
10 make out the small print here.

11 MS. FRANZETTI: Mr. Safley?

12 MR. SAFLEY: Yes, ma'am? Oh, no, I'm
13 fine, thanks.

14 MS. FRANZETTI: I'm not as young as
15 Mr. Safley.

16 MR. SAFLEY: Well, I'm using my
17 bifocals. This appears to me to be a printout of a
18 spread sheet. Was anymore -- any further
19 information provided to you at all by the Department
20 of Natural Resources along with this, or just this
21 one?

22 MR. ESSIG: No, just the spreadsheet.

23 MR. SAFLEY: Okay. Well, I'm not
24 going to ask to go through that right now. That

1 takes care of fish populations in the CAWS. Any
2 additional information regarding fish populations in
3 the Lower Des Plaines River?

4 MR. SULSKI: Not that we're aware of.

5 MR. SAFLEY: Okay. Putting all of
6 them together -- and we've talked about the water
7 temperature data and the fish population data -- did
8 the Agency take the data into account including this
9 new Illinois Department of Natural Resources data in
10 developing the proposed thermal standards in this
11 rulemaking?

12 MR. TWAIT: The Agency looked at the
13 ambient data from several of the sites to pick its
14 quote, unquote, "background temperature" along with
15 the district's effluent temperature. So in that
16 respect, the Agency used the temperature. We did
17 not look to see whether it was violated in other
18 sections of the CAWS or the Lower Des Plains River.

19 MR. SAFLEY: Well, to follow up on
20 that, I had been under the impression that the
21 effluent from the MWRD was the sole source for
22 determining background, and now that's not the case.
23 There was this is some other data used to determine
24 the background thermal?

1 MR. TWAIT: Correct. For the
2 non-summer months -- well, let's start out by saying
3 for the summer months we used Chris Yoder's thermal
4 report. For the non-summer months, he was looking
5 -- or we used a quote, unquote "background
6 temperature," and we originally started out by using
7 Route 83 bridge on the Sanitary and Ship Canal as
8 our background.

9 We got some comments from MWRD
10 that their discharge was warmer in the winter than
11 the background that were -- from the ambient
12 station. And so we made determinations since they
13 were the majority of the river, or the source of the
14 river, that we would use their effluent in
15 conjunction with the ambient station as a quote,
16 unquote, "background temperature."

17 MR. SAFLEY: Okay. What about the
18 fish data? Did the Agency use this DNR or any of
19 the other fish data that it was provided in
20 determining its thermal standards, proposed thermal
21 standards?

22 MR. SAFLEY: No. We used -- Chris
23 Yoder came up with a representative species list for
24 the Lower Des Plaines River. For the Upper Dresden

1 Island Pool, we used 27 species. For the CAWS,
2 along with Brandon Pool, with used eight species,
3 and then for the CAWS A waters we used the eight
4 species plus white sucker.

5 MS. WILLIAMS: Do you guys have
6 anything to add?

7 MS. TIPSORD: We have a followup
8 question in the back.

9 MS. BERKLAND: I wonder if by using
10 the -- MWRD's effluent temperature values for the
11 background in the non-summer months if you took into
12 effect cooling that might take place after their
13 discharge went into the waterway?

14 MR. TWAIT: We did. The station that
15 we chose for background is downstream of MWRD's
16 Stickney facility. During the wintertime, their
17 discharge is cooler than -- or no, I'm sorry. It's
18 warmer than the ambient station, and during some of
19 the other non-summer months in the spring/fall,
20 their discharge is cooler than the ambient station.

21 MR. ETTINGER: I'm sorry. I was going
22 to wait on this because we have some questions on
23 the same thing, but I was confused by your
24 conjunction with -- could you explain what was

1 averaged with what to get the background temperature
2 during the various winter months? Or how did you
3 calculate the background temperature for January?

4 MR. TWAIT: Well, what we did is we
5 started with the ambient station, and we had those
6 into period averages. Sometimes the period average
7 was two weeks, sometimes it was the entire month.
8 And then we asked MWRD to provide their effluent
9 data in the same format with the same period
10 averages, and then we took the least stringent of
11 the two-day assess for each period average.

12 MR. ETTINGER: So you took the higher
13 of the Route 83 and Sanitary and Ship Canal or the
14 Metropolitan Water Reclamation District temperature?

15 MR. TWAIT: Yes.

16 MR. ETTINGER: Thank you.

17 MS. TIPSORD: Mr. Safley.

18 MR. SAFLEY: Thank you. Does the
19 Agency believe that the information that has --
20 either in this DNR table or otherwise regarding fish
21 that were caught or surveyed in the water bodies is
22 relevant to the determination of thermal limits for
23 these water bodies?

24 MR. TWAIT: Yes, I think it's

1 relevant, and I believe that Mr. Yoder went through
2 and determined what he thought would be a
3 representative aquatic species list. When he did
4 that, he was basically doing it for the Brandon
5 Pool, and we continued that through the entire CAWS
6 waterway. He did not come up with a representative
7 aquatic species -- well, I take that back. He came
8 up with -- he came up with options for the Agency to
9 use, and the Agency used eight species for the --
10 for the Brandon Pool, and then all the way through
11 the CAWS for the CAWS B waters. And then for the
12 CAWS A waters, we used the eight species plus white
13 sucker.

14 MR. SAFLEY: Let me ask the question a
15 little bit different way. Did this data from DNR
16 effect, at all, the eight species that were chosen,
17 or was it all taken into account, or was it -- did
18 it not play a part -- did these survey results not
19 play a part in the Agency's determination of thermal
20 limits for the Chicago Area Waterway System?

21 MR. ESSIG: I do not believe that they
22 were used for the development of that.

23 MR. SAFLEY: Okay. That's what I'm
24 trying to understand. Mr. Twait, I had asked if you

1 thought this data was relevant, and you said yes.
2 And I'm just trying to understand what you mean by
3 that in connection -- in linking that up with the
4 eight species that were chosen.

5 MR. TWAIT: I'll agree with Howard
6 that this data was not used specifically. Chris
7 used his expertise to come up with a representative
8 aquatic species list. So this data was not used in
9 that determination.

10 MS. TIPSORD: Chris being Chris Yoder?

11 MR. TWAIT: Chris Yoder.

12 MR. SAFLEY: And is it the Agency's
13 view that Mr. Yoder's approach to developing that
14 species list is the preferred method to determine
15 what the thermal level should be for that water
16 body?

17 MR. TWAIT: I can only answer that
18 that is how we did it. So that's -- so, yes.

19 MR. SAFLEY: I think those -- that
20 concludes what I wanted to ask with 19, and all the
21 rest of our questions have been answered. So thank
22 you.

23 MS. WILLIAMS: Can I just ask -- I'd
24 like to ask a followup.

1 MR. SAFLEY: Oh, sure.

2 MS. WILLIAMS: Because I'm possibly a
3 little confused myself. He's the biologist. Can
4 you guys explain for the record, the white sucker
5 was added to one of the lists, I believe, we talked
6 about already. Was there any -- was that just a
7 professional judgment decision, or was there data
8 that was looked at to determine whether that was an
9 appropriate addition or not?

10 MR. SMOGER: I can speak to my input
11 in that. I referred to the fish data in Attachment
12 B, the CAWS UAA, to look for a present absence of
13 white sucker. So I did refer to those data, fish
14 data, in Attachment B to do that.

15 MS. WILLIAMS: Thank you.

16 MR. ESSIG: I also checked IDNR data
17 from the Des Plains River at I-55 to the Wisconsin
18 state line from 1978 through 1990. I also looked at
19 their Des Plaines report in 2003, and eight site
20 samples on the Upper Des Plaines River as well as
21 some tributaries, Hickory Creek and Jackson Creek.

22 MS. WILLIAMS: For what purpose?

23 MR. ESSIG: And that was specifically
24 for the presence of white suckers and central stone

1 rollers, and I think that was it.

2 MR. SAFLEY: Are those IDNR --

3 MR. ESSIG: And also IDNR fish data
4 from the Kankakee River in 2005.

5 MR. SAFLEY: Is all of that IDNR data
6 contained in the record?

7 MR. ESSIG: No, it is not.

8 MR. SAFLEY: Can we get copies?

9 MR. ESSIG: Yes.

10 MR. ETTINGER: I'm sorry. I gather
11 you found that white sucker were present at some of
12 all of those sites?

13 MR. ESSIG: In the Des Plaines basin,
14 yes. They're present in the Kankakee, but rather
15 rarely, and what I found is the two sites on the
16 Kankakee closest to Des Plaines.

17 MS. TIPSORD: Anything further? All
18 right. Then let's go, I believe, to Midwest
19 Generation. Ms. Franzetti.

20 MS. FRANZETTI: If I can have just a
21 minute to get --

22 MS. TIPSORD: You sure can. I think
23 we're at, like, Page 12 of your questions. Is that
24 correct?

1 MS. FRANZETTI: I thought we were --
2 I'm -- like Mr. Diamond, my pagination's off from
3 yours, but roman five.

4 MS. TIPSORD: Five.

5 MS. FRANZETTI: Regulatory proposal.

6 MS. TIPSORD: Yes. Then we're on the
7 same page figuratively, if not literally.

8 MS. FRANZETTI: That's what I like to
9 hear.

10 MS. DEXTER: What page is that?

11 MS. TIPSORD: Page 12.

12 MS. DEXTER: Thank you.

13 MS. TIPSORD: And we'll go for about
14 another 15 or 20 minutes before we go for a little
15 longer break.

16 MS. FRANZETTI: Ready for me to begin?

17 MS. TIPSORD: Yes.

18 MS. FRANZETTI: Okay. These questions
19 get into just -- just to put them in a little bit of
20 context here, these questions get into the actual
21 language in the proposed rules and in trying to both
22 understand the language as well as evaluate whether
23 or not the language might be improved upon. So with
24 that, with respect to Part 301, definition section

1 of the proposed rules. There's a proposed
2 definition in Section 301.307 for the Lower Des
3 Plaines River, and the question is that the term
4 Lower Des Plaines River is commonly used to refer to
5 the stretch of the Des Plains River from the
6 confluence of the Chicago Sanitary and Ship to the
7 -- all the way down with the confluence of the
8 Kankakee River. And in this UAA proceeding, we're
9 defining the southern extent of the Lower Des
10 Plaines River as the 1-55 bridge. So has the Agency
11 considered that its abbreviated definition may cause
12 confusion, given its more limited scope and,
13 perhaps, instead another defined term should be used
14 to identify this more limited stretch of the river?

15 MR. SMOGOR: Well, given that there's
16 no body of water on standardized maps that has the
17 name Lower Des Plaines River, the use of the word
18 "lower" becomes pretty much whatever you want to
19 define it as. So given that, our definition is
20 pretty clear. We believe that calling that stretch
21 Lower Des Plaines River is valid.

22 MS. FRANZETTI: Okay. Moving on to
23 the next question, Part 302, the language of
24 proposed Section 302.402's purpose, entitled

1 purposes, and the language of proposed
2 Section 303.204, Chicago Area Waterway System and
3 Lower Des Plaines River waters are very similar.
4 Can you explain what is the intended difference
5 between these two proposed regulations?

6 MR. TWAIT: I think the purpose of
7 302.402 is to indicate that the water quality
8 standards apply to the segments designated in
9 303.204. And the purpose of 302.304 is cross
10 referenced as the standard in sub part B of 302.

11 MS. TIPSORD: You meant 303.204,
12 didn't you?

13 MR. TWAIT: Yeah.

14 MS. WILLIAMS: I think the simple
15 answer is primarily they're intended for the ease of
16 the reader to cross reference in the numeric
17 standards where to find the waters to which they
18 apply, and in the description of uses to cross
19 reference the numeric standards that apply to those
20 waters. I mean, I think that's the primary
21 intention.

22 MS. FRANZETTI: So when you say the
23 cross reference, you mean just define what section
24 of the rules will you find the proposed use

1 designation for a given area like CAWS A, CAWS B?

2 MS. WILLIAMS: I think that's what I
3 mean, yeah.

4 MS. FRANZETTI: Okay.

5 MS. WILLIAMS: Primarily.

6 MS. FRANZETTI: All right.

7 MS. WILLIAMS: I believe if you -- in
8 303 -- we're just talking about 402 right now,
9 right? Okay. That's fine. If you want, I was
10 going to just add, but I don't think it's part of
11 this question. In 303.304, I think we are also
12 describing the generic use designations that don't
13 fall under aquatic life or recreational in addition
14 to the cross reference purpose of that.

15 MS. FRANZETTI: Oh. So 30 -- in part
16 303.204 is supposed to identify what uses other than
17 the level of aquatic life or recreational use are
18 also protected as part of the use designation for
19 these water bodies?

20 MS. WILLIAMS: Oh, was that -- yes,
21 the answer was yes if that was a question. Sorry.

22 MS. FRANZETTI: I think B2 has been
23 covered, and moving on to C, Part 303 use
24 designations. Why did the Agency elect to use these

1 water bodies specific use designations? And by that
2 I mean Chicago Area Waterway System aquatic life use
3 A, Upper Dresden Pool, use designation, versus the
4 nonspecific classification approach used in the
5 existing Part 303 subpart B use designations.

6 MR. SULSKI: We tried to follow the
7 original organization of the text, and just
8 basically modified the text in a strike and
9 underline mode. So we just followed the format of
10 the original text, and that's how it worked out.

11 MS. FRANZETTI: I think you're miss
12 understanding my question. It's the difference
13 between -- your proposed use designations
14 incorporate in the use designation the specific
15 water body that to which the use designation
16 applies. So in other words, in your use
17 designation, like in 303.230, it's the Chicago Area
18 Waterway System aquatic life use A waters. So that,
19 for example, if you moved on to do a UAA on the
20 Kankakee, I would expect that your proposed aquatic
21 life use designation would be Kankakee River and
22 then something on whatever you're going to call its
23 aquatic life use designation.

24 Whereas the existing Illinois

1 classification system has used more generic
2 terminology, like general use and secondary contact,
3 which apply to more than one water body. So this
4 is, at least in my humble opinion, a divergence from
5 the type of use classification system state
6 regulations have contained, and so I'd like to know
7 why you chose this different course.

8 MS. WILLIAMS: I don't think that was
9 the intent, and we'd be happy to look at language
10 that drafts it differently. I think the intent --
11 right now all that 303 does with regard to secondary
12 contact is send you to a list of waters in a
13 separate place, 303.441, to find out where they
14 apply. Does that -- do you understand what I'm --
15 so it seemed, just to us, that it was more logical
16 to include those waters with the description of the
17 use. But that's certainly not the only way to do
18 it.

19 MS. FRANZETTI: Counsel, I -- and
20 actually I'm not raising the question as to the
21 listing of the waters in -- for example, I'm looking
22 at 303.230, which is the Chicago Area Waterway
23 System aquatic life use A waters. My question's
24 really not directed to the listing of the waters to

1 which that use designation applies that's set forth
2 there in subparagraphs A through F, but rather to
3 the title that of the use designation, or the use
4 classification, being limited to Chicago Area
5 Waterway System, rather than simply aquatic life use
6 A waters of which these specific ones, at least at
7 the outset, are proposed to fall into or be
8 classified as.

9 And let me -- if it may help,
10 because I'm not -- I'm not trying to confuse
11 anybody. I'm just trying to understand the
12 underlying rationale. Is it the rationale that is
13 expressed in the quote from the Statement of Reasons
14 in my next question that says on Page 24 of the
15 Statement of Reasons the Illinois EPA states as
16 follows: When the Board is faced with a proposal to
17 update the one size fits all use designations for
18 the rest of the state, IEPA expects there to be no
19 need to open these uses and standards designed to
20 apply specifically to these waters.

21 MS. WILLIAMS: Is that the reasoning?
22 Is that what you're asking.

23 MS. FRANZETTI: Yeah. Did you want to
24 just do use designations for these waters so that

1 they are specific to them and then if the use
2 classification system is changed in the future,
3 these will be sitting out there by themselves and
4 won't have to change anymore?

5 MS. WILLIAMS: I'm sure that's part of
6 what went into the organization as well, keeping it
7 free from being tied into other sections that may or
8 may not change in the future.

9 MS. TIPSORD: Miss Franzetti, if I
10 may, I guess I'm a little confused too from the
11 outset. The Chicago Area Waterway designation use
12 A, by putting the title of the water in it, you can
13 nervous use that use designation for the Mackinaw
14 River or for the Vermillion River. So, I mean, if
15 the intent is that you're never ever going to give
16 another stretch of river the same designated use, or
17 same types of uses, it is a divergence from what
18 we've done in the past, but if that's your intent
19 that these are site-specific and you would not ever
20 put another segment of a river in those use
21 designations, is that your intent? I mean, that
22 these would be, in effect, site-specific for these
23 sections of the rivers?

24 MR. SULSKI: That's understanding. My

1 understanding from the get-go is that we were going
2 to deal with the secondary contact waterways, get
3 rid of them, and find out through the UAA process
4 what we could -- what their potential was and on and
5 on through the UAA process. And to deal with them
6 as a distinct set of waterways and reaches
7 irregardless of what happens to the rest of the
8 state. So don't think that these are going to be
9 carried on to some other portion of the state or
10 that some other portion of the state is going to be
11 dragged into these. They're stand-alone
12 regulations.

13 MS. FRANZETTI: I'm going to jump over
14 my Question B just, in part, based on that answer
15 and go to C first. Why didn't the Agency instead
16 propose aquatic life use A and aquatic life use B
17 use designations that are nonspecific and can apply
18 to other waterways in the state that may be similar
19 to the water bodies involved in this rulemaking in
20 order to minimize the potential for multiple use
21 designations in the future that are duplicative or
22 overlapping in their scope and intent?

23 MR. SULSKI: On the response that came
24 from upstairs was that -- and I didn't necessarily

1 disagree -- is that these secondary contact
2 waterways are unique enough from any of the other
3 waterways in the state that we can -- we can and
4 should proceed in that fashion. Carving them out.

5 MS. FRANZETTI: I'm sorry. When you
6 say from "upstairs," could you be a little more
7 specific?

8 MR. SULSKI: Toby said so.

9 MS. FRANZETTI: Okay. And so is it
10 the -- if I can just ask a followup on that, so it's
11 the Agency's position that, for example, the Upper
12 Dresden Pool is unique unlike any other waters in
13 the state?

14 MR. TWAIT: I think that would be fair
15 to say, because when we were in the UAA groups, we
16 were trying to find a reference site and there were
17 lots of members on the Board or in the group that
18 were opposed to any type of reference site because
19 this was just a unique system.

20 MS. FRANZETTI: And the same would be
21 true of all of the various -- I'm not going to go
22 through each one of them -- all of the various water
23 segments that are part of the CAWS?

24 MR. SULSKI: Yes.

1 MS. FRANZETTI: Okay. Going back to
2 my Question B that I skipped, isn't there the
3 possibility that planned future revisions to the
4 existing Illinois use classification system may
5 support a different approach to these waters -- and
6 I'll just keep going -- and if so, why should they
7 be excluded from potential revisions based on
8 further consideration of what the updated Illinois
9 use classification should be?

10 MR. TWAIT: I think if these waters
11 merit revisions, they can certainly be revised.
12 However, the proposal was written so that if general
13 use is so divided or changed in some way that these
14 rules would not have to be revised.

15 MS. FRANZETTI: You see, I'm actually
16 -- I don't follow that. If you, for example, just
17 take away the designation Chicago Area Waterway
18 System from your title for aquatic life use A
19 waters, how is that hurting whatever you may decide
20 to do or not do with respect to the general use
21 classification in the future, including splitting it
22 into a couple of categories?

23 MS. WILLHITE: I can make a comment.
24 Marcia Willhite, Illinois EPA.

1 MS. TIPSORD: Who has been previously
2 sworn.

3 MS. WILLHITE: Yes, but it's been
4 awhile. We are in the process of looking at a
5 tiered approach to aquatic life uses, and that is
6 in its very initial stages. I anticipate that at
7 some point in the future, we will get to that point.
8 What the framework will be is hard to anticipate at
9 this point, but we were very committed to dealing
10 with these waters, with like Rob mentioned, had
11 been, kind of, separate from the other use
12 classification in the state since pretty much the
13 beginning. So we wanted to go ahead and deal with
14 those. Once we see a framework in the future, you
15 know, we'll see how these might possibly fit in.
16 But since we don't have that framework available to
17 us at this time, this is what makes sense to us at
18 this point.

19 MS. FRANZETTI: Okay. Moving on to D,
20 did the Illinois EPA consider the approach taken by
21 the state of Colorado, which has a use
22 classification category for waters that are
23 wastewater dominated or effluent dependant, e.g., a
24 high percentage of the flow is wastewater.

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

2 MS. FRANZETTI: Let me broaden that a
3 little bit. Did the Agency consider any other
4 state's approach to how you expand your existing use
5 classification system or create new use
6 classification categories?

7 MR. SULSKI: We did. The contractors
8 did. The contractors, you know, relied on a lot of
9 the work that was done in Ohio, and they based a lot
10 of their decisions on how they would base them if
11 they were in Ohio, and then we added in our final,
12 you know, proposal we had to bring that back to what
13 are -- what we were charged to do and to reframe it
14 in the context of what our regulations look like and
15 like that.

16 So yes, those other systems were
17 considered, but we were charged with dealing with
18 the system, not -- as Marcia said, taking the whole
19 state and, you know, starting with an entire tiered
20 system like as used in other states and waiting
21 until that's done before we deal with these
22 waterways. These waterways were at hand, and we
23 dealt with them, I guess, the best we could.

24 MS. FRANZETTI: So, Mr. Sulski, I'm

1 not sure I understand your answer. I recognize your
2 consultants may have looked at other states and how
3 they identified and described particular types or
4 categories of uses, but are you saying that in the
5 end, the Agency came up with this language separate
6 and apart from patterning it after another state's
7 use classification system? I think that's what
8 you're saying, but I'm not sure.

9 MR. SULSKI: Right. Well, we
10 patterned it after what the consultant's
11 recommendations were for what the aquatic life
12 potential and recreational potential of these
13 waterways were. So they were patterned after that,
14 and they brought -- of course the consultants
15 brought in their experience from other systems. And
16 so I guess what I'm trying to say is they were
17 considered to some extent, but really we looked at
18 what were the potentials of the waterways and how
19 could we best address that with our current system
20 and knowing that we're trying to deal with just
21 these waterways, and we ended up with a proposal
22 written as it is, as you see it.

23 MS. FRANZETTI: Moving on to E,
24 doesn't this approach increase the likelihood that

1 as the Illinois EPA reviews existing use
2 designations in other water bodies of the states,
3 such as in the context of TMDL's that my identify
4 the need for a use designation change, it will then
5 propose additional water-body specific use
6 classifications to the Board?

7 MR. TWAIT: No. There's nothing
8 preventing someone from going to site-specific
9 standards for any waters in the state, and for TMDL,
10 those are site-specific.

11 MS. FRANZETTI: My question is,
12 though, in doing a TMDL, isn't it sometimes the case
13 that the conclusion is the use designation of the
14 water body that's wrong, that's too high, and so it
15 leads you to just what you did here, a UAA. And if
16 you conclude that, yes, in fact, one of the UAA
17 factors has been satisfied, will we then be seeing
18 for that particular river, or whatever, salt creek,
19 aquatic life use D proposed use? I mean, you're
20 setting a precedent here of specific use
21 classifications that is unusual.

22 MS. WILLHITE: Yeah. Can I respond to
23 that?

24 MS. FRANZETTI: Yes.

1 MS. WILLHITE: The sequence is that
2 you identify the use designation for the water body,
3 you set the standards that protect those uses, you
4 assess against that, those standards, to see if
5 they're meeting those standards, and if they are
6 not, then, potentially, you request down the route
7 of a TMDL. Doing a TMDL does not result in changing
8 the use designation.

9 MS. FRANZETTI: Well, in this state it
10 may because we pretty much just have one use
11 designation for the rest of the waters in this state
12 and that's general use.

13 MS. WILLIAMS: I'd like to --

14 MS. WILLHITE: Well, I agree that we
15 are looking at the issue, specifically for aquatic
16 life use, of the fact that we have used general use
17 over the years and there are other approaches to
18 utilize. But the way we are approaching identifying
19 and compared waters is against the standards that
20 are in place and the use designations that are in
21 place currently.

22 MS. WILLIAMS: I would like to add one
23 other point specific to this proposal, which is that
24 legally the Agency is obligated to review

1 periodically any designations that do not reflect
2 full aquatic life or recreational potential under
3 the Clean Water Act. Therefore, we have an
4 obligation that's different with regard to the
5 secondary contact water bodies than we do with any
6 other general use issue that would come up where
7 they are not -- they are designated as being able to
8 attain the full goals of the Clean Water Act.

9 MS. TIPSORD: Mr. Ettinger, you had a
10 followup?

11 MR. ETTINGER: I was just going to ask
12 if down the road, four or five years from now, in
13 the context of developing an overall use designation
14 system we find that there's a whole lot of other
15 waters for which aquatic life A or aquatic life B
16 specified the proper criteria, would there be
17 anything that would stop the Agency or this Board
18 from striking the Chicago area part of that title
19 and using those classifications?

20 MS. WILLHITE: No.

21 MR. TWAIT: I don't think so.

22 MR. ETTINGER: Thank you.

23 MS. FRANZETTI: Well, that's all and
24 good, Mr. Ettinger, but that's not what they said in

1 their Statement of Reasons that they don't want to
2 change these down the road. Moving on, why isn't it
3 preferable to first propose an updated side-wide use
4 classification rulemaking, rather than proceed first
5 with an approach to adding new use classifications
6 to the Illinois water quality standards regulations?

7 MS. WILLIAMS: I think that's what I
8 was partly what I was trying to answer with my
9 clarification of the legal requirements. We have a
10 legal requirement on these waters that we don't have
11 for the rest of the state.

12 MS. FRANZETTI: And we've had that
13 legal requirement since when?

14 MS. WILLIAMS: A long time.

15 MS. WILLHITE: Aren't you glad we're
16 getting to it?

17 MS. FRANZETTI: Well, one could also
18 submit that one could wait until you're finished --
19 you've already started work on a use classification
20 system. I'll skip over G. I will ask H just, at
21 least, to see if you've considered it. Given the
22 water body's specific nature of these proposed use
23 designations, is this rulemaking accurately
24 characterized as a regulation of general

1 applicability under Illinois law?

2 MS. WILLIAMS: Yes.

3 MS. FRANZETTI: And your basis?

4 MS. WILLIAMS: I have reviewed the
5 Environmental Protection Act, and while the
6 regulation is certainly not statewide in
7 applicability, it's not, by my analysis,
8 site-specific. That's my conclusion. It's
9 certainly a bit of a hybrid, and we discussed that
10 when we decided to recommend holding the hearings in
11 Joliet and Chicago rather than Joliet and
12 Springfield. But I do still think there's a
13 requirement to hold hearings in two parts of the
14 state. That was the analysis that was done. That
15 was the reason for the analysis.

16 MS. FRANZETTI: Is there precedent in
17 other states for taking this type of water
18 body-specific approach to creating a revised use
19 classification system?

20 MR. SULSKI: I don't know.

21 MS. FRANZETTI: The proposed placement
22 of these water bodies specific proposed use
23 designation within subpart B, which is entitled
24 "nonspecific water use designation," does not seem

1 appropriate and may create confusion. Has the
2 Agency considered these issues and concerns?

3 MS. WILLIAMS: I would say that --
4 that I think that title of that section is
5 misleading, because that's where all of the general
6 use waters are described in that subpart as well.
7 So I'm not sure. I guess the answer is we don't
8 think it creates confusion beyond what may already
9 be there by the way it's set up.

10 MS. FRANZETTI: Well, Counsel,
11 wouldn't you agree that general use is a nonspecific
12 water use designation?

13 MS. WILLIAMS: But -- I'm sorry. Yes,
14 it's nonspecific as is secondary contact public and
15 includes processing any of the designations that
16 apply beyond a specific site, site-specific to an
17 individual facility or their general area.

18 MS. FRANZETTI: Okay. Moving on to
19 Section 303.204 --

20 MS. TIPSORD: Miss Franzetti, let's go
21 -- it's 10 after 5:00. Let's go ahead and take a
22 little longer break. Let's try and be back here by
23 6:00 and we'll go, then, until about 8:00 o'clock,
24 between 7:30 and 8:00.

1 (Whereupon, a break was taken,
2 after which the following
3 proceedings were had.)

4 MS. TIPSORD: Thank you, everybody,
5 for your prompt return. I really do appreciate it.
6 I know it's kind of hard, but thank you.

7 MS. FRANZETTI: We were at Question 3.
8 I think, though, in a prior answer before we broke,
9 I think Miss Williams might have answered 3A, and is
10 it basically that the purpose of Section 303.204 is
11 to list all of the uses that are to be protected by
12 this use -- by all of the use designations that
13 apply to the CAWS and the Lower Des Plaines?

14 MS. WILLIAMS: Yes. That, and to
15 cross reference where you would look for the numeric
16 criteria that --

17 MS. FRANZETTI: Water quality
18 standards. Okay. In this language, again in
19 302.204, what use designation is intended to be
20 described by the language, quote, "The highest
21 quality aquatic life and wildlife that is attainable
22 limited only by the physical condition of these
23 waters and hydrologic modifications to these
24 waters."

1 MR. SULSKI: Well, the potential --
2 the aquatic life potential described that are
3 commensurate to the habitat that is there.

4 MS. FRANZETTI: Okay. I think -- let
5 me ask it a little differently, Rob. Is what
6 section -- proposed Section 303.204 is attempting to
7 do by that language is to narratively state that for
8 the aquatic life uses that are separately stated in
9 different sections, the intent is for each use
10 classification to try and achieve the highest use --
11 aquatic use possible based on the conditions --

12 MR. SULSKI: That's correct.

13 MS. FRANZETTI: -- in those types of
14 waters?

15 MR. SULSKI: That's correct.

16 MS. FRANZETTI: So that's what this is
17 saying?

18 MR. SULSKI: Yes.

19 MS. FRANZETTI: It's really not
20 stating a use designation, it's stating a goal of
21 the aquatic life uses that have been designated in
22 the other sections you've proposed?

23 MR. SULSKI: That sounds good to me.

24 MS. FRANZETTI: Okay. Then let's skip

1 over -- I think that answers subpart I of that
2 question. Well, and then my next question is: Is
3 this language properly included in a use definition,
4 or is it more suited to being the intended goal of
5 the proposed aquatic life use designations for these
6 waterways?

7 MR. SULSKI: Well, in general terms,
8 it can -- you know, in general terms, it applies
9 here in 303.204. When you get to this separate use
10 designations, then, you know, it applies in more
11 specific terms.

12 MS. FRANZETTI: Well, let me move on
13 to the triple I there, question, because that's a
14 concern. You know, what is the regulatory effect of
15 this language, and let me just go on to read the
16 rest of the question. In other words, does the
17 highest quality aquatic life that is attainable
18 limited only by physical conditions and hydrologic
19 modifications change from year-to-year under this
20 type of use definition, or does it somehow modify
21 the aquatic use designations set forth in proposed
22 Sections 303.230, 303.235, and 303.237?

23 MS. WILLIAMS: I think this is two
24 questions. I mean -- right?

1 MS. FRANZETTI: Well, it is two
2 questions, but I'm trying to give an example about
3 what I'm concerned about as the potential regulatory
4 effect of the language you've chosen to include in
5 303.204.

6 MR. SULSKI: Well, let me just read
7 this question again, because --

8 MS. WILLIAMS: Can we just take the
9 first part, "does it change from year-to-year under
10 this type of use definition?"

11 MS. FRANZETTI: Okay.

12 MR. SULSKI: Well, I'm trying to be
13 more general. I don't -- no. The answer, I think,
14 is no.

15 MS. WILLIAMS: I think is no, right.
16 And then the next part, "does it somehow modify the
17 aquatic use designations set forth."

18 MR. SULSKI: And the answer to that, I
19 think, is no.

20 MS. WILLIAMS: Okay.

21 MS. FRANZETTI: Okay. Which leads us
22 to the next question: Why is this language
23 necessary when the aquatic life use designations
24 separately described in 303.230, 303.235, and

1 303.237 specify the proposed aquatic life use
2 designations? I'm not trying to be difficult, but
3 legal interpretation says you've got to give meaning
4 to the words used in the regulations, and I don't
5 see what added meaning or why this kind of language
6 in 303.240 is necessary, given the specific aquatic
7 life use designations proposed in the other three
8 sections.

9 MS. WILLIAMS: I mean, I think -- I
10 suspect you could replace it with a reference to
11 those sections, if that's what -- if someone
12 proposed changing it to simply say something like
13 the aquatic life use that's applicable somewhere
14 else, yeah.

15 MS. FRANZETTI: Okay. Moving on to C,
16 what uses are intended to be protected by the
17 language "commercial activity," including navigation
18 and industrial water supply uses and, quote,
19 "language?" Obviously navigation?

20 MR. SULSKI: Yeah, navigation.

21 MS. FRANZETTI: And obviously
22 industrial water supply use, but what other -- is
23 there other commercial activity, because it just
24 says "including."

1 MR. SULSKI: Well, it might be access
2 to the water. Access to the waterways whereby, you
3 know, a company is located on the waterways. So
4 access would be another example.

5 MS. FRANZETTI: Is it meant to protect
6 the existing industrial uses of the waterway?

7 MR. SULSKI: Well, in as much as water
8 quality standards are set to not -- so that we don't
9 interfere with those uses, but keep in mind our
10 other goals, use goals. I don't know how else to
11 respond to that.

12 MS. FRANZETTI: Okay. All right. I
13 think the second part of this has been asked and
14 answered. Let me -- just a moment on D to see if
15 that's been asked and answered earlier today. I
16 think that's been asked and answered. Moving on to
17 -- down in D, D1 has been asked. E, aquatic life
18 use designations, I think that's -- we've already
19 covered that based on your filed list last week of
20 exactly which factors apply to which water body
21 segments. So moving on from number one, let me
22 change number two to cover the -- instead make
23 reference to your newly-filed information, and give
24 me just a moment. I'm trying to find where that is,

1 which I'm not succeeding in doing.

2 The Agency filed last week with
3 the Board -- I'm going to hold it up so you can see
4 it -- a three-page chart that was entitled "UAA
5 Factor Applications to CAWS and Lower Des Plaines
6 River." This chart sets forth which of the UAA
7 factors for each segment of the CAWS and the Lower
8 Des Plaines River involved in this rulemaking? The
9 Agency found to basically apply to those segments,
10 correct?

11 MR. SULSKI: Yes.

12 MS. FRANZETTI: And I think this
13 morning it was established that the only one for
14 which none of the six UAA factors were found to
15 apply was for Upper Dresden Pool aquatic life use,
16 correct?

17 MR. SULSKI: Correct.

18 MS. FRANZETTI: Okay.

19 MS. TIPSORD: For the record, that's
20 Exhibit 29.

21 MS. FRANZETTI: Exhibit 29. Thank
22 you. Sorry about that. I'm moving down to Question
23 4, but give me a moment to see that 1, 2, and 3 are
24 already covered. I know, Mr. Sulski, you have

1 already testified that you consider D.O. and high
2 temperatures to be major water quality constraints,
3 or I think you've also called them major stressors,
4 and I'll stand corrected. I'm not sure you have
5 answered A there, 4A. Identify each of the reaches
6 for which Illinois EPA has concluded that high
7 temperatures are a major water quality constraint
8 and identify what attainable uses are not being met
9 in those segments. And I think the latter part of
10 that's been done by your chart.

11 MR. ETTINGER: I'm sorry. Is there a
12 question there, or a description?

13 MS. FRANZETTI: The question is:
14 Which of the reaches has the Illinois EPA concluded
15 that high temperatures are a major water quality
16 constraint?

17 MR. SULSKI: That would be --

18 MS. WILLIAMS: So that's different
19 than the question of which reaches we think would
20 not attain our proposal, right?

21 MS. FRANZETTI: Right. No, no, no.
22 I'm trying to focus on --

23 MS. WILLIAMS: Thank you.

24 MS. FRANZETTI: -- what your position

1 is in terms of where is temperature a major stressor
2 in this waterway.

3 MR. SULSKI: Okay.

4 MS. FRANZETTI: Is it the whole thing,
5 or is it only certain segments?

6 MR. SULSKI: Now, there's been several
7 evaluations done of temperature. One compared
8 temperatures against second -- existing secondary
9 contact standards, they compared them against
10 general use standards, and now we did a comparison
11 using our proposed method of standards, and we
12 viewed --

13 MS. FRANZETTI: Your proposed thermal
14 standards?

15 MR. SULSKI: Proposed thermal
16 standards.

17 MS. FRANZETTI: In this rulemaking?

18 MR. SULSKI: Correct. So with all
19 that information in mind, I would say that the south
20 branch of the Chicago River, the Upper Chicago
21 Sanitary Ship Canal. I would have to defer to Scott
22 for the Lower Des Plaines.

23 MR. TWAIT: Probably both of those,
24 both segments of the Lower Des Plaines.

1 MS. FRANZETTI: So the rest of the
2 Chicago Sanitary and Ship Canal and the Upper
3 Dresden Pool?

4 MR. TWAIT: And Brandon.

5 MS. FRANZETTI: And Brandon Pool.
6 Sorry. I skipped over that. Now, is that -- I
7 think what I want to understand is how you're using
8 the term "major water quality constraint," or when
9 you use the term "major stressor" if that's meant to
10 mean -- is that meant to mean the same thing?

11 MR. SULSKI: Constraint and stressor,
12 yes.

13 MS. FRANZETTI: Okay. Are you using
14 it -- based on your last answer, it seems you are
15 using it to mean that it's a parameter that is not
16 currently in compliance with your proposed water
17 quality standard in this rulemaking.

18 MR. SULSKI: Using it in terms of that
19 it is -- was identified as a parameter that will
20 prevent -- that is preventing the aquatic -- the
21 existing aquatic life from meeting the potential
22 aquatic life which we've outlined in the designated
23 use, in the proposed designated use.

24 MS. FRANZETTI: I thought -- in

1 testimony in January, I thought the Agency was
2 acknowledging that, for example, in the Chicago
3 Sanitary and Ship Canal it was the lack of habitat
4 that was preventing that segment from meeting the
5 aquatic life use goal of the Clean Water Act, not
6 temperature. So now I'm confused.

7 MR. SULSKI: Well, we're talking about
8 aquatic life use that we're proposing for aquatic
9 life use B or aquatic life use A, whichever the case
10 may be that in themselves are short of the Clean
11 Water Act goal. We already recognize that. We're
12 talking about attaining those designated uses that
13 we're proposing, let alone a Clean Water Act goal
14 use. We haven't proposed a Clean Water Act goal
15 use.

16 MS. FRANZETTI: Right. Okay. I
17 understand. So what you're telling me is that
18 you're using the term "major constraint" to mean
19 that if your proposed aquatic life uses for these
20 segments that you've identified are adopted by the
21 Board, they will immediately, basically, be impaired
22 for those uses due to temperature, correct?

23 MR. SULSKI: Correct, and D.O.

24 MS. FRANZETTI: So they will go on the

1 303 D list immediately, correct?

2 MR. SULSKI: They would have to be --
3 correct. They'd have to be assessed first with
4 respect to the new standards. Then after
5 assessment --

6 MS. FRANZETTI: But based on the data
7 that you've reviewed and are testifying to in
8 response to my questions, you basically already have
9 concluded that these water bodies would be impaired
10 under these proposed use designations based on
11 temperature?

12 MR. SULSKI: That's a fair assessment
13 on your part.

14 MS. FRANZETTI: And would they be
15 impaired for any other reason?

16 MR. SULSKI: Dissolved oxygen and
17 temperature are the main parameters. We also have
18 identified some other parameters that may have some
19 relatively lesser concerns, but may trigger --

20 MS. FRANZETTI: And if I could just
21 stay with this for another moment to make sure I
22 understand, and assuming that all of these segments
23 are put on the 303 D list, then they will become
24 candidates -- well, not candidates -- at some point

1 there will have to be TMDLs done on each of these
2 segments, correct?

3 MR. SULSKI: Unless something happens
4 in the interim that removes those stressors.

5 MS. FRANZETTI: Okay.

6 MR. ETTINGER: May I just ask this:
7 Is there anyone here on the panel who's in charge of
8 determining how to list things on a 303 D list and
9 is familiar with the guidances for when you put
10 something on the 303 D list?

11 MR. ESSIG: In terms of making the
12 assessment, yes, I've done those. But in terms of
13 the actual decision of when to actually put
14 something on the 303 D list, that's done by somebody
15 else.

16 MS. WILLHITE: I would add to that
17 that we have a methodology that's listed in each one
18 of our reports on how things get listed.

19 MR. ETTINGER: And there's a
20 complicated methodology and a USEPA guidance on five
21 categories as to when you list things. Is that
22 correct?

23 MS. WILLHITE: But specifically, in
24 our integrated report, for example, for 2006, our

1 methodology for listing things on 303 D is
2 identified there, and will be also listed in the
3 2008 report.

4 MS. FRANZETTI: Okay. Now I'm
5 confused again. So is -- are there -- you know, as
6 part of the regulated sector, we're just -- we're
7 trying to understand what you've proposed and what
8 its affects are going to be. It's -- I'm not trying
9 to trick anybody, but I'm here -- you know, in
10 answer to my questions, it is that temperature's a
11 major constraint. It's what would keep those
12 segments from meeting the use designation you're
13 proposing. Now, what beyond that is needed to
14 decide that it would, therefore, be impairing this
15 water body? You're saying it's preventing it from
16 meeting its designated use. Isn't that what the 303
17 D list contains, water bodies that don't meet their
18 use designation?

19 MS. WILLHITE: Yes. It's -- and
20 you've simplified part of it, essentially what the
21 decision is. But when I say a methodology, it
22 describes how the data were considered in the
23 assessment that led to that decision that there was
24 an impairment, and therefore it was going to be

1 listed on the 303 D list.

2 MS. FRANZETTI: But hasn't -- as part
3 of this proceeding, I thought earlier today the
4 Agency testified that that they have looked at the
5 temperature data and concluded that these segments
6 will not meet the proposed thermal standards if
7 adopted. Is that correct?

8 MR. SULSKI: It's been done under the
9 context of a UAA. In other words, we've looked --
10 we've had the contractors look at all the available
11 data. They did a couple of cuts on comparing them
12 to benchmarks, secondary contact general use. They
13 said in their reports that here's were temperature
14 and D.O. and all the rest of the parameters sit and
15 the leading stressors on these systems in terms of
16 chemical are D.O. and temperature on some other
17 parameters, which actually fell away after we got
18 additional data from MWRD.

19 So that strips it down to
20 temperature and D.O. as the leading stressors. So
21 in the UAA context, they were identified and then
22 the next process was, you know, look at ways that we
23 can eliminate the stressors to what we're proposing
24 as attainable uses, and that's why we got them into,

1 you know, supplemental aeration and flow
2 augmentation and temperature reduction all talked
3 about within the stakeholder process.

4 MS. FRANZETTI: Okay. Moving on to
5 4B, has the IEPA used a formal process of causal
6 analysis for determining what pollutants are
7 responsible for the waterway being biologically
8 degraded, such as EPA's 2000, quote, "stressor
9 identification guidance document, EPA 822 B 00/05,
10 the EPA Caddis, C-a-d-d-i-s, System or a recent
11 article on the subject by Suitor and others -- and
12 it's Suitor, GW, Roman 2, SM Kormier, K-o-r-m-i-e-r,
13 and SB Norton, 2007, Ecological Epidemiology and
14 Causal Analysis, Chapter 4 and GW Suitor second
15 edition, Ecological Risk Assessment, second edition,
16 Taylor and Francis, Boca Raton, Florida.

17 Any of those things been used by
18 the Agency to conduct a causal analysis for
19 determining which pollutants are responsible for the
20 waterway being biologically degraded?

21 MR. SULSKI: I don't believe that we
22 did it directly. The contractor, CDM or Novotany,
23 may have used these. I'm not sure. And to the
24 extent that these are incorporated into guidance --

1 water quality criteria guidance, I mean, that's
2 possible. We just compared existing conditions or
3 conditions that need to be met by looking at the
4 water quality criteria guidance. That's how our
5 decision was basically made.

6 MS. FRANZETTI: Okay. And if any of
7 your two UAA contractors used any of this, it should
8 be cited in their references in their reports,
9 correct?

10 MR. SULSKI: It should be, yes.

11 MS. FRANZETTI: Okay. And so if I
12 understand you, in terms of any analysis performed
13 to reach the conclusion that temperatures and major
14 water quality constraints, it's really just
15 comparing the water data recording -- recording
16 temperature in the waterway and comparing it to your
17 proposed thermal water quality standard?

18 MR. SULSKI: Well, it's first looking
19 at the use designation related to habitat, and then
20 comparing, among other things, water quality in the
21 -- existing water quality, as well as existing
22 biological community quality et cetera. So
23 several -- several comparisons.

24 MS. FRANZETTI: Okay. Does it really

1 come down to -- I think you mentioned earlier today
2 that based on your view, at least in the Upper
3 Des Plaines Pool, that the QHEI scores should result
4 in higher IBI scores. Is that your basis for
5 identifying temperature as a major constraint?

6 MR. SULSKI: The QHEI scores and the
7 general habitat assessment. So besides QHEI scores,
8 we're looking at these maps this morning. Compared
9 to the IBIs, there's a disparity there.

10 MS. FRANZETTI: In the Upper Dresden
11 Pool?

12 MR. SULSKI: In the Upper Dresden
13 Island Pool.

14 MS. FRANZETTI: Does that also exist
15 in the Brandon Pool?

16 MR. SULSKI: I have to look at the
17 numbers, and whoever can help me out quickest on
18 that.

19 MS. FRANZETTI: You know what, if --

20 MR. SULSKI: In the Statement of
21 Reasons, isn't there something that says that -- I
22 could be wrong, but I recollect that Brandon Pool
23 QHEIs are pretty level or even steven with what the
24 IBIs are.

1 MS. FRANZETTI: I think so.

2 MR. SULSKI: Well, I'll have to look.

3 MS. FRANZETTI: At the Brandon Pool --

4 MR. SULSKI: It's close.

5 MS. FRANZETTI: Sorry. The poor court
6 reporter, we're both talking.

7 MR. SULSKI: That's all right.

8 MS. FRANZETTI: The Brandon Pool
9 QHEIs, those are down there in that low category of
10 poor numbers --

11 MR. SULSKI: Yes.

12 MS. FRANZETTI: -- that we've been
13 focusing -- the below 46. Nobody questions not
14 attaining aquatic life use goals of the Clean Water
15 Act. And so what you're saying is you think based
16 on recollection the IBI scores are commensurate with
17 the poor QHEI scores?

18 MR. SULSKI: Howard's going to have a
19 look.

20 MS. FRANZETTI: Okay.

21 MR. SULSKI: That's what I recollect.

22 MS. FRANZETTI: Okay. Because I
23 understand, then, where your evaluation of QHEI,
24 IBI, and observed habitat Upper Dresden lead you to

1 conclude that you think there should be a better,
2 for example, fish community in Upper Dresden than is
3 there. But I don't follow it for Brandon if the
4 QHEI and the IBI scores are commensurate. They're
5 both pretty bad.

6 MR. SULSKI: They're both pretty what?

7 MS. FRANZETTI: Bad.

8 MR. SULSKI: Pretty bad.

9 MS. FRANZETTI: Yeah.

10 MR. SULSKI: Okay.

11 MS. FRANZETTI: So how is temperature
12 a major constraint that is not allowing Brandon Pool
13 to attain what you think is its attainable use?

14 MR. SULSKI: Well, this is based on a
15 new criteria that we're adopting, and a report that
16 says the existing criteria is garbage, it's lethal.

17 MS. FRANZETTI: Okay. So what you're
18 saying is that the -- you can't leave the existing
19 temperature water quality standard in place for the
20 aquatic life use B designation. It's not protective
21 of that use, correct?

22 MR. SULSKI: Correct.

23 MS. FRANZETTI: And it's the Agency's
24 opinion that its proposed thermal water quality

1 standard is protective of aquatic life use B?

2 MR. SULSKI: Correct.

3 MS. FRANZETTI: And because existing
4 thermal levels in Brandon Pool are above your
5 proposed water quality standard, that's why
6 temperature is a major constraint in Brandon Pool?

7 MR. SULSKI: Correct.

8 MS. FRANZETTI: Okay. Now I
9 understand. And I think you've answered with that
10 C, D -- let's see. Well, let me ask E just to be
11 clear. Is it Illinois EPA's position that none of
12 the following are major water quality constraints in
13 the subject reaches, and that is: Lack of adequate
14 habitat, CSOs, non-point source urban runoff, and
15 flow alteration/modifications? I just want to be
16 clear whether we're just talking D.O., low D.O. and
17 high temperature are the only major water quality
18 constraints in the Agency's opinion.

19 MR. SULSKI: The lack of adequate
20 habitat is the basis in all the waterways, the use A
21 and use B waterways, for proposing a designated use
22 that falls below the Clean Water Act goal. So lack
23 of habitat is incorporated into the use. So then
24 once you have that use, then the question -- and

1 correct -- I don't want to put questions in your
2 mouth, so the question becomes CSOs and non-point
3 source urban runoff and flow alterations and
4 modifications are they not stressors? Is that your
5 question? Is that a fair --

6 MS. FRANZETTI: Right. I want to know
7 what makes your list of major stressors, or major
8 constraints.

9 MR. SULSKI: CSOs and non-point source
10 urban runoff would likely contribute to a stressor
11 on the list, and that would be D.O. Those -- the
12 CSOs are the major source of low D.O. It's been
13 shown in the reports. Non-point source urban runoff
14 is a much lesser stress eclipsed by the others, and
15 there's several reasons for that. Number one, we
16 talked about flow disparity and how the system is
17 basically eclipsed by flow from the wastewater
18 treatment plants.

19 MS. FRANZETTI: Can I stop you there
20 for a second?

21 MR. SULSKI: Yes.

22 MS. FRANZETTI: Flow disparity and
23 it's eclipsed by -- I'm not following why that
24 diminishes non-point source urban runoff as a

1 stressor to the system.

2 MR. SULSKI: Well, when you put a drop
3 in a bucket, it's hard to find the drop.

4 MS. FRANZETTI: Oh, so you're
5 referring to the non-point source urban runoff as a
6 mere drop in a bucket.

7 MR. SULSKI: Yes.

8 MS. FRANZETTI: And that's based -- I
9 mean, do you have flow or volume of non-point source
10 runoff data that you're basing that on?

11 MR. SULSKI: Well, we know what the
12 flow of the system is and we know what the flow of
13 the wastewater treatment plants are and roughly what
14 the flow of the CSOs are.

15 MS. FRANZETTI: And so that does --
16 you subtract all that and there doesn't leave much
17 left for non-point source runoff?

18 MR. SULSKI: That's correct.

19 MS. FRANZETTI: That's what you're
20 saying?

21 MR. SULSKI: In addition, you know,
22 non-point source comes from direct runoff to
23 waterways. Well, we're in a combined sewer area
24 where that non-point doesn't go into the waterway,

1 it goes into the sewers.

2 MS. FRANZETTI: In Joliet?

3 MR. SULSKI: In some cases, yes.

4 MS. FRANZETTI: Not all cases, though,
5 right?

6 MR. SULSKI: Not all cases. But
7 overall in the system, the whole Chicago
8 metropolitan area, substantial portions of it are
9 combined sewer areas. So you have to strip those
10 areas out of the non-point source realm.

11 MS. FRANZETTI: Okay.

12 MR. SULSKI: They go into the sewers.
13 They get -- they're captured, they get treated,
14 fully treated. If they don't get captured, well,
15 then they get CSOed out into the waterway so then
16 some of it gets translated there. But then that's
17 back to the CSOs.

18 MS. FRANZETTI: And on flow
19 alterations/modifications, would your answer --
20 would you put that in the same category you put lack
21 of adequate habitat and say that's already been
22 addressed by the use designation we've chosen?

23 MR. SULSKI: I think that would be a
24 fair way to do it.

1 MS. FRANZETTI: Right. Except in the
2 Upper Dresden Pool, right?

3 MR. SULSKI: Yes.

4 MS. FRANZETTI: Mm-hmm. Now, just so,
5 again, so I understand how the Agency's using
6 terminology in the next question: What minimum
7 temperature begins the range of temperatures that
8 are referred to here as high, and "here" meaning in
9 your testimony, in the Statement of Reasons, when
10 you used the phrase "high temperatures," where's
11 your -- where's the beginning of high temperatures,
12 numerically?

13 MR. TWAIT: I think the way we've used
14 it here, I think we're just talking about above the
15 proposed water quality standards.

16 MS. FRANZETTI: Okay. Now -- okay. I
17 think I thought you were using a number a little
18 higher than that, but okay. With respect to --
19 moving on to G-- and maybe I need to rephrase it a
20 little bit based on that answer. My question is:
21 Do the temperatures in the water column basically
22 vary out there in -- and let me stick, first, with
23 the case that makes a difference -- Upper Dresden
24 Pool? Do these quote, unquote, "high temperatures"

1 tend to be at the surface, or tend to be virtually
2 all the way down the vertical extent of the water
3 column?

4 MR. TWAIT: I believe the highest
5 temperatures will normally be at the surface.

6 MS. FRANZETTI: Okay. Do you have any
7 sense of whether after you get beyond the surface
8 that the water temperatures in Dresden Pool might be
9 close to, at, what you're proposing as the thermal
10 standards?

11 MR. TWAIT: I do not know the answer
12 to that. The only monitoring that we have is at the
13 1-55 bridge.

14 MS. FRANZETTI: And that's, again, the
15 Midwest General monitoring you're referring to?

16 MR. TWAIT: Yes, and I don't know what
17 depth that monitor is at.

18 MS. FRANZETTI: Do you know what depth
19 that monitor is at? Well, we'll tie this up later.
20 I'm being told by the person who has a role in
21 getting that data and presenting it to -- submitting
22 it to the Agency that the depth is three feet for
23 those -- for that monitoring station of ours at
24 Midwest Gen's at 1-55 bridge. Okay.

1 MR. ETTINGER: Can I just break in?
2 Have you ever looked at the flows of a plant
3 compared to the flows of a river?

4 MR. SULSKI: Yes.

5 MR. ETTINGER: Sometimes are the flows
6 of the plant as high or higher than the flow of the
7 river?

8 MR. SULSKI: Yes.

9 MS. FRANZETTI: And is the fact that
10 -- just to finish that thought -- is the fact that
11 the flow of the plant, and by that, I think, you
12 mean the discharge flow from the Midwest Gen plant.
13 Is that what you're talking about when you answered
14 that question?

15 MR. SULSKI: Yes.

16 MS. FRANZETTI: Okay. Is the flow
17 volume of the Midwest Gen discharges in Upper
18 Dresden Pool sometimes above the flow of the pool --
19 because it is a pool and there isn't a flow going
20 down, but rather it's like a bathtub to some extent.

21 MR. ESSIG: No. I think there's --
22 usually there is flow through the Brandon Bay. It's
23 not a bathtub.

24 MS. FRANZETTI: Okay. There's flow at

1 all times, but doesn't the level of flow change
2 significantly?

3 MR. ESSIG: Well, yes, as with any
4 river, yes. It's going to change.

5 MS. FRANZETTI: Okay. So when you're
6 answering the question that sometimes Midwest Gen's
7 flow volume is more than the flow in the Pool, are
8 we talking about those low flow times in Upper
9 Dresden Pool?

10 MR. SULSKI: There was an analysis
11 which Julia and I were involved with in trying to
12 answer a reporter on that, and we came up with some
13 figures and bounced them back and forth, and it
14 depends on the time of the year. It's not only on
15 low flow. There's a time when some of the plant's
16 flows exceed the waterway flow. Where that flow is
17 surfaced, low, this side, that side, I don't know.

18 MS. FRANZETTI: Okay. Moving -- I'm
19 skipping H, down to I. If you know, for each of the
20 reaches that we've identified -- you've identified
21 as being subject to these high temperatures, what
22 are the causes of the high temperatures referred to
23 in your testimony? Again, if you know.

24 MR. SULSKI: Primarily, the power

1 plant effluence.

2 MS. FRANZETTI: Anything else?

3 MR. SULSKI: Not that I can think of.

4 MS. FRANZETTI: Moving on to Question
5 5, I think you may have anticipated this back in
6 January, and so I'm going to restate it as I
7 recollect. Is the reason in the -- that temperature
8 is not identified as a cause of non to partial
9 attainment of beneficial uses in your 305 B report
10 is because it was the Agency's position that the
11 ambient thermal levels in the Lower Des Plaines
12 River were meeting secondary contact standards?

13 MR. ESSIG: Yes.

14 MS. FRANZETTI: And you may have
15 already answered six, but I'm going to jump to the
16 heart of it. Did the Agency consider the presence
17 of endocrine disrupting chemicals in this effluent
18 dominated system as a potential cause of
19 non-attainment?

20 MR. SULSKI: No. There was -- there
21 was no criteria for us to go by on this, so no.

22 MS. FRANZETTI: If the stressors are
23 present, if endocrine disrupting chemicals are
24 present, is there any way to remove them from the

1 system, to your knowledge?

2 MR. SULSKI: I don't know.

3 MS. FRANZETTI: Moving on to No. 7,
4 and let me rephrase that opening part of the
5 question. That isn't really a question, so I'll put
6 it in the form of a question. Does the Agency agree
7 that there is a clear link established by the USEPA
8 between sediment contamination and fish tissue
9 advisories?

10 MR. SULSKI: The USEPA suggests that
11 sediments are a route for fish flesh contamination,
12 yes.

13 MS. FRANZETTI: All right. So do you
14 agree that USEPA does believe there is a clear link
15 between having sediment contamination and fish
16 tissue advisories?

17 MR. SULSKI: It's a potential. It's
18 one of several potential links.

19 MS. FRANZETTI: All right. Well,
20 given, then -- and move on to A. Given that the
21 fish in this system exceed fish tissue advisories
22 for mercury and PCBs, isn't this likely due to the
23 contaminated sediments that are present?

24 MR. SULSKI: I'm not sure. I mean --

1 MS. WILLHITE: I can maybe address
2 that. We have not done any kind of analysis of
3 cycling of these contaminants of the fish tissues.
4 So we can't say with confidence that it's due to
5 sediments or atmospheric deposition or what.

6 MR. ESSIG: Although I could add,
7 though, that with the advisories statewide that we
8 have PCBs and mercury, and in some of the basis that
9 these advisories occur in, there are sites in those
10 basins where sediment does not appear to be
11 contaminated with PCBs. They're below the detection
12 in some of those sediments. So I don't think
13 there's a direct -- clearly a direct link to some of
14 the contamination.

15 MS. FRANZETTI: Isn't there sediment
16 data for this waterway showing that there are PCBs
17 and elevated concentrations present?

18 MR. ESSIG: Yes.

19 MS. FRANZETTI: Okay. But you don't
20 think that's a contributing factor?

21 MR. ESSIG: Well, it's contributing,
22 but as I was trying to point out, there are other
23 water bodies that don't have that level of PCBs and
24 they also have fish flesh contaminants. So there

1 is, you know -- only looking at this waterway, you
2 could probably say this appears to be a direct link
3 in all cases, but it isn't.

4 MS. FRANZETTI: Okay. So not in all
5 cases, but often it is the case?

6 MR. ESSIG: Yes.

7 MS. FRANZETTI: All right. Do the
8 contaminated sediments present a risk both to humans
9 and wildlife?

10 MR. SULSKI: I don't know. We don't
11 have enough data to make that.

12 MS. FRANZETTI: In Upper Dresden Pool,
13 isn't the proposed recreational use one that would
14 be consistent with kids wading along the shore line?

15 MR. SULSKI: Yes.

16 MS. FRANZETTI: All right. But we
17 don't know whether there are contaminated sediments
18 in those areas where we would be basically
19 encouraging that kind of activity, correct?

20 MR. SULSKI: The UAA -- the CAWS UAA
21 contractor spoke with one of our toxicologists, the
22 Agency's toxicologist, early on in the process with
23 just some bulk chemistry data, and wondered whether
24 just, straight out, the bulk chemistry would present

1 a dermal contact risk, and the response was no.
2 None of the levels in those sediments would present
3 a bulk -- you know, a skin contact risk.

4 MS. FRANZETTI: Okay. So if I
5 understand what you're saying correctly, you have
6 enough sediment data to make that judgment?

7 MR. SULSKI: That one.

8 MS. FRANZETTI: Just that one?

9 MR. SULSKI: Yes.

10 MS. FRANZETTI: Does that -- and
11 that's dermal, not ingestion?

12 MR. SULSKI: Correct.

13 MS. FRANZETTI: And is that the basis
14 on which the Agency still believes that its proposed
15 recreational use level is appropriate?

16 MR. SULSKI: Yes. That is one of the
17 factors that was considered when we -- when we set
18 the recreational use standards.

19 MS. FRANZETTI: Okay. Now, is that --
20 I don't recall reading it, but it may be mentioned
21 in your Statement of Reasons or other filings. Is
22 that part of the record that you've filed this
23 review by the toxicologist that says the levels in
24 the contaminated sediments won't cause dermal

1 exposure problems?

2 MR. SULSKI: I'm going to have to get
3 back to you on that one.

4 MS. FRANZETTI: Okay.

5 MR. SULSKI: I can't recall exactly
6 where that might be in the record, but that we will
7 get back to you with.

8 MS. FRANZETTI: Okay. Are the CSOs
9 that exist in the waterway a contributing,
10 continuing source of mercury to the system that will
11 continue for many years?

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

14 MS. FRANZETTI: Okay.

15 MR. SULSKI: There's not continuous --
16 I don't know the answer to that.

17 MS. FRANZETTI: And I think this is
18 the case, but when Mr. Sulski says he does not know
19 the answer to that, everybody else doesn't know the
20 answer either, right? Or you would respond,
21 correct?

22 MS. WILLIAMS: We will jump in.

23 MS. FRANZETTI: Okay. Mr. Sulski, I
24 just want to make sure that they're backing you up.

1 MR. SULSKI: Thank you very much. I'm
2 sorry, I have "Rob" written for just pages here.

3 MS. FRANZETTI: Oh, okay.

4 MR. SULSKI: Otherwise --

5 MS. FRANZETTI: I just wanted to be
6 sure. What is the Agency or any other regulatory
7 agency doing at present to mitigate -- and I'll
8 change this to mitigate -- any of the contaminated
9 sediments that are present in the Upper Dresden Pool
10 and/or Brandon Pool?

11 MR. SULSKI: That are currently
12 present, or for the future?

13 MS. FRANZETTI: That are current --
14 let's stick with that are currently present.

15 MR. SULSKI: Well, we haven't
16 established that they're a critical problem that
17 effect beneficial use -- what is beneficial use?

18 MS. FRANZETTI: Well --

19 MR. SULSKI: That's a sludge term.

20 MS. FRANZETTI: Let's just -- let's
21 just change it to the proposed protected uses.

22 MR. SULSKI: Well, we haven't
23 established that the sediments are a critical
24 problem. Neither of the contractors invoke the UAA

1 factor over them. And, again, from earlier
2 testimony, we talked about how they contribute to a
3 lessening of a metric in habitat in QHEI evaluation.

4 MS. FRANZETTI: I understand we keep
5 saying the contractors didn't invoke it. Now, I
6 think there was also testimony earlier that there
7 allegedly wasn't enough data for the contractors to
8 invoke it?

9 MR. SULSKI: Correct.

10 MS. FRANZETTI: Correct. Okay. Now,
11 isn't it true that at the end of the Novotany Heye
12 and Associates UAA report, that is Attachment A, at
13 the end of the Chapter 3 sediment quality, at the
14 least the contractor did say "We are proposing to
15 the responsible agency, IEPA, USEPA, US Army Corp of
16 Engineers, to conduct an interagency study on the
17 extent of sediment contamination of the Lower Des
18 Plaines River that would build upon the USEPA survey
19 and monitoring by IEPA and MWRDGC and the Midwest
20 Generation sediment study by Burton. That
21 recommendation was made, correct?

22 MR. SULSKI: Correct.

23 MS. FRANZETTI: Right. But that -- no
24 such interagency study on the extent of sediment

1 contamination of the Lower Des Plaines River has
2 been initiated as of today, correct?

3 MR. SULSKI: It would require
4 collecting much more information and data that is
5 currently available. It would be quite an
6 expenditure to do that assessment. In other words,
7 we'd have to jump in boats and start doing some very
8 specific, expensive, weight of evidence and mind
9 sampling. That's what he's suggesting. That's what
10 all the sediment studies that I've read --

11 MS. FRANZETTI: I understand.

12 MR. SULSKI: -- on the system suggest.

13 MS. FRANZETTI: I understand.

14 MR. SULSKI: If they're inconclusive
15 and they say because "We don't have this, we can't
16 have this, we can't say this, we can't say that."

17 MS. FRANZETTI: Mr. Sulski, can you
18 give me some order of magnitude on what this cost of
19 the study, at least that you have in mind as being
20 recommended here, would be for Upper Dresden Pool,
21 and the area just upstream of it in Brandon Pool
22 above the lock and dam where a lot of sediments tend
23 to accumulate? If we were doing that area, what's
24 your guesstimate?

1 MR. SULSKI: I can't give you a
2 guesstimate. I think Midwest Gen has done some work
3 along those lines, and if they took Burton's
4 suggestions and Novotany's suggestions and augmented
5 the study and did it, you could probably come up
6 with a better estimate than I could. I just don't
7 know.

8 MS. FRANZETTI: I'm sorry. When you
9 said it's going to cost a lot of money, I thought
10 you had --

11 MR. SULSKI: I mean, in terms of
12 resources. I mean, we got Howard and me.

13 MS. FRANZETTI: Oh, okay. I'm sorry.
14 I'm sorry.

15 MR. SMOGER: They don't pay me much.

16 MS. FRANZETTI: Because actually, I
17 mean, 30, 35 sampling stations, right, would about
18 cover it for that area, in that ballpark?

19 MR. SULSKI: For bulk chemistry and
20 biotoxicity analysis pour water analysis, on and on
21 and on from the same -- from the same area at the
22 same time.

23 MS. FRANZETTI: Am I right, though --

24 MR. SULSKI: It would be very

1 expensive.

2 MS. FRANZETTI: Am I in the ballpark
3 of the scale of the study we'd be talking about?

4 MR. SULSKI: You know, I couldn't even
5 tell you how many samples would be necessary because
6 of the heterogenous nature of that system from one
7 side to the other. And it changes all the time too.
8 So you would have to sit down and determine what
9 would be a representative sampling scheme for that
10 system.

11 MS. FRANZETTI: Okay.

12 MR. SULSKI: And agree on that first.

13 MS. FRANZETTI: Right.

14 MR. SULSKI: Before you could come up
15 with dollars.

16 MS. FRANZETTI: Okay. Where I'm
17 ultimately going with this, in heart, is what you've
18 proposed for Upper Dresden Pool. As you started to
19 hear from several of us asking questions, we believe
20 it's going to entail millions of dollars in cost to
21 comply. If it's feasible to comply, tens of
22 millions of dollars. And would you agree that it's
23 reasonable to at first want to know what is the
24 existence and prevalence of contaminated sediments

1 in Upper Dresden Pool, and just upstream of it in
2 Brandon Pool, that can be scoured down or
3 transported down into Upper Dresden Pool before
4 determination is made as to whether or not Upper
5 Dresden Pool truly, minimally meets the Clean Water
6 Act aquatic life goals?

7 MR. SULSKI: Approaching it from the
8 sediment is going to be a very difficult venture. I
9 can tell you it's just such a complicated subject,
10 and there's so much room for error, and so much room
11 for contention. We have enough trouble with IBIs in
12 that. You start getting into sediments and solids,
13 you can read what the reports say. Everybody's got
14 20 more opinions on whether this data's good or it
15 isn't. And more often than not, the money gets
16 spent, the samples get collected, and there's very
17 few conclusions from it, and then the system
18 changes.

19 MS. FRANZETTI: I appreciate what
20 you're saying. But on the other hand, certainly
21 there are now several sites under the superfund
22 program where the findings have been made that there
23 are contaminated sediments in certain rivers, the
24 Fox, the Hudson River, for example, and that they

1 need to be remediated to improve conditions or to
2 allow continues in those rivers to improve. So one
3 can do it with the sampling techniques and methods
4 that are available today. Isn't that true?

5 MR. SULSKI: Okay. I'll take your
6 word for it.

7 MS. FRANZETTI: Okay. With respect to
8 sediments, if I may, just going back, generally, to
9 some of the testimony earlier today, I wanted to ask
10 a couple of followup questions about the sediment
11 data that is available. I'd probably need to ask a
12 preliminary question. Is anybody for the Agency
13 aware of what are referred to as the sediment
14 quality guidelines?

15 MR. SULSKI: Yes.

16 MS. FRANZETTI: SQGs is another way
17 they are, by acronym. Okay. So Mr. Sulski is, and
18 Mr. Essig is. Okay. Is there -- isn't there data,
19 some data, that exists today -- granted we may be
20 going back into the 90s, but I don't think we have
21 to go back to the 1970s -- isn't there data from the
22 1990s and/or forward on the sediments in Upper
23 Dresden and Brandon Pool that can be compared
24 against the sediment quality guidelines to get a

1 sense of the level of contamination?

2 MR. SULSKI: Well, the sediment
3 quality guidelines tell that that's an initial
4 screening factor. If they exceed this, then we
5 potentially have a problem, then move on to all
6 these other analyses. So just going by the sediment
7 quality guidance numbers is not enough information
8 to make a decision.

9 MS. FRANZETTI: Okay. But it would
10 tell you there's -- at least you would say it'll
11 tell you there is a potential problem with the
12 sediments in Upper Dresden Pool and Brandon Pool,
13 correct?

14 MR. SULSKI: It's a useful tool for
15 deciding where you should place your resources in
16 further evaluations.

17 MS. FRANZETTI: Is that a yes?
18 There's -- it indicates a potential problem with the
19 sediments?

20 MR. SULSKI: I don't -- I don't --
21 it's one -- it's one screening factor. I can't say
22 whether there's a problem or not.

23 MS. FRANZETTI: I didn't say a
24 problem. I thought when you first started, you said

1 it indicates a potential problem. It's a way to
2 tell you you should keep going, correct?

3 MR. SULSKI: The suggestion is when
4 you find something that exceeds the sediment quality
5 guidance that it's point where you can make a
6 decision, and your decision, if you go forward,
7 would be probably a wise one.

8 MS. FRANZETTI: Okay. Now, has the
9 Agency looked at the sediment data that exists and
10 compared it to the sediment quality guidelines?

11 MR. SULSKI: The contractors -- CAWS
12 contractors did that for CAWS.

13 MS. FRANZETTI: All right. Mr. Twait,
14 do you think that they did that adequately and/or
15 completely for the Upper Dresden Pool and Brandon
16 Pool area?

17 MR. TWAIT: They looked at poor water
18 concentrations, and I'm not -- and compared it to a
19 -- they compared it to the water quality standards.

20 MS. FRANZETTI: Right. They didn't
21 compare it to the sediment quality guidelines, did
22 they?

23 MR. TWAIT: Not as far as I know.

24 MS. FRANZETTI: And do you recall,

1 Mr. Twait -- and you may not recall this, and I will
2 tie it up if you don't later on -- do you recall
3 Midwest Generation submitting a report to the Agency
4 by Dr. Alan Burton that did, in fact, do that and
5 advise the Agency that the concentrations of organic
6 contaminants in had the depositional sediments of
7 the Upper Illinois Waterway exceed reliable sediment
8 quality guidelines for probable, adverse, biological
9 affects. Do you have any recollection of Midwest
10 Gen submitting that evaluation?

11 MR. TWAIT: I do remember them
12 submitting a Burton report. I'll take your word for
13 what was contained in it. I don't remember the -- I
14 don't remember the specifics of it.

15 MS. FRANZETTI: Okay. And we will
16 submit it when it comes our time to submitting
17 evidence in this -- in this rulemaking. Did -- was
18 the Burton report that Midwest general submitted to
19 the Agency back during the UAA stakeholder process
20 -- and this was in or about October 2003 -- was it
21 reviewed by the Agency in the course of its decision
22 making process as to what the attainable use was for
23 Upper Dresden Pool?

24 MR. ESSIG: It was reviewed in

1 relation to the Lower Des Plaines UAA report.

2 MS. FRANZETTI: And --

3 MR. ESSIG: The contractor did look at
4 some of that information on that report.

5 MS. FRANZETTI: And were the findings
6 of the Burton report rejected? Is that --

7 MR. ESSIG: I think in some instances,
8 yes.

9 MS. FRANZETTI: And why?

10 MR. ESSIG: I'm going off memory here,
11 but I think in some cases, they -- the authors
12 indicated that they felt it was more of a thermal
13 issue that the toxicity of certain temperatures of
14 the sediments when they were in a more of a normal
15 range of temperatures, the toxicity -- if it was
16 there, it wasn't very much. But when they got to
17 higher levels of temperature, say above, I think,
18 35 degrees and up to -- possibly up to 37, I don't
19 remember, but the toxicity increased dramatically.

20 MS. FRANZETTI: Now, you're --

21 MR. ESSIG: They thought that it was
22 more -- that it was probably more of a thermal issue
23 in relation to the sediment toxicity.

24 MS. FRANZETTI: Oh. Now I understand.

1 MR. ESSIG: But I would have to go
2 back to the report to double check that, but that
3 was the gist, I think, I got out of it.

4 MS. FRANZETTI: Right. And is that
5 because Dr. Novotany thought that ammonia was a
6 major contributor to the toxicity?

7 MR. ESSIG: I don't recall.

8 MS. FRANZETTI: Okay. You're going to
9 -- would you go back, because we really -- and
10 again, we'll tie this up, but we got no responses to
11 the Burton report on his evaluation of the sediment
12 data. And so if it was reviewed and if there are
13 reasons that his findings were rejected, we would
14 appreciate hearing that.

15 MR. ESSIG: Okay.

16 MS. FRANZETTI: Moving on to -- I'm
17 going to skip eight, because I think we basically
18 covered it in January. Skipping nine, I mean, nine
19 asked and answered. As to ten, let me narrow ten,
20 because I think it's been covered on the Ship Canal.
21 Let me limit it to Upper Dresden Pool, and I'll
22 first just ask: Does the Agency agree that its
23 description of the Lower Des Plaines River having a
24 unique habitat conditions applies to the Upper

1 Dresden Pool? I mean, that was meant to include the
2 Upper Dresden Pool, correct?

3 MR. SULSKI: I believe so, yes.

4 MS. FRANZETTI: All right. Now my
5 question is: What are the unique habitat conditions
6 of the Upper Dresden Pool?

7 MR. SULSKI: I think we answered this
8 earlier where you have a shipping channel with
9 littoral zones that reach and branch out on either
10 side.

11 MS. FRANZETTI: Oh, that's unique?

12 MR. SULSKI: It's unique with respect
13 to the upper -- the other -- all three use water
14 bodies.

15 MS. FRANZETTI: It's unique as
16 compared to the aquatic life use A and B water
17 bodies?

18 MR. SULSKI: A and B, correct.

19 MS. FRANZETTI: But it is not unique
20 standing alone as compared to other water bodies in
21 the state?

22 MR. SULSKI: I think we consider it as
23 unique in the State of Illinois.

24 MS. FRANZETTI: Okay.

1 MR. ETTINGER: It's not unusual to
2 have a shipping channel with littoral zones that are
3 outside the channel?

4 MR. SULSKI: No, it's not. It's a --

5 MR. ETTINGER: The Mississippi, the
6 Illinois River, other -- Wabash also have shipping
7 channels with --

8 MR. SULSKI: Correct.

9 MR. ETTINGER: Okay. Thank you.

10 MS. FRANZETTI: I think 11's been
11 answered. And I think, Mr. Sulski, if I'm right --
12 I'm moving on to 12. And again, right where we are
13 about the plank by littoral zones with sand and
14 gravel, and I think you said earlier in answer to
15 12 -- my Question 12A, already been asked, I think,
16 that's based on personal observation, right?

17 MR. SULSKI: That's also based on
18 information in the -- on the Attachment A report.

19 MS. FRANZETTI: Okay.

20 MR. SULSKI: Some of the metrics
21 within the QHEI scores.

22 MS. FRANZETTI: And so that answers B,
23 that if there's any studies, it's really the UAA
24 report that supports your statement?

1 MR. SULSKI: Correct.

2 MS. FRANZETTI: Okay. Now, it comes
3 to Question C. Haven't prior studies in the Upper
4 Dresden Pool identified this area as more accurately
5 characterized as silty rather than sand and gravel?

6 MR. ESSIG: Do you want me to take
7 that one?

8 MR. SULSKI: Yeah, sure.

9 MR. ESSIG: If you're using the term
10 silty, meaning that the majority of the area is
11 covered in silt, that there's not much other type of
12 bottom type, is that what you're implying by using
13 the word "silt?"

14 MS. FRANZETTI: Well, I think I'm
15 implying that silty probably is -- I'm not saying
16 that 99 percent of it is silty, but that silty is
17 more predominant than to call it that the littoral
18 zones have predominantly sand and gravel.

19 MR. ESSIG: Okay. Well, I don't agree
20 with the term silty and we're using it.

21 MS. FRANZETTI: Okay.

22 MR. ESSIG: Taking a look at the QHEI
23 indices and the metric for substrate, if you have
24 heavily impacted sediments where you have the

1 majority of the system was sediment, in that metric,
2 basically, your metric score for substrate, which
3 can get up to total points of 20, if it was all
4 silt, it would be maybe about three to one points.
5 But that's all you get out of that metric. I took a
6 look at -- several of the sites that were done where
7 I could look at the individual metric scores. And
8 from what I'm seeing, in general, it seemed like the
9 majority of the scores were above ten, which means
10 that it isn't totally silty. And there are only a
11 couple that actually have substrate scores -- excuse
12 me I have to find what I'm looking for here.

13 MS. FRANZETTI: That's okay.

14 MR. ESSIG: Yeah, more than half of
15 the sites that I looked at have metric scores
16 ranging from 10 to 20, with 20 being the highest.
17 Three scores have scores one to three, which would
18 indicate a silty problem, but there were additional
19 four sites that scored between four and nine, which
20 I still think those probably aren't -- you know,
21 except for maybe scores of four and five, that still
22 might be considered silty somewhat. But I think
23 scores above five are probably indicative of other
24 types of substrate being present.

1 MS. TIPSORD: Mr. Essig, could you
2 tell us what you're looking, at what document?

3 MR. ESSIG: Okay. I -- this is a
4 review of several documents, several reports that
5 we've indicated that we've used the QHEI data from.
6 I think the -- I don't know if any of these are
7 actually in the record. The Com Ed 1996 UIW report,
8 I think we referred to that before. But I went back
9 to the EA reports from '93 and '94 that actually had
10 the original QHEI measurements in them, and within
11 those reports they have the different metrics for
12 the QHEI and I looked at those. And I can get you a
13 list of those documents, and I also looked at the
14 metrics from the MBI 2006 study that was done.

15 MS. FRANZETTI: Those were the three
16 sites in the Upper Dresden Pool?

17 MR. ESSIG: Those were the three that
18 I could come up with the actual metric scores at
19 this point.

20 MS. FRANZETTI: Well, I think we
21 established in January there were only three sites
22 in the Upper Dresden Pool in the 2006 MBI study,
23 right?

24 MR. ESSIG: Right.

1 MS. FRANZETTI: So you looked at --
2 those three were the three you looked at?

3 MR. ESSIG: Well, I looked at those
4 three in addition to 15 or 13 sites from the EA
5 reports.

6 MS. FRANZETTI: Yes, I wasn't trying
7 to exclude those. I just was trying to identify
8 that it was the three Upper Dresden Pool sites in
9 the MBI 2006 study that you looked at, as well as
10 these other ones you've listed.

11 MS. TIPSORD: And just for the record,
12 that MBI, isn't that Exhibit 7? I think so. It's
13 the MBI qualitative habitat.

14 MS. FRANZETTI: Well --

15 MS. WILLIAMS: Can I ask a clarifying
16 question? Because I got a little confused when he
17 was talking about the documents he's looked at. Is
18 that okay? I'm looking at what we've entered as
19 Exhibit 30. Are all of the documents that you are
20 referring to summarized? The final scores are on --

21 MR. ESSIG: They're on that map. I
22 believe most of them came from either directly from
23 the Lower Des Plaines UAA, report or from the -- I
24 believe it's the 1996 Com Ed Upper Illinois Waterway

1 report. But those just contain the -- that's where
2 we filed the QHEI -- the actual score QHEI, but the
3 metrics were in two different reports that I looked
4 at.

5 MS. FRANZETTI: Because when you talk
6 about metrics, you're going behind the summary that
7 is Exhibit 30?

8 MR. ESSIG: Yes.

9 MS. FRANZETTI: And you are going to
10 sheets like this that were contained in Exhibit 7?

11 MR. ESSIG: Well, they're not sheets
12 like that. They are actually just a -- it's a table
13 that shows -- actually I think I have a -- can hold
14 on for a second?

15 MS. FRANZETTI: Sure.

16 MR. ESSIG: I've got the reports. I
17 can pull them out for you.

18 MS. FRANZETTI: Well, you know what,
19 given the hour, I think we're just trying to
20 establish that to get to the information that you
21 are talking about that tells you what the substrate
22 is like, you won't find it on a summary of QHEI
23 scores like Exhibit 30?

24 MR. ESSIG: Well, no. You won't find

1 those.

2 MS. FRANZETTI: Right.

3 MR. ESSIG: Right.

4 MS. FRANZETTI: You have to get behind
5 those summaries to more of the raw data, so to
6 speak, on what the sampling location -- the QHEI
7 sampling locations substrate look like?

8 MR. ESSIG: Mm-hmm.

9 MS. FRANZETTI: Okay. For now is it
10 okay if we just --

11 MS. TIPSORD: Yes, that's fine.

12 MS. FRANZETTI: Okay. Maybe, Mr.
13 Essig, tomorrow morning you could be -- if you have
14 any examples --

15 MR. ESSIG: Sure.

16 MS. FRANZETTI: -- you could have them
17 then, rather than make you look for them now.

18 MS. WILLIAMS: But just so you
19 understand, we're not going to have the capability
20 to make a lot of copies and stuff --

21 MS. FRANZETTI: No, no.

22 MS. WILLIAMS: -- like we could in the
23 Thompson Center.

24 MS. FRANZETTI: I just don't want him

1 to try and pull them out now when he can do that
2 tomorrow before we start.

3 MR. ETTINGER: That was going to be my
4 suggestion on the record, which is that Mr. Essig
5 give a brief presentation of the documents that he's
6 looking at tomorrow morning.

7 MR. SULSKI: Could I answer Question
8 12C now?

9 MS. FRANZETTI: No. Yes, Mr. Sulski.

10 MR. SULSKI: No.

11 MS. FRANZETTI: I guess I deserved
12 that. Of course I closed my book in the process
13 here. I don't even know where I am. Okay. 13.
14 Okay. I don't think this has been answered. With
15 respect to the characteristics of the Upper Dresden
16 Pool, the Illinois EPA states at Page 51 of the
17 Statement of Reasons and at Page 14 of the Sulski
18 pre-filed testimony that it contains, quote,
19 "earthen bank reach with fixed aquatic and
20 overhanging riparian vegetation and other zones of
21 refugia for aquatic life," end quote. Describe what
22 portion or percentage of the Upper Dresden Pool
23 includes such characteristics.

24 MR. SULSKI: This is why we brought

1 the navigation charts for everybody this this
2 morning, so we could --

3 MS. WILLIAMS: Can we say Exhibit 30,
4 because I think we've entered two groups of
5 navigation charts.

6 MR. SULSKI: I'm sorry. That's Yoder,
7 but we have an additional set of three.

8 MR. ETTINGER: But these are the Yoder
9 ones.

10 MR. SULSKI: They have river mile
11 markers and QHEI numbers on there all back in a row
12 and rows and rows. So along --

13 MS. FRANZETTI: I'm sorry. Are you
14 waiting on me?

15 MR. SULSKI: Do you want me to answer
16 that question?

17 MS. FRANZETTI: Yes.

18 MR. SULSKI: Okay. So that's why we
19 brought these charts in, and starting from -- if you
20 put them -- 109, Map No. 109, to the left, 110 in
21 the middle, and 111 on the right, that's a survey
22 map of the reaches which we've planted QHEI and
23 river mark values. But it also shows you where the
24 main channel shipping channel portion is, and it

1 also demonstrates what other side littoral zones and
2 other features exist in this reach.

3 MS. WILLIAMS: Can you explain how it
4 shows that, Rob, by looking at it?

5 MR. SULSKI: Well, the white at the
6 center is the shipping channel. At the red dashed
7 line, that is sort of the center of it, and then
8 when you leave that white area and you enter the
9 blue areas, waterway areas, those are -- those are
10 the side littoral zones and delta mouths and
11 channels around Treats Island, for example on the
12 left-hand-side. So these are all features of this
13 portion of the pool, many of which are trade and
14 forested. Some have aquatic vegetation, overhanging
15 bank vegetation. You can look at some of the
16 photographs within Novotany to get a view of some of
17 those areas that we're talking about.

18 MS. FRANZETTI: You're not saying that
19 all of the areas --

20 MR. SULSKI: I am not saying.

21 MS. FRANZETTI: -- outside of the main
22 channel have, you know, earth and bank reach with
23 fixed aquatic and overhanging riparian vegetation.
24 Right, Mr. Sulski?

1 MR. SULSKI: I am not saying that.

2 MS. FRANZETTI: Okay. There are
3 certain parts that are characterized by that type of
4 -- excuse me -- vegetation or bank?

5 MR. SULSKI: Yes.

6 MS. FRANZETTI: Okay. And one of the
7 areas is around Treats Island?

8 MR. SULSKI: One of the areas is
9 around Treats Island, yes.

10 MS. FRANZETTI: All right. What other
11 area in Upper Dresden Pool has these
12 characteristics?

13 MR. SULSKI: Downstream of Treats
14 Island, I would have to look at photographs of the
15 reach within Map No. 110.

16 MS. FRANZETTI: Okay. So -- all
17 right. Are you telling me as you sit here today,
18 you can't, from memory, tell me whether and where
19 such areas might be on Map No. 110, correct?

20 MR. SULSKI: Correct.

21 MS. FRANZETTI: Okay. And --

22 MR. SULSKI: And then I'm most
23 familiar on map 111 with the Brandon tail water
24 area.

1 MS. FRANZETTI: Okay. Can you help
2 people who aren't quite as familiar --

3 MR. SULSKI: Yes.

4 MS. FRANZETTI: -- locate what you're
5 -- when you say the "tail water area," is --

6 MR. SULSKI: Look at Map No. 111 on
7 the right.

8 MS. FRANZETTI: Mm-hmm.

9 MR. SULSKI: And I'm sorry that I
10 didn't include a little section of what would be Map
11 No. 112, because that's actually where the dam is.
12 It's just slightly off the map. I didn't feel it
13 necessary to throw a whole map in just for a little
14 quarter inch.

15 MS. FRANZETTI: Right.

16 MR. SULSKI: But anyways, the lower
17 part on the right-hand-side is the Brandon lock and
18 dam tail water area.

19 MS. FRANZETTI: What river mile do you
20 use to denote the beginning of the tail water? Can
21 you help us in terms of spotting something on this
22 map?

23 MR. SULSKI: Yeah. It would be
24 somewhere from about 285 up to 286.

1 MS. FRANZETTI: Okay. In that --

2 MR. SULSKI: In that mile. It's about
3 a mile long.

4 MS. FRANZETTI: Okay.

5 MR. SULSKI: The first mile.

6 MS. FRANZETTI: All right. And on map
7 109, I know it was Treats Island.

8 MR. SULSKI: Yes.

9 MS. FRANZETTI: Which we can see is
10 right there. It's got Treats Island -- oh, well.
11 I'm sure that works. Is it -- is the Treats Island
12 area on Map No. 109 the area that has some hash
13 marks, almost looking like marks on it? Again, for
14 the record, how can we describe what constitutes
15 what you're referring to as Treats Island on Map No.
16 109?

17 MR. SULSKI: On Map No. 109 at --
18 starting at mile marker 27 -- 279 begins a channel
19 at the bottom that heads towards Jackson Creek and
20 goes below what is referred to as Des Plaines
21 Conservation Area, Treats Island. That's all --

22 MS. FRANZETTI: Yes.

23 MR. SULSKI: That clump of property
24 there is Treats Island.

1 MS. FRANZETTI: Okay.

2 MR. SULSKI: The light green and the
3 brown.

4 MS. FRANZETTI: Okay.

5 MR. SULSKI: And then the channel
6 reenters the main channel around mile marker 280,
7 280.1, 2.

8 MS. FRANZETTI: Okay. Moving on to
9 Question 14, it is noted that the Upper Dresden
10 Midstream Channel is generally about 15 feet deep,
11 and that's Statement of Reasons Page 51 Sulski
12 pre-filed testimony at Page 14. But there is no
13 discussion of the rate of flow changes in the Upper
14 Dresden Pool. Isn't the rate of flow changes in the
15 Upper Dresden Pool an equally or more critical
16 factor in terms of the effect on aquatic life than
17 is the depth of the pool?

18 MR. SULSKI: Well, I mean, you have a
19 shipping channel here that's deeper than littoral
20 zones. And if the shipping channel will
21 accommodate -- and I don't see that it doesn't
22 accommodate -- increases in flow, then you still
23 have aquatic life protection in these side areas
24 behind islands in various places. So I -- you know,

1 I don't know that --

2 MS. FRANZETTI: So are you saying the
3 fish get out of the way when you have the
4 significant and relatively quick changes in flow?
5 They head off to behind the island or up into the
6 tail water? Is that why you're saying these flow
7 fluctuations don't --

8 MR. SULSKI: I'm saying that they find
9 areas within the side zone, which doesn't have those
10 rates of flow, to get out of the way for a while.

11 MS. FRANZETTI: Okay. So the --
12 you're not disagreeing that there are significant
13 changes in flow rates that can occur in Upper
14 Dresden Pool, correct? I mean, you're agreeing they
15 occur?

16 MR. SULSKI: I'm not agreeing to that.

17 MS. FRANZETTI: No, you're not. Okay.

18 MR. SULSKI: No. I don't -- I need to
19 look at some data so see what the change is. Where
20 does it go from to how often does it do that, what
21 times of the years does it do that. I would have to
22 look at that. I think that we do have some data to
23 start that process, which I indicated earlier Julia
24 and I put together to answer a reporter's questions,

1 but I don't even think that that's sufficient enough
2 to make the determination you're asking me to.

3 MS. FRANZETTI: Well, Mr. Sulski,
4 doesn't the Army Corp have the data on flow rates
5 that go through Brandon lock and dam?

6 MR. SULSKI: Except for one thing,
7 when Julia and I put this together, we found that
8 that data was -- disagreed with itself from one end
9 to the zone to the other. I mean, we're talking
10 about 2,000 CFS disparity, and the flow numbers
11 reported without it being able to account for
12 additional flows from anywhere. So, no, that data
13 isn't going to help us out.

14 MS. FRANZETTI: Okay. Does any data
15 exist that tells us what the changes in flow rates
16 are like and what their effect, you know, is in
17 terms of the levels in Upper Dresden Pool?

18 MR. SULSKI: I don't know as I sit
19 here.

20 MS. FRANZETTI: Okay.

21 MR. ETTINGER: Let me just ask a
22 couple of questions here. All rivers vary in their
23 flow rates over time, don't they? Has any analysis
24 been done as to how the flow rate changes in this

1 body of water compared to other bodies of water?

2 MR. SULSKI: I don't know.

3 MR. ETTINGER: Thanks.

4 MS. FRANZETTI: I think, then -- with
5 Question 15, I think the answer would probably also
6 be you do not know. I'll just -- real quick -- with
7 respect to flow changes that occur on a continuing
8 basis in the Upper Dresden Pool, did the Illinois
9 EPA consider whether these flow changes occur at a
10 significant order of magnitude and whether those
11 changes have a negative impact on aquatic life?

12 MR. SULSKI: I guess the answer would
13 be no.

14 MS. FRANZETTI: Okay.

15 MR. SULSKI: It would be no.

16 MS. FRANZETTI: Okay. Question 16.

17 At Page 14 of the Sulski pre-filed testimony, it is
18 stated that the, quote, "Upper Dresden Island Pool
19 is subject to recurring impacts from navigation use
20 and upstream flood control functions, but to -- "
21 I'm sorry, I think this has been asked and answered.
22 Am I right?

23 MR. SULSKI: I think so.

24 MS. FRANZETTI: Yeah, I think so too.

1 I mean, you really can't quantify what you mean by
2 "to a lesser degree," right? It's just it's
3 something less than is experienced in the upstream
4 portions of the waterway?

5 MR. SULSKI: I can only go so far as I
6 did earlier with you and say that we have wider
7 zones, littoral zones, in areas of refugia.

8 MS. FRANZETTI: Did -- well, do you
9 know whether there are, at least at times, what
10 would be accurately characterized as extreme flow
11 changes in the Upper Dresden Pool due to the
12 operation of the Brandon lock and dam?

13 MR. SULSKI: I don't know about
14 operation of the lock itself. I don't suppose that
15 they use that to let the flow fly. They open one
16 door and close the other door before they -- or they
17 wouldn't be able to get them to flow. It's the dam
18 that transfers the flow. I don't -- I don't know
19 what the -- what the flow regimes are in there.

20 MS. FRANZETTI: Moving on to Question
21 17, I think that's been asked and answered. I don't
22 know that 18 has been asked and answered. Is it the
23 Agency's belief that it is required or compelled by
24 the Clean Water Act to upgrade the designated uses?

1 MR. SULSKI: There's a yes and a no
2 answer for that.

3 MS. FRANZETTI: Okay. Whichever one
4 you'd like to give me first, and explain.

5 MS. WILLIAMS: I was going to say the
6 legal answer is we're only compelled to study it and
7 look at it, but from a technical side, you can
8 answer that part, Rob.

9 MS. FRANZETTI: Well, actually, I
10 think it is a legal question, though. I mean, so
11 let's --

12 MS. WILLIAMS: No. We're not
13 compelled to upgrade if the study finds that it's
14 not attainable, then that's the conclusion of the
15 study.

16 MR. SULSKI: Thank you.

17 MS. FRANZETTI: You know, in -- in the
18 USEPA's blue book -- this is not a pre-filed
19 question, but in looking at the USEPA's blue book
20 when it talks about water quality criteria, in the
21 part dealing with thermal discharges, the USEPA does
22 speak about that because the thermal requirements of
23 various species differ that the social choice of the
24 species to be protected allows for different levels

1 of protection among water bodies. Have you looked
2 at --

3 MS. WILLIAMS: What's the date on that
4 document?

5 MS. FRANZETTI: I don't know.

6 MR. ETTINGER: That's the '72 blue
7 book, I think.

8 MS. FRANZETTI: Is it '72?

9 MR. ETTINGER: The first one.

10 MS. FRANZETTI: Yeah, yeah. Did the
11 Agency look at the USEPA blue book and its comments
12 on, you know, dealing with thermal requirements,
13 thermal discharges, as any sort of guidance to you
14 in determining your proposed thermal standards here?

15 MR. TWAIT: I can't say that I looked
16 at the '72 blue book.

17 MS. FRANZETTI: Okay. Want to stop?

18 MS. TIPSORD: I was going to say, if
19 you're through with followup, it's a good place to
20 stop. We are at the beginning Question Subpart F,
21 with Ms. Franzetti's questions. We'll start at
22 9:00 o'clock in the morning. Thank you all for your
23 patience.

24

1 STATE OF ILLINOIS)
) SS.
2 COUNTY OF COOK)

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
Cook County, Illinois

15

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18 of _____, A.D., 2004.

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