



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

2

3 HEARING TAKEN BEFORE:

4

5 Illinois Pollution Control Board,  
6 100 West Randolph Street  
7 Suite 11-500  
8 Chicago, Illinois 60601  
9 (312) 814-4825  
10 BY: MS. MARIE E. TIPSORD

8

9 ILLINOIS POLLUTION CONTROL BOARD MEMBERS

10

11 Mr. G. Tanner Girard

12 Mr. Ronald Flemal

13 Mr. Nicholas Melas

14 Mr. Anand Rao

15 Ms. Marili McFawn

16 Ms. Alisa Liu

17

18

19

20

21

22

23

24

1 HEARING OFFICER TIPSORD: Good morning. My  
2 name is Marie Tipsord and I've been appointed by the  
3 Board to serve as a hearing officer in this  
4 proceeding entitled in the matter of Revisions to  
5 Antidegradation Rules 35 Ill. Adm. Codes 302.105,  
6 303.205, 303.206 and 106.990 through 106.995. The  
7 docket number is R-01-13.

8 To my right is Dr. Tanner Girard, the  
9 lead board member assigned to this matter and to  
10 my immediate left is Dr. Ronald Flemal and to his  
11 left is Nicholas Melas, both of the board members  
12 also assigned to this proceeding and to Mr. Melas'  
13 left, Marili McFawn who has attended all of our  
14 hearings in this matter. To Dr. Girard's right is  
15 Alisa Liu and we will be joined by Anand Rao from  
16 our technical unit.

17 This is our third hearing to be held in  
18 this proceeding and today will be devoted to hearing  
19 prefiled testimony of the Illinois Environmental  
20 Regulatory Group, the environmental groups  
21 represented by Albert Ettinger and David L. Thomas  
22 on behalf of the Illinois Department of Natural  
23 Resources.

24 As you may know, the Board denied motions

1 to strike Mr. Thomas' testimony at the Board's  
2 February 1st, 2001, meeting. Copies of that order  
3 are available here at the front of the room and I  
4 will also note that yesterday the Board received a  
5 response to those motions filed by the Agency that  
6 was filed on February 2nd, it was actually filed  
7 after the Board denied the motions. As the response  
8 is moot by the fact that we denied the motion, we  
9 urge the Agency to raise any of the relevant issues  
10 contained in that response in its public comments  
11 filed after the hearing.

12 On February 1st, 2001, the Board also  
13 received prefiled testimony of Brett J. Marshall on  
14 behalf of Dynergy Midwest Generation, Inc. On  
15 February 2nd we received a fax indicating that Mr.  
16 Marshall would not be able to attend this hearing.  
17 I just wanted to check on the record to see if Mr.  
18 Marshall, in fact, is not here today, and I see that  
19 he is not, therefore, we will move his prefiled  
20 testimony into the record as a public comment and it  
21 will be so numbered and docketed.

22 Also, Mr. Ettinger prefiled questions for  
23 the Agency. They are not scheduled to testify today

24 and in addition, the Board may have some questions.

L.A. REPORTING (312) 419-9292

5

1 If the Agency wishes to address the questions on the  
2 record today, I will allow them to do so as time  
3 permits. Otherwise, we ask the Agency to address  
4 the questions in any public comments that may  
5 follow.

6 We will have the testimony taken as if  
7 read and allow for a brief summary of the testimony.  
8 I will mark the prefiled testimony as an exhibit  
9 unless there is an objection. We will begin with  
10 the testimony of the Illinois Environmental  
11 Regulatory Group. There were no prefiled questions  
12 directed to them, however, I will allow questions to  
13 be asked for a brief time after their presentations,  
14 if there are any. Next the environmental groups  
15 will present their testimony and answers to the  
16 prefiled questions submitted to them by the Illinois  
17 Environmental Regulatory Group. It's my  
18 understanding that Mr. Ettinger has prepared written  
19 answers and will have those for us then. I will  
20 allow follow-up to those questions by any person and  
21 I will also allow for additional questions to be  
22 asked for a brief time, if there are any. Finally,

23 Mr. Thomas will testify and answer prefiled  
24 questions addressed to him. Again, I will allow for

L.A. REPORTING (312) 419-9292

6

1 additional questions to be asked for a brief time if  
2 there are any.

3           Anyone may ask a question, however, I do  
4 ask that you raise your hand and wait for me to  
5 acknowledge you and after I have acknowledged you,  
6 please state your name and who you represent before  
7 you begin your questions.

8           Please speak one at a time. If you are  
9 speaking over each other, the court reporter will  
10 not be able to get your questions on the record.

11           Please note that any question asked by a  
12 board member or staff are intended to help build a  
13 complete record for the Board's decision and not to  
14 express any preconceived notion or bias.

15           Also, as time permits, we will allow  
16 anyone else who wishes to testify the opportunity  
17 to do so at the close of the prefiled testimony.

18           I have placed the list at the front of the  
19 room for anyone who wishes to sign up. Also, there  
20 are sign-up sheets for the notice and service list  
21 and copies of the current and notice service lists

22 are available. If you have any question about which  
23 list you should be on, please see me at a break and  
24 I will try and clarify that.

L.A. REPORTING (312) 419-9292

7

1 At this time, I'd like to ask Dr. Girard  
2 if he wishes to add anything.

3 MR. TANNER: Thank you, yes, I would. Good  
4 morning to everyone in attendance today. On behalf  
5 of the Board I welcome everyone to this third  
6 hearing on the proposed amendments to the Board's  
7 water antidegradation regulations.

8 The Board greatly appreciates the amount  
9 of time and effort that many people have dedicated  
10 to this endeavour, including attendance at the  
11 hearings as well as the testimony and written  
12 comments we've received. I can assure you that all  
13 of your contributions will be carefully considered  
14 by the Board. Thank you.

15 HEARING OFFICER TIPSORD: Thank you. Does  
16 anyone else have -- all right. At this time we'll  
17 begin with the Illinois Environmental Regulatory  
18 Group and it's probably easiest if we just go ahead  
19 and swear you all in at once.

20 (Witnesses sworn.)

21 MS. HODGE: Thank you. Good morning. My name  
22 is Katherine Hodge and I'm with the law firm of  
23 Hodge & Dwyer. I'm here today representing the  
24 Illinois Environmental Regulatory Group. We have

L.A. REPORTING (312) 419-9292

8

1 a panel of witnesses today and present with me first  
2 is Ms. Deirdre Hirner, she's the executive director  
3 of the Illinois Environmental Regulatory Group, to  
4 her right is Mr. Fred Andes, who is an attorney with  
5 the law firm of Barnes & Thornburg. To his right is  
6 Mr. Jeff Smith of Abbott Laboratories, right here is  
7 Mr. Bill Compton with Caterpillar, Inc., and  
8 Mr. Jay Rankin with Tosco Wood River Refinery.

9 All of my witnesses did submit prefiled  
10 testimony with the exception of Mr. Rankin. He is  
11 here today not to offer testimony, but to answer  
12 technical questions as they may arise on some of  
13 the questions that others may have.

14 As Mr. Tipsord had requested, we plan to  
15 go over just a summary of the prefiled testimony  
16 and then we would like to hold any questions until  
17 the conclusion of all the testimony, please.

18 HEARING OFFICER TIPSORD: Yes, that's fine.

19 MS. HODGE: And with that, Ms. Hirner.

20 MS. HIRNER: I am Deirdre Hirner and I  
21 currently serve as the executive director for IERG.  
22 On behalf of everybody and its member companies, I  
23 want to thank the Board for the opportunity to  
24 testify today and to thank the Board for granting

L.A. REPORTING (312) 419-9292

9

1 IERG's request to hold this third hearing.

2 I would like to take this opportunity to  
3 briefly explain the proposed revisions to the  
4 Agency's proposal which were filed by IERG and which  
5 appears as Exhibits A and B to my prefiled testimony  
6 and to outline how we believe our revision to the  
7 Agency's language will address the concerns we  
8 expressed at the December 6th hearing and how we  
9 believe these will result in a clearer, more  
10 workable set of regulations to accomplish the goal  
11 of antidegradation.

12 First, I will speak to our concern  
13 regarding the lack of a significance test to  
14 determine the need for a comprehensive  
15 antidegradation review. In this regard I would  
16 refer you to Section 302.105(c)(2)(a), which is on  
17 page three of IERG's Exhibit A. Our suggested  
18 revisions are based on the premise that some

19 increased loadings are, by their nature, of such  
20 limited significance that they do not warrant a  
21 comprehensive antidegradation review. We do not  
22 suggest, as some parties might allude, that there  
23 are activities which require no review, rather  
24 IERG's proposed revisions suggest a tiered approach.

L.A. REPORTING (312) 419-9292

10

1 Applicants for a new, renewed or modified permit  
2 would be allowed to request that the Agency make a  
3 significance determination as part of their  
4 application. The Agency would make its  
5 determination based upon the nature of the discharge  
6 and its potential impact upon the uses of the  
7 receiving water. If the Agency determined that the  
8 impact had the potential to be significant and to  
9 cause degradation, the applicant would then go  
10 forward to complete an analysis and evaluation of  
11 possible alternatives and establish that the  
12 proposed loading was necessary to accommodate social  
13 and economic benefit to the community at large,  
14 unless the Board determined through the appeals  
15 process that the Agency had erred in making its  
16 significant determination. Further, all of the  
17 information regarding the significance determination

18 would be available for public review as it would be  
19 documented in the fact sheet included with the  
20 permit in the public notice process. We believe  
21 this tiered approach would promote the Agency's  
22 ability to focus their time and resources on those  
23 loadings that truly are significant, thus better  
24 protecting water quality.

L.A. REPORTING (312) 419-9292

11

1 Second, there is a need for additional  
2 exceptions to individual antidegradation  
3 demonstration beyond those which are proposed by  
4 the Agency. In this regard, I would refer you to  
5 Section 302.105(d) at page 5 of IERG's Exhibit A.  
6 IERG is proposing minor revisions to those proposed  
7 by the Agency and is proposing six additional  
8 exceptions, including a de minimis. As stated in my  
9 December 6, 2000, testimony, we believe the absence  
10 of such exceptions would bog the Agency down in an  
11 endless review of permits that have virtually no  
12 environmental impact, robbing the Agency of  
13 resources necessary to review activities with  
14 greater potential for degradation. Along this line,  
15 we further believe the establishment of a de  
16 minimis, which the Agency indicated at the November

17 17th hearing that it did not oppose the concept  
18 would allow the Agency to more effectively use its  
19 limited resources. As a case in point, I did a  
20 quick e-mail survey of our members yesterday. Of  
21 those members, 24 responded and of the 24 who  
22 responded we found 15 who had problems in obtaining  
23 their permits. Some of those 15 had waited two to  
24 three years after submitting their application to

L.A. REPORTING (312) 419-9292

12

1 receive their final permit.

2           Specifics regarding IERG's proposed  
3 revisions to the Agency's list of activities not  
4 subject to further antidegradation review will be  
5 addressed by Mr. Jeff Smith and Mr. Fred Andes who  
6 will speak to the other Region V state experiences  
7 with similar exceptions.

8           Third, regarding IERG's concerns with  
9 up-front data submissions. We believe our proposed  
10 revision gives the Agency the ability to exercise  
11 discretion as to what information applicants must  
12 submit and we believe this is consistent with  
13 Mr. Frevert's testimony indicating the Agency's  
14 intended practices for implementing the rule.  
15 In this regard, while IERG understands that the

16 proposed Part 354, the Agency's implementation  
17 procedure, is not before the Board in this  
18 proceeding, the Agency did submit it to the Board  
19 and it is relevant as it demonstrates the Agency's  
20 attended approach for implementing proposed Sections  
21 302.105 and 303.105. While we intend to provide our  
22 proposed revisions to Part 354 to the Agency, we  
23 believe the most significant revision should be at  
24 proposed Part 354.103 to provide that the applicant

L.A. REPORTING (312) 419-9292

13

1 for a new, renewed or modified NPDES permit provide  
2 information only to the extent necessary and I would  
3 emphasize to the extent necessary for the Agency to  
4 determine that the permit application meets the  
5 antidegradation standard. Further, to ensure the  
6 Agency's ability to consider all information at  
7 its disposal when conducting an antidegradation  
8 review and again, consistent with Mr. Frevert's  
9 testimony at the November 17th hearing, that the  
10 Agency intends to consider information regardless  
11 of its source, IERGs has proposed a revision, a  
12 subsection 302.105(c)(2)(b) small three i on page  
13 five at our Exhibit A. This will allow the Agency  
14 to rely on its own data sources such as data or

15 reports in its possession and on it's experience  
16 with factually similar permitting reviews when  
17 making its assessment of any proposed increase in  
18 pollutant loading.

19 We believe exercising requests for  
20 information as proposed in IERG's revisions will  
21 provide the Agency with the information that it  
22 needs to complete a thorough and complete  
23 antidegradation assessment without placing an undue  
24 burden on the applicant to provide information that

L.A. REPORTING (312) 419-9292

14

1 would not be helpful to the Agency in fulfilling  
2 it's obligation to make an antidegradation  
3 determination. Mr. Jeff Smith will further speak  
4 to this issue in his remarks.

5 Regarding IERG's concern relative to the  
6 clarity of certain matters in the proposed rule,  
7 most significantly IERG has proposed a revision to  
8 302.105(c)(2) on page two of our Exhibit A to  
9 clarify that the minimum threshold to trigger an  
10 antidegradation review is an increase in pollutant  
11 loading that necessitates a new, renewed or modified  
12 NPDES permit with a new or increased permit limit.  
13 Our intent is to make it clear that the requirements

14 for an antidegradation review do not apply to all  
15 loadings subject to a NPDES permit, which we believe  
16 could allow our review to be triggered absent any  
17 increase in loading and we believe our proposed  
18 revision more clearly articulates Mr. Frevert's  
19 testimony at the November 17th hearing when he  
20 stated the proposed rule would not apply  
21 and I quote where there is no proposed increase in  
22 any pollutant parameter activity.

23 Finally, I would direct your attention  
24 to Exhibit B of my prefiled testimony. IERG's

L.A. REPORTING (312) 419-9292

15

1 proposed revisions to Part 303 dealing with  
2 outstanding resource waters. As I have indicated  
3 previously, IERG believes the designation of a  
4 surface water body as an ORW has the potential for  
5 profound economic impact, environmental restriction,  
6 and broad ramifications for surrounding property  
7 owners. Considering that such designation  
8 essentially carries with it a prohibition of  
9 future discharge not only to the designated segment,  
10 but potentially to tributaries too and up stream  
11 reaches of the segment. ORW designation is  
12 tantamount to land use regulation. We have given

13 careful and serious information to Mr. Frevert's  
14 November 17th testimony when he offered that the  
15 ramifications of a decision to designate an ORW are  
16 fundamentally more significant than the  
17 ramifications of a typical adjusted standard or even  
18 a state-wide standard. We are setting an absolute  
19 prohibition on some activities and that was a quote  
20 from Mr. Frevert. Accordingly, IERG has proposed  
21 revisions to clarify the process by which an ORW  
22 designation would occur. First, we have proposed a  
23 revision to propose Section 303.205 to clarify that  
24 the process to petition the Board to designate an

L.A. REPORTING (312) 419-9292

16

1 ORW is the adjusted standard procedure contained in  
2 Section 28.1 of the Act and Subpart D of Part 104 of  
3 Title 35 of the Illinois Administrative Code.  
4 We base this on the analogy between ORWs and Class  
5 III Groundwater, the designation of which takes  
6 place through an adjusted standard procedure. We  
7 believe this procedure provides a clear framework  
8 for both those who are seeking such a designation  
9 and those who would be affected by the designation  
10 than does the Agency's current proposal.

11 Next, we believe our revisions clarify

12 that the burden of proof in a proceeding to  
13 designate an ORW is on the person seeking the  
14 designation.

15           We further believe our proposed revisions  
16 clarify the information that must be submitted in  
17 support of that designation and given the weight of  
18 the impact of an ORW designation on surrounding  
19 property owners and potentially on those owners  
20 upstream, IERG believes its proposed revisions  
21 appropriately requires the Board to find that the  
22 benefits of an ORW designation would substantially  
23 outweigh lost economic and social benefits before  
24 granting an ORW designation. Mr. Bill Compton will

L.A. REPORTING (312) 419-9292

17

1 provide further remarks in this regard.

2           With that, I would conclude my comments to  
3 summarize my testimony, although I would like to  
4 make a brief comment regarding Mr. Brett Marshall's  
5 prefiled testimony, particularly regarding DNRs  
6 statement in its testimony that there were no NPDES  
7 discharges permitted on any of the four streams it  
8 proposed for designation. Dynergy's Vermillion  
9 Power Station discharges into the Middle Fork  
10 Vermillion and further, Dynergy negotiated an

11 agreement with the Department of Conservation, the  
12 predecessor Agency to the DNR and that negotiation  
13 in that agreement maintained a right to continue  
14 to operate, maintain and improve all its facilities  
15 existing at the time the agreement was negotiated  
16 and it allowed them to construct new facilities,  
17 including new ash ponds and additional water intake  
18 pump houses and if necessary a new bridge.  
19 We believe that this discrepancy calls to questions  
20 the reliability of DNR's information.

21 I would now like to pass the opportunity  
22 to speak to Mr. Jeff Smith and I would be pleased to  
23 answer questions at the conclusion of the panels'  
24 comments.

L.A. REPORTING (312) 419-9292

18

1 HEARING OFFICER TIPSORD: Thank you.

2 MR. SMITH: Thank you. My name is Jeffrey  
3 Smith. I'm with Abbott Laboratories and Abbott is a  
4 member company of the Illinois Environmental  
5 Regulatory Group. This morning I'd like to discuss  
6 four issues pertaining to the Agency's proposed  
7 antidegradation rules, the first being a requirement  
8 that the applicant is responsible for providing all  
9 of the information in the permit application, the

10 antidegradation application. The other three topics  
11 will pertain to additional exceptions that IERG is  
12 proposing to be included in Section 302.105(d).  
13 Proposed Section 302.105(c), which pertains to  
14 required information for the antidegradation review  
15 specifies the procedure by which the Agency must  
16 conduct an antidegradation review, this includes a  
17 reference to the Agency's proposed Part 354.103,  
18 which contains criteria for the kind of information  
19 that the Agency must consider when conducting such a  
20 review. As proposed by the Agency, Section  
21 302.105(c) coupled with proposed Part 354 mandates  
22 that the applicant for a new or modified NPDES  
23 permit proposing a pollutant load increase or  
24 seeking a Section 401 certification must submit all

L.A. REPORTING (312) 419-9292

19

1 information required for the antidegradation review.  
2 This requirement does not take into account the fact  
3 that the Agency may already possess much of this  
4 information, particularly as relating to water  
5 quality data.

6 Arbitrarily, requiring an applicant to  
7 provide all of the information required for  
8 antidegradation review would result in duplicative

9 and wasteful efforts. For example, the Agency may  
10 already have at its disposal an extensive database  
11 of chemical or biological data for the water segment  
12 of interest. This most likely will be true for  
13 larger waterways. If the permittee were to be  
14 required to provide such information without  
15 consideration of whether the Agency already  
16 possesses it, this would at a minimum delay the  
17 application from going forward until the information  
18 was obtained by the applicant through other sources,  
19 such as a literature review or an actual sampling  
20 study of the receiving water. In either case, the  
21 ensuing effort would be wasteful as an extensive  
22 chemical or biological sampling study can easily  
23 cost from several thousand to several hundreds of  
24 thousands of dollars and take weeks or months to

L.A. REPORTING (312) 419-9292

20

1 complete. Under some situations, it's even  
2 conceivable that such additional expense or delay  
3 could undermine the project's viability.

4           Additionally, any sampling investigation  
5 may only provide a snapshot of the current  
6 conditions as opposed to characterizing long-term  
7 trends or seasonal variations which may, in fact, be

8 possible using water quality databases maintained  
9 by the Agency or the Illinois Department of Natural  
10 Resources.

11 Illinois -- I'm sorry, IERG recommends  
12 amending the Agency's proposal to include new  
13 subsection 302.105(c)(2)(B)(iii), which appears as  
14 Exhibit A in Deirdre Hirner's testimony to clarify  
15 that the applicant is responsible for assuring that  
16 the Agency has at its disposal all information  
17 necessary for conducting an antidegradation review  
18 without requiring the applicant to necessarily  
19 provide all of that information. This approach is  
20 consistent with testimony previously provided by  
21 Mr. Toby Frevert and with the Agency's proposed  
22 Section 354.104, which promotes early communications  
23 between the permittee and the Agency.

24 Now, referring to Section 302.105(d) of

L.A. REPORTING (312) 419-9292

21

1 the Agency's proposal which covers a number of  
2 exemptions to the antidegradation review process.  
3 I'd like to state that IERG also recommends adding  
4 additional situations to the list of activities in  
5 proposed Section 302.105(d). One such situation  
6 would be where a new permit limit is applied or an

7 existing limit is revised, yet there is no actual  
8 increase in the loading of a pollutant. Such  
9 circumstances may arise due to the availability of  
10 improved monitoring data, new analytical testing  
11 methods or imposition of new or revised technology  
12 or water quality based effluent limitations.

13 Another situation that could occur is  
14 through normal variation in analytical monitoring  
15 data, particularly when the data are produced by  
16 more than one commercial laboratory.

17 This proposed exemption surfaces at  
18 several meetings of the Agency's antidegradation  
19 advisory group and was modeled after similar  
20 provisions contained in the GLI's antidegradation  
21 regulation and in other states' antidegradation  
22 rules. However, the provision was not included in  
23 the Agency's final antidegradation proposal as the  
24 Agency believes that it is evident that such

L.A. REPORTING (312) 419-9292

22

1 situations do not involve pollutant loading  
2 increases and, therefore, are not subject to the  
3 antidegradation rule at Section 302.105.

4 Nonetheless, for clarification purposes  
5 and to avoid possible future misunderstandings, IERG

6 believes it is beneficial to include the following  
7 additional exemption in Section 302.105(d) and that  
8 exemption would read: Changes to or inclusion of a  
9 new permit limitation that do not result in an  
10 actual increase of a pollutant loading such as those  
11 stemming from improved monitoring data, new  
12 analytical testing methods, new or revised  
13 technology or water quality based effluents.

14           Moving on, another exemption that IERG  
15 is proposing concerns internal facility offsets.  
16 IERG also believes it is necessary to include a  
17 provision in Section 302.105(d), which exempts new  
18 or increased pollutant loadings from the  
19 antidegradation requirement in those instances where  
20 there is an internal offsetting reduction of the  
21 pollutant made by the permittee, and the discharges  
22 involve the same body of water. Such a provision  
23 would be highly desirable where a permittee has two  
24 permitted outfalls discharging to the same water

L.A. REPORTING (312) 419-9292

23

1 body. Suppose, for example, that due to equipment  
2 problems the facility needed to shift manufacturing  
3 between two production buildings, each of which  
4 discharges to a different outfall. Assuming in this

5 situation that there is no net increase in the  
6 overall pollutant loading from the facility, under  
7 the Agency's proposed antidegradation rules, the  
8 facility would still be subject to the  
9 antidegradation requirement in addition to possibly  
10 being required to modify its NPDES discharge permit.  
11 In this example, subjecting the facility to the  
12 antidegradation demonstration requirement seriously  
13 impacts the facility's operating flexibility and  
14 such an outcome seemingly goes beyond the intent and  
15 purpose of the antidegradation concept, which is  
16 to maintain and protect surface water bodies at  
17 their existing level of quality.

18                   Therefore, IERG recommends that Section  
19 302.105(d) be amended to include the following  
20 additional exemption: New or increased discharges  
21 of a pollutant where the permit applicant has made  
22 a contemporaneous and enforceable decrease in the  
23 actual loading of that pollutant at the source such  
24 that there is no net increase in the loading of that

L.A. REPORTING (312) 419-9292

24

1 pollutant into the same surface water body or  
2 surface water body segment.

3                   And, finally, a third additional exception

4 that IERG is proposing concerns storm water  
5 discharges that are covered by an individual NPDES  
6 permit. Many industrial facilities have storm water  
7 discharges which are permitted under an individual  
8 NPDES permit. Such situations are commonly found  
9 at facilities which discharges non-storm water waste  
10 streams together with storm water that is subject to  
11 contamination from outdoor industrial activities.  
12 The Agency's practice is to regulate the storm water  
13 discharges by including a Storm water Pollution  
14 Prevention Plan requirement in the facility's  
15 individual NPDES permit. As proposed, Section  
16 302.105 (c)(2) could be construed to require an  
17 antidegradation review for outdoor plant  
18 modifications or construction at facilities  
19 operating with an individual NPDES permit for their  
20 storm water discharges. For example, the  
21 construction of a new building, lay-down area or  
22 plant roadway may have the effect of increasing the  
23 volume of storm water runoff if the amount of  
24 impervious surface area is increased. Additionally,

L.A. REPORTING (312) 419-9292

25

1 certain kinds of development or construction may  
2 inherently increase the potential for storm water

3 discharge. In either situation, even though such  
4 changes would be regulated by the Storm water  
5 Pollution Prevention Plan requirement in the  
6 facility's individual NPDES permit, it could be  
7 argued that under proposed Section 302.105(c)(2), an  
8 antidegradation review is still necessary.

9           It is important to note that the proposed  
10 exemption in Section 302.105(d)(6) would not be  
11 applicable to the above scenarios as this exemption  
12 applies only to discharges covered by a general  
13 NPDES permit as opposed to those covered by an  
14 individual NPDES permit.

15           At the Board's December 6th hearing, when  
16 questioned about such hypothetical situations,  
17 Mr. Toby Frevert indicated that the Agency would  
18 take the position that such modifications or  
19 construction would not be subject to an  
20 antidegradation review provided the plant was not  
21 expanding to a new property not already covered by  
22 the Storm water Pollution Prevention Plan  
23 requirement in its current permit. However, as  
24 proposed, this section does not specifically provide

L.A. REPORTING (312) 419-9292

1 the Agency with the discretion to make this

2 exemption.

3           Industrial facilities possessing an  
4 individual NPDES permit for their storm water  
5 discharges may face another unintended dilemma under  
6 Section 302.105 when they apply for a renewal of  
7 their NPDES permit. Specifically, some individual  
8 NPDES permits impose loading limits on specific  
9 pollutants present in a storm water discharge.  
10 When these permits are renewed, the facility is  
11 required to provide updated precipitation data in  
12 its permit application. The Agency, in turn,  
13 considers the updated precipitation information when  
14 establishing pollutant-loading limits for the new  
15 permit. Should precipitation levels happen to  
16 increase during the intervening years since the  
17 previous permit application, for example, in  
18 ten-year storm event precipitation amount increased  
19 from, say, three-and-a-half inches up to four  
20 inches, the Agency would likely propose a higher  
21 loading limit in the new permit because of the  
22 improved, broader precipitation database.  
23 Consequently, although nothing at the facility has  
24 changed, the permittee may find itself facing a

1 review requirement through no fault of its own.

2           To remedy these very real, but unintended  
3 problems, IERG recommends that Section 302.105(d) be  
4 amended to include the following exception: Site  
5 storm water discharges covered by a Storm water  
6 Pollution Prevention Plan as required in an  
7 individual NPDES permit, provided that the discharge  
8 will not cause or contribute to a violation of  
9 Illinois water quality standards.

10           This concludes my testimony this morning.  
11 I appreciate the opportunity to testify and next --

12           MS. HODGE: Mr. Andes.

13           MR. ANDES: Thank you and good morning.  
14 My name is Fredric P. Andes, I'm an environmental  
15 lawyer, I'm of counsel in the Washington and Chicago  
16 office of Barnes & Thornburg. I've been practicing  
17 environmental law for over 20 years now and for the  
18 last eight years or so have worked primarily on  
19 issues regarding the Clean Water Act. We are a  
20 counsel to the Great Lakes Water Quality Coalition  
21 as well as coordinator of the Federal Water Quality  
22 Coalition, which participates in water quality  
23 issues on the federal level. In addition, I was on  
24 the Federal Advisory Committee and the TMDL program

1 and have been involved in advisory groups on the  
2 TMDL and antidegradation issues in Ohio, Indiana and  
3 in the antidegradation technical advisory group in  
4 Illinois. What I'm really here to talk about today  
5 is the experiences that we have had in dealing with  
6 antidegradation issues in other states, particularly  
7 in the Great Lakes because of the Great Lakes'  
8 initiative of the Great Lake states including  
9 Illinois have been forced to address antidegradation  
10 issues directly over the last five years. A number  
11 of the states have issued very detailed rules  
12 concerning antidegradation and there are both good  
13 and bad lessons to learn from those experiences and  
14 those states.

15           One of the fundamental points about  
16 antidegradation is that you may not have heard about  
17 a lot of the problems in terms of discharges having  
18 issues concerning antidegradation around the  
19 country. The main reason in all honesty is that  
20 most states don't implement antidegradation. They  
21 have antidegradation general standards in their  
22 rules parodying the federal language on that issue,  
23 but most states really don't apply it. That is  
24 changing. EPA has been telling states they need to

1 implement antidegradation and a number of states,  
2 including a few beyond the Great Lakes, are moving  
3 forward, but the fact that there haven't been a lot  
4 of problems with antidegradation doesn't really  
5 indicate that it -- doesn't really indicate that the  
6 program does not pose concerns, it's simply that  
7 it's really in its infancy.

8           A couple of concepts that are important in  
9 implementing antidegradation and that Mr. Smith has  
10 already referred to include both de minimis levels  
11 and exemptions and it's important to note that the  
12 federal rules in this area and guidance that have  
13 been issued by EPA are very clear that states have a  
14 substantial amount of flexibility in determining how  
15 to craft their antidegradation program. The program  
16 needs to focus on significant lowering of water  
17 quality, that's really the point is when you have a  
18 significant project that is going to have an impact  
19 on water quality in areas that are cleaner than  
20 standards that that increase needs to be carefully  
21 reviewed. EPA has never said that every single  
22 increase of any sort has to be reviewed and, in  
23 fact, there are statements EPA has made, some of  
24 which I'll read for you, which indicate that EPA

1 understands the need to focus this program and it  
2 has given the states a leeway to make some decisions  
3 about that. For example, when EPA issued the Great  
4 Lakes rules which applied only to a small portion of  
5 Illinois, it required the states to issue  
6 antidegradation requirements for bioaccumulative  
7 chemicals, which are a fairly small group and did  
8 not require them to implement any detailed  
9 requirements as to the other pollutants, the whole  
10 universe of other pollutants. However, EPA did talk  
11 in detail when it issued the guidance supplementary  
12 information document or the SID as we call it. It  
13 talked about how it viewed antidegradation and how  
14 states ought to implement it for pollutants in  
15 general. In the proposed rule they had covered  
16 everything and then they decided not to cover  
17 everything in the final rule but they said here's  
18 what we think states ought to do and for one thing  
19 EPA said, and we'll provide copies of this, the de  
20 minimis provisions provide a means for states and  
21 tribes to differentiate between actions that will  
22 result in an increased loading of a pollutant to a  
23 receiving water that is likely to have a significant  
24 impact on water quality and those that are unlikely

1 to do so and focus review efforts on actions that  
2 will degrade water quality. They then go on to say,  
3 it is reasonable to assume that loading increases of  
4 non-BCCs that will use less than ten percent of  
5 their remaining assimilative capacity in a water  
6 body will have a negligible impact on ambient water  
7 quality. So there EPA was saying we understand the  
8 need for a de minimis provision, we think that's a  
9 good idea. Even more recently in 1998 EPA started  
10 evaluating the need to change its federal water  
11 quality standards regulation, which dictates how  
12 states do their jobs in this area and in an advanced  
13 notice of proposed rulemaking that they issued in  
14 July 1998, EPA again talked about triggers for  
15 review and said that states often include guidelines  
16 in their antidegradation procedures which are used  
17 to determine when the water quality degradation that  
18 will result in proposed activity is significant  
19 enough to warrant further antidegradation review.

20           Where the degradation is not significant,  
21 the antidegradation review is typically terminated  
22 for that proposed activity. EPA then goes on to  
23 say, applying antidegradation requirements only to  
24 activities that will result in significant

1 degradation is a useful approach that allows states  
2 and tribes to focus limited resources where they may  
3 result in the greatest environmental protection.  
4 EPA notes that some states have even created  
5 categorical exemption where they found a class of  
6 activities don't result in significant degradation.  
7 That is all allowable under the current federal  
8 framework.

9 HEARING OFFICER TIPSORD: Excuse me, Mr. Andes,  
10 I apologize for interrupting you, but you're quoting  
11 extensively from something that you said you would  
12 provide a copy of, I don't see any of these quotes  
13 in your prefiled testimony and I just want to be  
14 sure you do cite to the federal policy at 40 CFR  
15 131.12, is this what you're quoting from now?

16 MR. ANDES: No. These are additional  
17 documents, I'm sorry, and we will provide copies of  
18 these additional documents.

19 HEARING OFFICER TIPSORD: I apologize for  
20 interrupting, but just to keep the record clear.  
21 Thank you.

22 MR. ANDES: Absolutely. And, in fact, based on  
23 that federal guidance, a number of others states in  
24 the area have put de minimis levels into their

1 regulations. As I said, in my prefiled testimony,  
2 Indiana has done so, Michigan has done so and the  
3 fact they have already been using those provisions  
4 to try to focus their efforts.

5 Now, different states have adopted  
6 different numbers. Indiana will adopt a ten percent  
7 of remaining capacity rule, Wisconsin for some  
8 pollutants adopts a 33 percent capacity rule, other  
9 states have a smaller one, other states focus on  
10 loading increases as compared to concentrations.  
11 There are a number of different choices states can  
12 make in determining what's significant. The point  
13 is that these states that have examined the  
14 antidegradation issues in detail have decided that  
15 they need to have de minimis levels in their  
16 regulations approved by their boards. The one state  
17 that we're aware of that has detailed rules that do  
18 not include de minimis provisions, and this is among  
19 the states that have been actively implementing  
20 antidegradation, is Ohio. In one of the first  
21 meetings of the state advisory group here we had a  
22 person from the state of Ohio EPA come to tell us  
23 about their program and as I recall they

24 characterized it as a disaster, that was the word he

L.A. REPORTING (312) 419-9292

34

1 used and said don't do what we did. In the first  
2 two years of implementation of the Ohio rule where  
3 every change people make requires a public notice  
4 and a process, they had 800 notices they had to  
5 prepare and file in the first two years. They spent  
6 a lot of time doing that and very little time  
7 focusing on the truly significant activities because  
8 they had to look at everything. In that regard,  
9 it's important to distinguish when we talk about  
10 what's a review and when we talk about well,  
11 everything needs a review. Everything does get a  
12 review in the permitting process. It's important to  
13 distinguish between should increases in discharge  
14 get a water quality review to make sure that you're  
15 not posing significant impacts on water quality,  
16 absolutely and that's part of what Mr. McSwiggin's  
17 group in the permits area will do. The issue is do  
18 they need to go beyond that and do the analysis  
19 under the antidegradation rules, which is very  
20 generally phrased in these rules and may be in some  
21 cases it will be brief, but there's nothing in the  
22 rules that says that, there's nothing in the rules

23 that sets up here's where we're going to do it quick  
24 and here's where we're going to do it in a

L.A. REPORTING (312) 419-9292

35

1 complicated and extensive way, and based on our  
2 experience in other states, an antidegradation  
3 review can be very complicated and take a long time  
4 because there's an analysis of alternatives involved  
5 and there's no way to say whether that's going to be  
6 a short one or a long one and then there's the  
7 social and economic showing that has to be made,  
8 which is very arbitrary and very subjective and hard  
9 to know even how somebody will pass that. So should  
10 there be a water quality review? Absolutely. Do  
11 you need an antidegradation review in every case?  
12 We don't think so and clearly EPA doesn't think so  
13 either. That's why, in our recommendations, we've  
14 been trying to define what are the significant  
15 levels that ought to be put into the rules so the  
16 state  
17 can focus on those activities that are truly  
18 significant.

19 It's also important beyond the de minimis  
20 levels, the state has already included some  
21 exemptions from review in its rules and again,

22 that's something other states have done as well.  
23 In fact, even Ohio, which doesn't have a de minimis  
24 level, has a significant number of exemptions and

L.A. REPORTING (312) 419-9292

36

1 there really are two kinds of exemptions and we  
2 agree with the ones the state has provided, but we  
3 think there are other ones that are important and  
4 there are some, which EPA has talked about in its  
5 guidance, where you say a class of activities is  
6 minor and doesn't really require an antidegradation  
7 review. Some of the ones Mr. Smith has described  
8 fall into that category. There are also some where  
9 you say it's not that it's minor, it's that this is  
10 a good thing, this is a kind of activity that you  
11 say it has social and economic benefit. For example  
12 -- and we've already had situations where these have  
13 been applied, one is where you may be required by  
14 your water permit to reduce your metals  
15 concentration, for example, and when you put in  
16 precipitation systems to do that, it's going to  
17 increase your discharge of solids. Well, you need  
18 to do the metals reduction, in fact, that's a good  
19 thing, and the metals are more toxic than the solids  
20 that you're going to be discharging. Is that

21 something that makes any sense to go through an  
22 antidegradation review on? When you're being  
23 required to reduce the metals, you are going to have  
24 an increase in the solids, that's something that

L.A. REPORTING (312) 419-9292

37

1 shouldn't go through an antidegradation review, of  
2 course, it goes through permitting, but it's  
3 something that has benefit, you are reducing the  
4 discharge of metals. By the same token, there are  
5 times when you're going to be, as Mr. Smith said,  
6 applying air pollution controls because of the  
7 requirements under the Clean Air Act. It's a good  
8 thing. You're going to be increasing your discharge  
9 of wastewater, of certain pollutants because of that  
10 because of what comes out of air pollution control  
11 systems. Do you want to force someone to go through  
12 an antidegradation review on that? What would that  
13 mean? In essence, we know that that's a good  
14 project that has social and economic benefit and to  
15 be able to just put in the rules book, we think this  
16 just ought to pass right through antidegradation, of  
17 course, it goes through permitting, but does it have  
18 to go through this duplicative review, which, in  
19 fact, discourages things that are environmentally

20 positive, we don't think so.

21           These are provisions that other states  
22 have put in their rules and we think it makes sense  
23 to have them in here too and, in essence, what the  
24 combination all this does, the de minimis provisions

L.A. REPORTING (312) 419-9292

38

1 and the exemptions, is it creates a focused program,  
2 a program that says we need antidegradation review  
3 for significant projects that are going to have an  
4 impact on water quality, let's look at those, let's  
5 spend some time and effort looking at those and not  
6 divert and dilute that effort by having to look at  
7 everything that happens in any operation in the  
8 state. Our concern has been that these provisions  
9 need to be in the rules for certainty so everybody  
10 understands what the rules are and because if you  
11 have general rules, there's a lot of subjectivity, a  
12 lot of arbitrariness and a lot of argument later  
13 about well, if you have general rules, can you --  
14 how do you implement them and can you pass some  
15 things quickly through the process and some things  
16 have to go through more detailed review, we think  
17 it's worthwhile to clarify these things up front and  
18 make sure everybody understands what the rules of

19 the game are.

20 Those are the key issues that I wanted to  
21 raise today. Thank you and when we're done, I'll be  
22 glad to answer any questions.

23 HEARING OFFICER TIPSORD: Thank you, Mr. Andes.  
24 Mr. Compton is next.

L.A. REPORTING (312) 419-9292

39

1 MR. COMPTON: Good morning. My name is Bill  
2 Compton and I'm employed by Caterpillar, Inc.,  
3 Peoria Illinois. I want to thank the Illinois  
4 Pollution Control Board for the opportunity to  
5 present this testimony today. I am presenting  
6 testimony today in support of the Illinois  
7 Environmental Regulatory Group, IERG's proposed  
8 revisions to the Agency's antidegradation proposal.

9 My testimony is specifically offered in  
10 support of IERG's proposed revision that would  
11 clarify the procedure by which the designation of  
12 surface water body as an outstanding resource water  
13 would occur. Rather than read my prefiled testimony  
14 into the record if there's no objection, I'd like to  
15 elaborate briefly on the important issues of ORW  
16 designation and ORW designation procedure. My  
17 comments should be placed in the context of the

18 testimony provided by the Agency regarding the  
19 ramifications that ORW designations will have on two  
20 important concerns of the state.

21           The first of these concerns is the right  
22 to property owners and other properties affected by  
23 ORW designation.

24           The second of these concerns is the

L.A. REPORTING (312) 419-9292

40

1 unforeseen impact of ORW designation on public  
2 policy; that is, the potential of an ORW designation  
3 to prevent the state from taking actions in the  
4 future that are needed for important social and  
5 economic development on or upstream of ORWs.

6           ORWs are broadly defined in the federal  
7 regulation and the Agency's proposal as high quality  
8 water that exhibits some unique characteristics that  
9 justify reserving and preserving the water for  
10 special uses.

11           Participants in these proceedings have  
12 generally relied on 40 CFR 131.12(a)(3) for guidance  
13 in considering the issue, outstanding national  
14 resource waters. This section requires  
15 the maintenance and protection of high quality of  
16 water quality and high quality waters designated as

17 ORWs and lists examples of waters that could be  
18 candidates for ORW status. For example, waters in  
19 national and state parks, wildlife refuges and water  
20 of exceptional recreational or ecological  
21 significance. Using these examples as a guide, the  
22 closest we come up to determining and understanding  
23 what the individual and combined impact of the  
24 Illinois ORW designations would be as stated in the

L.A. REPORTING (312) 419-9292

41

1 testimony of Toby Frevert in the December 6, 2000,  
2 second hearing in this matter.

3           Mr. Frevert testified as follows: For  
4 some clarification, one must remember that the EPA's  
5 interpretation of such designation is in quotes,  
6 no new or increased discharges to, closed quotes,  
7 and then he adds their term, quotes, outstanding  
8 national resource waters and no new or increased  
9 discharges to tributaries to outstanding national  
10 resource waters that would result in lower quality,  
11 end quote. He continues, Illinois is fortunate to  
12 have parks and wildlife refuges all up and down its  
13 major rivers classifying all such locales as ORWs  
14 would affect the majority of the state and their  
15 tributary watersheds and adjoining states. So the

16 presumption that a state park along the Mississippi  
17 or the Illinois River is an ideal candidate for  
18 outstanding resource classifications, may have  
19 ramifications 500 miles away. I want to make sure  
20 that everyone understands that, any follow-up and  
21 that ends Mr. Frevert's testimony.

22 It appears that the impact of ORW  
23 designations would depend on the mix and location of  
24 designated areas. Although the number of potential

L.A. REPORTING (312) 419-9292

42

1 designation sites is yet to be determined, sites in  
2 the categories included in Section 131.12(A)(3) are  
3 widely distributed throughout the state. The  
4 Illinois Department of Natural Resources and the  
5 prefiled testimony of Thomas has identified 45  
6 streams or stream segments of exceptional ecological  
7 significance throughout the state that are  
8 candidates for designation. Some proponents of ORW  
9 designations will undoubtedly select and petition  
10 for candidate site designations based solely on  
11 water quality, biological criteria and/or  
12 significant recreational resources. While this  
13 information is extremely useful input and very  
14 compelling, these parameters represent only a few of

15 the many factors that the Board must consider in  
16 making a positive determination of demonstration.  
17 There is a wide diversity of existing uses and  
18 societal issues in addition to water quality,  
19 biological and recreational uses which are directly  
20 related to surface water resource management in  
21 Illinois. Societal issues are key components in  
22 any attempt to demonstrate that the benefits of  
23 protection of the surface water body or surface body  
24 water segment from future degradation substantially

L.A. REPORTING (312) 419-9292

43

1 outweigh the benefits of economic and social  
2 opportunities that will be lost as a result of the  
3 designation. Thus, the benefits deliberation  
4 conducted when considering a petition for ORW  
5 designations should consider a number of issues such  
6 as interstate commerce, impact on state  
7 administration of environmental initiatives and  
8 policy, impact on state-owned property, impact on  
9 private property, impact on state and local  
10 government and private land use planning, zoning and  
11 development, property taking issues and interstate  
12 politics. These issues are demonstrative of state,  
13 regional, local politics, public policy and economic

14 and social development considerations appropriate  
15 for a benefits demonstration. A further note, the  
16 Agency's proposal urges governmental proponents of  
17 ORW designation to file petitions for designation  
18 only after full intergovernmental coordination has  
19 been achieved.

20 IERG submits that any proponent of an ORW  
21 designation that does not address the issues I've  
22 outlined, would not fulfill its burden of proof on  
23 the issues of ORW designation.

24 Finally, with each position for --

L.A. REPORTING (312) 419-9292

44

1 petition for ORW designation will come affected  
2 parties. These parties should be identified during  
3 the demonstration phase in the petition process and  
4 further should be identified to the greatest extent  
5 possible. Although a proponent for an ORW  
6 designation may find the identification process  
7 tedious and time consuming, the effort may forestall  
8 questions or accusations regarding deliberative  
9 omissions or frivolous or mischievous filings. To  
10 ensure that the necessary public participation, the  
11 proponent's petition must be distributed in a timely  
12 manner so as to inform the affected parties that a

13 designation proposal that may have an impact on  
14 their interest has been submitted for consideration  
15 by the Board and so as to allow the affected parties  
16 to participate in the designation project as they  
17 desire.

18           To summarize, IERG recognizes the needs  
19 for a process by which appropriate surface water  
20 quality can be designated as ORWs. However, as the  
21 Agency has testified, the ORW designation has the  
22 potential for profound and far-reaching impact. The  
23 Agency has recognized this potential impact in its  
24 proposal which provides for consideration of

L.A. REPORTING (312) 419-9292

45

1 economic and social factors when deciding whether to  
2 designate a surface water body as an ORW. IERG has  
3 proposed revisions to the Agency's proposal to  
4 clarify this process. We request that the Board  
5 consider IERG's proposed revisions when finalizing  
6 the rules proposing this proceeding. That concludes  
7 my testimony. Thank you for the opportunity to  
8 speak to you today.

9           HEARING OFFICER TIPSORD: Thank you,  
10 Mr. Compton. Before we proceed to questions, we'll  
11 take care of some housekeeping matters. If there's

12 no objection, I will admit all the prefiled  
13 testimony into the record as exhibits. I will start  
14 with Deirdre K. Hirner's testimony, I'll mark that  
15 as Exhibit No. 24. Ms. Hodge, do you have copies of  
16 that?

17 MS. HODGE: Yes, I do. I have extra copies  
18 over here.

19 HEARING OFFICER TIPSORD: Jeffrey P. Smith's  
20 will be admitted as Exhibit NO. 25. Frederic P.  
21 Andes' will be admitted as Exhibit No. 26 and Bill  
22 Compton's will be entered as Exhibit No. 27.

23 MS. HODGE: And I would also like to note that  
24 Ms. Hirner's testimony does have two exhibits to it,

L.A. REPORTING (312) 419-9292

46

1 Exhibits A and B that reflect IERG's proposed  
2 revisions to the Agency's proposal.

3 HEARING OFFICER TIPSORD: Thank you. And then  
4 you have some --

5 MS. HODGE: -- and then we have the two  
6 documents that Mr. Andes was referring to in his  
7 testimony and the first is a copy of an excerpted  
8 page from the July 7th, 1998, Federal Register and  
9 this is Water Quality Standards Regulation Proposed  
10 Rule, 40 CFR Part 131.

11 HEARING OFFICER TIPSORD: Okay. We'll mark  
12 that as Exhibit No. 28.

13 MS. HODGE: And the next one, again, a cover  
14 page and a one-page excerpt from a USEPA document  
15 entitled Water Quality Guidance for the Great Lakes  
16 System, Supplementary Information Document and it's  
17 dated March 1995.

18 HEARING OFFICER TIPSORD: We'll mark that as  
19 Exhibit No. 29.

20 MS. HODGE: Thank you.

21 HEARING OFFICER TIPSORD: Okay. And I think  
22 we are ready to proceed with questions and we'll ask  
23 them as a panel. There were no prefiled questions  
24 filed so I'll ask if there are questions. Are there

L.A. REPORTING (312) 419-9292

47

1 any questions from the audience? Mr. Ettinger?

2 MR. ETTINGER: I didn't prefile questions --

3 HEARING OFFICER TIPSORD: You need to identify  
4 yourself, Albert.

5 MR. ETTINGER: I'm Albert Ettinger.

6 THE COURT REPORTER: Could they please step up  
7 when they speak? Thank you.

8 HEARING OFFICER TIPSORD: And we're also  
9 getting the els behind us and we loose a lot from

10 out there.

11 MR. ETTINGER: Fine. I'm Albert Ettinger.  
12 Again, I didn't prefile questions, I thought the  
13 proposal was all too clear as to what it was doing  
14 except in two respects, as to Section 302.105 and in  
15 various other sections, I'll just address the whole  
16 panel, a distinction here is made or you want to put  
17 in surface water body. I guess my question is what  
18 is the effect of adding the word water surface here  
19 as you see it.

20 MS. HIRNER: It was placed in to clarify that  
21 these rules did not apply to groundwater, that  
22 there's a separate body that deals with groundwater  
23 in the state of Illinois and so that this was to  
24 apply to the surface waters of the state.

L.A. REPORTING (312) 419-9292

48

1 MR. ETTINGER: Now, is it your understanding  
2 that these proposed rules apply to more than NPDES  
3 permits than 401 certifications?

4 MS. HIRNER: No.

5 MR. ANDES: I think the language was put in  
6 just to be absolutely clear.

7 MR. ETTINGER: Well, that stumped me as given  
8 that it applied only to discharges and 401

9 certifications what the effect was here and it was  
10 just for clarification. And then that brings me to  
11 my next question which is under existing uses you  
12 change or to and on 303 -- 302.105(a)(1). It goes  
13 from or to and, was that meant to have a substantive  
14 change or was that --

15 MS. HIRNER: It was just for clarification we  
16 thought it --

17 MR. ETTINGER: It was a grammatical change?

18 MS. HIRNER: We thought it clarified it.

19 MR. ETTINGER: So both one and two are separate  
20 examples of something that would affect existing  
21 uses?

22 MS. HIRNER: Right.

23 MR. ETTINGER: Thank you.

24 MR. TANNER: I have a follow-up to one of

L.A. REPORTING (312) 419-9292

49

1 Mr. Ettinger's questions dealing with surface water  
2 bodies and we're trying to discriminate between  
3 groundwater and surface water body. Where would the  
4 water bodies in caves fit into this classification?

5 MR. ANDES: I don't think we've looked at that  
6 issue.

7 MS. HIRNER: I mean, we can go back and discuss

8 it, but to be honest, I don't think we've looked at  
9 the issues of water bodies in caves.

10 MR. TANNER: Well, I bring the question up  
11 because water bodies in caves probably have  
12 characteristics more like surface water bodies in  
13 terms of biological communities, it's just a very  
14 different type of environment, no sun, maybe more  
15 stable environmental factors, but still biologically  
16 they're very rich and so we want to make sure we  
17 don't leave them out, they don't fall into some sort  
18 of regulatory crevasse so...

19 MR. ANDES: I guess one question that's  
20 directed to the Agency would be whether they've --  
21 how they've interpreted their rules in that context.  
22 I'm not aware of any policy from IEPA as to what  
23 regulations they think cover those water bodies. I  
24 would be interested myself.

L.A. REPORTING (312) 419-9292

50

1 MS. HODGE: And we'll be glad to go back and  
2 consider it and talk with some other members and  
3 back with a response.

4 MR. TANNER: Thank you.

5 HEARING OFFICER TIPSORD: Any additional  
6 questions?

7 MS. LIU: Ms. Hirner, IERG proposes a section  
8 at 302.105(c)(2)(a) to assist in a tiered approach  
9 to making a significance determination. In section  
10 iii there is a list of items that the Agency may use  
11 in making its determination. In that very initial  
12 stage the list includes things like volume and  
13 concentrations of the pollutant, the nature of the  
14 pollutant, the nature of the receiving waters and I  
15 was wondering, is this list intended to be a  
16 guideline for applicants for information that they  
17 are supposed to submit along with their permit?

18 MS. HIRNER: Well, I think that if you look  
19 at the entire listing, the applicant does have to  
20 permit -- does have to submit information and I have  
21 to take a look here to find exactly where it's  
22 alluded to, to the -- if you look in two it says  
23 that you would set forth as necessary information on  
24 the loading, the nature of the discharge, the

L.A. REPORTING (312) 419-9292

51

1 location, physical characteristics and any other  
2 information which may assist the Agency in making  
3 its determination so that, you know, preliminarily  
4 the applicant would know that it would have to  
5 submit those things clearly articulated in little --

6 ii and if the Agency in determining that it needed  
7 additional information in order to consider those  
8 listed in iii, then they could request that the  
9 applicant provide that information if it were not  
10 currently available to them in some other form or  
11 fashion.

12 MR. ANDES: As a practical matter I think this  
13 would be a dialogue between the Agency and the  
14 applicant and I think any reasonable applicant  
15 wouldn't just put together something skeletal and  
16 say, all right, do what you want with this and  
17 consider any information you have, you would -- if  
18 you're trying to make the argument, your discharge  
19 is not significant, I think you would want to put  
20 together a fairly clear and detailed explanation  
21 saying here are the factors you're going to be  
22 considering and here's how our discharge ranks on  
23 those factors. So I think that it would serve both  
24 purposes. It's probably information you would be

L.A. REPORTING (312) 419-9292

52

1 submitting, but it's also a clear guidance to the  
2 Agency on what factors they'll consider in making  
3 the decision.

4 MS. LIU: In this initial determination phase,

5 is there a provision for the Agency to use  
6 information that's already at its disposal?

7 MS. HIRNER: Yes, we do, I believe, again in  
8 this section say that in making its significance  
9 determination, this is in small four, Roman numeral  
10 four, in making its significance determination, the  
11 Agency may utilize the information set forth in  
12 Subsection (c)(2)(B)(iii), which is the information  
13 that is available to it from additional sources.

14 MS. LIU: Thank you.

15 HEARING OFFICER TIPSORD: I want to follow-up  
16 on that. You've added this information that you  
17 would expect the Agency to use its own resources, et  
18 cetera, to make these determinations. When a  
19 permit, an NPDES permit, is appealed, the Board  
20 makes its decision based on the record that was  
21 before the Agency. So my question being, especially  
22 with third-party permit appeals now available, how  
23 does the information that the Agency uses, which you  
24 almost seem to be talking about their institutional

L.A. REPORTING (312) 419-9292

53

1 knowledge in 105(c)(2)(B)(iii), how does that  
2 information get in the record for the Board's  
3 consideration?

4 MS. HIRNER: The way that we anticipate that  
5 working is that when the Agency makes its  
6 significance determination, it would have to place  
7 in its fact sheet that goes out with the NPDES  
8 permit for review, the things that it relied on in  
9 making that significance determination and so if it  
10 used studies that were available to it, you know,  
11 that were on record or conducted by other state  
12 agencies or any of the information sources that it  
13 relied on when it developed its fact sheet, it would  
14 place that in the fact sheet. So the significance  
15 determination is -- the factors used and the  
16 decision criteria used and the decision made by the  
17 Agency, would be put in the fact sheet and then the  
18 fact sheet, as I understand, is part of what -- of  
19 the record of information that is available to any  
20 party that would appeal that, but I'm not an  
21 attorney.

22 HEARING OFFICER TIPSORD: But the items  
23 installed would not be a part of the record. The  
24 record would be the record.

L.A. REPORTING (312) 419-9292

54

1 MS. HODGE: I think it should be. I think the  
2 Agency would reference it that it relied upon it

3 and, you know, information, data or reports, I would  
4 think that that would have to be part of the Agency  
5 record and then as I look at this on 3C, Agency  
6 experience, and then 3D, any other valid  
7 information, we would certainly expect that the  
8 Agency, you know, would again reference what it had  
9 relied upon and if it was just its experience, you  
10 know, there wouldn't be a document, but there would  
11 still be an indication that the Board put in the  
12 record for an appeal.

13 HEARING OFFICER TIPSORD: Thank you.

14 MR. TANNER: I have a follow-up question in a  
15 similar part of the regulation there. On page four  
16 of your Exhibit A, which I'm looking at  
17 302.105(c)(2)(A) and Roman numeral six, you put in  
18 language here that the Agency shall make  
19 significance determinations in accordance with its  
20 antidegradation implementation procedures. Are you  
21 assuming that those implementation procedures would  
22 all be spelled out in the Part 354 regulations that  
23 the Agency would be proposing?

24 MS. HIRNER: Yes, I believe that's what we

L.A. REPORTING (312) 419-9292

1 anticipate at this time because 354 is not part of

2 this proceeding and there is no 354 that exists. We  
3 referred to the Agency's implementation procedures  
4 because we know the Agency will have to have  
5 implementation procedures, but we just couldn't put  
6 the number in here because it does not yet exist.

7 MR. TANNER: Thank you.

8 MR. FLEMAL: I'd like to explore a little bit  
9 your suggestion that the mechanism by which ORW  
10 determinations are made is done in an adjusted  
11 standard proceeding. In reaching this  
12 recommendation, have you looked at yet other  
13 possibilities for how that proceeding might go  
14 forth, specifically rulemaking proceedings?

15 MS. HODGE: Yes, we did consider that and in  
16 looking --

17 HEARING OFFICER TIPSORD: Ms. Hodge, I think I  
18 need to have you sworn in.

19 (Witness sworn.)

20 MS. HODGE: We did consider that and in looking  
21 at the Agency's proposal we -- our understanding of  
22 that is that it was kind of a mix of a regulatory  
23 proceeding and an adjudicatory proceeding and we did  
24 think about that and consider the burdens of proof,

1 the standards in a regulatory proceeding versus an  
2 adjusted standard and it was the consensus of IERG  
3 that the ORW designation should be an adjudicatory  
4 proceeding. We have an adjudicatory proceeding in  
5 the statute in Section 28.1 for adjusted standard,  
6 we've got regulations, that's why we modeled this to  
7 follow that.

8 MR. ANDES: Just to add to that, a number of  
9 other states have felt that this kind of procedure  
10 that designates waters for special protection,  
11 beyond high quality is so important that they'll  
12 only do it -- the Board will make a recommendation  
13 and then the legislature will act on it.

14 MR. FLEMAL: Actually, it's along that line, I  
15 was wondering whether or not a rulemaking proceeding  
16 may not be a more appropriate device to use for the  
17 Board. My recollection is that we put in place the  
18 adjusted standard procedure largely to expedite  
19 certain kinds of decisions that may have been of  
20 lesser geographic or economic import than the kind  
21 of things we're dealing with here. We're hearing  
22 continuously that this is a very important  
23 determination to be made and it strikes me that  
24 maybe the mechanism that we're recommending for it

1 is one that has been put in place for something of  
2 a lesser import, right, if I can say that, any  
3 environmental decision we make is of a lesser  
4 import. We did adjusted standards, put those on the  
5 books again by my recollection because it was  
6 thought that the full panoply activities that are  
7 required under the Administrative Procedure Act  
8 weren't necessary for some of the kinds of things  
9 that we're dealing with that we even talk, to use  
10 the term, as a variance type procedure for the  
11 adjusted standards except that it wouldn't  
12 necessarily have time limits on it. Sort of with  
13 that background I can't help but wonder whether we  
14 shouldn't as well contemplate a rulemaking  
15 procedure, cite specifically general rulemaking for  
16 these things that there is indeed a need of  
17 determination.

18 MS. HODGE: And I think we did consider that,  
19 the members of the Illinois Environmental Regulatory  
20 Group, and we can certainly, you know, respond more  
21 fully in written comments, but we feel very strongly  
22 it should be an adjudicatory proceeding. In a  
23 rulemaking proceeding, which you're well aware of,  
24 the Board has obligations to consider certain

1 things. We think that in a proceeding like this,  
2 the Board should certainly weigh and balance the  
3 benefits with the detriments, the environmental  
4 benefits with the costs and that's why we have  
5 proposed an adjudicatory. Is the adjusted standard  
6 the best adjudicatory proceeding? I think, you  
7 know, we would certainly be willing to consider some  
8 other options, but we feel very strongly it should  
9 be an adjudicatory.

10 MS. McFAWN: That's very interesting because  
11 the adjudicatory proceeding that ASs are  
12 characterized as, my recollection was that it was  
13 adopted into the Act to circumvent the need for an  
14 economic impact statement at the time when our Act  
15 required an economic impact statement for all  
16 rulemakings whether site-specific or otherwise. So  
17 what you just testified to was that you want the  
18 economic impacts to be seriously considered?

19 MS. HODGE: That's correct, and I recall the  
20 discussions and the legislation and again, I do  
21 recall when that legislation was adopted and I think  
22 that was one of the bases, but the distinction here  
23 is really adjudicatory. I mean, that's where we're  
24 making the true distinction is that we not only want

1 the Board to consider economics, we want the Board  
2 to balance that against the environmental benefits.

3 MS. McFAWN: But that inspirations not  
4 considered in all adjusted standards, you're adding  
5 it to -

6 MS. HODGE: That's correct.

7 MS. McFAWN: So you're changing a criteria of  
8 the adjusted standard for the purposes of these  
9 designations, is that right -- proposed changes?

10 MS. HODGE: We're including in our proposed  
11 changes that the Board consider and weigh and only  
12 designate a water body segment as an ORW when the  
13 benefits substantially outweigh.

14 MR. ANDES: Which is not very different from  
15 what the Agency has already proposed in the terms of  
16 the Agency's proposal itself, talks about this  
17 balancing, I think our struggle was to say we really  
18 want an adjudicatory process, where is there one  
19 that we can look at as an analogy and we looked at  
20 adjusted standards. I think that IERG is open to  
21 figuring out what's the best way to do this, to make  
22 sure the right factors are weighed in a process that  
23 makes sense we can take back and think that through  
24 more fully in terms of getting you some views on

1 that.

2 MR. FLEMAL: Perhaps you could help us a little  
3 bit if you would list for us what you see as the  
4 advantages in an adjudicatory process over the  
5 regulatory process, whatever mechanism we might have  
6 available on either --

7 MS. HIRNER: And if I could add, not having  
8 been here when the adjudicated standard procedure  
9 was put into place, my understanding in some of the  
10 discussions that we had that led us to believe that  
11 it needed to be an adjudicatory proceeding was that  
12 whenever a proponent comes in for an adjusted  
13 standard, the burden of proof to demonstrate that  
14 that just -- that adjusted standard is warranted is  
15 on the proponent for the adjusted standard and  
16 similarly, our members felt that the burden of proof  
17 to demonstrate that a stream segment warrants  
18 outstanding resource water designation should be on  
19 the proponent for that designation. So that was  
20 another issue that we took into consideration and  
21 from my perspective in the discussion was probably  
22 one of the more important distinctions that we made  
23 and that was tied to the burden of proof being  
24 placed on the proponent.

1 HEARING OFFICER TIPSORD: But isn't that also  
2 through a rulemaking, a proponent who brings in a  
3 rulemaking is obligated to demonstrate economic  
4 reasonableness, technical feasibility, provide  
5 testimony, present their proposal to the Board and  
6 then the Board makes a decision whether to proceed  
7 or not and we don't always proceed. So isn't that  
8 really not that different?

9 MS. HODGE: That's an interesting issue, what  
10 is the burden of a proponent in a rulemaking and I  
11 know on behalf of IERG, we have submitted comments  
12 to the Board in the past, you know, on that and I'm  
13 not sure that it's really crystal clear about what  
14 burden a proponent in a rulemaking has, where in an  
15 adjudicated proceeding such as this, as Ms. Hirner  
16 said, you know, we think the burden is on the  
17 proponent.

18 MR. ANDES: I think we were also trying to  
19 distinguish between the Board having to consider a  
20 number of factors, including reasonableness and  
21 feasibility as opposed to here where in the Agency's  
22 proposal as well as ours, there is a clear finding  
23 needed that the benefits outweigh the costs. So

24 we were sort of trying to distinguish between those

L.A. REPORTING (312) 419-9292

62

1 two and that I think was part of the reason we were  
2 saying well, we look at it as a rulemaking you think  
3 in terms of the various factors that have to be  
4 considered, here, there's a real finding that has to  
5 be made, maybe that can be fit into a rulemaking  
6 process. I think we'd like to think about that a  
7 little more.

8 MS. McFAWN: When you're thinking about that or  
9 even today, are there any other safeguards that you  
10 think that you're going to garner for this process  
11 by making it an adjudicatory proceeding? What  
12 beyond the burden of proof, the higher standards for  
13 the Board review, that being the economic balancing,  
14 anything else?

15 MS. HODGE: I think that those are the primary  
16 issues, but we'll think about it.

17 MS. McFAWN: All right. Also, what I've always  
18 wondered and tried to conjure in comparing adjusted  
19 standard and site-specific rulemaking are two issues  
20 and if you can give us some input or the  
21 participating in this process, the fact that in a  
22 rulemaking there is public access to that process

23 through publication in the Illinois Registrar first  
24 and second notice and also participation by the

L.A. REPORTING (312) 419-9292

63

1 joint committee and finally, those -- the rules are  
2 adopted, they are published. Our decisions in  
3 adjusted standards are only published within the  
4 Board's document, not the standards. I wonder if  
5 there is any bearing on your recommendation of a  
6 adjusted standard over rulemaking.

7 MS. HODGE: I think we'll have to consider  
8 that, but we -- the notice part of -- notice to  
9 affected parties is a concern of ours in this  
10 proceeding as well so we'll consider it.

11 MS. McFAWN: Thank you.

12 HEARING OFFICER TIPSORD: Anything further?

13 MS. LIU: Mr. Smith, you had described some  
14 exceptions from the antidegradation review process,  
15 No. 9 of the proposed exceptions was in 302.105(d)  
16 and it's an exception for dischargers who have no  
17 net increase in their pollutant loading.

18 Is this intended to apply to all of the  
19 outfalls from a single facility or all of the  
20 facilities in a permit?

21 MR. SMITH: It's intended to apply to all of

22 the outfalls covered by a permit for that facility.

23 MS. LIU: In your experience, what would the  
24 maximum distance be between two outfalls where you

L.A. REPORTING (312) 419-9292

64

1 might spread these net increases apart?

2 MR. SMITH: Well, I can take back to experience  
3 with Commonwealth Edison where we had a separation  
4 of as much as a mile. At the facility that I work  
5 at now, the separation is about a half a mile  
6 between two outfalls.

7 MS. LIU: IERG also proposed an exception for  
8 storm water discharges covered by the Storm water  
9 Pollution Prevention Plan?

10 MR. SMITH: Right.

11 MS. LIU: In the example that you provided in  
12 your prefiled testimony you mention construction of  
13 a new building or a parking lot that may have the  
14 affect of increasing the volume of runoff because of  
15 the increase of impervious surface area?

16 MR. SMITH: Yes.

17 MS. LIU: Wouldn't the increased volume of  
18 runoff correlate to an increased pollutant loading,  
19 especially if you have a construction project where  
20 excavated soils may wash off or a parking lot where

21 dripping gasoline might wash off?

22 MR. SMITH: It certainly could and the concept  
23 that we're trying to get across here is that the way  
24 that those types of increases should be controlled

L.A. REPORTING (312) 419-9292

65

1 through the existing Storm water Pollution  
2 Prevention Plan for that part of the site which  
3 would be the condition in the facility's NPDES  
4 permit, the Storm water Pollution Prevention Plan  
5 requirement mandates that if any new construction  
6 takes place on the portion of the site covered by  
7 the plant, that the permittee has to consider what  
8 additional controls might be necessary to limit the  
9 additional loading of pollutants from that expansion  
10 and the -- basically, the EPA's determination of the  
11 Storm water Pollution Prevention Plan requirement in  
12 a permit is that that constitutes the best available  
13 technology and that seems to be a very workable  
14 approach for addressing those types of modifications  
15 to the site.

16 MS. LIU: Thank you.

17 MR. SMITH: Sure.

18 MS. LIU: Mr. Andes, I have question for you  
19 too.

20 MR. ANDES: Sure.

21 MS. LIU: In your prefiled testimony you say,  
22 quote, antidegradation review requires the IEPA to  
23 evaluate the social/economic worth of a project.  
24 This is a task that is not related to the Agency's

L.A. REPORTING (312) 419-9292

66

1 environmental focus, and the Agency is not well  
2 equipped to perform this function, end quote.

3 Would you suggest some other group or  
4 Agency who might be better equipped to do that?

5 MR. ANDES: Well, in fact, one of the concepts  
6 -- first of all, let me say when I say that I think  
7 that that concept applies to environmental Agency's  
8 generally and I've made the same statement in other  
9 states that the water permitting folks are not  
10 people who are in the business of making social and  
11 economic determinations. One of the concepts we've  
12 talked about in other states has been, how can we  
13 get the Department of Commerce involved in these  
14 decisions? How can we get local officials involved  
15 more in these decisions? So, for example, if the  
16 community comes forward and says well, here's a new  
17 project, it's going to increase pollutants so it has  
18 to go through antidegradation review, we have a

19 long-term plan and here's how this project fits into  
20 that plan. Well, that determination by the local  
21 agency really ought to be fit into this process in  
22 some way. We think that finding a way to do that,  
23 to get input from those folks I think is very  
24 important in this process so it's not all on the

L.A. REPORTING (312) 419-9292

67

1 backs of the agency that really deals with water  
2 permit issues and water quality, and I hope that as  
3 this process moves forward, that we can work with  
4 the Agency to develop procedures that will help  
5 provide that input.

6 MS. LIU: Do you see that type of provision or  
7 concept coming into play in the Agency's  
8 implementation process under Part 354?

9 MR. ANDES: It's not an issue we've really  
10 explored yet and I'm glad you're raising it because  
11 it is something we've talked about in other states.  
12 What that really says is again you're focusing on  
13 significance activities because communities aren't  
14 going to look at every tiny little change facilities  
15 make to fit it somehow into their long-term plan.  
16 Long-term plans concern major projects. So the  
17 concept that antideg ought to focus on those

18 projects and ought to consider input from the  
19 agencies that really do land use planning is  
20 something I think we'd be very interested in  
21 exploring with the Agency further.

22 THE COURT REPORTER: Ms. Tipsord, can I change  
23 my paper?

24 HEARING OFFICER TIPSORD: Yeah. We're going to

L.A. REPORTING (312) 419-9292

68

1 go off the record for just one second.

2 (Whereupon, a discussion  
3 was had off the record.)

4 MR. RAO: Mr. Andes, do you believe that this  
5 evaluation of social and economic impact, should  
6 this be done by the applicant, you know, the burden  
7 should be on the applicant to, you know, get and  
8 collect all the information and provide it to the  
9 Agency as to what the social/economic impact of a  
10 project would be?

11 MR. ANDES: Well I think that -- I think that,  
12 and as we've laid it out in our proposal, the  
13 applicant certainly has the opportunity to provide  
14 information and a lot of cases is going to provide  
15 information to help the Agency make up its mind,  
16 but there are going to be, we think, cases where

17 the Agency has information by which it can make the  
18 decision. Sometimes it's going to be a pretty easy  
19 decision in terms of whether this is something that  
20 meets the test and the Agency certainly ought to be  
21 able to rely on information it has in hand. Again  
22 as we said before identifying in the record, here's  
23 the information we have and here's how we're using  
24 it. So you really ought to have both options. The

L.A. REPORTING (312) 419-9292

69

1 Agency may be able to make up its own mind based  
2 on what --

3 THE COURT REPORTER: I'm sorry. Could you  
4 please slow down?

5 MR. ANDES: I'm sorry.

6 THE COURT REPORTER: You're very fast. Thank  
7 you.

8 MR. ANDES: The Agency ought to be able to make  
9 up its own mind based upon the information it has,  
10 but the applicant also ought to be able to provide  
11 information. Ultimately, the Agency needs to make a  
12 determination.

13 MS. HIRNER: And just to follow-up, I think  
14 we've made a point in our previous testimony that we  
15 do believe that the Agency should have all of the

16 information that it needs to do a thorough  
17 antidegradation review. We have no argument with  
18 that at all. The Agency should have the information  
19 that it needs and, in fact, in some discussions that  
20 we've had with the Agency about those proposed Part  
21 354 implementation procedures, we had recommended  
22 adding to the list of information, the required  
23 information, that the Agency believes it needs to do  
24 an antidegradation review another item that

L.A. REPORTING (312) 419-9292

70

1 specifically states, any other information that the  
2 Agency feels it needs to have or any other  
3 information that the Agency deems necessary to have  
4 to do its review.

5 MR. RAO: Yeah, I realize that they proposed  
6 those requirements. I was just asking these  
7 questions because Mr. Andes did say that the Agency  
8 doesn't have expertise in social/economic impact, so  
9 I thought maybe an applicant could hire consultants  
10 or get information from other sources and provide it  
11 to the Agency.

12 MR. ANDES: And I think that will happen.

13 MR. RAO: Okay. Thank you.

14 MR. MELAS: This is getting away from

15 specifics, a very general question. There was a lot  
16 of conversation --

17 HEARING OFFICER TIPSORD: Mr. Melas, speak up a  
18 little bit.

19 MR. MELAS: I'm sorry.

20 THE COURT REPORTER: Thank you.

21 MR. MELAS: I'm sorry. There were a lot of  
22 questions -- a lot of emphasis I should say on  
23 exemptions and de minimis. Now, I was -- my memory  
24 was refreshed reading a lot of this material that

L.A. REPORTING (312) 419-9292

71

1 the passage of the Clean Water Act of 1972, the  
2 objective of that Act was to -- for the first time  
3 in the history of the country to set up a policy for  
4 preservation of our waters and as I remember, it was  
5 to restore and maintain chemical, physical and  
6 biological integrity of nation waters and if we  
7 concentrate a lot on exemptions and de minimises we  
8 start chipping away at the ultimate objective of the  
9 Clean Water Act. I'd like to get just a general  
10 reaction from the panel as to that particular  
11 question that's in my mind.

12 MR. ANDES: Sure. And I'm glad you raised that  
13 point because it is one that we've discussed a

14 number of times in the advisory group and in other  
15 states as well and it's important to keep the whole  
16 structure in mind. What we're really talking about  
17 here is you start in the Water Act with --  
18 particularly from the 1972 Act with effluent  
19 guidelines, technology based effluent guidelines,  
20 for industry and secondary treatment from  
21 municipalities, sort of baseline levels of  
22 protection. Above that, you have water quality  
23 standards and water quality standards set to reach  
24 acceptable water quality -- to reach those safe

L.A. REPORTING (312) 419-9292

72

1 levels. What we're talking about here is another  
2 level, in fact, two levels beyond that because what  
3 we're saying is you don't let waters get to levels  
4 that are dirty. You don't let waters get polluted  
5 to a point where they are worse than water quality  
6 standards, that's an absolute. Here we're talking  
7 about saying when we have waters that are better  
8 than water quality standards, okay, so we know we  
9 already have the baseline level of protection, in  
10 fact, you have effluent guidelines and then  
11 secondary treatment and then standards so you have  
12 these baseline levels of protection and then you say

13 when waters are even clearer than that, when will we  
14 decide that all right we don't want to totally  
15 stifle any economic development or growth in these  
16 areas that are cleaner than standards. We know  
17 water quality is protected, the standards are being  
18 met. When will we allow some increases in  
19 discharges to allow industries and communities to  
20 continue to grow and to develop? The way the EPA  
21 structured this process is say, we don't ban it, we  
22 don't ban growth. What we say is we're going to  
23 manage it, we're going to say in these areas, we're  
24 not going to let them get worse than standards,

L.A. REPORTING (312) 419-9292

73

1 we're going to keep them better than standards, but  
2 we'll allow some increase as long as you can show  
3 certain factors. As long as you can show you  
4 thought about these issues and you're aware of what  
5 the increases are and how they affect water quality,  
6 and what EPA said is we're not saying every little  
7 increase needs to be reviewed here, remember we're  
8 talking about waters that are already better than  
9 standards, but we're saying when you have a  
10 significant project and water that's better than  
11 standards, we don't just want to let it happen, we

12 want to review it, we want to think about it, we  
13 want to make sure you're looking at alternatives, we  
14 want to make sure you're looking at the  
15 social/economic factors when you're focusing on  
16 these significant projects and before you let it  
17 happen, you look at those factors and make a  
18 decision.

19                   So it's again talking about extra levels  
20 of protection beyond water quality standards and  
21 saying when will we allow some things to happen  
22 because all waters, all waters, around the country  
23 are high quality for something because high quality  
24 means you're better than standards. There aren't

L.A. REPORTING (312) 419-9292

74

1 any water bodies I can think of that are not meeting  
2 any standards. So every water body is doing better  
3 than standards on some pollutants. We want to keep  
4 it that way, but you also want to make sure that  
5 you're not saying no growth, never, on any of these  
6 waters. We want to say we're going to balance the  
7 factors, we're going to manage growth and that's a  
8 concept that EPA has clearly explained, as I said,  
9 in these various documents, we're not saying no  
10 growth, we're saying significant projects we want a

11 review to happen and what we're really talking about  
12 here is what's the best way to conduct that review  
13 within the confines of the Water Act as a whole.

14 MR. SMITH: If I could just add on to that to  
15 get to your question, I think, Mr. Melas, there are  
16 other provisions in the Clean Water Act that really  
17 get to improving --

18 HEARING OFFICER TIPSORD: Mr. Smith, could you  
19 speak up a little bit, we have a train going by and  
20 we're losing you.

21 MR. SMITH: I'm sorry. There are other  
22 provisions in the Clean Water Act that really get at  
23 improving the quality of the nation's waters such as  
24 the requirement for EPA to come out and review

L.A. REPORTING (312) 419-9292

75

1 categorical effluent guidelines for categories of  
2 industrial facilities. EPA is continually coming  
3 out with new, tighter effluent discharge standards  
4 for different classifications of industries.  
5 There's also the requirement, too, for states to  
6 conduct triennial reviews of their standards to  
7 basically rash it down to the standards to come up  
8 with tighter standards. A very good example of us  
9 going through that process here in Illinois was the

10 Great Lakes Water Quality Standards that were  
11 adopted a couple years back. That established new  
12 standards, in fact, standards that never existed  
13 before for numerous contaminants, particularly  
14 bioaccumulative chemicals were of concern and what  
15 that eventually will mean is that industrial  
16 facilities will likely see water quality based  
17 effluent limitations applied to their permits, which  
18 will require them to better control the quality of  
19 their wastewater discharges. So that's how the  
20 water quality will improve and that's, I think, how  
21 the Clean Water Act really addressed and went about  
22 addressing the goal of improving the nation's water  
23 quality.

24 MR. ANDES: Well, and you can add to that the

L.A. REPORTING (312) 419-9292

76

1 other side of all this is that the waters that are  
2 meeting standards, you have the entire total maximum  
3 daily loads, TMDL program, which is saying here's  
4 how we're going to resource the waters that are not  
5 meeting standards and develop limits for dischargers  
6 to make those waters get up to the level that is  
7 acceptable. So you really have to think of  
8 antidegradation as one of the parts of this whole

9 program.

10 MS. HIRNER: And I would think that one of the  
11 other things that we think of in the context of  
12 these exceptions and I think it's important to note  
13 that these are listed as exceptions and not  
14 exemptions because I think Mr. Frevert's made it  
15 very clear in his testimony that these exceptions  
16 are not exempt from antidegradation review. They're  
17 exempt from further antidegradation review and I  
18 think that he has pointed out that these -- the  
19 activities which the Agency proposed get an  
20 antidegradation review in some other context and I  
21 believe that the exceptions that we have proposed  
22 get a review in some other context, but the  
23 practical side of this is that in having some  
24 exception is that the Agency has limited resources

L.A. REPORTING (312) 419-9292

77

1 to review permits and if they have -- if they're  
2 resources right now are so limited in that it takes  
3 two or three years to sometimes get a permit out,  
4 then we're going to have to -- or we think we should  
5 allow them to have a mechanism where they can choose  
6 to focus those very limited resources that they have  
7 for review purposes on those things, which have real

8 potential impact to affect -- or real potential to  
9 impact environmental quality.

10           And so if you look at the list of all of  
11 the things, all of the types of permits that the  
12 Agency has to review, there has been some  
13 recognition in what they have proposed as  
14 exemptions, there have been a list of activities  
15 that have been considered in other states where  
16 people have had enough experience with those types  
17 of activity to say the potential for degradation in  
18 these particular activities is very small compared  
19 to everything that we need to look at. So, you  
20 know, one of the things that we're thinking about  
21 is the practicality, how much -- how many resources  
22 does the Agency have and how are those resources  
23 best expended.

24           MR. ANDES: It's not that they're not going to

L.A. REPORTING (312) 419-9292

78

1 go through permitting, it's not an exemption from  
2 permitting or from review based on water quality  
3 standards. It is only an exception narrowly  
4 targeted toward the antidegradation program. The  
5 other provisions, permits, standard sets will still  
6 apply.

7 MR. MELAS: Specifically on your example,  
8 Mr. Smith --

9 THE COURT REPORTER: Please speak up.

10 MR. MELAS: Specifically, Mr. Smith, on your  
11 example of the two outfalls from one facility and  
12 you're going to shut the production down in one and  
13 increase it in the other so that the total load is  
14 now the same.

15 Is there a separate permit then that has  
16 been issued for the outfall that's still working --

17 MR. SMITH: No --

18 MR. MELAS: -- with a higher limit --

19 MR. SMITH: It would still be --

20 MR. MELAS: And then three years later the  
21 second one starts up again and then you got an  
22 increase in total maximum load?

23 MR. SMITH: That's a good question. The permit  
24 for the facility would cover both outfalls so the

L.A. REPORTING (312) 419-9292

79

1 process would be that the permittee would apply to  
2 the Agency for an increase from the one outfall and  
3 in the course of the negotiations over that, it  
4 would be demonstrated that the discharges or the  
5 loading from the other outfall would be reduced to

6 the point where it would offset the proposed  
7 increase and, therefore, that would, as proposed,  
8 negate the need for going through an antidegradation  
9 review for that proposed increase on the first  
10 outfall.

11 MR. ANDES: And that would be enforceable. I  
12 think that would address your point, which is you  
13 would have to commit that you're shutting down the  
14 first operation and that would be an enforceable  
15 part of your permit. You couldn't then two years  
16 later when nobody's noticing just increase it again.  
17 Your permit would incorporate the concept that  
18 that's shut down --

19 MR. MELAS: It would be specifically stated in  
20 the permit?

21 MR. ANDES: Yes, exactly.

22 MR. SMITH: And it would have to go through the  
23 permitting process is the point that I think is  
24 important to note.

L.A. REPORTING (312) 419-9292

80

1 THE COURT REPORTER: Ms. Tipsord, may I have a  
2 moment, my disk --

3 HEARING OFFICER TIPSORD: Sure. You know what,  
4 this might be a good time we've been at it for about

5 an hour and 45 minutes, it looks like we still have  
6 some questions, why don't we take a brief ten-minute  
7 break and we'll come back with -- or give you a  
8 chance to --

9 THE COURT REPORTER: Thank you.

10 HEARING OFFICER TIPSORD: Sure.

11 (Whereupon, after a short  
12 break was had, the  
13 following proceedings  
14 were held accordingly.)

15 HEARING OFFICER TIPSORD: Mr. Rao, I believe,  
16 has a few follow-up.

17 MR. RAO: Yes. I had a clarification question  
18 for Ms. Hirner. In your response to Member Melas'  
19 question you mentioned that the activities listed  
20 under Section 302.105(d), you know, they are not  
21 exempt from antidegradation, that only -- that they  
22 were not required to go through further  
23 antidegradation assessment. Can you explain what  
24 further antidegradation assessment means in this

L.A. REPORTING (312) 419-9292

81

1 context?

2 MS. HIRNER: I'm not sure that I can explain  
3 exactly what it means in the context, but I'll try

4 my best and if it's not clear, we can work on it and  
5 then I can maybe ask someone else --

6 MR. RAO: Let me -- just after that, also with  
7 these activities, do they have to go through the  
8 significance determination?

9 MS. HIRNER: No. They -- the activities that  
10 -- as I understand the activities listed as  
11 exceptions would not go through the significance  
12 determination. There are two matters which are  
13 separate and apart and my understanding, based upon  
14 discussions with representatives of the Agency and  
15 in listening to and reviewing Mr. Frevert's  
16 testimony, is that when he talks about, for example,  
17 the general permits for storm water discharge that  
18 at the time the decision was made to develop that  
19 storm water -- that general permit for storm water  
20 discharge, that many of the issues that are  
21 considered in the antidegradation review context  
22 are -- were considered at the time the decision was  
23 made to go forward with that general permit and so  
24 I would imagine that at that time they had made --

L.A. REPORTING (312) 419-9292

82

1 given some consideration to things such as the  
2 potential for impact on the existing uses of the

3 water.

4 MR. ANDES: So in other words, the equivalent  
5 of antidegradation review has already taken place in  
6 another context where the Agency has either decided  
7 that these discharges aren't significant or that  
8 they're clearly socially/economically beneficial so,  
9 therefore, the review has, in essence, already taken  
10 place, there's no need to have another review take  
11 place under these rules.

12 MR. RAO: So what do you think is -- the review  
13 that's taken place under the permitting is what  
14 you're referring to as, you know, that may address  
15 the antidegradation issues because the way you  
16 proposed it's a little confusing when you say  
17 further antidegradation assessment, you know,  
18 because in the rules itself we don't see any  
19 reference to other, you know, permitting provisions  
20 under the Act so --

21 MS. HIRNER: If I could, I think, when we look  
22 at what the antidegradation -- what is the  
23 antidegradation assessment, okay, when we talk about  
24 and there has been some discussion about full blown

L.A. REPORTING (312) 419-9292

83

1 comprehensive antidegradation review, but what I

2 consider are the factors for an antidegradation  
3 review is when I look at 302.105(c), high quality  
4 waters, and when I look under, I've got to get to  
5 the right page, B on page -- which is identified on  
6 page four of IERG's Exhibit A under large capital  
7 letter B it says if the Agency determines that the  
8 proposed increase will have a significant impact,  
9 because the first tier is to determine whether it is  
10 significant, such proposed increase shall be  
11 assessed in accordance with its antidegradation  
12 implementation procedures in making its assessment.  
13 Then there are four things listed, small Roman  
14 numeral i, which is the Agency considers the fate  
15 and effect and the Agency considers applicable  
16 numeric or narrative water quality standards. They  
17 assure that all existing uses are fully protected,  
18 all technically and economically reasonable measures  
19 to avoid or minimize the extent of the proposed  
20 increase in pollutant loading and the activity  
21 results in increased -- the activity results benefit  
22 the community at large.

23                   Now, my understanding in the discussions  
24 that we had as part of the work group is that the

1 Agency has a list of information that it will look  
2 at in its proposed 354 that it will rely upon to  
3 make this assessment and I believe that when we talk  
4 about further antidegradation review, again, and it  
5 becomes confusing because some people say there is  
6 no full-blown and everything is a full-blown and I  
7 don't think that that's ever been clearly defined,  
8 at least in my mind, but I see it as all of these  
9 things that are listed under B beginning on page  
10 four.

11 MR. RAO: Okay. And that's the reason I ask  
12 you whether these activities are subject to  
13 significance determination because that comes under  
14 (A), subsection (a) under 305 -- 302.105(c).

15 MS. HIRNER: And I would think that under these  
16 listed exemptions that -- let's just, to make it  
17 easy, the Agency identified five in its original  
18 proposal and we identified some additional ones, but  
19 let's just take a look at those first five that were  
20 proposed. Now, the Agency said these are the kinds  
21 of things that we'll look at and we looked at them  
22 in sufficient detail that we're not going to have to  
23 go back over to the B that's listed on page four to  
24 do further study on that list of parameters which

1 are listed in that B. Now, and I think that, just  
2 in our minds, is clearly defined. If, however,  
3 there were another activity that was not listed in  
4 that list of exceptions I were to propose some kind  
5 of increase in pollutant loading and it were not  
6 part of the exceptions list, I would, as a permit  
7 applicant, have the option to request that the  
8 Agency make a significance determination and I think  
9 that's one of the points that I'd like to make is  
10 that we actually don't anticipate that a  
11 significance determination would be made perhaps in  
12 each and every single review that went before the  
13 Agency because before the Agency has to look at that  
14 first tier of the threshold, the permit applicant  
15 has to request that the Agency make that  
16 significance determination. And again, when we look  
17 at some of the proposed implementation procedures,  
18 the Agency is encouraging early discussions between  
19 the Agency and the permit applicant and I think that  
20 some of these things would probably be flushed out  
21 in the context of those early discussions.

22 MR. ANDES: I think part of the confusion stems  
23 from the word further.

24 MR. RAO: Yeah. And that's what my question

1 is. If there's any way you can clarify that because  
2 it is confusing when you read the section because,  
3 you know, there's some other process somewhere that  
4 requires an analysis first before you get to this  
5 point.

6 MR. ANDES: There's no formal other  
7 antidegradation process. There isn't. I think what  
8 we are trying to get at was that in the context of  
9 the permitting process there is a review, okay, that  
10 these are not -- discharges are not reviewed, their  
11 significance is reviewed and in some cases they've  
12 gone through another process, including the permit  
13 process that encompasses a lot of the same factors  
14 and through these other processes you can decide  
15 that these discharges are either really minor or  
16 beneficial. So, in essence, because they've gone  
17 through other analyses, there's no need for a  
18 further review. I know it's a little confusing  
19 because we talk about further antidegradation review  
20 as if there's a first one and then this is the  
21 second one and the more they've been reviewed in  
22 other ways and, therefore, you don't have to do it  
23 again through the antidegradation process, but we do  
24 envision that these are situations that would not

1 have to go through the antidegradation process  
2 called for in these rules.

3 MS. HIRNER: And just to add a bit to that,  
4 again, we were trying to follow-up on the Agency's  
5 testimony that there were no exemptions, but that  
6 things weren't subject to further review and that  
7 was some of the language that was alluded to in the  
8 testimony, but if it is -- we can consider -- or  
9 would consider trying to develop some language that  
10 indicated that those lists of exceptions by their  
11 nature or by some set of parameters or circumstances  
12 would have been already found to comply with the  
13 provisions of the Act that -- the regulations in A  
14 and B that deal with the significance determination  
15 and the, for lack of a better word, we refer to as a  
16 full-blown antidegradation review listed in B.

17 MR. RAO: Yeah. That would be helpful.

18 HEARING OFFICER TIPSORD: Ms. Tonsor, did you  
19 have --

20 MS. TONSOR: Yeah. I heard some statements  
21 which I thought indicated --

22 HEARING OFFICER TIPSORD: Excuse me, you need  
23 to identify yourself for the court reporter.

24 MS. TONSOR: Sorry. I'm Connie Tonsor, I'm

1 with the Illinois Environmental Protection Agency  
2 and I just have a couple of questions to focus on  
3 the language that's been proposed which may clarify  
4 at what point one would get to the antidegradation  
5 review and the significance determination proposed  
6 by IERG and I'll address these to either DK or to  
7 Fred, I don't care which answers them, but  
8 essentially in the proposed language from IERG,  
9 302(c)(1) would indicate that except as otherwise  
10 provided in subsection (d) of this section. Do you  
11 see where I'm at --

12 MS. HIRNER: No, I'm sorry.

13 HEARING OFFICER TIPSORD: Page two of Exhibit  
14 A.

15 MS. TONSOR: It's page two of your Exhibit A.  
16 Okay. Would you agree that except as listed in (d)  
17 then you go through the processes of (c)?

18 MS. HIRNER: Yes.

19 MS. TONSOR: So we turn back to (d) and it  
20 lists those activities which you've amended to say  
21 are not subject to further antidegradation  
22 assessment, many of them are not subject, as the  
23 Agency proposed, because there's already been an  
24 antideg review, there's been some review of the

1 impact.

2                   Has there been a review of the impact in  
3 proposed D12, that's the de minimis proposal?

4           MR. ANDES: Number 12, as I understand, is the  
5 one that says an increase that results in a lower of  
6 water quality that is less than de minimis lowering.  
7 I think our thought was, and if we're getting  
8 confused by our terminology here, I think we can  
9 certainly deal with that. Is that when a  
10 determination is made that this is a de minimis  
11 lowering, this is a small lowering, in essence,  
12 you've done the antidegradation review, you've  
13 decided this is very significant -- a very  
14 insignificant lowering and, therefore, really that's  
15 all you need to do, you say that is not worth going  
16 through an antidegradation assessment as laid out  
17 here. Therefore, you know, we've made an initial  
18 call which is it's a very insignificant increase and  
19 that's the end of the story. Whether you call that  
20 an exception, whether you call that an initial  
21 antidegradation determination, we're not wedded to  
22 the language in there about how it's phrased, the  
23 concept, though, is you do make a determination.  
24 You're making a determination that it's a very small

1 increase, that is the only determination you need to  
2 make because once you've made that call, you can  
3 stop the process there. However, it's structures  
4 are not -- we're not wedded to as much as the  
5 concept.

6 MS. TONSOR: As compared to, say, the exception  
7 or the category of activities proposed in D6, which  
8 are the general permits, how would the de minimis  
9 proposed in D12 compare to the general permits?

10 MS. HIRNER: One of the things that we have  
11 found, and I don't know if this will directly answer  
12 your question, but I think it may clarify the  
13 thought process on this, which I think may be  
14 important, but one of the things that we have found  
15 in the -- in our process of looking at different de  
16 minimis -- de minimi, which we have in other states,  
17 is that we have found that there are certain rivers  
18 where the data is available to make this  
19 determination and I may or may not be wrong on this,  
20 but, for example, I believe that the Mississippi  
21 River is one of those rivers where there is a  
22 sufficient amount of data available, and I don't  
23 know the exact nature, I've had it explained to me,

24 but I could not explain back to you the exact nature

L.A. REPORTING (312) 419-9292

91

1 of the data that must be available to do this  
2 analysis, that there are certain rivers where you  
3 can do this de minimis analysis relatively easy.  
4 You have the data there, you have the information  
5 about your process there. You can make the  
6 calculations and you can offer that up to the Agency  
7 as proof that your proposed increase loading should  
8 not be considered antidegradation, however, there  
9 are some streams, and let's say, I don't know, but  
10 let's take the Lusk Creek just as an example that  
11 was offered up to be an outstanding state resource  
12 water, that there are some streams that by the  
13 nature of that stream and the amount of information  
14 that is known about that stream where the database  
15 is not sufficient to prove that you meet this  
16 assimilative capacity requirement. Okay. So this  
17 speaks to the different nature of the different  
18 bodies of water and the amount of information that  
19 is known about the different bodies of water in the  
20 state of Illinois.

21 So in looking at the information that's  
22 available for someone on the Mississippi River who

23 would like the opportunity to make an assimilative  
24 capacity demonstration to show that there is no need

L.A. REPORTING (312) 419-9292

92

1 for, for lack of a better word again, further  
2 antidegradation analysis, this exception would be  
3 available. However, if you were discharging into a  
4 stream where there was not a sufficient amount of  
5 data available to make the assimilative capacity  
6 determination, the discharger could opt for  
7 requesting a significance determination under the  
8 302.105(c), high quality provisions, and absent  
9 that, do the quote, unquote full-blown  
10 antidegradation review.

11 MS. TONSOR: Okay. You would agree then that  
12 the de minimis assessment is going to be made at the  
13 time that the proposed increase in pollutant loading  
14 comes up during the application process or prior to  
15 it?

16 MS. HIRNER: Uh, huh. Part of your permit  
17 application would be to prove your de minimis.

18 MS. TONSOR: Okay. And basically the exception  
19 in (d) provides essentially if it's ten percent of  
20 the unused loading capacity, is the cutoff?

21 MR. ANDES: Right.

22 MS. TONSOR: Okay. So our permit reviewer gets  
23 the permit and then they've made this assessment of  
24 de minimis, how do they then get into or is there a

L.A. REPORTING (312) 419-9292

93

1 need to go to antidegradation review in (c)?

2 There's not.

3 MS. HIRNER: No.

4 MR. ANDES: There's not, on antidegradation,  
5 not on permitting, but on antideg.

6 MS. TONSOR: Got that. So that your predicate  
7 for requesting a significance determination or a  
8 significance degradation determination under the  
9 proposed language of 302.105(c)(2) assumes that it  
10 is more than a de minimis increase in pollutant  
11 loading?

12 MS. HIRNER: Which one again? Which number  
13 please? Yeah. Could you back up and state which --

14 MR. ANDES: I think I understand the question.

15 MS. TONSOR: Okay.

16 MR. ANDES: There's an exception that says if  
17 you can show that you are less than ten percent of  
18 unused loading capacity, then that's all you need  
19 to do, you're done with antidegradation. There's  
20 also a provision, separate provision, that says in C

21 you can get a significance determination and, really  
22 we envision two circumstances in which that can  
23 apply -- really three, one is that it may be that  
24 data is -- may not be available to do the unused use

L.A. REPORTING (312) 419-9292

94

1 loading capacity determination, but basic  
2 information about these pollutants and about the  
3 water body says we think we can show pretty readily  
4 that this is not going to have a significant impact.  
5 We don't have to go through that. Okay. And your  
6 options are to bring forward information to try and  
7 convince the Agency that it's really insignificant,  
8 we don't even need to do the unused loading  
9 calculation. So that's one possibility.

10 Another possibility, which is I think  
11 which you're getting to, is that it's an increase of  
12 more than ten percent, but you may -- and I think  
13 this is particularly important in, say, small rivers  
14 and streams in the state where because of the low  
15 flow in the stream, ten percent of unused loading  
16 capacity may be easily hit as opposed to the  
17 Mississippi River, but you may nevertheless be able  
18 to say the pollutant I'm discharging is so harmless  
19 that yeah, I'm hitting 11 percent of unused loading

20 capacity, but really there's no significant impact  
21 on the stream. Now, you -- so all this says is you  
22 have a chance in that circumstance to come in and  
23 try to make a showing that, yeah, it is  
24 ten-and-a-half percent, but the pollutant or the

L.A. REPORTING (312) 419-9292

95

1 nature of the water body is such that this is really  
2 not going to be a big deal. If the Agency disagrees  
3 with you and says, no, we think it is a big deal,  
4 then you're into the full antidegradation process,  
5 it's just you have an opportunity to come in and  
6 make a showing and try to convince them that you're  
7 really insignificant. I think that's -- those are  
8 the different types of circumstances that this can  
9 apply to.

10 MS. HIRNER: But I think, Connie, it would be,  
11 I think, though, maybe to get at what you're getting  
12 at and maybe I'm missing the point of the question  
13 is that it could be that somebody's load would be  
14 four percent of the assimilative capacity, could be,  
15 but the data and the stream characteristic is not  
16 there to allow you to make that assimilative  
17 capacity calculation because going back to  
18 Mr. Frevert's testimony he has said, some of the

19 concerns about the de minimis relate to the fact  
20 that it is more difficult to prove up a de minimis  
21 than it is to do the antidegradation review and so  
22 if you have let's say a four-percent load, but the  
23 data availability is not such that you could do this  
24 assimilative capacity calculation, then you wouldn't

L.A. REPORTING (312) 419-9292

96

1 use it, but you may be able to go to the  
2 significance determination that's set aside. So it  
3 doesn't -- this exception does not necessarily in  
4 and of itself say that everything that is below ten  
5 percent can be used during the assimilative capacity  
6 procedure.

7 MR. ANDES: It's not reserved for only  
8 increases above ten percent. It's covering other  
9 situations.

10 MS. TONSOR: And one of the situations is  
11 increases over ten percent as well? That's the  
12 point I wanted to make.

13 MR. ANDES: Yes.

14 MS. TONSOR: If -- where in the significance  
15 determination would there be an opportunity for the  
16 Agency to tell the proponent of the activity that  
17 it should consider all technological, feasible,

18 economically reasonable alternatives to its proposed  
19 increase in the pollutant loading? This is absent a  
20 finding that it's significant. Does the Agency in  
21 the regulation that you've proposed have the  
22 opportunity to say, move your pipe 50 feet over?

23 MS. HIRNER: I think that when we look at the  
24 way that our language is structured, what the

L.A. REPORTING (312) 419-9292

97

1 significance determination does is say the Agency  
2 has determined that this isn't insignificant,  
3 therefore, you do not have to review all technically  
4 reasonable and economically feasible alternatives.

5 Now, in my review of other approaches and  
6 IERG is the one who raised this approach, looking at  
7 the USEPA Region 8 Guidance Document the -- in that  
8 particular guidance document they talk about doing  
9 a significance determination, number one, and  
10 primarily so that you will not have to do an  
11 evaluation of all alternatives. However, there is a  
12 provision in that guidance document which says that  
13 if there is a reasonable alternative and reasonable  
14 there, which we lack here, is defined as no greater  
15 than 110 percent of the cost of what -- of your  
16 proposed controls, if there is a clearly reasonable

17 alternative that is obvious to the Agency. The  
18 Agency may say that you cannot have a significance  
19 determination because moving the pipe 50 feet is a  
20 clearly reasonable alternative to -- and the Agency  
21 has identified that, and we believe that that could  
22 be covered, and I would refer you to number -- page  
23 three of Exhibit A. Our exhibit, under capital A,  
24 small Roman numeral three b, the nature of the

L.A. REPORTING (312) 419-9292

98

1 proposed increase in pollutant loading including the  
2 location of the discharge and the timing and  
3 physical characteristics of the discharge. So that  
4 if there were a clearly obvious reasonable  
5 alternative which the Agency could readily identify  
6 at the time that the permit applicant made the  
7 request for a significance determination within this  
8 context, the Agency could say, you know, you move  
9 that pipe 50 feet, it won't be significant any more.

10 MR. ANDES: We're trying to avoid having to  
11 look at alternatives in every single instance no  
12 matter how minor. At the same time, if you said  
13 that one of the factors, as we said, in evaluating  
14 significance where there is a readily available  
15 alternative, then in that dialogue when you go in

16 and say we think this is really insignificant. The  
17 fact is that -- you know, in most cases we think  
18 it's going to be really insignificant, it's not  
19 worth everybody spending a lot of time looking at  
20 detailed alternatives, but if you come in and say  
21 this is really insignificant and the Agency says,  
22 yeah, you're probably right, but couldn't you just  
23 put that over there instead. You know, there should  
24 be room for that dialogue and for that factor to be

L.A. REPORTING (312) 419-9292

99

1 part of the significance process without mandating  
2 that in every single instance you have to look at  
3 alternatives.

4 MS. TONSOR: And you believe that's contained  
5 within the language of A -- capital letter A, Roman  
6 Numeral three, small b.

7 MS. HIRNER: Yes, we do.

8 MR. ANDES: It could be clearer and if there's  
9 clarification in the order, I think that's something  
10 that we'd be willing to talk about.

11 MS. HIRNER: Yeah. We believe its there, but  
12 if it needs to be clarified, we can -- we are more  
13 than willing to discuss that.

14 MR. TANNER: I have a question along these same

15 lines. I'm trying to understand how the Agency is  
16 going to make these significance determinations.  
17 What standards will the Agency use if we assume that  
18 we had a de minimis exception and so anything  
19 between .5 percent and, you know, up to nine percent  
20 of the unassimilative load capacity is excluded and  
21 then we go beyond that, you know, it could be  
22 anything from ten percent to 99 percent of the  
23 unassimilative load capacity is being proposed to be  
24 used up in the permit application, but you're saying

L.A. REPORTING (312) 419-9292

100

1 now the Agency is going to have two lists of  
2 parameters, there's going to be parameters that will  
3 not trigger that significance, say, chlorine, and  
4 there may be other parameters on another list which  
5 will trigger the significance, say, arsenic.  
6 What -- you know, what standards will the Agency  
7 use?  
8 MR. ANDES: Well, I think that it's not going  
9 to be dichotomy as much as -- I think that it's  
10 going to be -- well, it's going to be dealt with on  
11 a case-by-case basis. On the other hand, I think we  
12 can identify some of the factors that would apply.  
13 You're going to be looking at fate and transport,

14 how readily is this water -- is this particular  
15 pollutant assimilated into the water, to what extent  
16 does it persist and to what extent is it  
17 bioaccumulative. What are the characteristics of a  
18 water body in terms of its physical and chemical  
19 nature such that a discharge of that pollutant into  
20 that water body might be okay whereas in other ones,  
21 it's not? I mean, there are a lot of the same  
22 factors you think about in doing -- in going through  
23 the permitting process, but fate and transport,  
24 bioaccumulation, persistence are the kind of things

L.A. REPORTING (312) 419-9292

101

1 that we would envision the investigation taking into  
2 consideration. Is it an enormous water body? Is it  
3 a small water body? What are the up stream and down  
4 stream characteristics? What are the uses? So it's  
5 hard to sort of have a bright line, but it's more --  
6 you're going have to go in and show the Agency that  
7 it's insignificant -- it's because -- either because  
8 it's over ten percent or because data just isn't  
9 available to make that determination. You're coming  
10 in and saying to the Agency, we think it's not  
11 significant and here's why and being able to take  
12 these various factors, and will there be guidance

13 from the Agency in terms of what are the factors and  
14 how they weigh them, I think that's probably  
15 something we'll need. I don't think you can just  
16 say well, arsenic's in and selenium's out. It's  
17 going to be more complicated than that. On the  
18 other hand, you know if the Agency is really -- part  
19 of our concern is that this whole process of  
20 antidegradation can easily get bogged down in terms  
21 of analysis of alternatives, analysis of  
22 social/economic issues. If the Agency comes up with  
23 a process whereby that moves fairly readily, then  
24 people aren't going to be applying for a lot of

L.A. REPORTING (312) 419-9292

102

1 exemptions from this process and, you know, we'd  
2 like to see that happen, but you need to have the  
3 opportunities available for people to come in and  
4 it's going to be a significant amount of time and  
5 effort you would have to, you know, invest in to  
6 make this determination. You'd have to come in and  
7 what I envision doing for a client would be coming  
8 in with a consultant and saying, we've looked at  
9 fate, we've looked at transport, we've looked at  
10 persistence, we've looked at bioaccumulation, here's  
11 what we came out with, here's why we thinks it's not

12 significant and see if the Agency agrees. I think  
13 that in a lot of cases you'll be able to make those  
14 calls fairly readily, whether it's on the  
15 Mississippi or some other water body and say we know  
16 this is clearly minor or we know this isn't minor  
17 and we want you to go through the process. So, you  
18 know, we think that that process can work, we think  
19 that these exceptions -- you know, not everybody is  
20 going to take advantage of them, some people might.  
21 It's going to take some time and effort for them to  
22 do so and then they're going to have to come in and  
23 really convince the Agency that it makes sense for  
24 them not to be in this process, but instead it's

L.A. REPORTING (312) 419-9292

103

1 minor and you don't have to worry about it.  
2 MS. HIRNER: And if I can add, in making any of  
3 these types of determinations, a significance  
4 determination or whether it is significant, there is  
5 one overarching directive that the Agency must  
6 always assure and that is that all existing uses of  
7 the water will be fully protected. That cannot be  
8 violated in any decision that the Agency makes. The  
9 Agency cannot make a decision that will allow the  
10 uses not to be fully protected, and when we have --

11 the Agency, Mr. Frevert, has said that there will  
12 be a range of considerations during these  
13 antidegradation reviews and this is the way that  
14 we have proposed to incorporate that range of  
15 reviews is through this two-tiered approach that  
16 we've outlined.

17 Now, in reviewing information from USEPA  
18 guidance documents and including the Region VIII  
19 document, including another of other documents and  
20 including the Agency's testimony. It has become  
21 clear that these determinations will never be done  
22 as an exact science and USEPA has acknowledged that  
23 it will not be an exact science and that, indeed,  
24 professional judgment by the people making these

L.A. REPORTING (312) 419-9292

104

1 decisions will enter into that ultimate  
2 determination of whether or not to allow degradation  
3 and so again, you know, in the context that whatever  
4 decision is made, existing uses will be fully  
5 protected. We think this opens up and clarifies  
6 that on a case-by-case basis the Agency may look at  
7 different types of information in making its  
8 decision, but if we look at A, which is the  
9 significance determination versus the B, which is

10 what I call the full-blown consideration parameters.  
11 Many of them are similar and, in fact, there may  
12 even be more detail in the parameters that the  
13 Agency must consider and evaluate in the  
14 significance determination than are defined in the  
15 full-blown antidegradation determination.

16 MR. TANNER: It certainly helps us to hear the  
17 types of factors that you would consider putting  
18 into a significance determination in particularly  
19 when we're crafting the regulations and we have to  
20 think about, you know, what kind of outline we put  
21 on the program in terms of giving direction to the  
22 Agency when they draft their Part 354 regulations  
23 and, you know, even then, they'll probably have  
24 internal guidance of how to carry those out. So

L.A. REPORTING (312) 419-9292

105

1 we've got several layers here of directions to  
2 people and on the other hand, we have to keep in  
3 mind that these decisions have to be reviewable.  
4 I certainly understand the art that goes into these  
5 decisions, it's not all science. You know, I was  
6 trained as a scientist and I understand the  
7 limitations, but at the same time these decisions  
8 have to be reviewable, you know, you would present

9 these decisions to, you know, a reasonable group of  
10 people and expect to come to the same decision.

11 So that's what we're trying to get help on  
12 here is how do we craft these regulations so the  
13 Agency can develop its Part 354 regulations in a  
14 fashion so that even though we've got a case-by-case  
15 application, the broad outline is still handled in a  
16 very reasonable, coherent and consistent basis.

17 MR. ANDES: And I think that we want that too  
18 particularly because there are going to be a lot of  
19 people who are going to be very interested in how  
20 the Agency makes its decisions and I think that one  
21 thing we probably share with all of the parties here  
22 is that this process ought to be as transparent as  
23 possible and that the Agency, when making  
24 determinations, whether it's a significance

L.A. REPORTING (312) 419-9292

106

1 determination or a determination on an antideg  
2 assessment, really needs to explain its reasons and  
3 not just say -- sort of wave a magic wand over it  
4 and say, we looked at all these factors and  
5 everything is okay. I think we want the Agency to  
6 have to go and explain how it got to its decision,  
7 how it weighed the various factors so then whether

8 it's a regulated party or citizen group or whoever  
9 is interested can look at that and evaluate it and  
10 say, do we agree with them, do we not agree with  
11 them. So we think that's an important part of the  
12 process.

13 MR. TANNER: Thank you.

14 MR. FLEMAL: This is still on the exceptions  
15 issue. Mr. Andes, you, I believe, outlined for us a  
16 suggestion that if there was a coupling of a  
17 pollution loading decrease in a media other than  
18 water that had an increase in discharge to the  
19 waters as a consequence that there ought to be an  
20 exception provided for that kind of activity, am I  
21 correct first off all from my understanding?

22 MR. ANDES: You did, you are correct.

23 MR. FLEMAL: Where in the language that you  
24 offered for us? Would you see that kind of

L.A. REPORTING (312) 419-9292

107

1 condition producing an exemption?

2 MR. ANDES: I think actually that is no longer  
3 in here. It was at one point and I still think it's  
4 a good idea. It was adopted in Indiana, for  
5 example, and we felt that again if you have -- if  
6 you have and I think the language is phrased and we

7 could provide that language again from the Indiana  
8 rules. If you have air emission controls that are  
9 applied which are either required or I think there's  
10 even language about substantially reducing exposure  
11 to hazardous air pollutants and that's resulting in  
12 increasing the water discharge that A, you would  
13 have to show that you've examined feasible  
14 alternatives. Okay, but you wouldn't have to make  
15 the social and economic showing because, in essence,  
16 we know this is something that from an environmental  
17 standpoint is positive. So that's actually sort of  
18 a limited exception because it would say you  
19 examined alternatives. You can't just say well, I'm  
20 putting on pollution control systems for air,  
21 therefore, I'm going to increase my wastewater  
22 discharge with new pollutants and this is how much.  
23 You'd have to say -- and because you're probably  
24 going to have to apply controls to do that anyway.

L.A. REPORTING (312) 419-9292

108

1 So you say, all right, I'm controlling the air  
2 emissions, and we've had situations like this, in  
3 fact, that have already been applied in Indiana,  
4 I'm controlling my air emission, it's going to  
5 increase my wastewater discharge. I looked at

6 alternatives, I've applied controls, but there's  
7 still some amount that I need to increase and,  
8 therefore, I don't have to go through the  
9 social/economic showing. So we do think that would  
10 be a good idea.

11 MR. FLEMAL: I assure you that the Board deals  
12 with these circumstances not uncommonly and sort of  
13 these cross media changes in loadings are of some  
14 concern to the Board. So we'd appreciate, indeed,  
15 if you could provide us with that actual language.

16 MR. ANDES: Absolutely.

17 MR. FLEMAL: And I think I'd also like to see  
18 if you could provide for us the Indiana examples. I  
19 take it the Indiana example has been approved by  
20 the USEPA as well, that particular provision of the  
21 regulation?

22 MR. ANDES: I believe so.

23 MR. FLEMAL: Okay. If you could, ascertain  
24 that and let us know again about that, we'd

L.A. REPORTING (312) 419-9292

109

1 appreciate that.

2 One other question on the exceptions, what  
3 is the basis for your choice of the ten percent of  
4 the unused loading capacity as opposed to some other

5 percentage in terms of what constitutes de minimis?

6 MR. ANDES: That was really from EPAs guidance,  
7 from the EPA Great Lakes guidance where they had --  
8 they had said and I think I quoted some language  
9 that they thought generally increases of less than  
10 ten percent would not have a significant impact on  
11 water quality.

12 MR. FLEMAL: Let me put it another way, suppose  
13 the Board did adopt that ten percent, what would be  
14 the defense against the change that that number of  
15 choice was arbitrary and complete?

16 MR. ANDES: Well, I think that whatever choice  
17 you make involves some judgment. If you're going to  
18 create a dividing line, then whatever dividing line  
19 you create involves some element of arbitrariness.  
20 Here, I think, you actually have a number that the  
21 EPA has specified in guidance and in other states  
22 have put in their rules that says we think ten  
23 percent is a good cut at this. Bearing in mind,  
24 that these are about water bodies where you have

L.A. REPORTING (312) 419-9292

110

1 unused capacity. In other words, these water bodies  
2 are meeting standards and, for example, if you had a  
3 water body that is at 91 percent of capacity so you

4 have only nine percent left, you don't get ten  
5 percent, right, because you can't violate standards  
6 so you're not going to be able -- the capacity left  
7 in the water body is always going to be a factor.

8 MR. FLEMAL: I guess I don't understand your  
9 numbers there. If 90 percent is already used, ten  
10 percent is what's left and one-tenth of ten percent  
11 is only one percent, you could go up one percent, I  
12 assume it was already 90 according to your scenario  
13 and still be under the de minimis.

14 MR. ANDES: If it's at 90, you could use ten --  
15 it's not ten percent of ten percent. It's ten  
16 percent of the unused loading capacity. If there is  
17 ten percent left, then you're right, you can only  
18 use ten percent of that. The point I was trying to  
19 make was that we're not talking violating standards.  
20 We're not talking about getting above the standards.  
21 There are limitations in terms of what you can use,  
22 but we think ten percent based on EPA experience  
23 they felt in their guidance and other states have  
24 put in their rules that that was a reasonable

L.A. REPORTING (312) 419-9292

111

1 dividing point and that, in essence, it makes sure  
2 that it's only small increases that are allowed.

3 MR. FLEMAL: For the record, could you provide  
4 us with the actual citations to that ten percent  
5 that you find both in the federal and state level  
6 regulations?

7 MR. ANDES: Absolutely.

8 MR. FLEMAL: In case we need to refer to those  
9 specific pages or whatever?

10 MR. ANDES: Yes.

11 MR. RAO: Mr. Andes, along the same lines,  
12 could you provide the Board with citations to  
13 regulations of other states that you refer to in  
14 your testimony, you know, I think you referred to  
15 Wisconsin, Indiana, Michigan and Ohio?

16 MR. ANDES: Yes.

17 MR. RAO: That would be helpful.

18 MR. ANDES: Absolutely.

19 HEARING OFFICER TIPSORD: Anything further?

20 MS. McFAWN: Oh, I have a couple questions.

21 These are just questions I think that merely go to  
22 the way you restructured the rule -- the language, I  
23 mean, the substance.

24 Under C, high quality waters, the Agency

L.A. REPORTING (312) 419-9292

1 had that listed that the water quality had to be

2 maintained unless the proponent made the  
3 demonstration which has now been moved to  
4 subparagraph capital B under high quality waters.  
5 That language was in the first paragraph of  
6 paragraph C of the Agency and it read, water of the  
7 state whose existing water quality exceeds  
8 established standards of this part --

9 THE COURT REPORTER: I'm sorry.

10 HEARING OFFICER TIPSORD: Marili, could you  
11 slow down just a little?

12 MS. McFAWN: Oh, sure. Sorry.

13 THE COURT REPORTER: And could you speak  
14 towards me?

15 MS. McFAWN: Certainly.

16 THE COURT REPORTER: Thank you.

17 MS. McFAWN: -- must be maintained in their  
18 present high quality unless the proponent can  
19 demonstrate pursuant to this subsection that  
20 allowing the lowering of water quality is necessary  
21 to accommodate important economic or social  
22 development.

23 While language similar to that appears in  
24 your proposed language, IERG's proposed language, I

1 don't see closure under paragraph B, the Agency's to  
2 make this assessment and then it doesn't tell the  
3 Agency what to do with that assessment. Does this  
4 make any sense?

5 MS. HIRNER: I think so. I'm not sure, but I  
6 think that in the Agency's proposal it has referred  
7 to doing -- making its assessment and putting in  
8 its Part 354, and we said with Agency implementation  
9 procedures and as we read through the Agency  
10 implementation procedures in Part 354 it comes back  
11 to the demonstration review, which says the  
12 antidegradation demonstration review pursuant to  
13 and, of course, that would be assessment because  
14 we've changed it from review to assessment, pursuant  
15 to 35 Ill. Adm. Code 303.105 is a part of the NPDES  
16 permitting process or the Clean Water Act Section  
17 401 certification process. So following on it says,  
18 after review or assessment pursuant to its  
19 subsection, the Agency shall produce a written  
20 analysis addressing the requirement of 302. So in  
21 their implementation procedures they say that they  
22 do the assessment and provide a written analysis of  
23 their assessment, which becomes part of the NPDES  
24 permit application and then the Agency then will --

1 and then after its done that if it determines that  
2 the load increase is acceptable upon receipt of  
3 whatever, the Agency will proceed to public notice.  
4 So it does its assessment in its implementation  
5 procedures, it writes an analysis or writes a report  
6 of its analysis or report on its assessment and then  
7 it incorporates its information into the fact sheet  
8 and now again, this is my understanding of what I've  
9 been explained that these things will work, then  
10 that proceeds to public notice and it's out there  
11 with your NPDES permit application for public  
12 hearing and review.

13 MS. McFAWN: And presumably they will take that  
14 analysis and either grant or deny the -- propose to  
15 grant or deny the limit the permit applicant is  
16 requesting.

17 MS. HIRNER: Uh-huh, and they've actually  
18 outlined like I think like three procedures in  
19 there.

20 MS. McFAWN: All right. For instance, if they  
21 found that the activity resulted in an increase in  
22 pollutant loading that would not benefit the  
23 community at large, they would not allow that to be  
24 the acceptable limit, is that right?

1 MS. HIRNER: Pardon me? Could you repeat the  
2 question?

3 MS. McFAWN: Sure.

4 MS. HIRNER: I was looking at something else.

5 MS. McFAWN: Certainly. If the Agency in its  
6 analysis determined that the increase would not  
7 benefit the community at large in its fact sheet it  
8 would then decline to allow the loading?

9 MS. HIRNER: Coupled with everything else that  
10 it has to look at. I mean, it has to -- I think,  
11 you know, Fred said earlier that they have to look  
12 at, you know, this is a high quality water and it  
13 has to be protected, but it could increase a  
14 discharge if certain things came into play and --

15 MR. ANDES: So the bottom line answer is yes.  
16 If you had a significant increase, it wasn't covered  
17 under an exemption or exception and the Agency says,  
18 all right, fine, it protects existing uses. You've  
19 examined alternatives and you've implemented all the  
20 available alternatives, but this doesn't benefit the  
21 community at large, they would say no, you can't do  
22 it, you don't -- you do not pass antidegradation  
23 review.

24 MS. McFAWN: Okay.

1 MR. ANDES: That's the way it works.

2 MS. McFAWN: Okay. Thank you.

3 MR. ANDES: Sure.

4 MS. McFAWN: Back to the discussion we had  
5 earlier about outstanding resource waters. You  
6 discussed in that proposed language the term party  
7 is used. I wonder if you could now or later explain  
8 who you think the parties are that would be involved  
9 in this type of determination, this adjusted  
10 standard.

11 MS. HIRNER: In which?

12 MS. McFAWN: I'm sorry. On the part 303, the  
13 adjusted standard procedure for outstanding resource  
14 waters.

15 HEARING OFFICER TIPSORD: Excuse me,  
16 Ms. McFawn, for the record that's Exhibit B to  
17 Deirdre Hirner's testimony.

18 MS. McFAWN: Thank you. In fact, I'm looking  
19 at page three of the Exhibit B under small paragraph  
20 -- or paragraph small c and d. The term party is  
21 used there and I wondered who would be the parties.

22 MS. HIRNER: I would -- let's take the example  
23 of community B and community B sits on -- is in the  
24 watershed because I think that's a critical thing to

1 remember. It's in the watershed in the drainage  
2 area to the outstanding state resource water and  
3 some petitioners came in and said we're going to  
4 designate this particular reach of the stream as an  
5 outstanding state resource water and interested  
6 parties, as we've outlined earlier in our proposed  
7 revisions, would be notified that there was a  
8 petition before the Board, and I could see where the  
9 mayor or the city counsel of community B would  
10 approach the Board and say, you know, we're  
11 concerned about this particular designation because  
12 we are in the watershed and that's part of our  
13 drainage area and if that reach is designated an  
14 outstanding resource water, that would, in essence,  
15 preclude us from ever doing any modifications to our  
16 sanitary sewer system that we would have to  
17 discharge in case our community would grow. That  
18 would be an example of whom I might see, or another  
19 one, in the instance of DNR's proposal on the  
20 Vermillion -- Middle Fork Vermillion River, they  
21 proposed to designate that as an outstanding  
22 resource water and Dynergy Midwest has a discharge  
23 there right now and so if the petition were made to  
24 designate that as an outstanding resource water,

1 then Dynergy Midwest might be a party who would be  
2 concerned to respond that, you know, if this is  
3 designated, these are the potential ramifications of  
4 that designation on our facility.

5 MS. McFAWN: Would they have to -- thank you,  
6 that helped me a lot. Now, I just wonder, would  
7 they have to prove standing in the way we normally  
8 think of it?

9 MS. HIRNER: Got to ask somebody else, I'm not  
10 the lawyer.

11 MS. McFAWN: Okay.

12 MS. HODGE: I don't think we had thought about  
13 that. I think that, you know, we had envisioned  
14 that reference to other party anyone whose rights  
15 may be affected by the designation, proposed  
16 designation. So in that sense I think there may be  
17 a standing issue, but I don't think we've really  
18 analyzed it to that point, but we'll be glad to do  
19 that.

20 MS. McFAWN: And along those lines, would they  
21 have a right to appeal the Board's decision or would  
22 just the petitioner for the adjusted standard?

23 MR. ANDES: I certainly think our intent was

24 that interested parties -- parties whose interests

L.A. REPORTING (312) 419-9292

119

1 would be affected would have an opportunity to  
2 appeal.

3 MS. McFAWN: They would? Okay.

4 MR. ANDES: One way or the other.

5 HEARING OFFICER TIPSORD: We would need some  
6 citation to that for that position.

7 MR. ANDES: Right.

8 HEARING OFFICER TIPSORD: Currently, in an  
9 adjusted standard proceeding, the party is the  
10 proponent and the Agency is the responding party and  
11 files a recommendation, but is not even listed as a  
12 party in the caption. The Agency has appealed  
13 adjusted standard proceedings, but, to my knowledge,  
14 no other interested person has done so. Check the  
15 definition of party in the Board's procedural rules  
16 as well.

17 MR. ANDES: Obviously, we want to make sure  
18 that if communities in the affected area feel that  
19 it's going to have a major impact on their economy  
20 and think that the Agency -- that the Board made a  
21 decision and they disagree with it, we want to have  
22 them able to appeal that. So we'll go back and take

23 a look at that.

24 HEARING OFFICER TIPSORD: Anything else?

L.A. REPORTING (312) 419-9292

120

1 MS. McFAWN: I wonder if you can address maybe  
2 here at the hearing even the basis for the language  
3 proposed on page three of Exhibit B, paragraph --

4 THE COURT REPORTER: Paragraph --

5 MS. McFAWN: Paragraph d, that's a small d.

6 THE COURT REPORTER: Thank you.

7 MS. McFAWN: This would be the criteria for the  
8 Board granting or denying such an adjusted standard  
9 and, Mr. Compton, you testified on this particular  
10 proposal, this portion of the IERGs proposal and you  
11 have a lot of history and a lot of background in  
12 this area. I just wondered if you could just  
13 address this and I would like some further  
14 elaboration on where it came from and that type of  
15 thing.

16 MR. COMPTON: This basically is a distillation  
17 of the Agency --

18 HEARING OFFICER TIPSORD: MR. Compton, could  
19 you speak up, please?

20 MR. COMPTON: This basically is a distillation  
21 of the Agency's language that was presented in

22 balancing the issues for making a determination  
23 that -- and if I recall correctly in going back  
24 through some USEPA guidance on the issue that the

L.A. REPORTING (312) 419-9292

121

1 Agency had provided that essentially this is  
2 patterned after the USEPA suggestion that there  
3 should be a balance in looking at the economic  
4 benefits versus just the practical scientific  
5 evaluation or technical evaluation of the issue.

6 MR. ANDES: We just added the word  
7 substantially to the Agency's language.

8 MS. McFAWN: Is that what --

9 MS. HODGE: Yes. If you'll look at the  
10 Agency's proposal at their proposed Section  
11 106.995(b) it's under Board action and then it's  
12 designation of ORW, the only substantive change that  
13 we made there was the word -- to insert the word  
14 substantially -- or that was our intent.

15 MS. McFAWN: All right. Thank you. I guess it  
16 made me focus very closely on it and it seemed like  
17 the language could be difficult to come to grips  
18 within making a decision. Mr. Compton, you said and  
19 maybe the Agency can help me on this as well, that  
20 this language came from federal guidelines, is that

21 correct? And maybe, if so, if you could provide the  
22 Board with a cite to that. Maybe not now,  
23 necessarily but --

24 MS. TONSOR: The Agency will review to find a

L.A. REPORTING (312) 419-9292

122

1 citation to this language or the basis of the  
2 language and we'll provide that back to the Board.

3 MS. McFAWN: Thank you. Thank you,  
4 Mr. Compton.

5 HEARING OFFICER TIPSORD: Anything further?

6 MR. TANNER: Let me follow-up on that then.  
7 What exactly does the word substantially add to the  
8 Agency's language? I mean, how do you know --  
9 outweigh, you know, means to go beyond,  
10 substantially ,does that mean, okay, if we're 51  
11 percent then you designate it, but if you put in  
12 substantially now we're 75 percent? How do you  
13 determine substantially?

14 MR. ANDES: I think our concept was just that  
15 -- the consequences of being an ORW are so dramatic,  
16 in essence, for most dischargers it will mean no  
17 increase at all and no new discharges that it ought  
18 to be an open process of weighing the cost and  
19 benefits and that it ought to be clearly beneficial,

20 it shouldn't be sort of a close call, it should be  
21 boy, this is just really good and it doesn't have  
22 much in the way of negative side effects. So we  
23 wanted to just convey the image that it's a clear  
24 choice, it's not a close call because the impacts

L.A. REPORTING (312) 419-9292

123

1 are so tremendous of that kind of designation, that  
2 was our effort. I mean, it's hard to define it I  
3 think any more clearly than that. It's something  
4 that's going to have to be determined on a  
5 case-by-case basis, but as long as it's done in a  
6 open process where all the benefits and costs are  
7 laid out for people and the Board when it balances  
8 that -- you know, when it's clearly laid out for  
9 people, these are the factors here, this is how we  
10 balance it, here's why it's an easy choice. I think  
11 that's the end goal.

12 MR. TANNER: Thank you.

13 MR. ANDES: Thank you.

14 HEARING OFFICER TIPSORD: Anything else? Thank  
15 you very much. Let's go off the record for a second  
16 while we move around.

17 (Whereupon, a discussion  
18 was had off the record.)

19

(Witness sworn.)

20 MR. ETTINGER: I just want to -- we had filed a  
21 brief and supplemental testimony which I think  
22 fairly well states our positions as to the  
23 proceeding and also responded in advance as to many  
24 of the proposals that IERG made.

L.A. REPORTING (312) 419-9292

124

1 I just want to stress a couple of points  
2 here and then maybe we wouldn't use up the whole 20  
3 minutes before lunch, maybe we will.

4 The major issues -- or one of the major  
5 issues here is on this whole significance and de  
6 minimis idea and there has been a lot of emphasis on  
7 flexibility throughout the proceeding. Now,  
8 personally I'm generally scared when I hear the term  
9 flexibility used in a regulatory context because  
10 that normally means flexibility to not apply to law,  
11 but in this case, it's clear there should be some  
12 flexibility from the Agency to do the amount of  
13 analysis which is necessary on the specific facts  
14 in front of them and I think you've got to keep the  
15 idea of flexibility in mind in the context of the  
16 type of proposal in front of you. When we talk  
17 about -- we look at other states, we've got to look

18 at not just -- can't take one provision here and  
19 throw it here or one provision there and say well,  
20 let's put that in that. You've got to look at the  
21 overall context of the regulation there. Something  
22 that is necessary in Ohio may not be necessary in  
23 Illinois because of the way we've shaped the overall  
24 Illinois Regulatory Program and in this I'd like to

L.A. REPORTING (312) 419-9292

125

1 emphasize two different types of flexibility, one is  
2 flexibility in applying the antidegradation analysis  
3 versus flexibility in avoiding the antidegradation  
4 analysis. Now, what the Agency has proposed is  
5 flexibility in applying the antidegradation  
6 analysis. What they have said is that they're going  
7 to look at different types of things as they come in  
8 and they're going to be flexible as to how much  
9 analysis they're going to do depending on a  
10 case-by-case basis. The term they use is sliding  
11 scale. They're going to try and make -- they're  
12 going to tailor the suit to what's in front of them.  
13 So because they're willing -- and we reluctantly in  
14 some way bought into the idea of flexibility in  
15 updoing the analysis, we need less flexibility in  
16 avoiding the analysis because we're not going to

17 require a Perry Mason style trial over everything  
18 that falls within antidegradation.

19 Now, that's the problem that has been or  
20 is a possibility. If we required a lengthy  
21 proceeding, you know, a 300-page EIS as to every  
22 case in which you fell into an antidegradation  
23 analysis, then we would need more flexibility in  
24 avoiding analysis, but given that we're willing to

L.A. REPORTING (312) 419-9292

126

1 shape the amount of analysis that we do to the  
2 individual case. We don't need these kind of  
3 exceptions to the same extent, and then I guess  
4 another concept we talked about is simplifying the  
5 thing and saving Agency resources.

6 One of the major issues we've had here is  
7 that it doesn't save the Agency any resources if  
8 it's as difficult to decide whether an exception or  
9 significance applies as it does to go ahead and do  
10 the antidegradation analysis and in some of these  
11 cases you're going to be doing math or you're going  
12 to be doing a lot more work to decide whether an  
13 exception applies than it would be to just do the  
14 analysis. So that doesn't help them at all. I  
15 might add, IERG to some extent made my point for me

16 by providing here a two-page significance test which  
17 purports to simplify the rule by adding two pages of  
18 very complicated and somewhat abstruse regulatory  
19 language that we've all been struggling with to  
20 understand today. This is not the way that you --  
21 adding two pages of language is not the way that you  
22 simplify a program. So I think the overall stress  
23 here has got to be on pollution prevention and on  
24 considering alternatives in almost all cases and in

L.A. REPORTING (312) 419-9292

127

1 some case that can be done quite quickly, the Region  
2 VIII guidance, which I have with me, they apply a  
3 significance test, they talk about significance, but  
4 then they go ahead and say if there are alternatives  
5 that can be easily considered, go ahead and consider  
6 alternatives because they always recognize a need  
7 for pollution prevention, which is really what we're  
8 talking about with tiered two antidegradation  
9 analysis, which is pollution prevention. What we  
10 want to do is look at other ways to achieve the same  
11 thing without putting more pollution in the water.  
12 This Board has recognized in numerous context the  
13 importance of pollution prevention and what we're  
14 really doing is adding a pollution prevention step

15 into the regulatory process.

16 Now, what we did in our filing was we  
17 filed a number of the antidegradation analyses that  
18 have recently been done by the Agency just because I  
19 wanted you to see them. This is Exhibit 3.  
20 Frankly, we don't think in most cases these are  
21 adequate, in fact, these are bad examples. We  
22 expect that in the future the analysis should be  
23 more thorough than the ones that were done here as  
24 to most of the permits. However, some of them will

L.A. REPORTING (312) 419-9292

128

1 look, you know, even under the new program we  
2 anticipate that some of them will look like this.  
3 Your trailer park with, you know, .0018 million  
4 gallons per day going into the Mississippi River is  
5 probably going to have a one-page antidegradation  
6 analysis saying this is not going to be a problem.  
7 The trailer park's using good technology or at least  
8 what -- the best that we can expect under the  
9 circumstances and that will probably be what the  
10 antidegradation analysis looks like, a one-page  
11 description of where its going, why it's not going  
12 to affect existing uses and just an explanation as  
13 to how they considered alternatives technologies



13 even worse. Now, you talk about a blanket arbitrary  
14 exception. Can you imagine how much arsenic a  
15 company would have to buy in order to use up nine  
16 percent of the assimilative capacity of the  
17 Mississippi River? Are we saying that a company  
18 should be allowed to use up nine percent of the  
19 water quality standard for arsenic in the  
20 Mississippi River without any consideration of  
21 alternatives? That's what they're really saying  
22 here, is that we're going to bypass that whole  
23 process. I don't want to paint it too black. There  
24 are technology-based standards that would preclude

L.A. REPORTING (312) 419-9292

130

1 most companies from doing that, however, this sort  
2 of arbitrary line in which we're going to say nine  
3 percent is okay, 11 percent we're going to consider,  
4 is really alien to the whole philosophy of pollution  
5 prevention and it's alien to the purpose of the  
6 Clean Water Act, which is to restore and maintain  
7 the nation's waters and this is where this chipping  
8 away gets at and I think Board Member Melas put it  
9 very well, you know, if we chip away at nine percent  
10 at a time, pretty soon there's nothing left. The  
11 purpose of the Clean Water Act was not to allow

12 Illinois waters and the nation's waters to degrade  
13 slowly. It was to maintain those waters and  
14 allowing a nine percent bite at the apple repeatedly  
15 just gets us to water quality standards and then  
16 come up with the least -- with the least that we can  
17 tolerate rather than what we want.

18           The other exceptions that are referred to  
19 or mentioned in the draft are in most cases -- in  
20 most cases -- in all cases they are useless, in some  
21 cases they are dangerous. I think again you've got  
22 to look at the overall context of what the Agency  
23 proposes to do here. Let's look at the example of  
24 somebody who wants to do something that's good.

L.A. REPORTING (312) 419-9292

131

1 He's going to eliminate -- he's going to eliminate  
2 the total amount -- not eliminate, he's going to  
3 lessen the total amount of pollution coming out of  
4 his plant so he's going to prove that he fits into  
5 this exception. As a reviewer, I can look at this  
6 in one of two sheets of paper. It can either be a  
7 sheet of paper in which the Agency explains why he  
8 fits into this exception or a sheet of paper which  
9 does the antidegradation analysis and says what do  
10 you know, we've done the antidegradation analysis

11 and because they're reducing the total amount of  
12 pollution coming from the plant, we find this is a  
13 good thing, and it's not clear to me that the one  
14 document would be any longer than the other. In  
15 fact, the antidegradation analysis would be much  
16 less suspect. It would take into all account, you  
17 know, the sorts of things that we're looking at  
18 rather than trying to fit into an arbitrary  
19 exception.

20 For instance, you have this other case  
21 that was presented of more than one discharge point.  
22 Okay. If, in fact, all they're doing is shifting a  
23 discharge from one area to another into equally  
24 sensitive receiving streams in which it's not going

L.A. REPORTING (312) 419-9292

132

1 to have any environmental impact, that's what the  
2 antidegradation analysis will say and there won't --  
3 you know, we would not see a lengthy antidegradation  
4 analysis in that case. Proving that you fit into  
5 that exception would, in fact, be the  
6 antidegradation analysis here. What the problem  
7 would be is what's the case the other way. What if  
8 there's something wrong with the one discharge point  
9 a mile away from the other one? What if there's

10 something at that other discharge point? We're  
11 going to skip that process here, we're not to going  
12 look at whether or not the alternative discharge  
13 point causes more problems. We're going to fit it  
14 into an arbitrary exception and say that this  
15 discharge point a mile away from the other one is  
16 okay because the total coming out of the plant is  
17 the same and that's -- you know, this is the kind of  
18 place where what we're going to see here or could  
19 see is a manipulation of exceptions, it's going to  
20 lead to more appeals, more complexity for the Agency  
21 rather than just looking at the thing on a case-by-  
22 case basis, which is what I understand the Agency  
23 proposes.

24 Then also having introduced myself -- or

L.A. REPORTING (312) 419-9292

133

1 admitted I was one of the more notorious permit  
2 challengers in the -- permit objectors in the state,  
3 I'm going to say something very strange, which is  
4 that I think that the Board in this should have a  
5 little trust in the Agency, which I don't see that  
6 the regulated community has. I don't really think  
7 the Agency is going to be using these rules to come  
8 up with arbitrary and capricious ways to torture

9 polluters by making them get information which is  
10 unnecessary or causing them to go through  
11 unnecessary paperwork. That's certainly not in the  
12 history of the Illinois Environmental Protection  
13 Agency. They're going -- they are going to be using  
14 this flexibility in different ways. They are --  
15 certainly they can talk to the Agency. The permit  
16 applicant is expected to have informal  
17 communications with the Agency to work these things  
18 out. So I don't see this vast concern or any reason  
19 for concern that there's going to be a large amount  
20 of unnecessary paperwork required as a result of  
21 these rules as they are proposed by the Agency.  
22 Now, we, of course, had suggested some improvements  
23 in some other areas, which frankly we think the  
24 Agency has shortcuted the matter a little bit or

L.A. REPORTING (312) 419-9292

134

1 has not provided -- or has put some outs that are of  
2 concern to us and also I will admit that we're  
3 frankly concerned about the flexibility the other  
4 way because there are no minimum procedures or very  
5 few minimum procedures put into this. They are  
6 states with rules that say -- you know, that require  
7 minimum showings that be made in a much more

8 detailed way or minimal procedures. We're not  
9 asking for a second set of hearings on the  
10 antidegradation, for example. Some of the states  
11 are saying well, you'll have a permit proceeding and  
12 then an antidegradation proceeding. This is all  
13 going to be considered in one permit proceeding.  
14 So we're not looking at the same sort of paperwork  
15 that you might be worried about in other states.

16 I wanted to discuss finally this ONRW or  
17 ORW proposal and all the concern that there has been  
18 about this -- first of all, the idea that this -- I  
19 wish it was such an absolute control as is  
20 suggested, but for one thing as the rule makes clear  
21 you can repeal these as well as pass them. So for a  
22 number of reasons I believe that an ordinary  
23 pollution permit is a much more drastic step to take  
24 than designating an ORW. A pollution -- what goes

L.A. REPORTING (312) 419-9292

135

1 wrong -- what is the problem if a bad pollution  
2 permit is issued? It's the case in which a mistake  
3 is made that we're worried about. If a mistake is  
4 made and we decide as a society to designate  
5 something as an ORW when if we'd known all the facts  
6 we wouldn't have. What happens? Well, we face the

7 tragedy of having water that's a little too clean  
8 for the period until we repeal the ORW. What's the  
9 mistake that's made if we issue a bad permit, if we  
10 let somebody put pollutants into the water? We may  
11 kill something that we're never going to see again.  
12 We may allow pollution into the water that's going  
13 to sit on the bottom of the river for a long time  
14 until those sediments are clean. So I would say  
15 before you go looking at a whole lot of new notice  
16 or extraordinary procedure for designating an ORW,  
17 maybe you should put all of these procedures on an  
18 NPDES permit. Maybe everybody who fishes in that  
19 water should be given of a notice of a new permit.  
20 Maybe we should require individual notice of every  
21 property owner who might want to fish off of his  
22 property. Now, we're not, in fact, asking for that,  
23 but do I wish to contrast what the extraordinary  
24 notice and procedures and safeguards we're asking of

L.A. REPORTING (312) 419-9292

136

1 people who wish to prevent pollution as opposed to  
2 those who wish to add pollution to the nation's  
3 waters. That's all I have.

4 HEARING OFFICER TIPSORD: Would you introduce  
5 the rest of the group, please?

6 MR. ETTINGER: Yes. Cindy Skrudkrud, Rob Moore  
7 and Jack Darin. I will admit I was laboring more in  
8 writing this document, but I do want to say they all  
9 did review it, they supplied a lot of information,  
10 some of them, a great deal of information and we've  
11 been working together for a number of years in  
12 reviewing permits, our expertise in working through  
13 the permitting process and apply it in considering  
14 this problem.

15 HEARING OFFICER TIPSORD: Well, since you  
16 included them as the four most notorious, I thought  
17 they should be introduced.

18 MR. ETTINGER: Well, actually I should probably  
19 let the Agency decide who the most notorious are.

20 HEARING OFFICER TIPSORD: A couple of other  
21 housekeeping things. We will enter your memo of law  
22 and prefiled supplemental testimony as Exhibit 30 if  
23 there's no objection, and I'm going to go ahead and  
24 admit your answers to the prefiled questions as

L.A. REPORTING (312) 419-9292

137

1 Exhibit No. 31 and we'll allow follow-up on those  
2 after lunch. Let's go ahead and break for lunch.  
3 Let's be back by about ten to two, that's about an  
4 hour from now so that we can proceed with questions

5 and then we'll go to IDNR. Thanks.

6 (Whereupon, after a short  
7 break was had, the  
8 following proceedings  
9 were held accordingly.)

10 HEARING OFFICER TIPSORD: Before we begin with  
11 the questions, Mr. Ettinger, I wanted to let  
12 everyone know that IEPA had indicated to us that  
13 they would have a USEPA representative here today  
14 and they do have someone here from USEPA. I know we  
15 had several questions that seemed to need their  
16 input at the December hearing. So if anyone wants  
17 to ask questions when we finish with DNRs testimony,  
18 we'll let you do that.

19 Okay. All right. Let's begin with the  
20 Illinois Environmental Regulatory Group that had  
21 prefiled questions which we have admitted the  
22 answers to and I would note that the questions are  
23 repeated on the answers so we'll just mark this as  
24 an exhibit and not admit the prefiled questions as

L.A. REPORTING (312) 419-9292

138

1 an exhibit, if that's okay with IERG.

2 MS. HODGE: That's fine.

3 HEARING OFFICER TIPSORD: And then we'll

4 proceed with --

5 MS. HODGE: Do you want us to go ahead and ask  
6 these on the record?

7 HEARING OFFICER TIPSORD: Actually, if you'd  
8 had a chance to review them -- have you had a chance  
9 to review them?

10 MS. HODGE: I have.

11 HEARING OFFICER TIPSORD: Then I would say just  
12 -- let's just go with follow-up. I think there were  
13 copies available for people and let's just go with  
14 follow-up and try and save some time.

15 MS. HODGE: And I do just have a couple  
16 follow-up questions.

17 HEARING OFFICER TIPSORD: Okay.

18 MS. HODGE: And, Mr. Ettinger, in your  
19 responses to our first question on page one of  
20 your document, and I will read this question, but  
21 why do you think the different types of loading  
22 should be treated differently in antideg reviews and  
23 in particular referring to your answer in paragraph  
24 two and you indicated, we believe the context of the

L.A. REPORTING (312) 419-9292

139

1 IEPA antidegradation proposal and the overall  
2 Illinois regulatory systems, different loadings

3 should be treated on a case-by-case basis weighing a  
4 large number of factors, and also related to that on  
5 page three of your document. Question number two,  
6 would there be any level of review other than brief  
7 and not brief, those are the questions, your answer  
8 was yes. The Agency will decide what is necessary  
9 on a case-by-case sliding-scale basis and in  
10 follow-up there, do you believe that the Agency  
11 proposal allows such case-by-case flexibility and  
12 discretion to the Agency.

13 MR. ETTINGER: Yes.

14 MS. HODGE: Could you please identify the  
15 proposed regulatory language in the Agency's  
16 proposal that allows that discretion.

17 MR. ETTINGER: Well, I don't have the precise  
18 language before me, but there's nothing in there  
19 that precludes it. They talk about informal  
20 consultations, they talk about what has to be in an  
21 application --

22 HEARING OFFICER TIPSORD: Albert, could you  
23 face --

24 MR. ETTINGER: Sorry. They talk what has to be

L.A. REPORTING (312) 419-9292

140

1 in an application, they talk about informal

2 consultations between the permit applicant and the  
3 Agency. I don't see anything in their proposed  
4 regulation that would require them to have a long  
5 proceeding on something that didn't require it.

6 MS. HODGE: Could you please refer to proposed  
7 Section 302.105(c)(2) of the Agency's proposal. And  
8 I'm sorry, there's no page numbers.

9 MS. SKRUDKRUD: Could you repeat --

10 MR. ETTINGER: What's the number again?

11 MS. HODGE: 302.105(c)(2).

12 HEARING OFFICER TIPSORD: Do you have it? I  
13 have a copy.

14 MR. ETTINGER: Could I see that? I don't have  
15 their -- I've got my rewrite of what they did. I  
16 don't have what they did.

17 MR. ETTINGER: Yes. What's the problem?

18 MS. HODGE: Could you read just the first  
19 sentence in (c)(2).

20 MR. ETTINGER: Any proposed increase in  
21 pollutant loading subject to NPDES permit or CWA  
22 Section 401 certification must be assessed pursuant  
23 to 35 Illinois Administrative Code 354 to determine  
24 compliance with this section.

1 MS. HODGE: Okay. And then could you also  
2 look at the Agency's proposed language at Section  
3 354.103, and again I realize that proposed Part 354  
4 is not a proposed Board regulation, but I think  
5 this is important for us to determine how the Agency  
6 attempts to --

7 MR. ETTINGER: Correct. We found the language.

8 MS. HODGE: 354.104, and I will just read this  
9 first sentence, a permit application for a new or  
10 modified NPDES permit that proposes any increase in  
11 pollutant loading that necessitates the issuance of  
12 a new NPDES permit, modification of existing NPDES  
13 permit or involves an activity subject to Agency's  
14 certification pursuant to Section 401 of the Clean  
15 Water Act must include, but is not limited to and  
16 then is it true that there's -- about three-quarters  
17 of a page of information requirements that the  
18 application must include.

19 MR. ETTINGER: That's true.

20 MS. HODGE: Do you believe that the Agency --  
21 that this language would allow the Agency to  
22 exercise a discretion and apply the case-by-case  
23 analysis that you talked about?

24 MR. ETTINGER: Certainly I think what -- I

1 think what we've got to look at is the overall  
2 Agency proceedings here in the way they consider  
3 permits. Yes, you could imagine a hardhearted  
4 Agency that wants to have all sorts of legislatures  
5 mad at it saying we're not going to consider this  
6 until you provide us with the perfect application,  
7 but I don't think that's the way the rule works.  
8 In fact, the rule specifically refers to informal  
9 consultations with the Agency. So my understanding  
10 would be that they come out, they talk to you, they  
11 give the permit applicant the information that they  
12 had. We would then come up with an application that  
13 was in the file that would provide this sort of  
14 information, it wouldn't necessarily come originally  
15 from the applicant, it might come from the Agency,  
16 it might come from someone the Agency has referred  
17 them to to help them get this information and the  
18 nice thing about this provision is for reviewers  
19 like me. Later on I would see an application in  
20 which all the information was collected that would  
21 answer all of these questions, which are what is  
22 relevant to doing the antidegradation review, but as  
23 to each of these questions, you know, it would be --  
24 it would include more or less detail depending on

1 more or less study depending on what the Agency  
2 thought was necessary.

3 MS. HODGE: And what about in a situation where  
4 let's say I made an application for a new NPDES  
5 permit? I met with the Agency and we talked about  
6 it and they said yes, that's one of the easy cases,  
7 you don't need to submit this information. Do you  
8 think the Agency would have the discretion under  
9 this rule to say that to me as a permit applicant?

10 MR. ETTINGER: Well, I think what they would do  
11 if they were wise is they would fill out the permit  
12 application themselves. That way I could see it  
13 because there's going to have to be a document in  
14 the record somewhere which documents that these  
15 things were considered. Now, here it would be  
16 proposed to do it in a permit application, but in  
17 order for the reviewer to know that the  
18 antidegradation analysis is done, a document's got  
19 to be created. In a case like what you're talking  
20 about where it's an easy case, I would imagine the  
21 Agency would essentially say, we've got all the  
22 information we need, we can fill out the necessary  
23 document, the necessary permit application, you go  
24 home, you don't have to do too much work.

1 Alternatively, there is other information here which  
2 would have to come from the applicant at least  
3 initially, but I've got to see this as a reviewer to  
4 know that at least some level of review has been  
5 done, but it wouldn't have to be anymore than is  
6 necessary under the circumstances. So to look at my  
7 hypothetical trailer home going -- you know, trailer  
8 park discharging into the Mississippi, you know,  
9 filling out all the information here could be a  
10 fairly short document.

11 MS. HODGE: And what about the case where I was  
12 the applicant and the Agency agreed with me that it  
13 was the quick case, but what happens when you come  
14 in to review that file and you disagree with that?

15 MR. ETTINGER: Well, then I'll object and  
16 that's going to happen. I think that's probably  
17 going to happen in some cases. I'm frankly more  
18 fearful of that case than the one in which the  
19 Agency decides to unnecessarily put a lot of  
20 dischargers or proposed dischargers through hoops.  
21 I think there will be cases given the resource  
22 limits of the Agency and the general state of  
23 Illinois regulatory system in which they will do  
24 less studies than I will think are necessary. I

1 will object and at that point they'll look at our  
2 objections during the permitting process and either  
3 decide yes, you've got a point, maybe we should look  
4 in that water a little more carefully and see if  
5 there's something, some sensitive species there or  
6 they'll look at a DNR comment and say, oops, we  
7 didn't think that water needed this sort of  
8 attention, but now that DNR has pointed out to us  
9 there's this sensitive species that's a mile below  
10 the proposed discharge, maybe we should require some  
11 more studies.

12           So yes, there will be cases like that and  
13 I'm certain there will be. There will also be other  
14 cases in which they'll blow off our comments and in  
15 some cases that will be the end of the proceeding  
16 and in other cases, it won't.

17           MS. HODGE: But as a permit applicant, how am I  
18 supposed to know that? How am I supposed to know  
19 whether I think the Agency's done a job that would  
20 satisfy you or other reviewers?

21           MR. ETTINGER: That's a situation that exists  
22 now as to every permit. They send out draft permits  
23 constantly now, we object to them. I assume the  
24 Agency thinks as to each of those permits that we

1 object to that they have done an adequate job. We  
2 disagree and so we have objected and in a few cases,  
3 changes have been made in response to our objections  
4 and in other cases, no changes have been made and  
5 in some cases there have been appeals to this Board,  
6 but that's the process. It's an uncertain world.

7 MS. HODGE: Is it likely that in that situation  
8 where the Agency may have done an abbreviated  
9 case-by-case review that if you or some other person  
10 wanted to challenge, wouldn't the first place that  
11 you would go would be to look at the required  
12 information and see whether that was sufficient?

13 MR. ETTINGER: Yes.

14 MS. HODGE: So do you really believe that this  
15 language allows the Agency or the permit applicant  
16 any of that flexibility in applying the antideg  
17 review?

18 MR. ETTINGER: I think you've asked the  
19 question and adding really to it doesn't change it.  
20 Yes, I really believe that this provides the amount  
21 of flexibility which is justified. It doesn't give  
22 them the flexibility to ignore the Clean Water Act  
23 or federal law. It doesn't give them the  
24 flexibility to ignore the requirements of

1 antidegradation. It does give them the flexibility  
2 to do a short or a smaller investigation in the  
3 cases in which that's justified.

4 MS. HODGE: Thank you. That's all the  
5 follow-up questions that I have, but IERG does  
6 intend to fully respond to Mr. Ettinger's comments  
7 that were made right before lunch. Some of that  
8 information was new, it was not in the prefiled, but  
9 there's one point that we feel strongly that we  
10 would like to address today.

11 Mr. Ettinger claims that industry in the  
12 Illinois Environmental Group doesn't trust the  
13 Agency to apply the antidegradation review process  
14 and I would just like to say that it's my  
15 understanding that this proceeding is before the  
16 Board today because the Sierra Club didn't trust the  
17 Agency to do that job and we have proposed revisions  
18 to the Agency's proposal because that proposal  
19 simply does not allow the kind of flexibility that  
20 Mr. Ettinger is talking about and we will be  
21 submitting additional information. Thank you.

22 HEARING OFFICER TIPSORD: Thank you. Any other  
23 questions?

24 MS. LIU: Mr. Ettinger, in your proposed

L.A. REPORTING (312) 419-9292

148

1 revisions in addition to new or increased pollutant  
2 loadings that would trigger an antidegradation  
3 review you also suggest adding, quote, the  
4 disturbance of natural hydrological conditions.  
5 Could you please give some examples of such  
6 disturbances?

7 MR. ETTINGER: Well, I think when these rules  
8 were drafted, the Agency's rules were drafted, and a  
9 lot of us were thinking primarily of discharges  
10 allowed under the NPDES permits and that's -- and  
11 when I went through the Agency rules, I didn't think  
12 that that language applied as well to the 401  
13 certification problem in which there's not normally  
14 a discharge, per se, but there might be a stream  
15 channelization project, a wetlands fill, the  
16 construction of the dam or something like that.  
17 I did give examples in response -- IERG had the same  
18 question and I was able to answer that question  
19 something like that, I lost the document, yes, on  
20 page four of my responses today IERG asked the same  
21 question or a similar question and this disruption  
22 of natural conditions or -- natural conditions

23 already applies in the rules and in federal law in a  
24 few places so that it's a slightly vague term, I

L.A. REPORTING (312) 419-9292

149

1 will grant that, but laws can only be spelled out  
2 so well. In the context here, I don't think its  
3 vagueness is going to be a problem because we're not  
4 talking about people making loud noises around  
5 wildlife or something because it's only going to  
6 apply again to NPDES permits and 401 certifications.  
7 So if you're not discharging into a water or asking  
8 for a 404 permit or a Section 10 permit from the  
9 Corps of Engineers that has to have a 401  
10 certification, you're not going to be worrying about  
11 a disturbance of natural conditions. So in that  
12 context, I think the phrase is fairly clear.

13 MS. LIU: Thank you.

14 HEARING OFFICER TIPSORD: Anything further?

15 MR. TANNER: I have a question. Mr. Ettinger,  
16 on page ten of your testimony you talked about the  
17 Agency operating under a 1992 document in performing  
18 their antidegradation analysis and you called it a  
19 draft Agency guidance document. Has that document  
20 been entered into the record in this proceeding?

21 MR. ETTINGER: No.

22 MR. TANNER: Thank you. Is it appropriate for  
23 me to ask the Agency --

24 HEARING OFFICER TIPSORD: Yeah, I think so.

L.A. REPORTING (312) 419-9292

150

1 MR. TANNER: Ms. Tonsor, is it possible for you  
2 put a copy of that 1992 Agency guidance document  
3 into the record in this proceeding?

4 MS. TONSOR: Sure, we'll do that.

5 MR. TANNER: Thank you.

6 MR. FREVERT: I'd like to clarify that I don't  
7 know that we have --

8 THE COURT REPORTER: Could you --

9 MR. FREVERT: My name is Toby Frevert with the  
10 Illinois Environmental Protection Agency.

11 THE COURT REPORTER: Could you step up, please?  
12 I can't hear you.

13 HEARING OFFICER TIPSORD: We can't hear you at  
14 all, Toby. Sorry.

15 MR. FREVERT: My name is Toby Frevert with the  
16 Illinois Environmental Protection Agency. I just  
17 wanted to clarify that I don't think we strictly  
18 adhere to that draft document of today's activity.  
19 We have evolved since then.

20 MR. TANNER: Thank you.

21 HEARING OFFICER TIPSORD: Thank you. Anything  
22 further? Susan, you need to come up to the front,  
23 please.

24 MS. FRANZETTI: I just had a number of

L.A. REPORTING (312) 419-9292

151

1 questions --

2 THE COURT REPORTER: Could you identify her?

3 HEARING OFFICER TIPSORD: You need to identify  
4 yourself as well.

5 MS. FRANZETTI: I'm Susan Franzetti, counsel  
6 for American Bottoms Regional Treatment Facility.

7 Al, I'd like to refer you to the same  
8 issue that you were just discussing, disturbance of  
9 natural conditions and my question is on whose  
10 activities are we focusing within the intended  
11 meaning of this language? If it's -- you're tagging  
12 it on to any proposed increase in pollutant loading  
13 or disturbance of natural conditions, so is it just  
14 what the applicant caused in the receiving water?  
15 That's what I'm confused about or is it what any  
16 NPDES permittees or Section 401 holders activities  
17 have caused in the receiving stream?

18 MR. ETTINGER: I'm sorry. I'm missing  
19 something here. What's the distinction that we're

20 drawing?

21 MS. FRANZETTI: Well, I'm not sure. I'm trying  
22 to understand what disturbances of natural  
23 conditions are we focusing on for the receiving  
24 water.

L.A. REPORTING (312) 419-9292

152

1 MR. ETTINGER: Yeah. The normal type of  
2 disturbance of natural conditions would be something  
3 like a stream channelization in which you would take  
4 a meander out of a stream and I think if you -- and  
5 that's the sort of activity that I'm looking at.

6 MS. FRANZETTI: Right, I understand from the  
7 answer to your question -- from the question that  
8 was posed to you what types of activities you  
9 included within the meaning of disturbance of  
10 natural conditions. I'm not sure, though, which  
11 ones are relevant here. In other words, if I'm a  
12 discharger, I'm not proposing any increase in  
13 pollutant loading, but in the receiving water I  
14 discharge to there have been disturbances of natural  
15 conditions. When my permit comes up for renewal  
16 does this language cause an antideg review because  
17 there have been disturbances in the receiving water  
18 that I discharged to, whether or not I maybe have

19 caused them? I just don't understand what triggers  
20 this language.

21 MR. ETTINGER: Well, I guess what would trigger  
22 that language is you're requesting a permit -- you  
23 requested a permit to do that in the past or you are  
24 doing it in the future if there's -- the idea of

L.A. REPORTING (312) 419-9292

153

1 this disturbance of natural --

2 MS. FRANZETTI: To do what in the past?  
3 Because I have a permit and I discharged?

4 MR. ETTINGER: The disturbances of natural  
5 conditions is really targeted not at the discharge  
6 situation. It's targeted at the 401 certification  
7 situation and we're talking generally about wetlands  
8 fill or stream channelization permits. So if you  
9 have a permit like that, then that's what we're  
10 focusing on. I'm not --

11 MS. FRANZETTI: All right. So not the NPDES  
12 discharger who didn't cause a stream channelization  
13 or wetlands filling type activity?

14 MR. ETTINGER: Yeah.

15 MS. FRANZETTI: Changing more of the physical  
16 conditions of the receiving waters, is that what  
17 you're getting at?

18 MR. ETTINGER: I'm reading this again, I  
19 certainly did not anticipate and I'm not sure how  
20 you're reading this so that an NPDES discharger  
21 would be affected by this. I mean, if you were  
22 discharging to a water and somebody else channelizes  
23 it, that might prove to be relevant in some way, but  
24 that's not going to affect your permit directly.

L.A. REPORTING (312) 419-9292

154

1 MS. FRANZETTI: And again, I'm not trying to be  
2 difficult, but I'm having trouble with the intended  
3 meaning of this language. So if since my last  
4 permit was issued something has caused a disturbance  
5 of the natural conditions in the receiving water as  
6 you explained what that's intended to include, then  
7 it could trigger -- that situation could trigger an  
8 antideg review when my permit comes up for renewal?  
9 If there's been stream channelization -- let me use  
10 a specific example, since my last permit was issued  
11 there has been a stream channelization that has  
12 occurred in the receiving water I discharged to,  
13 when my permit comes up for renewal will that  
14 trigger an antideg review?

15 MR. ETTINGER: Not normally. I mean, I can sit  
16 here --

17 MS. FRANZETTI: When would it?

18 MR. ETTINGER: -- and just barely -- I can just  
19 barely think of some hypothetical situations. If --  
20 and it's really almost hard for me to come with a  
21 hypothetical situation, but if you were discharging  
22 into a channel which because of its meanders and,  
23 you know, the way the channel was formed it was  
24 doing a better job of removing the pollution than it

L.A. REPORTING (312) 419-9292

155

1 was after they channelized the stream, maybe that's  
2 something the Agency would want to look at again,  
3 but that's certainly not my -- that's not the  
4 situation I was anticipating here. What I'm talking  
5 about is discharge permits and 404 permits and we're  
6 just -- I'm not imagining a situation in which 404  
7 type activity is going to change a discharge permit.

8 MS. FRANZETTI: All right. So would you agree  
9 that under your proposed language, if I'm an NPDES  
10 discharger and I'm not proposing a new or increased  
11 loading, then your proposed additional language  
12 would not trigger an antideg review for me?

13 MR. ETTINGER: Are you on C here? I'm sorry.  
14 Are we --

15 MS. FRANZETTI: I'm on (C)(2).

16 MR. ETTINGER: (C)(2).

17 MR. MOORE: You're on (C)(2)(c), correct?

18 MS. FRANZETTI: I'm at (C)(2). I could also  
19 be, I guess, at (C)(2)(c), but I was reading it from  
20 (C)(2), any proposed increase in pollutant loading  
21 and then your new proposed language or disturbance  
22 of natural condition that has occurred since  
23 November 28th, 1975.

24 MR. ETTINGER: Right.

L.A. REPORTING (312) 419-9292

156

1 MS. FRANZETTI: So I simply want to make sure  
2 that if I'm an NPDES discharger --

3 MR. ETTINGER: Oh, I understand. I understand  
4 what your concern is and I guess that could be  
5 reworded slightly so that it was any proposed  
6 increase in pollutant loading authorized by an NPDES  
7 permit or disturbance of natural conditions under a  
8 404.

9 MS. FRANZETTI: I think that helps a lot.

10 MR. ETTINGER: That would take care of your  
11 problem.

12 MS. FRANZETTI: And that was your --

13 MR. ETTINGER: That was what was intended.

14 MS. FRANZETTI: Okay. Thank you. No further

15 questions.

16 HEARING OFFICER TIPSORD: Anything further?

17 Mr. Andes, please come to the front and identify  
18 yourself, again, please, for the record.

19 MR. ANDES: Fred Andes with Barnes & Thornburg  
20 and I just have a few.

21 Mr. Ettinger, back on the same provision,  
22 302.105(C)(2).

23 THE COURT REPORTER: Could you repeat that  
24 number again?

L.A. REPORTING (312) 419-9292

157

1 HEARING OFFICER TIPSORD: And please speak  
2 slowly.

3 MR. ANDES: 302.105(C)(2). Correct me if I'm  
4 wrong, but doesn't it say that any increase in  
5 loading -- for any increase in loading the applicant  
6 has to demonstrate that it's implemented all  
7 technically and economically reasonable measures and  
8 that the activity will benefit the community at  
9 large? That applies to every single increase in  
10 loading, correct?

11 HEARING OFFICER TIPSORD: Let me -- you see (C)  
12 (2) --

13 MR. MOORE: You're actually on --

14 MR. ANDES: (C)(2) --  
15 MR. MOORE: (C)(2)(b).  
16 MR. ANDES: (C)(2)(b).  
17 THE COURT REPORTER: Who is he?  
18 MR. MOORE: Not (C)(2).  
19 HEARING OFFICER TIPSORD: You need to --  
20 Mr. Moore, you need to identify yourself so the  
21 court reporter --  
22 MR. MOORE: I'm sorry. Robert Moore from  
23 Prairie Rivers Network.  
24 THE COURT REPORTER: Thank you.

L.A. REPORTING (312) 419-9292

158

1 MR. ETTINGER: Okay. That's what -- that was  
2 the Agency's language that you're referring to,  
3 right?  
4 MR. ANDES: Right.  
5 MR. ETTINGER: Okay.  
6 MR. ANDES: Is there anything in there about a  
7 sliding scale?  
8 MR. ETTINGER: No. I mean, the word sliding  
9 scale did not apply here -- I mean, did not appear  
10 in this text if that's what your question is.  
11 MR. ANDES: Is there anything that says that  
12 there are differing levels of review?

13           MR. ETTINGER: I think -- well, if your  
14 question is is there anything in this wording here  
15 that says that, you and I can both read it and I'll  
16 agree with you that the word sliding scale and  
17 reasonable review do not appear in this place where  
18 I would read it if I were you, as a clever lawyer,  
19 is under demonstrate and you would see that there  
20 would be different levels of demonstration depending  
21 on what you're talking about.

22           MR. ANDES: Is that necessarily true? The  
23 Agency could have just one level of review for  
24 everything if they wanted to?

L.A. REPORTING (312) 419-9292

159

1           MR. ETTINGER: They've told us that they will  
2 not do that and they would be very foolish to do  
3 that and I see no reason to believe that they would  
4 do that.

5           MR. ANDES: Okay. Now, in the showing that you  
6 have to make in every increase that the activity  
7 benefits the community at large, are you aware of  
8 any definition of what benefitting the community at  
9 large means?

10          MR. ETTINGER: Well, first of all to come back  
11 to demonstrate, it's been pointed out to me that

12 same language, shall demonstrate, is in the existing  
13 rule. So if that doesn't work, we've got a problem  
14 already and have had one for a long time.

15 MR. ANDES: I'll concede that, but --

16 MR. ETTINGER: Okay. And --

17 MR. ANDES: But that doesn't mean this is the  
18 right way to go?

19 MR. ETTINGER: Well, I agree with you, it  
20 doesn't mean it's the right way to go, but it does  
21 point to the fact that we necessarily have to use  
22 language in context and that given the way the  
23 Agency said they're going to handle this and the  
24 overall way that the 354 rules that they have

L.A. REPORTING (312) 419-9292

160

1 helpfully given us speak, I think it's reasonable  
2 to say that, you know, we're going to be looking  
3 more thoroughly at certain types of things than  
4 others and even this language, technically and  
5 economically reasonable, that has the word, you  
6 know, what we're going to be doing is looking at  
7 what's technically and economically reasonable and  
8 that's going to be varied from situation to  
9 situation in the depth in which you're going to be  
10 looking at that. There's only a certain -- there's

11 a very limited number of ways to deal with municipal  
12 sewage. We're not going to have to do, you know,  
13 15-volume EISs to consider the alternatives.

14 MR. MOORE: If I could add something to that.

15 HEARING OFFICER TIPSORD: I need to have you  
16 sworn in.

17 (Witness sworn.)

18 MR. ANDES: Let me continue asking him a couple  
19 of other questions. Let's -- you just talked about  
20 municipals, let's shift to industrials for a  
21 moment, particularly with regard to benefiting the  
22 community at large.

23 HEARING OFFICER TIPSORD: You need to slow down  
24 a little bit.

L.A. REPORTING (312) 419-9292

161

1 THE COURT REPORTER: Please, please.

2 MR. ANDES: With regard to benefiting the  
3 community at large, the question I asked you was are  
4 you aware of any definition of that term?

5 MR. ETTINGER: In the draft regulations they  
6 list -- in the draft 354 regulations they list a  
7 number of things which they would consider purpose  
8 of anticipated benefits of the activity, proposed  
9 activities, and then it lists a series of benefits.

10 MR. ANDES: Factors.

11 MR. ETTINGER: Factors.

12 MR. ANDES: Let me ask you, for example, if you  
13 had a situation where a company wanted to make more  
14 -- say they're an aluminum plant, they want to make  
15 more aluminium, it's not going to increase the  
16 amount of jobs at the plant or have any other real  
17 impact on the community, but the economy is better  
18 at some point and they want to make more aluminium  
19 at that plant and there's a tiny increase in loading  
20 as a result. How does that -- they have to make a  
21 demonstration that their activity benefits the  
22 community at large, correct? How do they do that?

23 MR. ETTINGER: I think what they do is pretty  
24 much what they say here, they list a number of

L.A. REPORTING (312) 419-9292

162

1 different things from which it is more almost  
2 presumed that this does benefit --

3 MR. ANDES: Is there any presumption? Is there  
4 any presumption there? It's just a lists of  
5 factors.

6 MR. ETTINGER: It's a list of factors, that's  
7 correct.

8 MR. ANDES: Okay. So there's no presumption

9 that things at any particular level meet the test of  
10 benefiting the community at large? It's totally up  
11 to the Agency?

12 MR. ETTINGER: I don't think that's quite true.  
13 As a practical matter, we all live within a society  
14 in which companies are generally allowed to make  
15 more money if they're not hurting anybody else in  
16 doing so and I think that anybody who objected to  
17 that permit simply on the basis that all they were  
18 doing was making more aluminium that people want to  
19 buy, would be under a thin ground.

20 MR. ANDES: So is it your reading that the  
21 community at large or the economic and social  
22 development test as EPA has laid it out is met if  
23 the company just comes in and says I want to make  
24 more money at this plant? What else do they have to

L.A. REPORTING (312) 419-9292

163

1 show?

2 MR. ETTINGER: I think the main thing they  
3 would have to show is that they need to have this  
4 increased pollution in order to do that.

5 MR. ANDES: Well, but that's not the test. The  
6 test is whether the activity benefits the community  
7 at large. In other words, the expansion of the

8 plant has to benefit the community at large. How  
9 could they make that showing?

10 MR. ETTINGER: I think that the normal  
11 presumption would be that if they are making more  
12 aluminum that they are probably benefiting the  
13 community at large.

14 MR. ANDES: But you don't see that presumption  
15 anywhere there or in EPA guidance on this issue,  
16 correct?

17 MR. ETTINGER: I can't -- I do not know the EPA  
18 guidance with a sufficient detail. Perhaps  
19 Mr. Pheifer (phonetic) could help you with that.

20 MR. ANDES: I think my recollection is at least  
21 I stated is that from the EPA standpoint the  
22 analysis focus is on the community.

23 HEARING OFFICER TIPSORD: Mr. Andes, you need  
24 to slow down.

L.A. REPORTING (312) 419-9292

164

1 MR. ANDES: I'm sorry. I believe that the  
2 analysis needs to focus on the community where the  
3 discharge is located. In this case, where the issue  
4 is simply that the company wants to produce more of  
5 its product and we can't identify a tangible benefit  
6 to the community where the discharge is located from

7 the standpoint of tax revenue or jobs, et cetera,  
8 does that mean that the company fails the  
9 antidegradation test and cannot do the increase?

10 MR. ETTINGER: No. You're taking -- that  
11 language is directly from the federal regulation.  
12 If we were to apply what you just said, they  
13 shouldn't have granted any of these permits in the  
14 last 25 years.

15 MR. ANDES: Well, I don't think that's the  
16 issue under this proposal.

17 MR. ETTINGER: Find me the federal regulation.  
18 It says that's the social or economic necessary  
19 language that comes from the existing federal  
20 regulation. In fact, what I think you're proving is  
21 what we all know as lawyers, which is that  
22 regulatory language has to be dealt with in context  
23 and you can't define every term that's used in any  
24 regulation. If we go back -- let's just read the

L.A. REPORTING (312) 419-9292

165

1 federal language on that, that is -- with all due  
2 respect to this Board, they didn't -- they can't --  
3 they did not write and cannot rewrite 40 CFR 131.12.  
4 It says here that water quality shall be maintained  
5 and protected unless the state finds after full

6 satisfaction of the intergovernmental coordination  
7 and public participations provisions --

8 HEARING OFFICER TIPSORD: You need to slow down  
9 a little bit. She can't get it all.

10 MR. ETTINGER: I'm sorry.

11 MR. ANDES: Thank God it's not just me.

12 MR. ETTINGER: I'm in the wrong place, any way  
13 so it's a good thing. Yes, it does. I was in the  
14 right place. That allowing lower water quality  
15 is necessary to accommodate important economic and  
16 social development in the areas in which the waters  
17 are located.

18 So the problem is if there's any ambiguity  
19 in the proposed Agency regulation, it's no more  
20 ambiguous than the federal statute and to some  
21 degree we are -- it is going to be necessary to look  
22 at this language in the context of our society and  
23 what we believe people should normally be allowed to  
24 do if there isn't a reason not to allow them to do

L.A. REPORTING (312) 419-9292

166

1 that.

2 MR. ANDES: But I think our question is not  
3 whether there's ambiguity, see, I think the question  
4 and what you're telling me is in this kind of

5 example I haven't heard any concrete application of  
6 the rule that would say yes this can go forward  
7 under the regulations. If there's no way to  
8 identify a direct benefit to that community, then  
9 antidegradation becomes a major problem, doesn't it,  
10 because it could say, you can't do that change, even  
11 though it's a tiny change, which goes back to our  
12 feeling that there needs be a de minimis level to  
13 let those kinds of minor changes go forward.

14 MR. ETTINGER: Well, I don't know if we should  
15 be arguing with each other on the record, we'll have  
16 plenty of time to do that later, although if -- or  
17 if people want to hear it we can.

18 What the basic thing is here is yes, the  
19 rule is a little vague, but in practice the way it  
20 has worked is that -- and has to work is that people  
21 look at these things and they decide is this  
22 socially beneficial in the context of the way we're  
23 doing it and the way we have to use language in  
24 English in our practice here, and as a practical

L.A. REPORTING (312) 419-9292

167

1 matter, those permits have all been granted for 25  
2 years.

3 MR. ANDES: And you're been arguing that the

4 way they've been doing it is illegal?

5 MR. ETTINGER: I've been arguing that the way  
6 they've been doing it is illegal because they don't  
7 ever consider alternatives. What they generally do  
8 is they go ahead and give the permit without showing  
9 the public what their reasoning is, without any  
10 explicit consideration of alternatives. If you came  
11 into that case in which they had considered  
12 alternatives and said, you know, this is our choice  
13 as an Agency, as a society, that this is a very  
14 small increase. We believe it's justified by the  
15 need or desire of this company to make money and  
16 our general -- somebody wishes to buy that  
17 aluminium, I've got a document there, I've got an  
18 antidegradation analysis, that particular discussion  
19 of social and economic benefit is before me and A,  
20 I'm not going to object to that, but even if  
21 somebody else does, they're A, going to loose in  
22 front of the Agency and B, they'll probably loose in  
23 front of the Board unless there's a good reason not  
24 to.

L.A. REPORTING (312) 419-9292

168

1 MR. ANDES: The question I'll leave to be  
2 addressed later by EPA, and I'm glad we have staff

3 here, is whether EPA's policy is that in increase  
4 justified simply by the company's desire to make  
5 more product or make more money meets the  
6 antidegradation test and would be granted. We've  
7 already discussed that, but I'm very interested to  
8 hear what the federal answer is on that question.

9 HEARING OFFICER TIPSORD: Are there any more  
10 questions?

11 THE COURT REPORTER: Excuse me, I'm going to  
12 flip my tape.

13 (Brief pause.)

14 HEARING OFFICER TIPSORD: And then whenever  
15 you're ready, you can swear in Mr. Thomas.

16 (Witness sworn.)

17 HEARING OFFICER TIPSORD: We have the prefiled  
18 testimony of David L. Thomas, Chief, Illinois  
19 Natural History Survey and I will admit that as  
20 Exhibit No. 32 if there's no objection. Seeing  
21 none, it's admitted as Exhibit No. 32. Mr. Thomas,  
22 would you like to give us a brief summary?

23 MR. THOMAS: Basically, the Natural History  
24 Survey has been collecting data on Illinois rivers

L.A. REPORTING (312) 419-9292

169

1 and streams for up to 140 years. We're a little

2 over 140 years old, but particularly over the last  
3 100 years the first fishes of Illinois publications  
4 was 1908, I believe and one of the objectives of our  
5 testimony is go on record with what we know about  
6 the streams in Illinois, particularly those that we  
7 think are of exceptional ecological characteristics  
8 and so one of our objectives is to lay out some of  
9 the primary streams that we think have exceedingly  
10 high importance ecologically in the state. Most of  
11 these are a larger list that we present, 40-some  
12 streams have threatened and endangered -- state  
13 threatened and endangered species.

14           The second part of our testimony was  
15 really just some comments on the whole proposed  
16 procedure for designating outstanding resource  
17 waters. As an Agency, we have been involved in the  
18 past in doing economic evaluations. We find the  
19 present proposal exceedingly difficult to comply  
20 with it. If, in fact, one is to do a true economic  
21 evaluation, I have a particular concern because I'm  
22 not sure that ecological functioning has ever taken  
23 into account economically.

24           What does it mean economically to loose a

1 population of a species from a stream segment? I  
2 don't think as scientists and economists we put  
3 values there and yet we know there is a value.  
4 Right now the state is looking at spending  
5 potentially up to a billion dollars to restore the  
6 Illinois River. So it obviously has some value that  
7 it lost, but we don't have good economics to make  
8 those kind of determinations. So what we usually  
9 get are things we can get our hands on, the value to  
10 a company of putting in a discharger to a community,  
11 but we often don't have the values for the resource  
12 that may need to be protected. There are scientists  
13 working on that, but we're ways off from truly being  
14 able to deal with that issue.

15           And the third point was we picked out four  
16 stream stream segments that we thought were of such  
17 high ecological value that they needed more  
18 immediate protection. I think it's up to this Board  
19 whether the outstanding resource waters is the way  
20 to provide that or not, but I think as ecologists  
21 and as scientists we felt that these particular  
22 stream segments were in high need of protection. I  
23 think one of the reasons we picked these is that  
24 they were also ones that had a fair amount of state

1 and in some cases federal land along them. They had  
2 relatively few dischargers. I did erroneously say  
3 no and it has been adequately pointed out that there  
4 are some dischargers on the water bodies that we  
5 selected, but basically, if you look at it as a  
6 state, these are water body segments that are  
7 relatively undisturbed, if you will, and have  
8 relatively few discharges.

9 HEARING OFFICER TIPSORD: Would you like to  
10 introduce --

11 MR. YONKAUSKI: Kevin Cummings is Dave's  
12 associate and will be supplementing testimony from  
13 Dave if technical matters come up.

14 HEARING OFFICER TIPSORD: Okay. Then let's  
15 go to the prefiled questions from the Illinois  
16 Environmental Regulatory Group.

17 MR. YONKAUSKI: Do you want to read the  
18 questions or just --

19 HEARING OFFICER TIPSORD: It would probably be  
20 best if we let Ms. Hodge read the questions and then  
21 we'll let you answer them, if that's okay with  
22 everybody.

23 THE COURT REPORTER: Could I get Ms. Hodge to  
24 come a little closer?

1 HEARING OFFICER TIPSORD: Could you come  
2 forward a little bit, because she's having a hard  
3 time hearing you guys?

4 THE COURT REPORTER: I'm sorry. Thank you.

5 MS. HODGE: We had just a few questions for the  
6 Department of Natural Resources and in your prefiled  
7 testimony, Dr. Thomas, you had asked the Board to  
8 designate these four water bodies as ORWs. My first  
9 question is, what was the process that you went  
10 through when deciding that the Middle Branch, North  
11 Fork Vermillion River drainage should be designated  
12 as an ORW? Could you describe the process and could  
13 you tell us what information you considered.

14 MR. YONKAUSKI: That's basically the same  
15 question for each of the four?

16 MS. HODGE: Yes, it is.

17 MR. YONKAUSKI: I think Dave has one --

18 THE COURT REPORTER: I can't --

19 MS. HODGE: That's fine.

20 HEARING OFFICER TIPSORD: She couldn't hear  
21 you.

22 MR. YONKAUSKI: It's basically the same  
23 question for all four streams and I believe Dave  
24 has one ominous answer for all four questions.

1           MR. THOMAS:  When we did the first report,  
2   which is an addendum to my testimony called  
3   Biologically Significant Illinois Streams, I believe  
4   it was published probably in 1992.  We based it on  
5   the data from the Illinois Scientific Survey over  
6   100 or more years, but we also looked at collections  
7   made by others in Illinois.  So I believe they  
8   visited a number of different museums around the  
9   country that had collections from Illinois where we  
10  had verified and vouchered specimens that we could  
11  examine to determine what populations were in those  
12  stream segments.

13                 The response that we prepared for all four  
14  questions basically is this:  We went through a  
15  process to identify the streams and to select those  
16  with threatened and endangered species, high  
17  diversity and/or high quality habitat and we defined  
18  this -- what we mean by that in the testimony.  
19  These four stream segments were selected for ORW  
20  designation at this time for the following reasons:  
21  One, they are among the most biologically diverse  
22  streams in Illinois; two, all four have state  
23  threatened and endangered species; three, Lusk Creek  
24  is the most biologically diverse stream in the state

1 for EPT taxa and what that means Ephemeroptera,  
2 Trichoptera and Plecoptera, those are three groups  
3 of insects. They're often used to look at water  
4 quality because they're good -- if you have a number  
5 of those species, it's a good indicator that you  
6 have good water quality.

7           The fourth reason was the Middle Branch of  
8 the North Vermillion River has more threatened and  
9 endangered species than any other stream segment in  
10 the state. It also has a federally listed  
11 endangered species, this is a species of mussel.

12           Five, the Middle Fork of the vermilion  
13 River is only Illinois River with federal wild and  
14 scenic river status.

15           Six, all four of these stream segments are  
16 in small watershed basins with few or no industrial  
17 or community dischargers. So the economic impact of  
18 ORW designation should be minimal.

19           And the seventh is that all four stream  
20 segments, or at least some portion of each, run  
21 through federal, state or county-owned lands at  
22 least in portions and if there is interest by the  
23 Board, I do have some GIS maps that show a little  
24 more detail of those stream segments. I wasn't sure

1 if that would be requested here because of the  
2 Board's designation that they won't consider at this  
3 time those four streams for ORW designation.

4 MS. HODGE: Thank you. We may have --

5 MS. HIRNER: I'm Deirdre Hirner with IERG.

6 As a follow-up, on the four waters that you  
7 nominated or that you suggest be nominated, one has  
8 a 43-mile -- square mile drainage, one a 438-square  
9 mile drainage, another an 88-square mile drainage  
10 and another a 43-square mile drainage. How do  
11 you know -- how would you characterize those  
12 drainage areas or the watersheds? What is the type  
13 of development that exists within those watersheds,  
14 of particular interest one that's 438 square miles  
15 in size.

16 MR. THOMAS: Most of them have forested  
17 riparian water -- a component of the watershed. Two  
18 of them that are in the Shawnee National Forest are  
19 mostly forested, but relatively little development  
20 around them. The longest stretch is  
21 the Middle Fork Vermillion River, which was  
22 designated wild and scenic and as you pointed out,  
23 there is a discharger on that and probably a few

24 others. I'm not sure what else you want for

L.A. REPORTING (312) 419-9292

176

1 characterization on this.

2 MS. HIRNER: Let's say in the -- let's just  
3 select one, the Middle Fork Vermillion with a  
4 438-square mile drainage area, would you generally  
5 say that that is a developed or undeveloped  
6 watershed and including, just including, because if  
7 we think about it and I know you all are aware that  
8 whatever happens in the water is generally the  
9 result of what's going on on the lands that drain  
10 into that water and so would you characterize it as  
11 semi-urban, residential, agricultural, how would you  
12 characterize the uses, the land uses of that  
13 watershed?

14 MR. THOMAS: Yeah, I mean, there are some  
15 agricultural, there's a number of state parklands  
16 that are along there. I mean, one of the reasons it  
17 was wild and scenic was because there's relatively  
18 -- I would say -- I wouldn't undevelop or developed,  
19 but there's a relatively low amount of development  
20 along that river and so it does have scenic  
21 characteristics if you're canoeing on the river of  
22 which there's a lot of recreation so --

23 MS. HIRNER: Can I ask a clarification? Is  
24 that part of the national wild and scenic river

L.A. REPORTING (312) 419-9292

177

1 system, is it a wild, a scenic or a recreation  
2 because those carry different decrease of --

3 MR. THOMAS: My understanding was wild and  
4 scenic.

5 MR. YONKAUSKI: I believe that's right.

6 MS. HIRNER: That was just my question. And  
7 how would you -- is there the ability to control --  
8 what would be the ability to control or to regulate  
9 development within that watershed?

10 MR. THOMAS: You mean based on its status?  
11 I'm not really sure. I know there is some  
12 development that's going on in terms of -- I'm not  
13 sure of all the restrictions. You mean the  
14 restrictions that are afforded by having a wild and  
15 scenic status?

16 MS. HIRNER: No. The ability to control let's  
17 say community growth or to control increased  
18 agricultural production or increase those land uses  
19 that could potentially increase discharges into that  
20 river.

21 MR. THOMAS: I'm not really sure. I know

22 there's some areas that because they're state lands  
23 or state parks would not likely be developed  
24 anywhere in the near future, but I'm not sure about

L.A. REPORTING (312) 419-9292

178

1 some other areas.

2 MS. HIRNER: Now, based on your work in the  
3 Natural History Survey, would you just, if you can  
4 today or just as a point of interest, maybe a point  
5 of comparison, would you be able to identify a  
6 couple of other rivers that are designated either  
7 outstanding national or outstanding state resource  
8 waters in states -- in surrounding states that have  
9 those designations currently on the books and be  
10 able to compare or contrast the characterization of  
11 the uses and development of the watersheds of those  
12 waters with those which you proposed for designation  
13 today.

14 MR. THOMAS: I couldn't do that now. That is  
15 something that we could probably provide you some  
16 information on. It might take a while.

17 MS. HIRNER: I just ask that because there are  
18 some which I'm familiar where the entire watershed  
19 -- they warrant that designation simply because the  
20 entire watershed is under more or less total control

21 of the state entities of a management agency that  
22 can absolutely assure that there will be no  
23 additional development of watershed. So I think to  
24 fully understand your proposal for designation it

L.A. REPORTING (312) 419-9292

179

1 would be important to have some other ways to  
2 compare it. That's all.

3 HEARING OFFICER TIPSORD: Thank you. Any  
4 additional questions? Let's go ahead and let Mr.  
5 Moore ask his question.

6 MR. MOORE: I'm sorry. I noticed in looking  
7 through the list of outstanding waters of high  
8 ecological significance that the Natural History  
9 Survey identified, it seemed like there were a lot  
10 of streams and stream segments identified that  
11 happened to be in -- that could be viewed as low  
12 flow streams or have 7Q10 flows of zero. That seems  
13 to be odds with one of the criteria that the Agency  
14 spelled out in four ORW waters. In your opinion, is  
15 the fact that a stream has a 7Q10 flows of zero, is  
16 that significant in determining its ecological  
17 significance.

18 MR. THOMAS: No, it certainly wouldn't be  
19 significant in determining its ecological

20 significance. There are a lot of other factors  
21 that come into play, groundwater, springs that may  
22 come into a stream. I fished a lot of troubled  
23 streams in New England that would dry up in places  
24 and yet in other areas would have flow. So a lot of

L.A. REPORTING (312) 419-9292

180

1 it depends where you measure flow and the fact that  
2 some of these streams even very biologically  
3 productive ones may not have a flow from one pull to  
4 another, it doesn't mean that they can't maintain a  
5 diverse and biologically productive final.

6 MR. CUMMINGS: Could I clarify?

7 HEARING OFFICER TIPSORD: I need to have you  
8 sworn in.

9 (Witness sworn.)

10 MR. CUMMINGS: Yes. In fact, your question  
11 about 7Q10 flows of zero has little ecological  
12 relevance because as we pointed out, three of the  
13 four streams that we proposed for  
14 this immediate ORW designations have 7Q10 of zero  
15 and yet they remain and are some of our highly  
16 prized ecological areas in the streams of the state  
17 of Illinois. So this idea of the 7Q10 zero having  
18 to have special consideration or having to have

19 special considerations or requirements doesn't make  
20 sense from an ecological standpoint.

21 MS. LIU: Good afternoon, Chief Thomas.  
22 It's very evident from your testimony that the  
23 Department of Natural Resources, as well as the  
24 Natural History Survey, is poised to propose or

L.A. REPORTING (312) 419-9292

181

1 nominate some ORWs. I was wondering if you were  
2 envisioning the department or the Natural History  
3 Survey having some kind of a regular review where  
4 you would propose those types of waters on an annual  
5 basis or something along those lines?

6 MR. THOMAS: Well, one thing we talked about is  
7 there is a need to sort of update the original  
8 report that we did which is almost 11 - nine or 11  
9 years old now and I think that's something important  
10 to do. Whether we'd be the ones designating or not  
11 that would be marginally our role. We are more the  
12 science branch of our Agency.

13 I think one of our roles -- that's one of  
14 the roles that I'm trying to play here in this  
15 testimony is to present to you what we know about  
16 some outstanding aquatic resources in the state and  
17 I think we can readily testify that some of these

18 need probably some extra protection above and beyond  
19 just maintaining present water quality standards,  
20 but whether we would be the ones to go ahead and  
21 actually work to propose, I'm not sure. Our Agency  
22 has said and I've conferred with our people that do  
23 economic evaluations, we're not sure under the  
24 present standards that we could have the resources

L.A. REPORTING (312) 419-9292

182

1 even within DNR to actually meet one of the  
2 requirements for designating NORW if we had to go  
3 through the full process as is presently outlined  
4 so...

5 MS. LIU: Would the Department or the Natural  
6 History Survey be willing to work with citizens'  
7 groups on a team effort to nominate ORWs?

8 MR. THOMAS: We certainly are -- as state  
9 Agency we're always prepared to share the  
10 information that we have now and we have lots of  
11 different projects now. We're working with various  
12 watershed groups around the state, some of them may  
13 end up having an interest of doing this kind of  
14 designation. Actually, we probably prefer to work  
15 that way as a resource to them as opposed to  
16 ourselves taking necessarily a lead in providing a

17 designation for ORWs.

18 MS. LIU: In your prefile testimony you say  
19 quote, adding an economic analysis requirement may  
20 make it impossible to designate an ORW, unquote.  
21 Your sentiment was echoed several times over in  
22 public comments that the Board received. On the  
23 other hand, IERG has stressed what a profound  
24 economic impact this designation could have on

L.A. REPORTING (312) 419-9292

183

1 surrounding land uses. Can you think of a way that  
2 would help the Board to weigh both the environmental  
3 and the social/economical information objectively?

4 MR. THOMAS: That's a very good question.  
5 I'm not sure I could answer it. I do want to  
6 clarify it's not that I don't think looking at the  
7 social and economic factors aren't important, they  
8 certainly are. I think what was asked for, though,  
9 in terms of the type of economic evaluation of both  
10 present and potential future economic development  
11 that might occur is an extremely onerous one. How  
12 are you going to know? Now, communities could come  
13 forward and talk about longer range plans and the  
14 types of development it would like to see and it  
15 would certainly seem fitting that the Board take

16 that into consideration.

17           As I did testify earlier, though, I think  
18 it is also important that we look carefully at what  
19 is the value of the systems, the ecological value  
20 and beyond that, a broader societal value. I just  
21 saw an article from the New York Times this weekend  
22 that said bird watching now is a \$25 billion  
23 industry. Well, we don't put a value  
24 to bird watching on a river stretch or even the fish

L.A. REPORTING (312) 419-9292

184

1 probably from there and yet they do have a value and  
2 I think a real challenge in the future is to provide  
3 some value. If you don't do that, then it's a very  
4 one-sided economic evaluation. It's not truly  
5 reflecting the economics to the society. It's not  
6 reflecting that a lot of communities right now are  
7 spending a lot of money trying to restore areas that  
8 have already been degraded. So as a society, we're  
9 saying we're willing to spend it, but we don't do  
10 the economics up front to say what is it going to  
11 cost if we loose it and I'm just arguing that we  
12 need to do that. I don't have an answer for you. I  
13 wish I did because all those things have to be taken  
14 into account.

15 MS. LIU: In Mr. Ettinger's prefiled testimony  
16 he suggested that appropriate officials from the  
17 Department of Natural Resources should review all  
18 the draft NPDES permits and 401 certifications to  
19 assure that resident species are not being  
20 overlooked in the analysis and he mentions that's  
21 already been done to some extent and I was wondering  
22 how you think that the Department could be  
23 effectively included in either this rulemaking or  
24 the Agency proceedings?

L.A. REPORTING (312) 419-9292

185

1 MR. THOMAS: I'm not sure that I can really  
2 comment on that. I know that there are parts of  
3 our Agency that do provide information at present  
4 to the Illinois EPA as part of their review. I  
5 don't think I'm prepared to comment on how that is  
6 or isn't working so...

7 MS. LIU: Thank you very much.

8 HEARING OFFICER TIPSORD: Anything further?

9 MR. MELAS: A moment ago you said ONRW --

10 HEARING OFFICER TIPSORD: Nick, we can't hear  
11 you.

12 MR. MELAS: A moment ago you said ONRW. Now,  
13 we've had some testimony here that we really ought

14 to use that term. Is there any intrinsic value in  
15 using the N --

16 MR. THOMAS: I didn't -- I actually didn't even  
17 realize I used it. No, we've just been referring to  
18 these as outstanding resource waters, OR -- more  
19 scientifically what we've been testifying are waters  
20 that have outstanding ecological characteristics,  
21 high biodiversity.

22 MR. MELAS: ORW is a sufficient enough acronym?

23 MR. THOMAS: I would think so.

24 MR. MELAS: Would Mr. Ettinger like to say

L.A. REPORTING (312) 419-9292

186

1 anything about that because I noticed that you --

2 MR. ETTINGER: Well, it's just the federal term  
3 is ONRW and so if we use the same terminology that  
4 the federal rule does, it would be obvious to people  
5 who are coming into the state what we mean when we  
6 use that term. This was a matter -- it's not going  
7 to break our hearts if you use a different  
8 terminology or call them Ralph for that matter. The  
9 point is if you use the same terminology as the  
10 federal government, it's going to be easier for  
11 people who are reading the rules to know this is an  
12 ONRW designation than it would be if you use a term

13 that's similar, but not quite like the federal term.

14 I'm particularly worried about if you look  
15 at the Indiana rules, they have about six different  
16 terminologies they used with different  
17 classifications and they're all close and a little  
18 different, like ones an outstanding state resource  
19 water or a pretty good state resource water or kind  
20 of outstanding and you read them all and it's very  
21 hard to track, you know, what it's doing. So my  
22 suggestion was just to use the federal terminology,  
23 but that's not the most important issue we face.

24 MR. MELAS: I agree.

L.A. REPORTING (312) 419-9292

187

1 HEARING OFFICER TIPSORD: Anything further?

2 MS. McFAWN: I had a question about what we're  
3 talking about earlier just shortly ago, the economic  
4 analysis and it's concerning the thing you might not  
5 be able to achieve ORW status for some of the  
6 streams and impossible because of the economic  
7 analysis requirement. Not to put you on the spot,  
8 but I wonder if you were talking about perhaps in  
9 the future being able to come up with that kind of  
10 economic information to attach some kind of economic  
11 analysis to maintaining a stream using maybe what it

12 would cost to recover a stream in the environment  
13 around it. If we keep that kind of requirement in  
14 the ORW rules, do you think that will generate  
15 information on the economic benefits?

16 MR. THOMAS: Not probably in and of itself.  
17 I think there is a lot of interest. I've talked to  
18 some scientists that have been involved in trying  
19 to look at the economic value of ecological  
20 functions. In fact, there's this Costanza  
21 (phonetic) paper that's out, looked at it worldwide  
22 and said it's something like two and a half times  
23 the world gross product or whatever. People will  
24 argue those over those numbers and, you know, a lot

L.A. REPORTING (312) 419-9292

188

1 of them are pulled out of the air, some have more  
2 solid foundation. I think the fact their paper is at  
3 least raising an awareness that there is a value  
4 that we haven't been able to well quantify, but we  
5 probably need to particularly as more and more of  
6 these discussions get down to economics. I think  
7 it's going to be very important that we do an  
8 across-the-board economic evaluation and we do  
9 consider the value of some of these areas that there  
10 is an economic value even though we may have trouble

11 putting a dollar -- a good dollar value on what that  
12 economics is. We do it for fish kills and bird  
13 kills, sometimes we'll put a dollar value per fish,  
14 per bird, well, that's just an estimate. I mean,  
15 something that may be used to find, but it is  
16 recognizing the fact these do have a value and so  
17 anyway, I think that's something that we need to  
18 think about.

19 MS. McFAWN: It probably doesn't come within  
20 your Agency or Department's purview, does it?

21 MR. THOMS: Not within the Natural History  
22 Survey, but there are others within the Department  
23 of Natural Resources that are more involved in  
24 looking at some of the economic affects of the

L.A. REPORTING (312) 419-9292

189

1 policy or whatever that would have probably more  
2 involvement in something like that.

3 MS. McFAWN: So they might be developing the  
4 guidelines for that kind of quantifications?

5 MR. THOMAS: No, I wouldn't say --

6 HEARING OFFICER TIPSORD: Couldn't hear you.

7 MR. YONKAUSKI: Yes. There's a member of the  
8 staff that's putting together a research proposal  
9 to do exactly that, looking to economic values and

10 how to use economics in the evaluation of  
11 outstanding resource waters.

12 MS. McFAWN: Do you know does any other  
13 agencies at the state level, be it for the purposes  
14 of tourism or anything like that, evaluate the  
15 state's natural resources and money it might  
16 generate?

17 MR. THOMAS: Well, our Agency a number of years  
18 ago actually did a report on watchable wildlife and  
19 this is not -- we have figures for hunting and  
20 fishing, but they actually did for people that just  
21 want to camp or watch birds or just enjoy the  
22 outdoors and if I remember rightly, it was about  
23 three-quarters of a billion dollars a year for the  
24 state of Illinois.

L.A. REPORTING (312) 419-9292

190

1 So, again, there is a large value for  
2 people just enjoying areas. They're willing to  
3 spend money to visit an area that's in a natural  
4 state, but, again, I don't think people quantify  
5 where they say well, this section of stream has to  
6 be broken down as to have 100th of that value and  
7 therefore should be \$100,000 -- \$100,000,000 or  
8 something. We just -- we haven't done those types

9 of analyses, but -- yeah, the first paragraph of  
10 my testimony does point out something on the  
11 recreational values and I said we do have better  
12 dollars there in terms of fishing days or hunting  
13 or those types of values that can be better  
14 quantified and there are other data which I didn't  
15 include here for bottom land forest in terms of the  
16 resource that can be harvested, but in terms of  
17 sort of the less easily quantified, which is what  
18 I mentioned before in terms of more esthetics and  
19 use of various areas because of their natural state  
20 we don't have values on that and we don't have  
21 values on what a threatened and endangered species,  
22 what does the loss of that mean. We haven't put an  
23 economic value on that.

24 MS. McFAWN: Thank you, Mr. Thomas.

L.A. REPORTING (312) 419-9292

191

1 HEARING OFFICER TIPSORD: Anything else?  
2 Thank you very much. We appreciate your coming  
3 today. We're going to take a ten-minute break and  
4 then we'll come back and maybe have some discussion  
5 with the Agency.

6 (Whereupon, after a short  
7 break was had, the

8 following proceedings  
9 were held accordingly.)

10 HEARING OFFICER TIPSORD: The other thing I  
11 want to note is that I failed to mention earlier,  
12 although I did off the record, that DNR also filed a  
13 response to the motions to strike David Thomas'  
14 testimony. It came in today. The Board also moved,  
15 since we denied the motion to strike, but if there's  
16 anything additionally in that that DNR would like to  
17 see in the record, please feel free to file that  
18 with your comments. In addition, the environmental  
19 groups have filed a series of questions for the  
20 Agency and it's my understanding that the Agency's  
21 going to submit those in writing prior to the public  
22 comment deadline to allow for the opportunity of  
23 everyone  
24 to look at those answers. I think that we still

L.A. REPORTING (312) 419-9292

192

1 have a few questions that we'd like to propose to  
2 the Agency that we can put on the record and the  
3 Agency can also respond to those in writing. If  
4 they're short and the Agency must respond to them  
5 now today, that's fine too, whichever you would  
6 prefer.

7 MR. FREVERT: Let's hear them.

8 HEARING OFFICER TIPSORD: Okay. Let's go ahead  
9 and swear Toby in in case he wants to answer a  
10 question or two.

11 (Witness sworn.)

12 HEARING OFFICER TIPSORD: And please remember  
13 to keep your voice up.

14 MR. FREVERT: It's amazing what I'll do to get  
15 a more comfortable chair.

16 MS. LIU: Good afternoon, Mr. Frevert. IERG  
17 suggested inserting the word surface before water  
18 body in the proposed rule, could this rule apply to  
19 any other types of water besides surface water?

20 MR. FREVERT: Other than the potential issue  
21 that Tanner arose regarding water in caves that have  
22 an open surface to them, I can't think of any, no.

23 MS. LIU: Would that be a good reason not to  
24 insert that word?

L.A. REPORTING (312) 419-9292

193

1 MR. FREVERT: I don't know that I have a strong  
2 answer for you right now. We can look into it, but  
3 certainly the intent is we're not proposing or we  
4 think we have an obligation to apply this concept to  
5 to the groundwater arena.

6 MR. RAO: Does the Agency plan to do  
7 antidegradation views on all permit renewals until  
8 eventually you've gone through all cycles or is it  
9 possible that some, you know, permits that never  
10 need to change the pollutant loading will not go  
11 through the process?

12 MR. FREVERT: Antidegradation is a concept  
13 that in my mind requires review and a conscious  
14 decision to allow --

15 THE COURT REPORTER: To allow --

16 MR. FREVERT: To allow pollutant loading  
17 increases for permit renewals, permit modifications  
18 that don't constitute any load increases, I don't  
19 believe it's necessary and we don't intend to do it.

20 MR. RAO: Okay.

21 MS. LIU: In the ORW designation process,  
22 Mr. Bill Compton of IERG had suggested that owners  
23 of properties located adjacent to the water body at  
24 issue be notified of the petition for the ORW

L.A. REPORTING (312) 419-9292

194

1 designation among any other parties that are already  
2 listed in the Agency's proposal, the Illinois Coal  
3 Association in its public comment also suggested  
4 providing notice to mineral owners. How does the

5 Agency feel about including all adjacent property  
6 owners and mineral owners in that notification  
7 process?

8 MR. FREVERT: I think that people that would be  
9 potentially affected in the detrimental fashion in  
10 terms of losing some future property rights or  
11 development rights, it's important for the Board to  
12 be aware of those people and understand their  
13 prospective and information they have to bring to  
14 the table. Ideally, I think they should all be  
15 notified from a practical or pragmatic standpoint.  
16 How you go about that, how much effort and approach  
17 you take to that notification process, it's going to  
18 be a balance because obviously it's difficult to go  
19 to every courthouse in every county that streams  
20 watershed goes through and to track down every  
21 property owner and every trust and whatever else  
22 that may have some interest to it. I recognize the  
23 burden in that. The Board's got to make a balance.  
24 I don't think you want to make a decision blindsided

L.A. REPORTING (312) 419-9292

195

1 in terms of there are some potential interests and  
2 potential activities you're not aware of, but I also  
3 think you've got to make a program workable and I

4 think we suggested what we thought was a proper  
5 approach, other parties have offered what they think  
6 is a proper approach. I don't have a perfect  
7 answer. We're trying to help you find that balance,  
8 but it's truly a balancing.

9 MS. LIU: In Mr. Ettinger's prefiled testimony  
10 there's a footnote and it states quote, because of  
11 the scarcity of ambient water quality monitoring  
12 sites, Illinois permit writers often find it  
13 necessary to guess at critical background conditions  
14 based on monitoring sites that are many miles  
15 upstream of the proposed discharge and may be even  
16 on a different stream. Assumptions are made about  
17 the stream and the effluent flow, unquote.

18 Is this accurate?

19 MR. FREVERT: I guess yes and no. I don't  
20 believe that's a guess. I believe that's an  
21 estimation and an approximation based on some series  
22 of data that is a routine part of some of our  
23 activities, yes.

24 MS. LIU: How does extrapolating such data

L.A. REPORTING (312) 419-9292

196

1 affect your calculation of the assimilative capacity  
2 of a stream?

3 MR. FREVERT: It makes it possible.

4 MS. LIU: Okay. Another footnote in  
5 Mr. Ettinger's prefiled testimony says that the  
6 Agency doesn't receive nor review the construction  
7 Storm water pollution prevention plans required by  
8 the NPDES permits, is this accurate?

9 MR. FREVERT: I believe that pollution for  
10 Storm water pollution prevention plans are required  
11 as a matter of the permitting process. They're  
12 expected to be developed and available on the  
13 property grounds for the property managers to  
14 access and utilize. They're expected to be  
15 available for state and local inspectors to access  
16 and determine the adequacy of them. I don't believe  
17 on a routine basis either the federal model or  
18 operating practices require them to be submitted  
19 to the Agency and formally reviewed and if Tom  
20 McSwiggin our permit manager wants to add to that,  
21 apparently I'm correct.

22 MS. LIU: Do you think that there would be a  
23 benefit to the Agency if they were to review those?

24 MR. FREVERT: In a perfect world if we had

L.A. REPORTING (312) 419-9292

197

1 25,000 employees we would review a lot more than

2 what we do. From a practical standpoint we do have  
3 the requirements now. There is a very obvious  
4 requirement for people to be aware of, manage the  
5 storm water practices on their property, be  
6 available and knowledgeable of pollution prevention  
7 management practices, have plans developed for their  
8 operating staff and that's the direction of the  
9 federal model. That's the direction we followed.  
10 Again, I think in terms of balancing public  
11 interest and public resources and public  
12 perspectives that probably it is an appropriate  
13 approach to take at this time.

14 MS. LIU: Mr. Ettinger also suggested that it  
15 might be helpful if the Agency could help identify  
16 some of the interested parties in an ORW designation  
17 process such as current and permit applicants for  
18 NPDES permits. Is that something that the Agency  
19 could help citizens' groups to identify?

20 MR. FREVERT: I believe routinely we get  
21 requests to identify current permit holders within  
22 a certain geographical area and honor those  
23 requests. It's public information. It's reasonably  
24 within our capability to accommodate those requests

1 and we intend to continue that in the future.

2 MS. LIU: How about permit applicants, ones  
3 that don't actually have applicants yet?

4 MR. FREVERT: To the extent that we've got  
5 applications logged in another location in there and  
6 the vicinity, I think it's also our practice  
7 and desire to relay that information to interested  
8 parties.

9 MR. RAO: In Mr. Ettinger's prefiled testimony  
10 and as well as some public comments reviewed by the  
11 Board there is some concern expressed about how  
12 these proposed rules would affect the Board's  
13 mine-related water pollution, you know, permits  
14 issued under the Board's mine-related water  
15 pollution regulations. Could you explain how these,  
16 you know, antidegradation rules would affect mine  
17 waters regulated under 35 Ill. Adm. Code 405 and  
18 406?

19 MR. FREVERT: I believe that's part of subtitle  
20 D, which is the Board's mining regulations and the  
21 current status of those Board mining regulations if  
22 I remember correctly actually defer to a technology  
23 level of operation with a waiver from water quality  
24 standards, with a presumption of compliance with

1 water quality standards if those technology levels  
2 are complied with. Since antidegradation is indeed  
3 a part of the state's water quality standards and  
4 contained with part two of subtitle C, my  
5 non-lawyers read of subtitle D may potentially say  
6 that doesn't apply to mining activities such as  
7 subtitle D and I believe that's a concern of  
8 Mr. Ettinger.

9 MR. ROA: Would it be possible for the Agency  
10 also to respond maybe later in comments from a  
11 lawyer's perspective on this?

12 MR. FREVERT: That's possible, but I probably  
13 would supplement that and say that I think it's  
14 probably time to revisit subtitle D in a larger  
15 fashion than just this one particular issue.

16 MR. RAO: Okay.

17 MR. FREVERT: I don't know when I'll get along  
18 to it, but I'd certainly like to.

19 MR. RAO: Yeah. You know, between us technical  
20 people I thought it would be better to get a  
21 lawyer's perspective.

22 MR. FREVERT: I'm not sure of that, but --

23 MS. LIU: Mr. Frevert, this proposed rulemaking  
24 clearly applies to new or increased pollutant

1 loadings. How would the law apply to a decreased  
2 pollutant loading from, say, the shut down of a  
3 discharge that actually had a positive environmental  
4 impact. For example, a facility discharges into  
5 a riverbed and provides perhaps the only perennial  
6 contribution to that stream and in so doing has  
7 created or actually improved the habitat and then  
8 they stop discharging, they shut down, go out of  
9 business. Are there any legal ramifications in the  
10 antidegradation arena for the loss of habitat if  
11 that were to occur?

12 MR. FREVERT: Well, number one, I think you  
13 could probably get all sorts of debates among the  
14 scientists over whether your scenario is a positive  
15 or negative influence over the environment. Number  
16 two, our NPDES permits authorize discharges, they  
17 don't require discharges. I don't know that we  
18 would have the authority to tell somebody they have  
19 to continue to operate, perhaps the legislature  
20 could, but I won't.

21 MS. LIU: There has been some discussion about  
22 the term ORW versus ONRW?

23 MR. FREVERT: That's correct.

24 MS. LIU: Does EPA -- USEPA have an opinion one

1 way or the other as to --

2 MS. FREVERT: They call them tier three waters.  
3 From my perspective, outstanding national resource  
4 water carries with it the implication that this is  
5 some kind of national designation and other than one  
6 individual in the room here that works for USEPA and  
7 has no authority in the adoption of this matter,  
8 this is purely a state's action and if indeed there  
9 may be some streams and lakes in the state of  
10 Illinois that are outstanding resources to us. The  
11 citizens of Illinois and the criteria for that can  
12 be and may be and probably will be different than  
13 the criteria for West Virginia or Montana or some  
14 other state would use to decide what is outstanding  
15 to them. So I don't really think there's a problem  
16 or confusion with a consulting engineer or a company  
17 out of the state of Illinois coming to Illinois to  
18 try to understand our regulations and being confused  
19 by the lack of the word national, but I do think  
20 it's more straight up and appropriate that if it's a  
21 state determination, that it is characterized as a  
22 national determination.

23 MS. LIU: One last question. In the public  
24 comment from Prairie Woods Environmental Coalition

1 as well as the Families Against Rural Messes, there  
2 is a suggestion of adding additional information  
3 requirements to the demonstration required of  
4 proponents applying for new or increased pollutant  
5 loading, they suggest that in addition to showing  
6 that the activity will benefit the community at  
7 large that the proponent also show that the economic  
8 benefit to the discharger in comparison to the  
9 environmental cost paid by the taxpayer. Does the  
10 Agency see a benefit in requiring such economic  
11 information as part of its antidegradation review?

12 MR. FREVERT: If there are circumstances where  
13 that can be done and it is appropriate for that to  
14 be done, I don't believe there's anything in our  
15 proposal that would prohibit us from going to that  
16 degree of analysis. To have a blanket requirement  
17 to do that uniformly, I think it would become a  
18 little cumbersome and I would certainly not  
19 recommend it.

20 MS. LIU: Thank you very much.

21 HEARING OFFICER TIPSORD: Anything further?  
22 Thank you, Mr. Frevert. We appreciate it. Are  
23 there any questions or any comments that anyone  
24 wants to direct to the USEPA? I thank you very much

1 for being here today and we appreciate it and it's  
2 always a pleasure to see you.

3           Okay. At this time the Board does not  
4 anticipate holding any additional hearings and I  
5 think we talked a little bit off the record and  
6 everyone agrees that now is probably the time for  
7 the Board to take everything under consideration,  
8 deliberate and proceed. That being the case, we  
9 also spoke off the record and we will set a date of  
10 March 20th, 2001, for submission of comments to be  
11 considered to the Board prior to the Board  
12 proceeding in this matter. That is by no means the  
13 last date by which the Board will accept public  
14 comment. It's only the last date by which you must  
15 get them in to ensure they'll be considered by the  
16 Board before the Board begins proceeding. If the  
17 Board goes to first notice, obviously there will be  
18 an additional public comment period at that time and  
19 I suspect at that time we will consider additional  
20 hearings. Is there anything you would like to add?

21           I just personally want to thank all of  
22 you, you've really made this proceeding interesting.  
23 You provided us with a great deal of information and  
24 it's been very helpful and I can't wait to see the

1 last of the comments so we can start working on it.

2 Thank you very much and we're adjourned.

3 (Whereupon, the proceedings

4 were ended.)

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

L.A. REPORTING (312) 419-9292

1 STATE OF ILLINOIS )  
 2 ) SS.  
 3 COUNTY OF C O O K )  
 4  
 5

6 I, TERRY A. STRONER, CSR, do  
 7 hereby state that I am a court reporter doing  
 8 business in the City of Chicago, County of Cook, and  
 9 State of Illinois; that I reported by means of  
 10 machine shorthand the proceedings held in the  
 11 foregoing cause, and that the foregoing is a true  
 12 and correct transcript of my shorthand notes so  
 13 taken as aforesaid.

14

15

16

\_\_\_\_\_

17

Terry A. Stroner, CSR

18

Notary Public, Cook County, Illinois

19

20 SUBSCRIBED AND SWORN TO  
 21 before me this \_\_\_ day  
 22 of \_\_\_\_\_, A.D., 2001.

23

---

Notary Public

24

L.A. REPORTING (312) 419-9292