

1 PRESENT:

2 HEARING TAKEN BEFORE:

3 Illinois Pollution Control Board
4 100 West Randolph Street
5 Room 11-500
6 Chicago, Illinois 60601
7 (312) 814-4825,
8 BY: MS. MARIE E. TIPSORD

9 ALSO PRESENT: MR. G. TANNER GIRARD
10 MR. RONALD FLEMAL
11 MR. NICHOLAS MELAS
12 MR. SAMUEL T. LAWTON, JR.
13 MS. MARILI McFAWN
14 MS. ALISA LIU

15 ALSO VARIOUS MEMBERS OF THE PUBLIC WERE PRESENT

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1 HEARING OFFICER TIPSORD: Good morning. My
2 name is Marie Tipsord, and I have been appointed
3 by the Board to serve as a hearing officer in this
4 proceeding entitled In The matter of Revisions to
5 Antidegradation Rules: 35 Ill Admin. Code
6 302.105, 303.205, 303.206 and 106.990 through
7 106.995. This is docketed as R01-13.

8 To my immediate right is Dr. Tanner
9 Girard, who is the lead board member assigned to
10 this matter. To his immediate right is Nicholas
11 Melas, who also has been assigned to this. And at
12 the far left is Dr. Ronald C. Flemal, who has also
13 been assigned to this matter.

14 In addition, with us today, we have
15 Samuel Lawton. And to my immediate left, Alisa
16 Liu, a member of your technical unit who will be
17 assisting us in preparing a record in this
18 rulemaking.

19 The purpose of today's hearing is to
20 hear the prefiled testimony that was prefiled for
21 the hearing. The Illinois Environmental
22 Protection Agency prefiled the testimony of Toby
23 Frevert. We will begin with Mr. Frevert and then
24 allow questions to be asked of the Agency.

L.A. REPORTING (312) 419-9292

4

1 In addition, testimony was filed by

2 Albert Ettinger on behalf of seven individuals.
3 After we have finished with the Agency's
4 presentation, we will proceed with those seven
5 individuals and have questions after each of them
6 has testified.

7 As the prefiled testimony is not
8 lengthy, we will have the testimony read into the
9 record. Anyone may ask a question. However, I do
10 ask that you raise your hand, wait for me to
11 acknowledge you. After I have acknowledged you,
12 please state your name and who you represent
13 before you begin your questions. Please speak one
14 at a time. If you are speaking over each other,
15 the court reporter will not be able to get your
16 questions on the record.

17 Please note that any questions asked by
18 a board member or staff are intended to help build
19 a complete record for the Board's decision and not
20 to express any preconceived notions or bias.

21 Additionally, as time permits, we will
22 also allow anyone who wishes to testify the
23 opportunity to do so at the close of prefiled
24 testimony. I have placed a list at the side of

L.A. REPORTING (312) 419-9292

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1 the room for persons who wish to testify today to
2 sign up.

3 Also at the side of the room are sheets
4 for people who wish to be added either to the
5 Board's notice or service list. If you wish to be
6 on the service list, you will receive all
7 pleadings and prefiled testimony in this
8 proceeding. In addition, you must serve all of
9 your filings on the persons on the service list.
10 If you wish to be on the notice list, you will
11 receive all Board and hearing officer orders in
12 this rulemaking. If you have any questions about
13 which list you should be on or would like to be
14 on, please ask me at a break.

15 There are also copies of the current
16 service and notice list at the back of the room
17 and a few copies of the Board's order accepting
18 this rulemaking.

19 At this time I would also like to note
20 that it has been indicated to me that there are
21 people who wish to testify at the second hearing
22 scheduled in December. Therefore, later on in
23 this hearing, we will set a prefiling deadline for
24 that hearing in addition to the one we have

L.A. REPORTING (312) 419-9292

6

1 already been through.

2 I also have been asked, since this is a
3 Friday and it is snowing, although not much, how

4 long we plan to go today. My answer to that is I
5 do know the Agency has got flights and trains at
6 5:00 o'clock. I hope we can accommodate that.
7 But I also hesitate to short circuit any of the
8 discussion or dialogue. Mr. Ettinger?

9 MR. ETTINGER: Albert Ettinger. I would
10 state too in terms of your scheduling, Mr. Moore,
11 who is one of my prefiled packages, is not
12 planning on testifying today, but rather in
13 Springfield. So that might shorten us up a little
14 today.

15 HEARING OFFICER TIPSORD: Wonderful. Thank
16 you for that.

17 At this time I would like to ask
18 Dr. Girard if he would like to make some opening
19 comments.

20 MR. GIRARD: Good morning. On behalf of the
21 Board, I would like to welcome everyone to this
22 hearing on the Agency's proposal to update and
23 clarify the water quality standards for Illinois.
24 Specifically, the proposal which revises the

L.A. REPORTING (312) 419-9292

7

1 state-wide nondegradation policy regarding water
2 quality standards and establishes procedures for
3 implementation. Parts of the updating include
4 replacing the term nondegradation with the more

5 widely-used term antidegradation.

6 What we are discussing today is one of
7 the earliest environmental protection concepts
8 established by this Board. The concept of
9 nondegradation first appeared in Board opinions
10 almost 30 years ago. I should note for the record
11 that we have a couple of individuals in this
12 proceeding who may have actually voted on some of
13 those early opinions. Current board member Sam
14 Lawton served a term in the early years of the
15 Board and then after leaving for private practice
16 came back last year for an additional term.

17 Also I note in the audience we have
18 Dick Kissel, who is a member of those early
19 boards. And so if you have any questions of a
20 historical perspective, privately you may want to
21 ask them outside of the proceeding.

22 We appreciate the considerable work
23 reflected in this proposal, including the numerous
24 meetings of the antidegradation workshop during

L.A. REPORTING (312) 419-9292

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1 the last two years. We realize that there are
2 substantial issues to decide in this proceeding,
3 so we look forward to your testimony and
4 questions. Thank you.

5 HEARING OFFICER TIPSORD: Thank you,

6 Dr. Girard. Mr. Melas or Mr. Flemal, would you
7 like to make a statement at this time?

8 MR. MELAS: I have nothing further to add.

9 HEARING OFFICER TIPSORD: Then at this time I
10 would ask if the Agency has an opening statement.

11 MS. TONSOR: I have an opening statement. It
12 is brief.

13 My name is Connie Tonsor and I am an
14 attorney with the Illinois Environmental
15 Protection Agency here representing the Agency in
16 this rulemaking package. I have with me Mr. Toby
17 Frevert, who is the -- as many of you know the
18 Bureau of Water Standards Development Manager, and
19 he is also our coordinator of the Great Lakes
20 Program.

21 Mr. Frevert prefilled testimony and will
22 be the primary witness for the agency. Hopefully,
23 sometime this morning Tom McSwiggin, our permits
24 manager, will also be able to attend the hearing.

L.A. REPORTING (312) 419-9292

9

1 Mr. McSwiggin is going to be available if
2 questions arise concerning the use of the general
3 permit in the antideg demonstration proceedings,
4 as there were several concerns in the prefilled
5 testimony on this issue.

6 Also Mr. Dave Pfeiffer with the United

7 States Environmental Protection Agency is here.
8 Mr. Pfeiffer was very helpful in the development
9 of this proposal and will be available to answer
10 questions concerning the background and the
11 federal impact on the antidegradation water
12 quality standard.

13 As the Board mentioned, the concept of
14 nondegradation existed in Illinois for many years.
15 Approximately two, two and a half years ago, the
16 Agency identified a need to revisit the
17 nondegradation standard with the goal of proposing
18 amendments that would revise it as needed. In an
19 effort to do this in a transparent fashion and in
20 a fashion that we hope would present a balanced
21 approach for the Board, we organized a meeting and
22 set up a workgroup of various individuals and
23 representative groups.

24 The workgroup had industry and

L.A. REPORTING (312) 419-9292

10

1 environmental groups and initially considered
2 regulatory proposals from several different
3 states, including Ohio, Wisconsin, Wyoming,
4 Colorado and Montana. It utilized the Water
5 Quality Standards Handbook and other guidance and
6 the federal regulation in discussing the instant
7 proposal. And we tried to make a proposal that

8 would be consistent with the federal standard
9 found at 40 CFR 131.12.

10 Several drafts of language went around
11 the workgroup and were considered by it. Finally,
12 in August of this year, the Agency proposed the
13 instant amendments to the Board. At the
14 conclusion of the workgroup process, the Agency
15 and the other members of the workgroup recognized
16 that the proposal wasn't going to be a perfect
17 proposal that met everybody's needs. And we
18 agreed to disagree before the Board if that was
19 necessary.

20 However, the Agency's position is that
21 the proposal is a well-balanced approach.
22 Mr. Frevert, as I indicated, will discuss specific
23 language in the regulation as needed.

24 As a note, the Agency recognizes that

L.A. REPORTING (312) 419-9292

11

1 the proposal will need an amendment and will be
2 offering that amendment soon before the December
3 hearing. The Agency is going to suggest a
4 revision so that we can acknowledge the general
5 permit under Section 404 of the Clean Water Act
6 process as an area which would be not necessary
7 for an individualized antidegradation
8 demonstration. Mr. Frevert is also available to

9 discuss that.

10 Finally, on behalf of myself, the
11 Bureau of Water, and Tom Skinner, the director of
12 the Agency, we want to thank the members of the
13 workgroup who assisted in the process of revising
14 this regulation and formulating the proposal and
15 also to thank the Board for its prompt
16 consideration of the matter. That concludes my
17 remarks.

18 HEARING OFFICER TIPSORD: At this time then
19 could we swear in Mr. Frevert?

20 (Whereupon Mr. Toby Frevert
21 was sworn into the record.)

22 HEARING OFFICER TIPSORD: Whenever you are
23 ready to proceed.

24 MR. FREVERT: Do you me to read this?

L.A. REPORTING (312) 419-9292

12

1 HEARING OFFICER TIPSORD: Yes, please.

2 MR. FREVERT: I assume everybody has a copy.
3 So if you have trouble hearing me, at least you
4 can follow it that way.

5 My name is Toby Frevert and I am
6 manager of the Standards Development Program and
7 the Great Lakes Program within the Bureau of Water
8 of the Illinois EPA. I have been with the Agency
9 in excess of 20 years. The Standards Program is

10 responsible for the review of water quality
11 standards and the development of proposal for
12 revisions to those standards when revision is
13 necessary.

14 Since 1998, I have been the chairman of
15 the workgroup established to review the
16 antidegradation policy and regulations and have
17 worked with the members of the group to formulate
18 the instant proposal. My testimony will contain
19 three sections. First, I will discuss the
20 background concerning development of the proposal.
21 Second, I will discuss the antidegradation concept
22 in the context of the Board's regulations and the
23 standard established at 40 CFR 131.12, which is
24 the federal guidance for antidegradation. Third,

L.A. REPORTING (312) 419-9292

13

1 I will discuss the Illinois EPA's proposal for the
2 Board's water quality standard and the Illinois
3 EPA implementation procedures.

4 The developmental process, the Federal
5 Water Pollution Control Act, 33 United States
6 Code, Sections 1251 through 1387, is commonly
7 known as the Clean Water Act. Pursuant to the
8 Clean Water Act, states are required to revise and
9 update their water quality standards to ensure
10 that they are protective of public health and

11 welfare, enhance the quality of the water and
12 promote the purposes of the Clean Water Act. The
13 process of reviewing the state's standards is
14 called the triennial water quality standards
15 review. The antidegradation policy and procedures
16 were one element of the Illinois EPA's current
17 triennial water quality standards review.

18 In 1998, the Agency established an
19 antidegradation workgroup. The workgroup
20 contained members of the Illinois Attorney
21 General's Office, the Illinois Department of
22 Natural Resources, the United States Environmental
23 Protection Agency, the Illinois Environmental
24 Regulatory Group, the Chemical Industry Council,

L.A. REPORTING (312) 419-9292

14

1 the Sierra Club and individuals representing
2 municipalities, industries and law firms.

3 The Agency's purpose in establishing
4 the workgroup was to provide an open rulemaking
5 process in which all views could be considered and
6 the needs of each group balanced in the
7 formulation of a workable regulation. The
8 workgroup met eight times and considered many
9 different drafts of antidegradation standards and
10 several different mechanisms for implementation of
11 antidegradation concepts. The Agency believes

12 that the resulting proposal presents a
13 well-balanced approach. The present proposal
14 includes many of the suggestions of the workgroup
15 and benefited from the contribution of its various
16 members.

17 The antidegradation concept, the
18 concept that the waters of the state need to be
19 protected from unnecessary deterioration, is a
20 long-standing environmental goal in the state. It
21 existed prior to the passage of the Illinois
22 Environmental Protection Act, 415 Illinois
23 Consolidated Standards, Section 5, and the
24 creation of the Illinois Pollution -- Illinois

L.A. REPORTING (312) 419-9292

15

1 Environmental Protection Agency and the Pollution
2 Control Board. The Board adopted the concept of
3 nondegradation in 1972. The regulation was
4 R71-14.

5 Although the standards have been
6 codified since its adoption, its language has
7 stayed essentially the same. The purpose stated
8 by the Board in adopting the standard was to
9 preserve the present prohibition of unnecessary
10 degradation of waters presently of better quality
11 than that required by the standards, recognizing
12 that the standards represent not the optimum of

13 water quality, but the worst we are prepared to
14 tolerate if economic considerations so require. I
15 believe that is from the adopted hearing or
16 adoptive opinion in R71-14.

17 Currently, Section 302.105 applies when
18 existing water quality is better than the
19 established standards as of the date of those
20 standards' adoption. After a water body reaches a
21 quality above the established standards, the
22 existing quality must be maintained. The federal
23 antidegradation regulation, 40 CFR 131.12, sets
24 forth an antidegradation policy that with water

L.A. REPORTING (312) 419-9292

16

1 quality based and technology based effluent limits
2 is a tool to ensure that the objective of the
3 Clean Water Act is to restore and maintain the
4 chemical, physical and biological integrity of the
5 nation's waters is achieved in Illinois. Each
6 state must develop, adopt and retain a statewide
7 antidegradation policy regarding water quality
8 standards and establish implementation procedures
9 that are consistent with the components of the
10 federal guidance, 40 CFR 131.12. That is the
11 Water Quality Standards Handbook, Second Edition.

12 The Illinois EPA's proposal, this
13 proposal is actually very specific and limited.

14 It deals with only one issue, the update and
15 clarification of the existing nondegradation
16 standard, apparently at 35 Illinois Administrative
17 Code 302.105. The proposed language parallels
18 federal regulations for the inclusion of
19 antidegradation provisions within state water
20 quality standards. The federal regulations found
21 at 40 CFR 131.12 and federal guidance specify that
22 an antidegradation standard views a state's
23 surface water resources in three general
24 categories.

L.A. REPORTING (312) 419-9292

17

1 Those categories include water whose
2 current conditions are not particularly good, a
3 category referred to as Tier 1 in the federal
4 guidance; waters of high quality referred to as
5 Tier 2 in the federal guidance; and the third
6 category is waters of exceptionally high quality
7 referred to as Tier 3 waters in the federal
8 guidance.

9 In the Agency's proposed language for
10 Section 302.105, subparagraph (a) contains
11 requirements for all waters and is the fundamental
12 basis for the Tier 1 waters. It provides that
13 existing uses actually attained in the water
14 body must be maintained and protected. It should

15 be noted that the proposal protects the existing
16 uses, rather than designated uses in the water
17 body. This provision corresponds to 40 CFR
18 131.12(a)(1).

19 Section (b) -- Section 302.105(b)
20 contains supplemental requirements for Tier 3
21 waters. Tier 3 waters are those high quality
22 waters that have been designated as outstanding
23 resource waters. Section 302.105(b) corresponds
24 to 40 CFR 131.12(a)(3).

L.A. REPORTING (312) 419-9292

18

1 Section 302.105 contains supplemental
2 requirements for Tier 2 waters. Tier 2 waters are
3 those waters whose existing quality exceeds
4 established standards. This section, Section
5 302.105(c), corresponds to 40 CFR paragraph
6 131.12(a)(2). Collectively, these three
7 paragraphs establish the substantive requirements
8 of an antidegradation standard. Those
9 requirements are a combination of actual
10 prohibitions and less sharply defined policy to
11 avoid or minimize effects of activities upon the
12 water resource.

13 The prohibitions are relatively
14 straight forward. Prohibitions are no loss of
15 existing uses in Section 302.105(a), and no

16 lowering of water quality in exceptionally high
17 quality or outstanding resource waters in Section
18 302.105(b).

19 The remaining requirements are not
20 prohibition per se. Section 302.105(c) allows
21 some extent of degradation of high quality waters
22 when it is necessary to accomplish other goals in
23 the realm of social and economic needs of the
24 community. I might point out at this time that is

L.A. REPORTING (312) 419-9292

19

1 one of the main areas that we are recommending the
2 language be changed from nondegradation to
3 antidegradation. It is not a prohibition. It is
4 a discouragement.

5 The provisions of 40 CFR 131.12(a)(2)
6 state that the quality of the water shall be
7 maintained and protected unless the State finds
8 that allowing lower water quality is necessary to
9 accomplish important economic or social
10 development in the areas in which the waters are
11 located. A significant aspect of this principal
12 is that the determination of justifiable
13 degradation must include a public notice and
14 participation element. Additionally, the State
15 must ensure that no water quality or -- no lower
16 water quality or degradation renders the water

17 quality inadequate to fully protect existing uses.
18 Section 302.105(c)(2) states that the basic
19 requirements of 40 CFR 131(a)(2) must be found
20 prior to allowing a lowering of water quality in
21 high quality waters.

22 To accomplish this fundamental tenant
23 of the federal criteria requirements, the Agency
24 is proposing that activities subject to prior

L.A. REPORTING (312) 419-9292

20

1 approval through Clean Water Act permitting
2 programs, and those two permitting programs are
3 NPDES program and the State's 401 certification of
4 404 Corps of Engineers Permits, which demonstrate
5 that the proposed lowering of water quality meets
6 the requirements set forth in Section 302.105(c)
7 and the corresponding federal criteria by
8 completing the necessary demonstration as a part
9 of the permit application and review process.

10 The Agency has attached as an exhibit
11 to this rulemaking its proposed procedures,
12 proposed 35 Illinois Administrative Code Part 354,
13 to implement the Board's standard during Illinois
14 EPA's administration of the permit programs.

15 We believe it is important to identify
16 upfront how the Agency intends to operate this
17 administrative responsibility. And that proposed

18 set of procedures is there to make available to
19 permit applicants and other interested parties the
20 process that we think we would follow. And
21 indeed, if we -- this gets adopted and we go ahead
22 and codify those rules, we would be obligated to
23 enforce those rules.

24 The Illinois EPA's proposal in

L.A. REPORTING (312) 419-9292

21

1 Section 302.105(d) includes a listing of
2 categories of activities that will not be subject
3 to an individual demonstration to determine
4 compliance with the antidegradation standard.
5 These are categories of activities that the Agency
6 proposes the Board determine comply with the
7 substance and intent of the standard through
8 adoption of this language without performance of
9 individual demonstrations. The Agency is not
10 proposing that these activities are exempt from
11 the standard, rather it is proposing that in
12 adopting this particular section the Board will
13 have made a generic determination that these
14 activities are compatible and compliant with the
15 intent of the standard. The rationale for this is
16 that these categories of activities are
17 essentially subject to similar types of reviews
18 under other regulatory provisions, and a separate

19 demonstration would constitute an unnecessary and
20 burdensome redundancy.

21 Section 302.105(e) is simply a
22 cross-reference to clarify that additional
23 antidegradation standards currently exist for the
24 Lake Michigan basin and are located elsewhere in

L.A. REPORTING (312) 419-9292

22

1 the Board's regulations.

2 This proposal also contains additions
3 to 35 Illinois Administrative Code Part 303, which
4 is the Board's use designation area, to create a
5 new water use designation. Proposed Section
6 303.205 establishes the exceptionally high quality
7 or outstanding resource water classification.
8 Additionally, the Agency's proposes reserving
9 Section 303.206 as the location within their
10 regulations to list any waters that may be so
11 classified in the future. The Agency is not
12 proposing the designation of any specific waters
13 as outstanding resource waters today. The Agency
14 believes that such designations should be fully
15 considered by the Board in a rulemaking devoted to
16 that specific purpose.

17 However, the Agency is proposing the
18 procedures that it recommends that the Board
19 establish for receiving and considering proposals

20 for classification of a water body as an
21 outstanding resource water. These procedures are
22 proposed as 35 Illinois Administrative Code
23 106.990 through 106.995. In proposing the
24 procedure rules, the Agency was mindful that the

L.A. REPORTING (312) 419-9292

23

1 Board must strike a balance between the need for
2 an open regulatory process and the need to ensure
3 that those who seek to designate a water body as
4 an outstanding resource water establish that the
5 water is of exceptional quality.

6 This concludes my prefiled testimony.
7 I am here today to supplement this testimony and
8 be available for questions both today and
9 throughout the rest of the proceeding.

10 HEARING OFFICER TIPSORD: Thank you very
11 much. Just a couple of clarification points. You
12 talked about the Water Quality Standards Handbook.
13 Was that attached to the proposal as submitted to
14 the Board?

15 MR. FREVERT: I believe it is part of the
16 petition.

17 MS. TONSOR: It was.

18 HEARING OFFICER TIPSORD: Okay. Secondly,
19 you talked about the Agency's proposed rules at
20 Part 354. The specific reasons you indicated it

21 is in the second notice with these, and -- but you
22 talked about not having codified them as yet. And
23 my question is where are these in the process?
24 Have they been proposed for first notice?

L.A. REPORTING (312) 419-9292

24

1 MR. FREVERT: No, they have not. These are
2 procedures available to help participants in this
3 hearing process understand how the Agency actually
4 intends and thinks we are capable of administering
5 this program. If and when it becomes evident that
6 a new antidegradation standard will be adopted by
7 the Board, we will proceed with the adoption
8 process for those procedures. Those procedures
9 are based on a Board standard and they were
10 drafted with the premise that what we are
11 proposing will become a Board standard.

12 HEARING OFFICER TIPSORD: And those will be
13 Agency regulations and not Board regulations,
14 correct?

15 MR. FREVERT: Those are operating procedures
16 to help permit applicants and the public to
17 understand how we view the standard, the type of
18 information and the type of review we intend to
19 undertake.

20 HEARING OFFICER TIPSORD: And so they are not
21 actually a part of this proposal, but just

22 information?

23 MR. FREVERT: It is an informational
24 material, that's correct.

L.A. REPORTING (312) 419-9292

25

1 HEARING OFFICER TIPSORD: Thank you. At this
2 time I would open it up then for anyone else who
3 has questions. Ms. Hodge?

4 MS. HODGE: My name is Katherine Hodge, and I
5 am with the law firm Hodge & Dwyer in Springfield,
6 Illinois. I am here today representing the
7 Illinois Environmental Regulatory Group. Also
8 with me today is Deirdre K. Hirner, who is the
9 executive director of IERG, which is short for
10 Illinois Environmental Regulatory Group, and Harry
11 Walton, who is a consultant to the group.

12 IERG is a not-for-profit Illinois
13 corporation, and we are composed of 68 member
14 companies engaged in industry, commerce,
15 manufacturing, agriculture, trade, transportation
16 or other related activities in which persons,
17 entities or businesses are regulated by such
18 government agencies which promulgate, administer
19 and enforce environmental laws, regulations, rules
20 and policies.

21 As many of you here know today, IERG is
22 organized to promote and advance the interests of

23 its members before governmental agencies such as
24 the Illinois EPA and the Illinois Pollution

L.A. REPORTING (312) 419-9292

26

1 Control Board. And IERG is an affiliate of the
2 Illinois State Chamber of Commerce. The state
3 chamber has more than company members within the
4 state of Illinois.

5 IERG appreciates the opportunity to
6 participate in this proceeding, and we do intend
7 to offer testimony at the December 6th hearing, in
8 Springfield. Today we have a few questions for
9 Mr. Frevert related primarily to the background of
10 the Agency's proposal, as well as to try to
11 clarify the Agency's intent and the various
12 processes in the proposal.

13 Mr. Frevert, you just testified that
14 the Agency's proposal deals with an update and
15 clarification of the Board's current
16 nondegradation standard found at Section 302.105.
17 And Ms. Tonsor indicated in her statement that the
18 Agency had identified a need to update this for
19 approximately two, two and a half years. Could
20 you please explain why the Agency believes the
21 standard needs to be updated and clarified?

22 MR. FREVERT: Yes, I think I can. This
23 nondegradation standard has been on the books for

24 some 30-plus years. Quite frankly, the first 15

L.A. REPORTING (312) 419-9292

27

1 years the standard was probably totally ignored.
2 Subsequent to that, we sort of evolved into a
3 process where we would implement an
4 antidegradation program into our day-to-day
5 permitting activities.

6 Certain groups, environmental activists
7 were concerned. I think perhaps industry was
8 concerned as well at the way we went about that
9 implementation. It was not well enough understood
10 and not an open enough process. The upshot of all
11 of this was we progressed to the point where our
12 program was viewed inadequate to the point that
13 there was a threat of a lawsuit, threat to sue the
14 United States Environmental Protection Agency for
15 allowing Illinois to operate the program
16 inconsistent with the Clean Water Act.

17 In response to that, we made a
18 commitment, both the USEPA and some other parties,
19 a program planning commitment, that we would
20 review the antidegradation program and we would
21 produce implementation procedures for the issuance
22 of the NPDES program under our authority. We
23 would adopt those and submit those for federal
24 blessing or federal approval.

1 In the process of doing that, we
2 assembled a workgroup and sort of went through a
3 rampup process of bringing everybody up to speed
4 in addressing those deficiencies and reviewing
5 those program requirements at the federal level in
6 the light of what we needed to do in Illinois.
7 And one of the first conclusions perhaps we
8 reached in that process was that not only was our
9 implementation program less than ideal, but the
10 standard itself is probably outdated and needs to
11 be updated to be more consistent with the current
12 federal requirements. That is the basis for the
13 proposal today and why we are here.

14 MS. HODGE: You mentioned the threat of
15 litigation and that then the Agency made a
16 commitment. Was there any kind of a formal
17 settlement agreement?

18 MR. FREVERT: My understanding -- we made a
19 commitment to the United States Environmental
20 Protection Agency that we would incorporate this
21 requirement into our yearly activities as part of
22 our -- essentially part of our operating program,
23 our permit delegation and also the grant monies we
24 received to operate from.

1 My understanding was that parties that
2 had threatened the litigation believed there was
3 enough action and progress on the part of the
4 state that they did not proceed with any legal
5 action beyond the notice. And I guess you could
6 say the actual litigation was avoided because of
7 the State's desire and the decision to respond and
8 proceed with this project.

9 MS. HODGE: Thank you. I note that the
10 Agency's proposal was not filed as a federally
11 required rule. So is it the Agency's position
12 that this proposal is not required by the USEPA?

13 MR. FREVERT: I am not sure I can answer the
14 question of why it was not filed as a federally
15 required rule. But I can testify that it is a
16 federally required rule.

17 We clearly need an antidegradation
18 program in our water quality standards, which are
19 mandated by the Clean Water Act. And we clearly
20 need an implementation procedure to protect the
21 NPDES permit for the nondegradation.

22 MS. HODGE: To follow up on that, did the
23 USEPA ever notify the Agency in writing that the
24 non -- that the Board's nondegradation standard

1 was inadequate?

2 MR. FREVERT: I am not sure I can give you a
3 direct answer on that. I know that there has been
4 a long -- a long on-going dialogue with the USEPA
5 and the state agency and annual performance review
6 and performance partnership deliberation sessions.
7 And I know it was obvious that that was a
8 deficiency they viewed was overdue and that needed
9 to be raised and a priority they dealt with in
10 that time frame. And as such that commitment was
11 made in our performance partnership documents.

12 But I can't tell you I have gone back
13 to the record and looked for a letter that
14 specifically said we had to do that on date
15 certain.

16 MS. HODGE: Could you please describe for us
17 the implementation procedures that the Agency
18 currently uses to implement the Board's existing
19 nondegradation standard?

20 MR. FREVERT: That process has evolved, and
21 it has evolved substantially in the last several
22 years with the increased public attention. We
23 don't have a written procedure per se. As a
24 permit application comes in, a review starts, if

1 it is identified that that particular application
2 is needing or requesting an increased load in a
3 regulated parameter, that triggers an internal
4 review by part of the Agency's staff.

5 That review is usually based on the
6 application materials received with the permit
7 application, any file information that we have,
8 any specific knowledge of the facility and the
9 receiving water body and the general environmental
10 conditions in the vicinity of the proposed
11 activity. And as that information is gathered and
12 reviewed, if it is deemed adequate for us to
13 determine that this is a request that is
14 consistent, I believe, with the intent and the
15 nature, spirit of the program, we will draft
16 documentation to that effect, including the
17 rationale for that, public notice that
18 information, so it is available for public review
19 and reaction during the permit of the public
20 notice stage.

21 If it is not adequate, we usually get
22 on the telephone or write a letter and call up the
23 permit applicant and say we don't believe there
24 was enough information and you may have to deal

1 with the issue in study A or study B and come in

2 and sit down and say how we acquired the
3 additional information which we believe may be
4 necessary.

5 It is pretty much an ad hoc process at
6 the present time. Although, quite honestly, it
7 has evolved. And I would say almost on a yearly
8 basis for the last 15 years we recognized and had
9 the importance of this particular aspect of the
10 permit review thrust upon us more and more, and we
11 are responding accordingly.

12 MS. HODGE: Thank you. Would you say that
13 the Agency's current procedures are consistent
14 with the federal antidegradation policy found at
15 40 CFR Part 131.12?

16 MR. FREVERT: I believe our day-to-day
17 activities are generally consistent with those
18 requirements. I don't believe our day-to-day
19 activities are adequately documented in writing
20 for a formal submittal or approval and
21 corroboration of that opinion on the part of the
22 USEPA yet, and that is the part of this intent of
23 this procedure, is to get -- get those review
24 activities, those aspects of this particular

L.A. REPORTING (312) 419-9292

33

1 federal requirement better defined so they can be
2 submitted for formal approval and hopefully

3 eliminate any potential exposure we have to not
4 implementing that procedure.

5 MS. HODGE: Could you please describe how the
6 proposed Part 354 procedures differ from the
7 antidegradation procedures currently used by the
8 Agency that you just described?

9 MR. FREVERT: From one thing they are written
10 down. That is probably the biggest difference.
11 As I said, we are pretty much operating on an ad
12 hoc basis at the present time.

13 HEARING OFFICER TIPSORD: Excuse me,
14 Mr. Frevert, before you answer on Part 354, I want
15 to say again Part 354 is not a part of the
16 Agency's proposal before the Board. So before we
17 get into too much on Part 354, I am going to ask
18 if you can explain, Ms. Hodge, why you think it is
19 relevant to this proceeding.

20 MS. HODGE: Certainly, I will be glad to do
21 that. Because I understand that it is not part of
22 the proposal before the Board, however, the Agency
23 has submitted it to the Board as evidence of how
24 it intends to implement the proposed revisions if

L.A. REPORTING (312) 419-9292

34

1 the Board goes forward with the Part 302
2 modifications. And I guess my question to
3 Mr. Frevert is, we are trying to understand --

4 what the regulated community is trying to
5 understand is this a big change from what the
6 agency -- how they currently conduct the
7 antidegradation. So that is the intent.

8 HEARING OFFICER TIPSORD: Okay. Thank you.
9 Go ahead.

10 MR. FREVERT: I think in direct response to
11 that, I think, probably the largest individual
12 change in the way we operate -- the single largest
13 one is this contains a commitment on the part of
14 the Agency as to how we intend to document and
15 make available for public review, public scrutiny
16 the thought process and the considerations and the
17 factors we considered in determining whether or
18 not any particular permitted activity does or does
19 not meet the intent of the federal and state
20 antidegradation policy.

21 At the present time I don't believe we
22 have any documentation out there that commits and
23 binds the Agency to what is a fundamentally
24 significant component of antidegradation, and that

L.A. REPORTING (312) 419-9292

35

1 is the public participation, how we intend to
2 accomplish that. The perception or the
3 underpinnings of this whole program is that
4 additional -- that residual capacity of the stream

5 to accept waste is, indeed, a public resource.
6 And if that public resource is allocated to an
7 individual entity, then there ought to be some
8 public role playing in the allocation of that
9 resource to that individual entity and there ought
10 to be some indication of why that is generally
11 consistent with the good of the public at large.

12 MS. HODGE: When the Agency suggests its
13 antidegradation reviews currently, do you -- does
14 the Agency reduce its determination to a writing?

15 MR. FREVERT: Yes, we do.

16 MS. HODGE: And would that part of the NPDES
17 permit file for a particular facility?

18 MR. FREVERT: Yes, it is.

19 MS. HODGE: Is there any reference made to
20 the antidegradation in the draft permit?

21 MR. FREVERT: I believe the reference made to
22 the antidegradation review would be in the
23 accompanying fact sheet, not a permit per se. But
24 it is in quite of the public notice materials.

L.A. REPORTING (312) 419-9292

36

1 MS. HODGE: So the draft permit, the fact
2 sheet would be public notice currently so that the
3 public would have an opportunity to see that the
4 Agency had made an antidegradation review?

5 MR. FREVERT: That's correct. If we get a

6 permit application, I think everybody accepts and
7 understands in reality that it is our job to make
8 sure proper standard is complied with, the DO
9 standard or anything else. And those have been
10 around for a while. There is a fairly simple,
11 usually an analytical or calculation process we go
12 through to demonstrate this particular discharge,
13 whether it would be a copper standard or a lead
14 standard.

15 I believe we are suggesting this is a
16 process to accomplish the same thing for an
17 antidegradation standard, how we evaluate that
18 activity against that standard and how we
19 determine whether or not it is compliant, and if
20 any modifications to the operation are necessary,
21 to make it compliant.

22 MS. HODGE: If a member of the public during
23 the public notice period, a member of the public
24 asks the Agency to provide a copy of this written

L.A. REPORTING (312) 419-9292

37

1 antidegradation review determination, would the
2 Agency provide that to the public?

3 MR. FREVERT: Certainly.

4 MS. HODGE: Mr. Frevert, can you please
5 tell us how many -- approximately how many
6 antidegradation reviews the Agency has conducted

7 in the past five years or so? And I say in the
8 past five years or so, since perhaps January 1 of
9 1995.

10 MR. FREVERT: I should be able to. I want to
11 say in excess of 100 per year. And I know the
12 numbers were generated by my staff or someone who
13 issues permits. Those numbers were available.
14 That is the best of my recollection, is it was in
15 that range.

16 MS. HODGE: Could the Agency provide a list
17 of those permit actions for which it performed
18 antidegradation reviews to the Board?

19 MR. FREVERT: I think we probably can. I
20 can't personally, but I believe one of my staff
21 maintained the list of that, yes.

22 HEARING OFFICER TIPSORD: Just to clarify, do
23 you want that from January of 1995?

24 MS. HODGE: Yes.

L.A. REPORTING (312) 419-9292

38

1 MR. FREVERT: Just to clarify, we will do our
2 best to honor that intent. I don't know if it
3 goes back to January 1995. We will get you what
4 we have.

5 MS. HODGE: Thank you. How many of these
6 antidegradation reviews have been reviewed or
7 commented upon by USEPA?

8 MR. FREVERT: More than zero. I can't give
9 you a number.

10 MS. HODGE: Does the USEPA comment on every
11 antideg review?

12 MR. FREVERT: No. We -- unfortunately, Tom
13 is not here. Maybe he had travel plans. He can
14 give you -- travel trouble.

15 We have an operating relationship with
16 the USEPA where they don't review every individual
17 permit that we issue. They do some auditing level
18 reviews, and there may be specific permits that
19 are called to their attention and they are
20 specifically asked to review. But as a matter of
21 course, the federal government doesn't duplicate
22 our work. We are the delegated NPDES authority,
23 and that means we do the lion's share of the work
24 and they do some auditing level reviews. They

L.A. REPORTING (312) 419-9292

39

1 don't review everything that we produce.

2 MS. HODGE: So you don't provide every single
3 draft permit to the USEPA?

4 MR. FREVERT: We may provide it to them and
5 they may file it, they don't review them.

6 MS. HODGE: The permitting matters that USEPA
7 has commented upon, could you give us just a
8 general idea of the nature of their comments as it

9 would relate to the Agency's antidegradation
10 review?

11 MR. FREVERT: Some specific permits that have
12 come up recently, there have been questions
13 regarding the adequacy of the antidegradation
14 review and they have asked for some consideration
15 of additional issues and maybe suggested
16 alternative ways of handling that application and
17 perhaps all of their implement requirements.

18 I can think of one specific case that
19 we are currently working on, and I believe there
20 are a couple more recent. But in that regard,
21 their review comments aren't a whole lot different
22 from the antidegradation perspective as they are
23 from that issue. If there is something of
24 interest to them or something that may call their

L.A. REPORTING (312) 419-9292

40

1 attention to something that is controversial, it
2 usually means their comments asked for some
3 additional assessment or evaluation of
4 documentation. Occasionally, they may even
5 specifically demand a certain course of action,
6 although that is not common.

7 MS. HODGE: Has the USEPA ever taken formal
8 action upon the Agency's issuance of an NPDES
9 permit based upon its concerns about the Agency's

10 antidegradation review?

11 MR. FREVERT: What do you mean by formal
12 action? Do you mean objecting to a permit?

13 MS. HODGE: Have they ever objected to a
14 permit?

15 MR. FREVERT: Yes, I think they have. It is
16 an often occurrence, but occasionally they will
17 object. Many times they object to the fashion
18 through dialogue and communication such that a
19 different requirement or a modification of the
20 certain permit condition is necessary to remove
21 their objection. More rarely, but they do have
22 the option in actually writing a letter objecting
23 to the permit, essentially going on record in
24 writing saying we object to this permit for these

L.A. REPORTING (312) 419-9292

41

1 reasons.

2 I don't want to lead the audience to
3 believe that that is done on a wholesale basis. I
4 think we do a pretty good job of reviewing these
5 things now, and our process has evolved to the
6 point that we can anticipate and use common sense
7 the same way they can. So we don't have major
8 disagreement on the wholesale basis.

9 Periodically, there is one or two
10 issues where we need to educate one another and

11 get on the same wavelength.

12 MS. HODGE: You answered my question earlier
13 that the Agency has probably conducted in excess
14 of 100 antidegradation reviews per year. Just,
15 you know, as an estimate out of that number, how
16 many per year would USEPA object to, file a
17 written objection?

18 MR. FREVERT: Probably less than three, maybe
19 less than two, some years none.

20 MS. HODGE: Of the antidegradation reviews
21 that the Agency has conducted in the past five
22 years, how many of these have been reviewed and/or
23 commented upon by members of the public?

24 MR. FREVERT: We are on a growth curve to the

L.A. REPORTING (312) 419-9292

42

1 point that probably the -- I don't want to say the
2 majority of -- but in certain categories municipal
3 growth in suburban areas, for instance, the
4 antidegradation review is a very important factor.
5 And probably if there is an expansion of the POTW
6 in the metro Chicago area in nearly 100 percent of
7 them, there is a request for the antidegradation
8 review so they can review it themselves and
9 comment on it and enter their recommendations
10 during the public comment period.

11 In the case of industrial facilities,

12 at some downstate facilities, perhaps it is not as
13 high a percentage, but it is still a fairly --
14 fairly active part of our review in the public
15 participation process.

16 MS. HODGE: And the Agency currently
17 considers the comments of the public that come in
18 in this course?

19 MR. FREVERT: Of course, we work for the
20 public. We work for the citizens. That is what a
21 public participation is all about.

22 MS. HODGE: Have any of the NPDES permits
23 issued by the Agency, this group that -- in which
24 the Agency conducted antidegradation review, have

L.A. REPORTING (312) 419-9292

43

1 any of those been appealed by a member of the
2 public and then a third-party appeal to the Board
3 because of the antidegradation review?

4 MR. FREVERT: There have been a number of
5 cases where we have held agency hearings, NPDES
6 drafting hearings because of issues regarding
7 antidegradation. To the best of my knowledge,
8 there has not been an actual appeal of a finalized
9 permit because of antidegradation review. And I
10 would like to get a program in place that assures
11 that that doesn't happen.

12 MS. HODGE: I have a few questions now

13 related to some of the actual proposed regulatory
14 language. And in particular, Mr. Frevert, I refer
15 you to proposed Section 302.105(c)(1).

16 MR. FREVERT: Okay.

17 MS. HODGE: Could you please explain what the
18 Agency intends by using the word proponent in this
19 provision?

20 MR. FREVERT: Proponent is intended to refer
21 to a permit applicant, that individual that is
22 asking for authorization to carry out some
23 activity as a result of a discharge or potential
24 alteration of the stream.

L.A. REPORTING (312) 419-9292

44

1 MS. HODGE: So do you mean an application for
2 any discharge?

3 MR. FREVERT: The intent -- the specific
4 intent there is to come up with a word that
5 encompasses both the NPDES permitting program and
6 the 404 permit program as it relates to the
7 Section 401 water quality certification that is
8 necessary from the state. So it means applicants
9 for NPDES permits and parties seeking 401
10 certifications.

11 MS. HODGE: And the phrase that is in here,
12 unless the proponent can demonstrate that allowing
13 the lowering of water quality is necessary to

14 promulgate important economic or social
15 development, is it the Agency's position that an
16 application for a discharge would automatically
17 result in allowing the lowering of water quality?

18 MR. FREVERT: I don't believe that is our
19 intent, no. But I want to clarify what our intent
20 is. This applies to a proponent or an applicant
21 for prior authorization of an activity that will
22 result in an increased pollutant loading to the
23 stream.

24 If you are seeking a permit for an

L.A. REPORTING (312) 419-9292

45

1 existing operation where there is no proposed
2 increase in any pollutant parameter activity, this
3 rule doesn't apply to you. If you are asking for
4 another pound of dioxin to be put in the stream,
5 this section applies to you. The counterpart
6 being in terms of activities subject to the course
7 of the 404 program. If you are going to do some
8 stream alteration or some construction activity
9 that could deteriorate habitat or another aspect
10 of the stream, that particular activity is subject
11 to the antidegradation standards. And there needs
12 to be a conscious determination of the level of
13 degradation resulting from that construction
14 activity that is consistent with the intent of the

15 standard, which is that other social and economic
16 and community goals are adequate to warrant that
17 degree of deterioration.

18 MS. HODGE: So is it the Agency's intent that
19 the antidegradation review would only apply -- and
20 let us talk about this in the NPDES permit
21 context. Would it only apply if a permit
22 applicant is seeking an increase over a current
23 permit application?

24 MR. FREVERT: That's correct. If you have an

L.A. REPORTING (312) 419-9292

46

1 existing NPDES permit and you are operating at a
2 level below the authorized ceiling limits in that
3 permit, when we issued that initial permit, we
4 essentially concluded that the intent of
5 antidegradation was met up to that operating level
6 and no additional or subsequent reviews are
7 necessary. As you add on your growth area -- and
8 this is very common in the municipal arena, where
9 you build a sewage treatment plant for your
10 20-year needs, the day you operate you are well
11 below that. But when we make the decision to
12 permit and allow construction of that facility, we
13 have accepted that level of loading that is
14 contained in the permit. And the antidegradation
15 review would not come into place unless you filed

16 an application for an increase over and above
17 those levels that are already authorized in your
18 permit.

19 MS. HODGE: What about the case where an
20 industrial facility would discharge contaminant
21 acts, but there is no limitation in the -- in the
22 NPDES permit, at what point would the Agency
23 require antidegradation review?

24 MR. FREVERT: Maybe it would help if we came

L.A. REPORTING (312) 419-9292

47

1 up with an example. For instance, chloride that
2 is so low and it is so benign in this
3 circumstance, 20 milligrams per liter, the
4 standard is 500. There is no reasonable potential
5 under the federal guidance or even the state
6 operating procedures, there is no reasonable
7 potential for that level of discharge to cause a
8 problem. Therefore, it is not specifically
9 limited in the NPDES permit. However, what is
10 limited in that NPDES permit is a hydraulic rate
11 or flow rate. And consistent with those operating
12 levels, as a chloride increases along with that,
13 that type of activity we would view as not subject
14 to any kind of review or any kind of additional
15 permit approval.

16 MS. HODGE: Okay. I am going to ask that a

17 little differently and see. What about the case
18 where an existing facility discharges substance
19 acts again but there is no limitation in the NPDES
20 permit facilities, at renewal the Agency
21 determines to include a new limitation for
22 substance acts, if the regulation were adopted as
23 proposed, would the Agency anticipate an
24 antidegradation review would be required for the

L.A. REPORTING (312) 419-9292

48

1 substance prior to the issuance of the renewal
2 permit?

3 MR. FREVERT: I view that as a different
4 question. I think what you are saying is if your
5 waste water currently contains an unregulated
6 parameter and it becomes necessary for some reason
7 to regulate that parameter, if we establish a
8 limitation or regulation on that parameter for
9 such existing levels, it is not an increase. It
10 is not a -- as defined by this program, not a
11 deterioration. So it is not subject to this level
12 of review, merely permitting an existing load.

13 That load was not limited previously,
14 but it existed previously, it would not trigger an
15 antidegradation review.

16 MS. HODGE: In proposed Section
17 302.105(c)(2), you reference that an increase in

18 pollutant loading subject to NPDES permit or a
19 Clean Water Act Section 401 certification must be
20 assessed. Could you explain the Agency's Section
21 401 certification process?

22 MR. FREVERT: Yes, I will do my best. Prior
23 to that, I want to -- I want to -- maybe it would
24 be helpful if I explained the rationale for the

L.A. REPORTING (312) 419-9292

49

1 language here. In paragraph (c) for high quality
2 waters, in subparagraph (1) it essentially
3 establishes the standard -- in my mind establishes
4 the standard, and that standard includes some kind
5 of a positive demonstration for loading. The
6 purpose of paragraph (2) is to specify in the 401
7 program and the NPDES program it is the Agency's
8 job to determine whether or not that demonstration
9 has been met. So the importance of paragraph (2)
10 is it places a responsibility on the Agency to
11 ensure the adequacy of the demonstration called
12 for in paragraph (1).

13 Section 401 is sort of a parallel to
14 the NPDES program in that it is for those
15 activities involving construction or rather
16 disturbances within a water body, stream or lake
17 or whatever, Section 404 of the Clean Water Act
18 requires permitting for those activities,

19 permitting is allocated or assigned to the Corps
20 of Engineers. The language in the Clean Water Act
21 specifically says that the Corps of Engineers
22 cannot issue that permit in an area where the
23 State has denied certification that that activity
24 is compliant with the water quality standards.

L.A. REPORTING (312) 419-9292

50

1 So it creates responsibility on the
2 part of the State to inform and notify the Corps
3 of Engineers whether or not this proposed activity
4 is compliant with or is noncompliant with the
5 State's water quality standards.

6 In the state of Illinois, we actually
7 have a cooperative arrangement with our own
8 agency, the Corps of Engineers, and I believe the
9 division -- the Department of Natural Resources,
10 Division of -- excuse me, Department of Natural
11 Resources, Division of Water Resources, where --
12 they are two state agencies that carry out
13 reviews. They are looking at different end points
14 and different considerations in the water quality
15 standards.

16 It is our job to review those proposals
17 against the water quality standards and identify
18 any potential problems and notify those to the
19 Corps of Engineers. They have a notification

20 process. They have an application process where
21 you essentially make a joint filing to the three
22 agencies. So if you apply for a 404 permit, your
23 application goes to all three. A copy of that
24 will come to the Agency for review. And then we

L.A. REPORTING (312) 419-9292

51

1 review those and have the opportunity to provide
2 that certification of that input to the Corps of
3 Engineers in the context of its review stages
4 prior to that finalized permit action.

5 In reality, in Illinois, we do have a
6 section that deals with 401 reviews. It is a
7 fairly busy program. I can't tell you the number
8 of facilities that review. But dredging
9 activities, for instance, we almost always review
10 dredging activities to ensure compliance with the
11 water quality standards.

12 There are a number of activities
13 subject to the 404 permitting process that we
14 don't do reviews on. If the township road
15 commissioners puts a road culvert in to some
16 intermittent stream in downstate Illinois, it
17 probably happens 500 times a year, they need a 404
18 permit for that. We don't have the resources and
19 we don't believe there would be much accomplished
20 environmentally to allocate resources to review

21 those anyway.

22 There are some standard management
23 practices, some standard restrictions in the
24 permits that they have to adhere to. We have

L.A. REPORTING (312) 419-9292

52

1 entered an arrangement with the Corps of Engineers
2 whereby there is a -- they would be covered by a
3 national 404 permit. There would be certain
4 restrictions and applications to those facilities.
5 And with that in place, we have suspended any
6 individual reviews of those kind of activities.
7 So we reserve our staff abilities to review those
8 401 certifications we think make a difference.

9 MS. HODGE: How would the public be involved
10 in the 401 certification?

11 MR. FREVERT: There is a public notification
12 process for the 404 permitting program, the same
13 as there is for NPDES. I believe there must be --
14 the notice is actually done by the Corps of
15 Engineers, and we have got a cooperative
16 relationship with them.

17 MS. HODGE: What if a permit applicant there
18 wanted to challenge the Agency's antidegradation
19 determination, what would be the route for the
20 challenge?

21 MR. FREVERT: Again, comments under the

22 public notice procedures.

23 MS. HODGE: To the Army Corps of Engineers?

24 MR. FREVERT: I believe those comments would

L.A. REPORTING (312) 419-9292

53

1 be directed to all the reviewing agencies.

2 MS. HODGE: But what if they wanted a legal
3 challenge, where would that challenge be taken?

4 MR. FREVERT: Well, if those comments came to
5 the Corps of Engineers, the Corps would refer them
6 to the state agency because that is a -- if the
7 challenge was that this proposed activity is in
8 violation of the state water quality standard, the
9 Corps is not going to deal with that issue. The
10 Corps is going to defer that issue to us. That is
11 what the 401 certificate certification is about.
12 That aspect of a 404 review is assigned by
13 Congress to the states, not to the Corps.

14 MS. HODGE: But who reviews the Agency's
15 decision? Would the Agency's final determination
16 be appealable to the Board?

17 MR. FREVERT: Pardon me?

18 MS. HODGE: Would the Agency's final decision
19 be appealable to the Board in those cases?

20 MR. FREVERT: Once it is resolved, if there
21 is a controversy and we issue a certification and
22 the Corps issues their permit based on our

23 certification and a member of the public disagrees
24 with this, are you asking what the challenge

L.A. REPORTING (312) 419-9292

54

1 process is there? Connie is telling me that under
2 our Environmental Protection Act at the state
3 level that challenge would go directly to the
4 Circuit Court. It would not go to the Pollution
5 Control Board.

6 MS. HODGE: What if the Agency did not issue
7 the certification to an applicant, would there be
8 any way to challenge that?

9 MR. FREVERT: Well, I am sure there would be,
10 but I think you need to talk to a lawyer about
11 that.

12 MS. HODGE: Pursuant to the Illinois
13 Administrative Review Act?

14 MR. FREVERT: Yes.

15 MS. HODGE: Mr. Frevert, are you familiar
16 with the Board's definition of modification found
17 at Section 301.315?

18 MR. FREVERT: Somewhere in the last 30 years
19 I probably dealt with it, but I am not immediately
20 familiar with it, no.

21 MS. HODGE: I have a copy that we just
22 printed off the West Law, I believe.

23 MR. FREVERT: What are you asking me to do?

24 MS. HODGE: I just asked if you were familiar

L.A. REPORTING (312) 419-9292

55

1 with this, and this is just to refresh your
2 memory.

3 MR. FREVERT: I am familiar with this
4 language. What document is this from?

5 MS. HODGE: It is from the Board's
6 legislation 35 Illinois Administrative Code
7 Section 301.315, the Board's definition of
8 modification for water permitting purposes.

9 MR. FREVERT: Okay. This is just the
10 definitions in subtitle (c).

11 MS. HODGE: Right.

12 HEARING OFFICER TIPSORD I would just note for
13 the record, since that is a part of the
14 regulations, we wouldn't enter this as an exhibit.

15 MR. FREVERT: I assume you are going to ask
16 me a question.

17 MS. HODGE: Yes. Is it the Agency's position
18 that a -- and I should say modification, it goes
19 through A, B, C and D, and it deals with different
20 kinds of changes or increases in quality and
21 strength that would be defined as a modification
22 for which a permit applicant would need to seek a
23 permit. And then my question is, is it the
24 Agency's position that only changes and/or

1 increases that are actually modifications could
2 also be increases in pollutant loading that would
3 need to undergo the antidegradation review?

4 MR. FREVERT: I don't know exactly what you
5 asked me, but I think the point gets back to what
6 type of a permit action is subject to
7 antidegradation review and what type is not.
8 There are many, many activities for which we issue
9 permits and we modify permits that don't involve a
10 loading. We are not going to do and we are not
11 proposing to do an antidegradation review in those
12 instances. Those are instances where that load
13 has already been determined to be consistent with
14 the water quality standards. And until you go
15 over that load, the reviews will not focus on that
16 issue.

17 Typically, for instance, back to the
18 example of POTW. You build a plant for your
19 20-year needs, throughout that 20 years as you
20 grow, you are going to need construction permits
21 for new sewers and things of that nature. Those
22 reviews and the issuance of those construction
23 permits within the body of that NPDES permit would
24 not trigger new or supplemental antidegradation

1 permits.

2 MS. HODGE: Thank you. Let's focus a little
3 bit on subsection (d).

4 HEARING OFFICER TIPSORD: Going back to the
5 proposal now, correct?

6 MS. HODGE: I am right now looking at
7 Section 301.315(d).

8 HEARING OFFICER TIPSORD: Thank you.

9 MS. HODGE: And would it be the Agency's
10 position that the facility so long as the facility
11 did not trigger this 301.315(d) modification that
12 it is possible in some cases that there could be
13 an increase in load that would not trigger a
14 permit action and, therefore, would not trigger an
15 antidegradation review?

16 MR. FREVERT: That's correct.

17 MS. HODGE: And is that the case currently,
18 the Agency would not conduct an antidegradation
19 review in situations like that?

20 MR. FREVERT: That's correct.

21 MS. HODGE: I have another case, and I am
22 going to read this question because this was --
23 one of our members asked that we clarify this. An
24 existing NPDES permit limits a permittee's

1 discharge to 1,000 pounds per day of substance X
2 for which a water quality standard exists. Flow
3 must be reported on the permittee's discharge
4 monitoring report, but it is not specifically
5 limited in the permit. This 1,000 pounds per day
6 of substance X is based upon a flow of 3 million
7 gallons per day that permittee provided in his
8 original permit application. The permittee is now
9 submitting his renewal application. Over the
10 five-year time period since the original permit
11 issuance, the average flow has increased to 3.3
12 million gallons per day. So we have an increase
13 from 3 million gallons to 3.3 due to increasing
14 infiltration into the sewer system, a lot of wet
15 weather, et cetera, not really related to any kind
16 of change at the facility.

17 In the past, the Agency would use this
18 higher flow to increase the new permit substance X
19 load limit to 1,100 pounds per day, assuming that
20 no other limits would apply. If the regulation is
21 adopted as proposed, does the Agency anticipate
22 that an antideg review would be required prior to
23 issuance of a renewal situation?

24 MR. ETTINGER: Could we read that back? This

1 was a little long.

2 HEARING OFFICER TIPSORD: Kathy, would you
3 mind reading it again?

4 MS. HODGE: An existing NPDES permit limits a
5 permittee's discharge to 1,000 pounds per day of
6 substance X for which a water quality standard
7 exists. Flow must be reported on the permittee's
8 discharge monitoring report, but it is not
9 specifically limited in the permit. This 1,000
10 pounds per day of substance X is based upon a flow
11 of 3 million gallons per day that permittee
12 provided in its original permit application. The
13 permittee is now submitting his renewal
14 application. Over the five-year time period since
15 the original permit issuance, the average flow has
16 increased to 3.3 million gallons per day due to
17 increasing filtration into a sewer system, a lot
18 of wet weather, et cetera. It is not project
19 related. There has been no principal change at
20 the facility. It is our understanding in the past
21 the Agency would use the higher flow to raise the
22 permit amendment for substance X, assuming that no
23 other limits would apply. If the regulation is
24 adopted as proposed, does the Agency anticipate an

1 antidegradation review would be required prior to
2 issuance of the permit?

3 MR. ETTINGER: Excuse me, I wonder, this
4 wasn't clear. Is there currently 1,000 pounds per
5 day limit or not?

6 MS. HODGE: Yes, there is.

7 MR. ETTINGER: Okay. It seemed like you said
8 that at the beginning and then two sentences later
9 you said there wasn't.

10 MS. HODGE: There is a limit of 1,000 pounds
11 per day, but it is our understanding that the
12 Agency calculates limits by using standards and
13 then adjusting that based upon flow. So what is
14 happening here is we have had an increase in flow
15 that is not related to a physical change in the
16 facility. Would that kind situation undergo an
17 antidegradation review?

18 MR. FREVERT: Well, there are a lot of
19 specifics that aren't present in this example that
20 I need to know to give you an absolute answer, so
21 I am going to hedge a little bit. But I think
22 what I heard you say was there is an existing
23 facility that is currently limited to 1,000 pounds
24 per day of a pollutant discharge and they are

1 asking to have that limit raised to 1,100 pounds

2 per day. And my initial response -- not knowing
3 all the other circumstances, my initial response
4 would be there would be some level of review or
5 consideration of the antidegradation standard in
6 dealing with that request.

7 MS. HODGE: Thank you. I am going to ask
8 another question about the proposed Part 354, but
9 again it is related to we are trying to determine
10 the impact on the regulated community. And within
11 your proposed Section 354.103, you include a
12 number of things that a permit applicant will have
13 to submit in order for the Agency to conduct its
14 antideg review. Does the Agency currently require
15 the permit applicant to supply the same
16 information as set forth in its proposed 354.103?

17 MR. FREVERT: I believe most of that is
18 embodied in a typical NPDES permit application.
19 But I think the more important thing here is to
20 state what we are trying to accomplish. We are
21 trying to accomplish what we believe are the
22 categories and the types of information necessary
23 to give this standard proper review. And while
24 the language may specifically require that

L.A. REPORTING (312) 419-9292

62

1 information to come from a particular permit
2 applicant, our intent is to put everybody on

3 notice. That is the information we need to do our
4 job right. If we get it from another source, we
5 are not going to refuse to look at it because you
6 didn't mail it to us.

7 So the point you are getting at here is
8 does that put an unnecessary burden on the
9 applicant. It is not our intent to do that. It
10 is our intent to identify what the minimum
11 information is. And ultimately, if we don't have
12 it, the burden is going to fall to the applicant.
13 But if we have it, we are not going to go back and
14 make our own staff and his staff do unnecessary
15 labor to generate something we already have.

16 MS. HODGE: In addition to information that
17 an applicant would currently submit to the Agency
18 for antidegradation review, does the Agency also
19 utilize information, data or reports available to
20 the Agency from its own sources?

21 MR. FREVERT: Yes.

22 MS. HODGE: Does the Agency also rely upon
23 its experience with factually similar permitting
24 scenarios?

L.A. REPORTING (312) 419-9292

63

1 MR. FREVERT: Yes.

2 MS. HODGE: Does the Agency also rely upon
3 other valid information that may be available to

4 the Agency?

5 MR. FREVERT: Of course.

6 MS. HODGE: Does the Agency anticipate that
7 in making its antidegradation assessments under
8 the proposed regulations, it will continue to
9 utilize and/or rely upon such information, data,
10 reports available to the Agency from its own
11 sources, its experience with factually similar
12 permitting scenarios and other valid information
13 available to the Agency?

14 MR. FREVERT: Yes, that is our normal
15 operating mode.

16 MS. HODGE: Would the Agency support the
17 inclusion in this proposal provisions that would
18 allow the Agency to continue this practice?

19 MR. FREVERT: I don't know that there is any
20 prohibition for us doing that anyway. For
21 clarification or confidence level, that additional
22 language has some benefit. We would not be
23 opposed to it.

24 MS. HODGE: I would ask you to turn now to

L.A. REPORTING (312) 419-9292

64

1 proposed Section 302.105(c)(2).

2 HEARING OFFICER TIPSORD: Excuse me,
3 Ms. Hodge. Can we go off the record?

4 (Discussion had off the

5 record.)

6 HEARING OFFICER TIPSORD: Why don't we take a
7 brief ten-minute break here since it is about
8 11:00 o'clock. And then we can shoot for a lunch
9 break around noon as well.

10 (Short recess taken.)

11 HEARING OFFICER TIPSORD: Ms. Hodge, would
12 you like to begin?

13 MS. HODGE: Yes, I will.

14 Thank you. I have just a few questions
15 now about proposed Section 302.105(c)(2). And I
16 am going to read this into the record. "Any
17 proposed increase in pollutant loading subject to
18 NPDES permit or Clean Water Act Section 401
19 certification must be assessed pursuant to 35
20 Illinois Administrative Code Part 354 to determine
21 compliance with this section." And, Mr. Frevert,
22 just to clarify, what section does this provision
23 refer to?

24 A. That is an issue we probably will

L.A. REPORTING (312) 419-9292

65

1 clarify in some amendments. The intent there was
2 to say essentially that the Agency should adopt
3 procedures so that notifying everybody interested
4 in how they are going to go about performing this
5 determination, and that the only intent there was

6 to reference that the Agency shall have
7 procedures, adopted procedures specifying when
8 they intend to accomplish this.

9 I think you already know that Part 354
10 is the number we have given to those draft
11 implementation procedures we included for
12 information purposes in this proceeding.

13 MS. HODGE: And what do you mean by the word
14 compliance there? You say to determine
15 compliance.

16 MR. FREVERT: What I mean is that to make
17 that determination if the Agency permits an
18 increase, that they have permitted that increase
19 with a conscious determination that that increase
20 is, indeed, compatible with the antidegradation
21 standard, in other words, that the justification
22 has been made and it is available in the fact
23 sheet.

24 MS. HODGE: Thank you. Section 302.102 of

L.A. REPORTING (312) 419-9292

66

1 the Board's existing regulations provides for
2 allowed mixing, mixing zones, and ZIDS, Z-I-D-S.
3 How would such mixing be treated in the context of
4 the proposed antidegradation reviews?

5 MR. FREVERT: I don't know that mixing would
6 be an issue at all. I mean, there is a

7 requirement for how you determine whether a mixing
8 is allowed or not. And we -- for new discharges,
9 quite honestly, we look at the mixing issues at
10 the time we are considering new discharges and
11 whether or not a specific mixing zone is allowed
12 or precluded due to the criteria in the Board's
13 standard. So I guess you can say there would be
14 the need for the Agency to consider both of those
15 standards in the context of a new discharge.

16 But in terms of antidegradation in and
17 of itself, a load increase is a load increase. If
18 you add another pound of pollutants, that is
19 another pound of pollutants that is going to be in
20 there and beyond the mixing zone. So we would do
21 an antideg review whether there was a mixing zone
22 or not.

23 MS. HODGE: Would this affect in any way the
24 Board's provision right now that says some

L.A. REPORTING (312) 419-9292

67

1 degradation is allowed within a mixing zone?

2 MR. FREVERT: No, I don't believe it would.
3 I believe the same factors that currently exist we
4 are not proposing to change the factors we
5 consider in the decision of whether or not to
6 allow mixing and what the purpose of that mixing
7 zone is.

8 MS. HODGE: You answered my question earlier
9 that the Agency currently conducts somewhat over
10 100 antidegradation reviews per year. How many
11 antidegradation reviews does the Agency anticipate
12 it would conduct on an annual basis if the Board
13 adopts the proposal here?

14 MR. FREVERT: Approximately the same number.
15 We are updating the language of the standard. We
16 are providing more specificity and more certainty
17 in what kind of information would be available to
18 document those reviews. Nevertheless, there still
19 are a plethora of facilities out there that would
20 fall in that category we are proposing be exempt
21 from a specific stand-alone demonstration. That
22 more or less reflects our current operating mode.

23 MS. HODGE: Do you think that the proposed
24 regulations if adopted by the Board and then

L.A. REPORTING (312) 419-9292

68

1 implemented by the Agency would result in any
2 delays or slowing down the NPDES permitting
3 process for applicants?

4 MR. FREVERT: In a general sense, I would
5 anticipate that this new revised language and
6 these implementation procedures we have, if
7 anything, would expedite the process and save
8 resources. I believe there would be more specific

9 information brought in at an earlier stage so some
10 of the public comments, they would -- they would
11 have access to the information and our thought
12 process to be able to determine whether or not
13 early on they agree or disagree and would want to
14 pursue it further.

15 At the same time I believe that the
16 significant load increases -- any permit applicant
17 out there with any consciousness at all is going
18 to recognize this is something they have to deal
19 with anyway. And the implementation procedures
20 are a good starting point for them to understand
21 what it is that we are going to be looking for.
22 So they will more or less have a partial guidebook
23 how do I determine what I have to do to address
24 this issue.

L.A. REPORTING (312) 419-9292

69

1 So no delay, hopefully expedite the
2 process.

3 MS. HODGE: We may have already covered this
4 next question, but I just want to be sure. Could
5 you please explain how the proposed amounts will
6 affect discharges by publicly-owned treatment
7 works, POTWs? For example, will a POTW be subject
8 to an antidegradation review every time one of its
9 industrial discharges increases the load in the

10 discharge to the POTW?

11 MR. FREVERT: Those activities currently are
12 more or less dealt with in the context of the
13 pretreatment program. The requirements and the
14 procedures to determine and review the
15 acceptability of those to a great extent are
16 defined by the pretreatment program and the POTW
17 sewer use requirements. Typically when we issue
18 an NPDES to a POTW with a pretreatment program,
19 that context is part of what we have approved, and
20 we recognize that the changes and the additions
21 and the modifications going on internally with
22 that system are going to be dealt with in the
23 context of that permit and the pretreatment
24 program and the procedures that permit embodies.

L.A. REPORTING (312) 419-9292

70

1 So we are not going to get involved
2 with a separate review of those activities. We
3 are going to allow that program to move forward as
4 it would otherwise.

5 MS. HODGE: It is our understanding that
6 currently the Agency would issue construction
7 permits to industrial facilities for certain
8 modifications at an industrial facility even
9 though the discharge from the facility would be
10 directly into a POTW. And my question is will

11 industrial facilities which discharge into POTWs
12 be subject to antidegradation reviews when they
13 submit a permit application for a modification?

14 MR. FREVERT: If that particular activity
15 necessitated a change in the NPDES permit, it may
16 be possible. But I would assume that in the
17 context you are thinking, changes within the
18 system already anticipated and approved and
19 consistent with the existing standing NPDES
20 permit, there would be no -- no review anticipated
21 or required, I believe, by these procedures
22 specifically to deal with the antidegradation
23 review.

24 MS. HODGE: And to clarify, you mean the

L.A. REPORTING (312) 419-9292

71

1 NPDES permit of the POTW in which the industrial
2 discharge or discharges?

3 MR. FREVERT: That's correct. Once that
4 NPDES permit is in place and the procedure for
5 dealing with industrial users and subdivision
6 expense, things of those nature are embodied in
7 that operating program, they control the
8 situation. We don't go back and rereview the
9 antidegradation findings we made.

10 MS. HODGE: We infer based upon our review of
11 the Agency's proposal here that -- and I think you

12 have testified to this -- that the Agency intends
13 that all applicants for permits -- NPDES permits
14 that would result in increases in pollutant
15 loading with the exception of those activities
16 that are set forth in proposed Section 302.105(d),
17 that these applicants must make an antidegradation
18 demonstration; is that correct?

19 MR. FREVERT: The intent here is that those
20 proposed actions cannot be permitted until the
21 Agency makes a determination and documents in some
22 form a determination that proposed action is
23 consistent with the antidegradation standard.
24 Now, that stops short of saying a specific

L.A. REPORTING (312) 419-9292

72

1 document that you call a demonstration has to be
2 mailed in to us separately from your normal permit
3 application.

4 And the way we operate and the way we
5 propose to continue to operate is that the
6 information necessary for that demonstration to be
7 documented as part of our permitting review is
8 available to the Agency from whatever it comes in
9 with the permit application and whatever other
10 material we have available to us is adequate to
11 make that demonstration, we are not going to call
12 you up and say we know the answer but mail us a

13 piece of paper anyway. You don't have to make a
14 demonstration if the demonstration already exists.

15 MS. HODGE: What criteria will the Agency use
16 to determine whether the demonstration has been
17 made?

18 MR. FREVERT: Well, I think that criteria is
19 going to vary from case to case. And, indeed, the
20 intent of our proposed permitting procedures is to
21 outline in a broad sense the types of information,
22 the types of environmental considerations, the
23 types of community activities and alternative
24 analysis things that we are going to weigh into

L.A. REPORTING (312) 419-9292

73

1 this decision.

2 But I can tell you there is a world of
3 difference between the ones in our workgroup we
4 call no-brainers and the ones in our workgroup
5 that we call the most significant five permitting
6 activities of the year. So it is a concept, and
7 there is a category of information, but I can't
8 itemize to you that any given case is going to
9 require five man days or 1,000 hours of effort.

10 I can tell you we can look at the
11 nature of the waste water. We can look at the
12 nature of the environmental receiving body to be
13 dealt with. We can look at the chemical fate and

14 transporting ability to deteriorate or
15 bioaccumulate or whatever else that those
16 substances deal with. We can look at the
17 alternative of doing something a different way
18 that would eliminate the need or reduce the need
19 for pollutant entries, things of that nature. But
20 we don't intend to do the same level of effort for
21 every decision.

22 We have got a sliding scale here that
23 intends to target our resources and your resources
24 where the significance of the decision was more

L.A. REPORTING (312) 419-9292

74

1 apparent and back off in those cases where we know
2 the relative significance still warrants some
3 review, but it warrants a lesser review.

4 MS. HODGE: Thank you. And you used the term
5 significance. And I think that is important. Are
6 you familiar with the USEPA guidance for
7 antidegradation implementation that has been
8 issued by Region 8?

9 MR. FREVERT: I seen a copy of it and I
10 looked at part of it.

11 MS. HODGE: Are you aware that this guidance
12 includes very detailed factors for making
13 significance determinations?

14 MR. FREVERT: Yes, I am. And I think there

15 is a semantics issue here. Those significance
16 issues are the same issues that I am saying we
17 would consider in the process of determining
18 compliance or noncompliance with the standard.

19 You know, that particular document was
20 drawn to my attention a few weeks ago as having
21 some specific meaning that was perceived to be new
22 to our workgroup discussions, and I am still
23 struggling to find what in that document was
24 substantively different than what we talked about.

L.A. REPORTING (312) 419-9292

75

1 They talk about alternatives analysis and other
2 things as reviews you do in the process of
3 determining significance. In my mind that is the
4 same thing we are proposing to do in the review.
5 We are looking at alternatives. We are looking at
6 relative loading and things like this to determine
7 what, if any, additional permit restrictions or
8 other things would be necessary to honor the
9 intent of the standard.

10 So I would call the significance review
11 of Region 8's guidance almost the same as our
12 antidegradation review. We are doing the same
13 thing. They call it a significance determination.
14 I call it a compliance determination.

15 MS. HODGE: Would the Agency oppose the

16 inclusion of language in the proposal that would
17 articulate that significance determination a
18 little bit more clearly?

19 MR. FREVERT: I think we probably would be
20 receptive to discussing that a little bit if we
21 understood what the ramification of the
22 significance finding meant. Does that mean there
23 is some aspect of this standard you determine has
24 been attained or doesn't apply? Those are two

L.A. REPORTING (312) 419-9292

76

1 different issues. I don't think the Agency would
2 support an activity where you determine for some
3 significance determination the standard didn't
4 apply. I think we would support something where
5 we said the significance of this activity is such
6 that the standard has been met.

7 And another word thrown around in our
8 workgroup that sort of dealt with the same issue
9 is the de minimis concept. Is it too small to
10 warrant a review or is it too small to be subject
11 to the standard? And those are two different
12 things. Everybody is subject to the standard.
13 Now, we are talking about what is subject to the
14 stand-alone review versus a generic finding by the
15 Board that no stand-alone review is necessary.

16 MS. HODGE: But how is a permit applicant

17 and/or a member of the public to know how the
18 Agency would make that determination?

19 MR. FREVERT: That is the review process, I
20 believe. You know what factors we are going to
21 consider. For instance, if we are talking about a
22 new load of chloride versus a new load of dioxin,
23 I am going to tell you I am going to do my reviews
24 fundamentally different for the parameters, even

L.A. REPORTING (312) 419-9292

77

1 if they go to the same stream at the same time.
2 If you are talking about 50 pounds of BOD going to
3 the Mississippi River versus 50 of BOD going to
4 Cash Creek, I am probably going to do those
5 reviews differently too.

6 So we have tried to document in writing
7 as best we can a conceptual approach, the types of
8 considerations that sort of warrant more attention
9 and less attention that every review is going to
10 be different. And I can hint to you that if it is
11 a biochemical substance, I am going to look at it
12 different than a substance that breaks down, you
13 know, pretty rapidly over time. That is part of
14 what I mean by fate and effects and constituency
15 and environmental activity. And I believe we try
16 to articulate those things as best we could in our
17 implementation procedures. These are the

18 categories, environmental and economic and
19 technology considerations we went to look at. And
20 they will be different for you than it will for
21 the next guy.

22 MS. HODGE: Could we go back to the chlorides
23 example and the case that I had asked you about
24 before the break where an NPDES permit limits a

L.A. REPORTING (312) 419-9292

78

1 permittee's discharge to 1,000 pounds per day of
2 substance X? And let's say it is chloride. And
3 let's say under that same situation I think you
4 answered that, yes, it would be deemed an increase
5 in pollutant loading. But how would the
6 antidegradation review work there? What would you
7 expect the applicant to submit? The applicant
8 here has not made a change. Is this something
9 where you might do this early-on significance
10 determination?

11 MR. FREVERT: In that particular example, I
12 would look at the potential impact on water
13 quality in the context of incremental
14 concentration increases and whether or not that
15 was anywhere near. Here you are bumping up
16 against the water quality standard. We are trying
17 to create a no brainer example here so I want to
18 include in this example it is still far below the

19 water quality standard. And probably the net
20 result is going to be maybe two hours worth of
21 work by our staff documenting concentrations, the
22 reason and how it came about as being requested,
23 receiving stream body, any potential for impact,
24 document that in a fact sheet. The review is

L.A. REPORTING (312) 419-9292

79

1 over. We haven't asked for a single thing from
2 that applicant that wasn't already in evidence.

3 MS. HODGE: So you would not expect the
4 applicant to submit information on these social
5 and economic issues in a situation like this?

6 MR. FREVERT: There are examples. That is
7 probably a good example where I say there are many
8 circumstances where we are not going to ask for
9 social and economic information over above what we
10 already have in-house, that is correct.

11 MS. HODGE: How is an applicant to know that?

12 MR. FREVERT: If it is a significant thing
13 and time is important to him, we are trying to
14 promote early-on discussion. Call us up. We work
15 for the taxpayers. You want to schedule a
16 meeting, come in and make your proposal and ask us
17 what kind of information you put in your
18 documentation. If you are not in a hurry or it
19 doesn't appear like a big deal, mail your permit

20 application in.

21 Most of the NPDES permit applications
22 and the modification forms require some standard
23 information anyway. And there are certain
24 instances where the information in those basic

L.A. REPORTING (312) 419-9292

80

1 forms are all we need. We don't need anything
2 more. We are not going to ask for anything more.
3 We will do a review, but you probably won't even
4 know. You are not being asked to put out any more
5 effort than you ordinarily would otherwise. We
6 will do our review and make a public statement of
7 how we did it and what we included.

8 MS. HODGE: Would you perform an assessment
9 of alternatives in a situation like that?

10 MR. FREVERT: There may be some circumstances
11 where there is not even a need to look at
12 alternatives. As a matter of fact, I can
13 guarantee you there will be situations come up
14 where we feel there is some kind of a review
15 necessary, albeit an abbreviated review. But
16 under the circumstances, there is no reason to go
17 out and look for or ask for any alternatives.
18 What is being proposed is sort of a logical common
19 routine.

20 MS. HODGE: We had had the discussion before

21 about the Region 8 guidance and I do have copies
22 here. I have three copies that I would like to
23 enter into the record.

24 HEARING OFFICER TIPSORD: Ms. Hodge has

L.A. REPORTING (312) 419-9292

81

1 offered EPA Region 8 guidance antidegradation
2 implementation as an exhibit. Is there any
3 objection? Seeing none, we will mark this as
4 Exhibit No. 1.

5 (Whereupon Exhibit No. 1 was
6 marked into the record.)

7 MS. HODGE: And just a little bit more on the
8 significance determination. I think you had also
9 said a de minimus provision. Are you aware that
10 other Region 5 states have included an initial
11 significance determination in the regulatory
12 language and/or a de minimis provision that would
13 fit with the situation that you just described?

14 MR. FREVERT: I don't know how to fit with
15 the situation I just described, but I am aware of
16 that other states have attempted to incorporate
17 some kind of de minimis language in standards or
18 their implementation procedures.

19 MS. HODGE: And is there a reason that the
20 Agency -- I mean, what I heard you describe, you
21 know, over the last few minutes, you know, fits

22 with a significance determination or you had said,
23 you know, the review would not be the same in
24 every single case, it would be made on a

L.A. REPORTING (312) 419-9292

82

1 case-by-case basis. Is there a reason that the
2 Agency didn't put some more definitive language
3 into the proposal to describe that situation?

4 MR. FREVERT: We spent a lot of time in the
5 workgroup talking about de minimis issues. There
6 was some suggestion that came forward. The Agency
7 is not opposed to the concept. As a matter of
8 fact, we would be happy to consider workable
9 proposals or alternatives that come forward, even
10 today. What we are concerned about is a -- an
11 additional step in the whole process that merely
12 determines whether or not you do a review. And if
13 that step is more burdensome than doing the review
14 itself, we feel like we are going backwards than
15 forwards.

16 In many instances, significance
17 determinations of other states that have gone
18 through, as best they have expressed them to me,
19 actually are more burdensome than what I believe
20 the appropriate level of review would have been
21 made to determine compliance with the standard to
22 begin with. They merely determine whether they do

23 a review of the standard.

24 In essence I think they have and

L.A. REPORTING (312) 419-9292

83

1 concluded that small things are consistent with
2 the intent of the policy. So in other words, we
3 are compliant with the standard. We are not
4 exempt from doing a review if we have done one.

5 Our major concern is that we don't want
6 another step in the process that prolongs it.
7 When you finish that process, maybe your decision
8 is, well, now we have to go to another process
9 because I have determined it is significant or I
10 am going to get appealed because I can't document
11 adequately how I determine that I was either above
12 or below the significance level. Those are some
13 of our concerns. If we can work through those and
14 come up with a program that reaches the same
15 decision with less man-hours and less effort,
16 bring it on. We are ready for that.

17 MS. HODGE: Mr. Frevert, I have just a few
18 more. Let's go back to the activities that are
19 listed in proposed Section 302.105(d). And these
20 are the proposal indicates that these are
21 activities not subject to an antidegradation
22 demonstration. Are you aware that other Region 5
23 states have included other activities? And I am

24 going to use the word exemption, I know in your

L.A. REPORTING (312) 419-9292

84

1 testimony you said it is nonexemption. But states
2 have included other kinds of activities and
3 exemptions in their antidegradation review
4 procedures.

5 MR. FREVERT: I believe some of the other
6 states in Region 5 have tackled that issue and
7 actually incorporated some language in some of
8 their procedures. I don't know other than the
9 state of Ohio that has been through several
10 iterations of, I would say, unsuccessful attempts
11 to get a standard in place. I don't know the
12 status of the other states in terms of whether
13 their procedures are federally approved or not.
14 We can probably get that information. I don't
15 know if you want Dave to address that or not. He
16 is the USEPA rep here.

17 MS. HODGE: That answers my question. And I
18 won't go over, you know, the entire list of these
19 things, but really just want to inquire whether
20 the Agency would be willing to consider the
21 inclusion of other activities on this listing at
22 302.105(d).

23 MR. FREVERT: In a general answer, yes, we
24 would.

1 MS. HODGE: Thank you.

2 MR. FREVERT: These are limitations to doing
3 a review that we feel comfortable with as being
4 dependable, workable and rash. That is not to say
5 they are the only ones. But these are a list of
6 exemptions that we feel very comfortable with.
7 This were a number of others brought up during the
8 workgroup sessions, some of which had some merit
9 with some complications, and we fully expect some
10 discussion from a number of participants on adding
11 to this list. But this is a list that we feel
12 both workable and federally approved. And those
13 were probably our two prime criteria, can we make
14 this work and can we secure federal approval.

15 MS. HODGE: Subsection (d)(5) of this list
16 deals with new or increased discharges of
17 noncontact cooling water without additives, return
18 to the same body of water from which it was taken.
19 And I would like you to focus on the without
20 additives. Is it the Agency's understanding that
21 most noncontact cooling water is treated with
22 additives?

23 MR. FREVERT: Is it the Agency's
24 understanding that most is or is not?

1 MS. HODGE: Is or is not?

2 MR. FREVERT: I don't know that the Agency
3 has an understanding. The Agency knows it is done
4 both ways. What we are saying here is that the
5 only load in there is heat under these
6 circumstances, we don't feel there is much merit
7 in doing an antidegradation review. If in
8 addition to heat there is some chemical additive
9 to prevent scaling or some other problem, maybe
10 there is some benefit in reviewing that source to
11 determine if that is the best additive and if
12 there are toxic ramifications for that additive.

13 But lacking those additives, we are
14 saying we can't justify doing a stand-alone
15 antidegradation review just to the heat if the
16 heat is consistent with the other thermal
17 requirements.

18 MS. HODGE: I have a few questions now about
19 proposed Section 302.105(b), outstanding resource
20 waters. And in particular in 302.105(b)(1), this
21 proposal provides that waters that are classified
22 as an ORW must not be lowered in quality except as
23 provided below. And I would just -- I am just
24 looking for some clarification on -- for example,

1 on (A) as to subsection capital (A), does that
2 mean that an activity that results in short-term
3 temporary lowering of water quality of an ORW is
4 automatically allowed?

5 MR. FREVERT: No, it doesn't. The way this
6 is structured and we are attempting to parallel
7 federal guidance, we are saying with very few and
8 very limited exceptions, outstanding resource
9 waters should receive no load increase whatsoever.
10 And those very limited and very restrictive
11 exceptions are these presented below, and even
12 they are subject to the review for the high
13 quality waters.

14 MS. HODGE: So under subsection (b)(1)(c),
15 the antidegradation demonstration would be
16 required even in these two situations that are set
17 forth in (A) and (B)?

18 MR. FREVERT: That's correct.

19 MS. HODGE: Based upon our review of the
20 proposed procedures for ORW designation, and that
21 would be in your proposed revisions to Part 106,
22 again, we were asking for a little bit of
23 clarification. Mr. Frevert, in your testimony you
24 indicated that the ORW designation would be a

1 regulatory process. The placement of these
2 procedures in Part 106, it is there with what
3 appear to be other adjudicatory proceedings, and
4 we just ask the Agency to clarify its intent.
5 Would you intend this process to be an
6 adjudicatory or regulatory process.

7 MR. FREVERT: That is a toughy. Our intent
8 is that the process -- indeed, it is a regulatory
9 designation. In that regard we want to adhere to
10 a fairly open regulatory process. However, the
11 ramifications of this decision are fundamentally
12 more significant than the ramifications of a
13 typical adjusted standard or even a statewide
14 standard in that we are not setting a target to
15 protect an environmental use here. We are setting
16 an absolute prohibition on some activities. And
17 that has greater ramifications on property owners
18 and other citizens in the community than changing
19 the water quality standard from No. A to No. B.

20 So our intent is to remain relatively
21 flexible, recognizing those higher ramifications,
22 making sure there is an obligation to disseminate
23 adequate information to start the process and that
24 potentially effected property owners and other

1 citizens have adequate notice, which probably

2 isn't accomplished in a typical adjusted standard
3 set of procedure requirements.

4 You are not only talking about surface
5 property rights, but even mineral rights and an
6 outstanding resource water other than a very few
7 things you are almost precluded in any
8 development. And that is so much of a higher
9 significance than merely adjusting an
10 environmental effect standard that we thought
11 there is a responsibility to even start the
12 process to make sure that the people that have
13 something at stake and are effected have a better
14 chance of getting notice early on so they can
15 participate.

16 That be being said, we still believe it
17 is a regulatory process. And if the Board chooses
18 some other starting ground to initiate a
19 proceeding, that is their prerogative.

20 HEARING OFFICER TIPSORD: Ms. Hodge, could I
21 ask a follow-up? Mr. Frevert, I would note that
22 an adjusted standard is an adjudicatory process,
23 so it is not the rulemaking process. So already
24 by suggesting that this is a regulatory process,

L.A. REPORTING (312) 419-9292

90

1 you put it in a different category than an
2 adjusted standard.

3 I guess my follow-up question to this
4 would be that we have currently in place a
5 specific provision that allows for regulated
6 recharge areas to be named as a part of a regular
7 rulemaking. Would you see this type of activity
8 to declare an outstanding resource water similar
9 to that process?

10 MR. FREVERT: There may be some similarities,
11 although I can't tell you now it is exactly
12 identical. And I have some familiarity with that
13 process, but not a great deal. And one of my
14 concerns would be -- well, the burden of the
15 process itself, who and how can initiate a process
16 and what role or responsibilities flow upon the
17 Agency at that point.

18 HEARING OFFICER TIPSORD: Okay.

19 MR. FREVERT: We can certainly go back and
20 review that more and give you more specific
21 testimony at a later date, if you so like.

22 HEARING OFFICER TIPSORD: I think that might
23 be helpful.

24 MR. FREVERT: Well, what we are trying to

1 create is an obvious opportunity for someone who
2 thinks that water has not only special value, but
3 enough special value to warrant an extremely high

4 classification here, give them some guidance on
5 what is enough information to make -- to start the
6 process and go forward and expend your time and
7 our time and everybody else's time on the
8 consideration, how much information do you need
9 and who are the people that are likely to be
10 affected by the ruling and how do we make sure we
11 know if we declare an outstanding resource water
12 in a certain area, how much property has some
13 effect on the futurability of those property
14 owners to construct anything or carry on any kind
15 of social, commercial activities.

16 High quality water is you can do
17 something with a demonstration. Outstanding
18 resource waters you can do nothing. So there is a
19 fundamental difference there. We want to make
20 sure you understood. And understanding that
21 situation, as far as I am concerned, you can
22 subject it to any procedures you want. We were
23 merely offering our suggestions.

24 HEARING OFFICER TIPSORD: Thank you.

L.A. REPORTING (312) 419-9292

92

1 MS. HODGE: Under the Agency's proposal,
2 would the proponent of an ORW have a burden of
3 proof?

4 MR. FREVERT: I would assume there is a

5 burden of proof somewhere, and the Board
6 designates a water body in a use classification.
7 We need to substantiate that, whether they place
8 that burden on the initiation of a proceeding or
9 that is their criteria for final action at the end
10 of the proceeding. I am not sure that we have a
11 strong position on that one way or another. I
12 mean, our two issues are you need to understand
13 the ramifications of your decision. And before
14 you need that -- to make that decision, you need
15 to have all that information. How much
16 information it takes to get a proposal filed, get
17 on the docket and trigger the hearing process, we
18 think should be a little more rigorous than a
19 routine adjusted standard. But again, I am -- the
20 Board can open the docket any time they want on
21 any issue they want.

22 MS. HODGE: Does the Agency have any position
23 on what criteria or factors the Board should rely
24 upon in its designation of ORWs?

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93

1 MR. FREVERT: I am not sure at this time we
2 have a -- have actually formulated the specific
3 and quick answer to that. We think the Board
4 needs to understand the ramifications to fully
5 understand the nature of the water body and the

6 nature of the impacts that designation has.

7 But in terms of itemizing or listing a
8 number of technical or economic or other factors
9 that would lead up to that, I don't believe we
10 have done that exercise.

11 MS. HODGE: And I have just a couple more
12 questions. And this one is related to
13 Ms. Tipsord's question. Are you aware,
14 Mr. Frevert, that the Board has promulgated rules
15 for designation of special resource ground waters
16 at 35 Illinois Administrative Code Part 620.260?

17 MR. FREVERT: Yes, I am.

18 MS. HODGE: Are you aware that the special
19 resource ground water designation is an
20 adjudicatory process?

21 MR. FREVERT: I will take your word for it.
22 No, I have no specific knowledge of that.

23 MS. HODGE: Would you agree that special
24 resource ground waters and outstanding resource

L.A. REPORTING (312) 419-9292

94

1 waters are similarly unique quality waters?

2 MR. FREVERT: I believe in my own mind that
3 the ramifications on property owners and the
4 restrictions on what they can do are significant
5 in the special ground water section you are
6 referring to. And they are also very significant

7 in outstanding resource water classification for
8 surface waters.

9 At this point in time, my understanding is
10 that they may be even more restrictive for
11 outstanding resource waters than the limitations
12 placed on ground waters. But again, this is an
13 area that I would be happy to research more and
14 give you more specific answers to later on. I am
15 not our best ground water spokesman.

16 MS. HODGE: Thank you. Does the Agency have
17 any idea as to the number of potential petitions
18 that might be submitted to the Board for
19 designation of ORWs if this proposal is adopted?

20 MR. FREVERT: No, we don't. I know that
21 there are interested parties within the state who
22 feel that some waters warrant that level of
23 protection and may be willing to pursue that
24 classification, but I can't give you a number.

L.A. REPORTING (312) 419-9292

95

1 MS. HODGE: That concludes my questions.
2 Thank you very much.

3 HEARING OFFICER TIPSORD: Thank you,
4 Ms. Hodge.

5 Are there any other questions for
6 Mr. Frevert? Mr. Harrington?

7 MR. HARRINGTON: Maybe I can be heard better

8 if I stand up.

9 HEARING OFFICER TIPSORD: Mr. Harrington,
10 excuse me. Can you identify yourself?

11 MR. HARRINGTON: James T. Harrington, Ross &
12 Hardies, for the Illinois Steel Group. I am a
13 little confused about the applicability provisions
14 even after Ms. Hodge's questions and your answers.

15 If an existing discharger has a permit,
16 he has set forth existing discharge of the permit
17 application, the Agency regulates some of those in
18 the permit, is that not the common way it is done?

19 MR. FREVERT: There are limitations placed on
20 the parameters of significance.

21 MR. HARRINGTON: There are other pollutants
22 in the application that are listed on the range of
23 tests that are above background which the Agency
24 does not think are significant enough to limit?

L.A. REPORTING (312) 419-9292

96

1 MR. FREVERT: That's correct.

2 MR. HARRINGTON: If in the course of
3 operations there is an increase over the numbers
4 of permit application so there was nonregulated
5 pollutants, will there be a nondegradation review
6 when they apply for renewal of that permit?

7 MR. FREVERT: Not per se, no. And I am
8 presuming that your -- you are talking about an

9 example where there is some incremental rise in
10 those pollutants that would warrant regulation.

11 MR. HARRINGTON: We don't know what warrants
12 regulation. We will say there will still be a
13 limit that might not have results in a new permit,
14 either traditionally --

15 MR. FREVERT: Yes.

16 MR. HARRINGTON: -- more zinc in the
17 discharge or for some reason it is being used in
18 the plant but not of great significance. You
19 haven't put a zinc limit in the first permit, so
20 you won't put a zinc limit in the renewal?

21 MR. FREVERT: If there is a conscious
22 addition of additional zinc -- I think this is
23 what you are getting at.

24 MR. HARRINGTON: Yes.

L.A. REPORTING (312) 419-9292

97

1 MR. FREVERT: I am operating a facility and I
2 have zinc that is at some incredibly small amount
3 relative to significance determination for water
4 quality standards review, but I am going to -- if
5 you are going to add a new process that
6 substantively increases that zinc, we may look at
7 that in terms of alternatives. If it is just an
8 incidental increase associated with your normal
9 activities, it won't receive any kind of review.

10 MR. HARRINGTON: Back up a minute. The
11 Agency provides forms for permit applications; is
12 that correct?

13 MR. FREVERT: That's correct.

14 MR. HARRINGTON: And when the permit
15 application is submitted, the first thing the
16 reviewer usually does is reviews the forms for
17 completeness; is that correct?

18 MR. FREVERT: Tom is telling me yes.

19 MR. HARRINGTON: And if they find that all
20 the applicable parts aren't filled out, before
21 they go any further, they send that back and say
22 this is not a complete application; is that
23 correct?

24 MR. FREVERT: Not always. I mean, in some

L.A. REPORTING (312) 419-9292

98

1 instances we may ask for that supplemental
2 information and carry on with our review
3 simultaneously.

4 MR. HARRINGTON: But you do ask for that to
5 be completed --

6 MR. FREVERT: We do ask for it to be
7 completed.

8 MR. HARRINGTON: -- before you even get to a
9 substantive issue?

10 MR. FREVERT: It is possible. Yes.

11 MR. HARRINGTON: Are you going to have forms
12 for nondegradation review?

13 MR. FREVERT: We are proposing to adopt
14 procedures to help permit applicants and the rest
15 of the world understand how we view the
16 requirements of the standard and how we are going
17 to go through the review. We are not proposing to
18 add any specific elements to any of our existing
19 application forms or create new application forms.

20 MR. HARRINGTON: If an application comes in
21 and there is an increase in one of the pollutants,
22 we will take the renewal to start with, and the
23 elements of a nondegradation review are not
24 addressed in the application, there is no

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99

1 alternative consideration, there is no economic
2 consideration, no social impact consideration,
3 what happens to that application when it comes in?

4 MR. FREVERT: Any one of a number of things.
5 There are circumstances like that going on right
6 now and will continue in the future where we will
7 complete our review and we will address the
8 requirements of the antidegradation and will
9 document them in a fact sheet without ever
10 requesting any additional input from that
11 permittee. And there are other circumstances

12 where we may feel that the antidegradation
13 requirements are such that we need to go back to
14 that applicant and open a dialogue or at least get
15 some additional factual information.

16 MR. HARRINGTON: Maybe this is a question
17 that the Agency lawyers need to address like
18 Mr. McSwiggin does, maybe it can't be answered
19 now.

20 But the question I have is would the
21 Agency feel justified in returning that permit
22 application as incomplete if the factors of the
23 nondegradation review are not addressed in the
24 permit application?

L.A. REPORTING (312) 419-9292

100

1 MR. FREVERT: I guess I have trouble with
2 your term returning. Do you mean like a formal
3 denial?

4 MR. HARRINGTON: Yes, denial.

5 MR. FREVERT: Not unless he have exhausted
6 attempts for further information requests and they
7 are ignored or denied, no.

8 MR. HARRINGTON: What if the deadline for
9 renewing the permit when you get to it has about
10 run out and you don't get an extension from the
11 applicant, are you going to deny the permit for
12 failure to address each one of the elements of

13 nondegradation review?

14 MR. FREVERT: Tom, you can help me. I am not
15 sure there is a deadline for NPDES issuance.

16 HEARING OFFICER TIPSORD: Excuse me, can we
17 have you sworn in first?

18 (Whereupon Mr. Thomas G.
19 McSwiggin was sworn into the
20 record.)

21 MR. McSWIGGIN: Thomas G. McSwiggin. The
22 scenario you are describing where we have diverted
23 a review on a permit renewal on an NPDES permit
24 application, the regulation requires that you

L.A. REPORTING (312) 419-9292

101

1 submit that application 180 days prior to the
2 expiration date of that permit. If you are in
3 that mode, then the permit will -- your existing
4 permit will continue by the operations of the
5 Administrative Procedures Act, and then we will
6 have the luxury of the time, so to speak, to go
7 forward with the clarification process to seek the
8 additional information that we need.

9 Now, if you fail to timely apply, my
10 reading of that is that you would be on your own
11 for operating without a permit while the
12 administrative process grinds away to get the new
13 permit in place. So you run some risk.

14 MR. HARRINGTON: Let me pursue that and
15 whoever is appropriate can address it. I think I
16 am trying to get to the point that can the permit
17 be denied because somebody doesn't address in
18 their application or doesn't in your mind
19 adequately respond to each of the factors you have
20 set out in the proposed agency guidance for permit
21 application for nondegradation?

22 MR. FREVERT: If we don't feel like we have
23 at the end of that review process a complete
24 defensible demonstration that we can present in a

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102

1 fact sheet, I do believe we have the prerogative
2 to deny that load increase. That is different
3 from denying the permit. We can issue a permit
4 that does not authorize that load increase.

5 MR. HARRINGTON: If you deny the permit
6 because you have asked for additional information
7 which you didn't get, for example, on again
8 alternatives or economic and social impact, when
9 somebody takes it and appeals to the Board, what
10 standards should the Board -- is the Board going
11 to be asked to consider in deciding whether your
12 agency acted correctly in denying that?

13 MR. FREVERT: I am trying to fully understand
14 your question here. I guess what you are saying

15 is ultimately there is a disagreement on what
16 antidegradation requires between the Agency and
17 the permit applicant, what is the basis for the
18 appeal?

19 MR. HARRINGTON: Yes.

20 MR. FREVERT: In that regard we have tried to
21 define in some of our examples and some of our
22 implementation procedures the level of
23 information, the types of information we are
24 looking for. Our workgroup considered several

L.A. REPORTING (312) 419-9292

103

1 times how you can come up with a crisp cutoff that
2 deals with a whole gamut of circumstances from the
3 smallest to the biggest for trying to deny the
4 nastiest chemical. And we managed to try to craft
5 some general classifications of type of
6 information, level of effort that is warranted.

7 But if you are looking for an absolute
8 yardstick to say that antidegradation can boil
9 down to, for instance, sound oxygen level of 6.00,
10 we have yet to produce that.

11 MR. HARRINGTON: Understood. But, for
12 example, the application comes in, there is no
13 demonstration of alternatives. There is no
14 demonstration of economic and social impact.
15 There is water quality data that says ten feet

16 down the stream you can't find the difference in
17 this increase or not, but there is a lot of social
18 upheaval about the source, the Agency denies it
19 for failing to address these additional issues.
20 And I can well see if the citizens are concerned
21 about a source they may look to something like
22 that, the Agency may consider that concern and
23 say, well, we want to consider all these factors
24 then. You deny the permit. There is an appeal.

L.A. REPORTING (312) 419-9292

104

1 What does the Board look at? Do they look at the
2 Agency factors, the Agency guidance?

3 MR. FREVERT: I would think beyond the Agency
4 guidance they would have to look at the extent and
5 the rigger and the nature of the review and the
6 information available to what extent it is
7 consistent with the decision the Agency made.

8 MR. HARRINGTON: Maybe what I am getting at,
9 is the Board going to be bound by the Agency
10 procedures?

11 MR. FREVERT: No. The Board is not bound by
12 the Agency procedures. The Agency is trying to
13 clarify what we are looking for and how we intend
14 to encourage and maintain lines of communication
15 and lines of efficiency to reach a decision.
16 Perhaps what you are getting at is the fundamental

17 nature of the antidegradation policy under federal
18 law, which says it goes beyond -- this standard
19 exists to protect a specific use and that specific
20 use is defined as being achieved at this level.
21 The antidegradation policy at the federal level
22 basically says any increment of water quality
23 better than what you define as the floor necessary
24 to protect that existing use is a public resource,

L.A. REPORTING (312) 419-9292

105

1 and that public resource shall be allocated to
2 other people consistent with the general intent of
3 the public at large and their overall social and
4 economic goals.

5 I hate to use this word, but I don't
6 know how to get around it. The nature of
7 antidegradation in the Clean Water Act imparts a
8 judgment decision. It is not science. It is
9 policy. And we are defining that policy as
10 strictly and rigorously as we are capable of doing
11 now. And I believe in that context the way we are
12 operating today is as good as most other states
13 that I am familiar with building it.

14 I understand your point and I recognize
15 some merit in the fact that this isn't pure
16 science. This is public policy.

17 MR. HARRINGTON: Now is not the time for me

18 to be making statements, but I will try to just --
19 you agree one of the questions here is what goes
20 into the Board regulations is them making public
21 policy of the rulemaking body of the state and
22 what is left to the discretion of the Agency
23 without Board guidance. That is one of the issues
24 the Board has to decide, isn't it?

L.A. REPORTING (312) 419-9292

106

1 MR. FREVERT: Yes.

2 MR. HARRINGTON: Okay. And the issue -- and
3 part of that is also what standard the Board
4 applies when it reviews an agency decision for
5 public policy; is that correct?

6 MR. FREVERT: That's correct.

7 MR. HARRINGTON: Where in the Agency proposed
8 rules are the standards by which the Agency --
9 rules proposed for adoption are the standards that
10 the Agency will follow in processing a
11 nondegradation application and that the Board will
12 follow in reviewing the Agency decision?

13 MR. FREVERT: I guess my answer is they are
14 contained right there within the body of the rules
15 themselves. The general statement and the
16 assurance of public participation are the two
17 primary objectives of that standard and then the
18 process of what you are comparing different public

19 objectives to, environmental objectives versus
20 social and economic objectives.

21 MR. HARRINGTON: In the Agency proposal there
22 is a list of things to be addressed; is that
23 correct?

24 MR. FREVERT: That's correct.

L.A. REPORTING (312) 419-9292

107

1 MR. HARRINGTON: The Agency proposed agency
2 rules?

3 MR. FREVERT: That's correct.

4 MR. HARRINGTON: Those are not in the Board
5 rules; is that correct?

6 MR. FREVERT: As of this point, they are not.
7 They are broad categories of issues to be
8 considered. And to the extent, you know, that can
9 resolve some of your concern, I am sure we can
10 work on that.

11 MR. HARRINGTON: I am not sure, just so the
12 record is clear, that I have a particular concern
13 or a particular solution. But I think there is
14 some issues the Board is going to have to consider
15 that I am trying to bring out for the Board's
16 consideration and for the party's consideration to
17 how we might want to deal with them.

18 MR. FREVERT: Fair enough.

19 MR. HARRINGTON: You reference in the

20 proposed Board rules that an application for an
21 NPDES permit modification or NPDES permit where a
22 401 certification must meet the standards set
23 forth in the Agency rules; is that correct? Am I
24 reading that right?

L.A. REPORTING (312) 419-9292

108

1 MR. FREVERT: I don't think you are reading
2 that right. If you are, then we have some editing
3 to do.

4 MR. HARRINGTON: Maybe I can -- if the
5 application -- can the Agency change the criteria
6 they are going to consider on a nondegradation
7 application without going through the Board?

8 MR. FREVERT: I don't know that the Agency
9 can change the criteria if they consider it. I
10 think the Agency can, indeed, adjust and will have
11 to adjust the types of information and the amount
12 of information that is necessary to address those
13 criteria in virtually every case.

14 MR. HARRINGTON: Well, for example, could
15 the Agency specify in their rules how many
16 alternatives have to be considered in every
17 application?

18 MR. FREVERT: I don't know if they can or
19 not, but I can guarantee you we won't. I am not
20 going to put a number on that. Some places there

21 are no alternatives. Other places there are
22 infinite alternatives.

23 MR. HARRINGTON: Do you recall saying several
24 years ago when we had the water toxic regulation

L.A. REPORTING (312) 419-9292

109

1 going through the Board?

2 MR. FREVERT: I don't know whether I remember
3 that or not.

4 MR. HARRINGTON: You were the principal
5 agency witness, weren't you?

6 MR. FREVERT: Yes, vaguely.

7 MR. HARRINGTON: Do you recall several times
8 don't worry because that is not something I would
9 ever do?

10 MR. FREVERT: I don't recall that, no. But I
11 won't, you know...

12 MR. HARRINGTON: Wasn't it shortly after that
13 you were transferred to the air program?

14 MR. FREVERT: Somebody did something I
15 wouldn't do, so they brought me back. I think I
16 understand the point you are getting at. And I
17 want to emphasize these are not totally forever
18 implementation procedures. These are
19 implementation procedures that the Agency is
20 suggesting to make available to facilitate the
21 process for people with basic information on how

22 to participate and how to move it along rapidly.

23 There is no pass/fail criteria in those
24 procedures. I want everybody to understand that.

L.A. REPORTING (312) 419-9292

110

1 This is -- our procedures define the process.

2 They don't set a pass/fail criteria.

3 MR. HARRINGTON: These are issues to be
4 considered, not standards to measure, would that
5 be a fair way of saying that?

6 MR. FREVERT: I can agree with that.

7 MR. HARRINGTON: Again, getting back to the
8 applicability issue, is a full nondegradation
9 review going to be required of somebody who
10 installs pollution control equipment which has the
11 impact of increasing one pollutant perhaps while
12 it decreases others? I will give you an example.
13 Somebody is required to install a chlorination
14 system to treat cyanide or ammonia, so they will
15 add chlorides to the stream to retake out the
16 cyanide or ammonia. Will that require a
17 nondegradation review?

18 MR. FREVERT: Well, your first comment, your
19 first question is would we require a full
20 nondegradation.

21 MR. HARRINGTON: Yes.

22 MR. FREVERT: There is no such thing as a

23 full review. There is no ultimate review. We are
24 trying to scale and design these reviews to

L.A. REPORTING (312) 419-9292

111

1 address the nature of the individual application
2 to save everybody's resources. In your example,
3 -- probably a better example is cross-media
4 things, in order to prove air quality you are
5 adding some small amount to the parameter of a
6 waste stream. There would be some level of review
7 done in those instances and it would be relatively
8 minor. And I think the outcome would be pretty
9 obvious to most people.

10 To a great extent, that demonstration
11 would almost boil down to our drafting the summary
12 fact sheet. Because in most of those cases the
13 engineering feasibility studies have done
14 everything we would imagine wanting their
15 degradation anyway. They come to us with that
16 conclusion. Those things have been done, and they
17 usually come in a report anyway.

18 MR. HARRINGTON: Let me take an air example.
19 I was trying to avoid using that because it is a
20 little complex. But would the Agency be in a
21 position to say, well, you are putting in
22 scrubbers and we think -- the water group thinks
23 you would be better off with an incinerator on

24 those stacks so you don't have to discharge that

L.A. REPORTING (312) 419-9292

112

1 water?

2 MR. FREVERT: I am fairly confident that not
3 I but my successors are not going to do that sort
4 of thing.

5 In those circumstances we are a unified
6 agency, and our water quality engineers don't step
7 over the air pollution engineer's evaluations and
8 vice versa.

9 MR. HARRINGTON: The air pollution engineer
10 might say, hey, they both achieve air quality
11 standards, that is all I have to worry about. So
12 you want scrubbers because you are going to save
13 some money or you think they are safe or
14 something, that isn't our concern as an air
15 pollution engineer. I am trying to get to this
16 alternative demonstration issue.

17 MR. FREVERT: If there are no ramifications
18 to any other media than ours and there are two
19 equally desirable alternatives from all other
20 aspects and one has a better water quality
21 outcome, we would work toward making that the
22 preferred option, yes. But, you know, with these
23 examples you are coming up with, I don't know how
24 to -- I don't know how to concoct an example so

1 specific that you are always going to get the same
2 answer.

3 It is the same in water. If you
4 discharge something into an intermittent stream
5 versus the Mississippi River, the level of review
6 and the level of evaluation, even the types of
7 information we are going to ask for, are going to
8 vary somewhat.

9 MR. HARRINGTON: The examples I am using,
10 just so you understand, are all examples I have
11 dealt with. I am not making them up. One of the
12 other examples I wanted to ask about is if
13 somebody has an ammonia discharge, which is a
14 concern in many streams, puts in a biological
15 treatment system so they reduce the ammonia, but
16 you have higher discharges of nitrates. Will that
17 require an antidegradation review?

18 MR. FREVERT: In that circumstance, no. But
19 I might point out that over and above
20 antidegradation reviews, of course, are today's
21 water quality standard reviews. And even when we
22 don't do an antidegradation, we are always going
23 to make sure that all of those parameters comply
24 with the standards. And in your example, sometime

1 in the future we may be looking at nitrate, total
2 nitrogen standards. So consideration will expand
3 in the future.

4 MR. HARRINGTON: I understand. In all my
5 examples I am assuming compliance with water
6 quality standards because, obviously, you won't
7 permit a violation of those in any case.

8 MR. FREVERT: Good. We are on the same
9 ground there.

10 MR. HARRINGTON: Understood then. I have
11 some more questions, but I would be happy to defer
12 them until anyone else has done their questions or
13 if you want to take a break at this time.

14 HEARING OFFICER TIPSORD: Could we go off the
15 record?

16 (Discussion had off the
17 record.)

18 (Whereupon the matter was
19 recessed until 1:15 p.m. this
20 date, November 17, 2000.)

21
22
23
24

1 A F T E R N O O N S E S S I O N

2 HEARING OFFICER TIPSORD: We are back on the
3 record. Mr. Ettinger?

4 MR. ETTINGER: I motion that we don't read
5 the prefiled testimony into the record in order to
6 save time and because there are copies sitting
7 over there. I think people have had a chance to
8 get it by now. If that is not a problem, I think
9 it would save us some time this afternoon.

10 HEARING OFFICER TIPSORD: Is there any
11 objection to taking the remaining prefiled
12 testimony into the record as if read? Okay,
13 seeing none, at the appropriate time, we will
14 enter each as an exhibit at that time. Thank you.

15 And let's continue with questioning of
16 Mr. Frevert. Does anyone have any additional
17 questions? Yes, please.

18 MS. FRANZETTI: My name is Susan Franzetti.
19 I am appearing today on behalf of the American
20 Bottoms Regional Waste Water Treatment Facility,
21 Sauget, Illinois. Mr. Frevert, are you ready?

22 MR. FREVERT: Good afternoon.

23 MS. FRANZETTI: I am going to turn your
24 attention to 302.105(c), high quality waters. Is

1 the intended meaning and scope of the proposed
2 definition of high quality waters the same as in
3 the federal antidegradation requirement, namely,
4 that high quality waters are those whose existing
5 water quality is better than necessary to support
6 fishable, swimmable uses?

7 MR. FREVERT: This is language that we sort
8 of carried over from the existing standard, and it
9 is not restricted to then water quality necessary
10 to support fishable, swimmable uses. It would
11 apply to any other use you might envision, and
12 that is -- the reason we retain that language is
13 we think it is consistent with the existing state
14 policy.

15 To the extent that federal guidance
16 restricts antidegradation to its relationship to
17 fishable and swimmable only, it is something we
18 kicked around a little in the workgroup hearings.
19 And I don't know that -- I don't believe, for
20 instance, you can come up with a parameter to add
21 a water supply ramification and no fishable or
22 swimmable ramification. They would say that was
23 not subject to antidegradation. That is a
24 debatable issue in terms of the federal guidance.

1 But our proposal today is not
2 restricted to fishable and swimmable applications.
3 It is retaining the existing policy that says
4 chemical water quality is better than the water
5 quality standards.

6 Typically, those water quality
7 standards are based on achieving fishable,
8 swimmable uses. But, for instance, an incremental
9 increase in copper, say, which is still well below
10 the levels necessary to protect fishing and
11 recreational uses, we view an increase like that
12 as consistent with the state nondegradation
13 policy.

14 MS. FRANZETTI: For high quality waters.

15 MR. FREVERT: For high quality waters.

16 MS. FRANZETTI: Let me make sure I understand
17 you correctly. If I have a water whose use
18 designation is secondary contact but in some
19 portion of that water body the water quality is
20 better than secondary contact standards but not as
21 good as general use standards, is that a high
22 quality water --

23 MR. FREVERT: Yes.

24 MS. FRANZETTI: -- under this proposal?

1 MR. FREVERT: Yes.

2 MS. FRANZETTI: And if I have an increase of
3 loading, I have to go through the high quality
4 waters demonstration?

5 MR. FREVERT: Yes.

6 MS. FRANZETTI: So in that regard this is
7 stricter than the federal Tier 2 antidegradation
8 requirement?

9 MR. FREVERT: I think we are having a
10 misconnect here. Our secondary contact waters
11 were set at water quality standards defined as
12 adequate to protect the indigenous population.
13 That being said, they are less than the general
14 use waters, which are -- they are defined as a
15 diverse and healthy population.

16 But to the extent that our secondary
17 contact waters, indeed, have better water
18 chemistry than the standards that are established
19 for the indigenous aquatic life classification
20 that currently exists, this rule applies, and the
21 intent is to not allow that water body to be
22 deteriorated down to that basic level that is
23 barely adequate to protect indigenous populations,
24 without some kind of a documentation or

L.A. REPORTING (312) 419-9292

119

1 demonstration.

2 MS. FRANZETTI: What criteria are you going

3 to use to identify a high quality water?

4 MR. FREVERT: Water whose existing quality
5 exceeds established standards is the high quality
6 water for the application of this standard.

7 MS. FRANZETTI: And how do I determine -- how
8 will the Agency determine whether or not a water
9 body exceeds the established standards of this
10 part?

11 MR. FREVERT: Primarily through chemical
12 analysis.

13 MS. FRANZETTI: Can you explain what you mean
14 by that?

15 MR. FREVERT: I mean a DO standard is 6 in
16 the actual water quality, the DO never drops below
17 7. That is a high quality. You have got an
18 increment of reserve of similar capacity above the
19 absolute standard, which is the floor. If the
20 standard for iron is 1 and your existing water
21 chemistry is 1/10, that is a high quality water
22 from the perspective of its iron loading.

23 MS. FRANZETTI: You said you would rely
24 primarily on chemical standards. Anything else

L.A. REPORTING (312) 419-9292

120

1 that is going to be considered in identifying a
2 high quality water?

3 MR. FREVERT: I can think of examples, for

4 instance, in the Corps Section 404 permit program
5 where a water body may have a specially high
6 quality habitat where there is a construction
7 activity that threatens to diminish that habitat.
8 It would be subject to that kind of review.

9 MS. FRANZETTI: Will the Agency look at as a
10 part of the determination whether a water body is
11 a high quality water, whether any a remaining
12 assimilative capacity exists in the water body?

13 MR. FREVERT: I think, indeed, that is --
14 that is inherently part of the review to achieve
15 the water quality standards themselves.

16 MS. FRANZETTI: Taking your other example of
17 a 7 versus 6 DO comparison, does the 7 indicate
18 versus the 6 that there is remaining a simulative
19 capacity?

20 MR. FREVERT: To the extent that we have the
21 information to define those conditions that truly
22 exist at that time, yes. Other issues, we will do
23 a review, basic water quality standards review,
24 against some theoretical worse case conditions

L.A. REPORTING (312) 419-9292

121

1 like 7 Q 10 some estimates of the water chemistry
2 for that. In that case we may not know exactly
3 what the ambient water quality of the variation in
4 the ambient water variation is, but we can assure

5 a discharge limitation that will not cause a
6 violation during those extreme circumstances.

7 So that is the way we can meet water
8 quality standards without absolutely knowing the
9 amount of residual of similar capacity for any
10 particular parameter that exists on a day in and
11 day out basis.

12 Similar capacity is going to vary
13 almost continuously or constantly.

14 MS. FRANZETTI: So given your responses, if I
15 am a member of the regulated community and I may
16 think I am dealing with or facing an increase in
17 loading, and given that the demonstration I have
18 to make is going to depend on what type of water
19 body I am discharging to, how does the Agency
20 contemplate a permittee, for example, in existing
21 NPDES permittees who got a proposed increased
22 loading, how do they figure out what type of water
23 body they are for antidegradation purposes
24 discharging to?

L.A. REPORTING (312) 419-9292

122

1 MR. FREVERT: I would assume when they
2 identify the outfall location in their permit
3 application they know what water body they are
4 going to.

5 MS. FRANZETTI: But, Toby, in my permit

6 application I have also got to make my antideg
7 showing, so at that point I need to know what type
8 of water I am going to. That is why I am asking
9 the question. How do you --

10 MR. FREVERT: Not what water body, but what
11 the existing conditions are.

12 MS. FRANZETTI: Is it existing use? Is it
13 high quality water? I think, you know, an ORW I
14 think that I understand because that has to go
15 through a public notice proceeding and there will
16 be a published list. But as between, do I simply
17 need to show I am going to maintain and protect
18 existing uses or am I thrown into the stricter
19 high quality waters demonstration at the time I
20 make my permit application, how am I going -- how
21 am I supposed to know that?

22 MR. FREVERT: Well, there are a number of
23 ways of doing it. To begin with, I think you
24 should assume you are going to be in a high

L.A. REPORTING (312) 419-9292

123

1 quality water. And I would think perhaps the only
2 waters in the state of Illinois that are not going
3 to be considered high quality are those that are
4 already impaired.

5 MS. FRANZETTI: So the provision in here on
6 existing uses that you have to make a showing to

7 protect existing uses and that is it, you are
8 saying that is really intended to only imply to
9 impaired waters?

10 MR. FREVERT: That is my understanding of
11 federal requirements and that is our proposal,
12 yes.

13 MS. FRANZETTI: Let's go back to my question.

14 MR. FREVERT: There is not much in
15 population. It is either impaired or it is high
16 quality. There might be one that is absolutely on
17 the line that doesn't dip one way or the other,
18 but that is theoretical. Most of our waters in
19 Illinois are of high quality for some of the
20 regulated parameters, probably all of them.

21 For instance, I will try to give you a
22 real world example to help you out. We may be in
23 a water body that is violating ammonia standards.
24 At the same time it may have, I don't know, a

L.A. REPORTING (312) 419-9292

124

1 cooper standard that has a very low copper
2 concentration, very high quality. Just because we
3 have an ammonia problem doesn't mean we are going
4 to allow the copper loading to come up after we
5 address the ammonia problem.

6 So the intent of this, both our
7 proposal and I believe the federal law, is we are

8 trying to minimize the amount of incremental
9 additional pollution coming into the resources
10 consistent with the goals of the Clean Water Act,
11 recognizing that that absolutely is not going to
12 work, but there needs to be a process to recognize
13 and allow society to continue functioning. How
14 you justify that you are, indeed, deteriorating
15 the water chemistry incrementally every time you
16 add loads and how do you -- how do you allocate
17 that resource in such a fashion that the public
18 has access to understand and provide input on that
19 decision.

20 The bottom line to your question is I
21 think you can assume safely every water in the
22 state of Illinois will fall into the high quality
23 category.

24 MS. FRANZETTI: Except for those that are on

L.A. REPORTING (312) 419-9292

125

1 the 303(d) list?

2 MR. FREVERT: Except for those that are
3 impaired, whether they are on the 303(d) list or
4 not. Those that have a nonimpairment, they are
5 not meeting some borderline requirement.

6 MS. FRANZETTI: Is the intention that the
7 antidegradation review will be done and determined
8 based on a use-driven review for the water or on a

9 parameter-by-parameter basis?

10 MR. FREVERT: The intent of the program is
11 that specific water quality standards are
12 established and defined and set to protect
13 specific designated uses, which must include all
14 known existing uses. And then antidegradation is
15 another tier of the standards program placed over
16 and above that to show that you only move down
17 towards that floor when it is justifiable.

18 MS. FRANZETTI: Let me put my question a
19 different way because I think it wasn't clear. If
20 the water body I am discharging to is listed as
21 impaired for ammonia and for nothing else, and
22 that is certainly possible, right, that you are
23 just listed based upon a single impairment?

24 MR. FREVERT: That's correct.

L.A. REPORTING (312) 419-9292

126

1 MS. FRANZETTI: If my increase loading is
2 only for ammonia, no other parameters, am I just
3 in a Tier 1 review under the proposed regs where I
4 just have to show all protected existing uses?

5 MR. FREVERT: In that scenario you have to
6 show you are going to be able to avoid any
7 contribution to that existing ammonia violation.
8 So if you can discharge ammonia at the water
9 quality standard, you can get a permit.

10 MS. FRANZETTI: I pass antidegradation with
11 you, correct?

12 MR. FREVERT: Yes. If you are asking for an
13 ammonia discharge, some increment higher than the
14 water quality standard, it would be prohibited by
15 the standard. It is not an antidegradation
16 review. It is a basic water quality.

17 MS. FRANZETTI: I mean to -- I am sorry. I
18 didn't mean to cut you off. In the interest of
19 saving time, I wanted to get clarification on the
20 point where your regulatory proposal talks about
21 any increase in loading, not whether or not it is
22 above the water quality standard or not. So I may
23 be going above my previous loading on ammonia to
24 an impaired stream and I am trying to determine

L.A. REPORTING (312) 419-9292

127

1 the showing I have to make that I don't violate
2 water quality standards.

3 MR. FREVERT: In an impaired water body,
4 impaired because of ammonia, if you propose an
5 ammonia increase that is still at or below the
6 water quality standard, that is the extent of the
7 antidegradation test in that example.

8 MS. FRANZETTI: Let me take an example that
9 moves through high quality water. If I am
10 discharging -- let's stay with ammonia at a level

11 -- I have been discharging it at a level well
12 below the ambient ammonia concentration in that
13 high quality water, I am proposing an increase
14 that is still well below the ambient water
15 quality, the ambient concentration for ammonia in
16 that water body, will I trigger antidegradation
17 review?

18 MR. FREVERT: Yes.

19 MS. FRANZETTI: And why is that?

20 MR. FREVERT: Because you are proposing an
21 increased loading.

22 MS. FRANZETTI: That is all that matters
23 under these proposed regulations?

24 MR. FREVERT: You are talking about a

L.A. REPORTING (312) 419-9292

128

1 scenario where you can increase loading and the
2 net result is the instream concentration would
3 still be less?

4 MS. FRANZETTI: Correct.

5 MR. FREVERT: Okay.

6 MS. FRANZETTI: Is your answer still the
7 same?

8 MR. FREVERT: Well, I think in this case the
9 review would indicate this is an environmentally
10 beneficial thing and you would get your permit.

11 MS. FRANZETTI: But I would still have to go

12 through an antidegradation review?

13 MR. FREVERT: We would still have to document
14 in the permit fact sheet the rationale for our
15 allowing that increment loading to be discharged.
16 You probably wouldn't have to do anything.

17 But we would have the obligation to
18 explain our rationale on how we concluded that was
19 a permissible loading increase.

20 MS. FRANZETTI: Let's stay with this concept
21 of lowering of water quality. The federal
22 regulation in 40 CFR 131.12(a)(2) uses the
23 language lower water quality. And under the
24 federal regulations, is it your understanding that

L.A. REPORTING (312) 419-9292

129

1 an increase in loading has to cause a lowering of
2 water quality before antidegradation requirements
3 apply?

4 MR. FREVERT: Increase in loading has to --

5 MS. FRANZETTI: Under the federal
6 regulations, your testimony talks about
7 paralleling the federal regulation and I am trying
8 to figure out where you do and where you don't.

9 MR. FREVERT: Fair enough.

10 MS. FRANZETTI: So under the federal
11 regulations, does an increase in loading have to
12 cause a lowering of water quality before the

13 antidegradation requirements apply?

14 MR. FREVERT: I am not sure I can
15 specifically point to the language you are
16 referring to now and give you an answer. I think
17 the issue you are probably getting at is how do we
18 define the lowering of water quality.

19 MS. FRANZETTI: No. I think that is a
20 separate issue. What I am trying to understand is
21 is there, in fact, a two-step process that you
22 have to go through before you trigger the
23 application of the antidegradation requirements,
24 step one being you do have an actual proposed

L.A. REPORTING (312) 419-9292

130

1 increase in loading, but then a necessary step two
2 has a condition precedent to it applying is that
3 that proposed increase in loading has actually got
4 to lower water quality before I would have to make
5 an antidegradation showing.

6 MR. FREVERT: Okay.

7 MS. FRANZETTI: And I am confused both by the
8 language of the proposal and some of the testimony
9 today. It seems you might be saying, no, there is
10 not that two-step process; in fact, we are going
11 to just deem any increase in loading to lower
12 water quality, and so you -- if you got an
13 increase in loading, that is it, that is the sole

14 trigger and now you have got to make the
15 demonstration in your permit application.

16 MR. FREVERT: I know where you are going now.
17 And we dealt with that to some extent in the
18 workgroup and we are -- and I thought I did an
19 adequate job of explaining that there was some
20 complexities there, and I didn't know that the
21 benefit of doing that or not doing that warranted
22 much of anything other than it created a second
23 opportunity or requirement for the Agency to make
24 a decision, which perhaps is even more difficult

L.A. REPORTING (312) 419-9292

131

1 than a lot of the other decisions we have to make.
2 But I tried to make it clear at the onset, to
3 avoid dealing with that issue, we stayed -- we are
4 proposing to stay with existing policy and
5 existing language, water whose existing quality is
6 better than the existing standards. It is a
7 standard that currently exists. And we propose to
8 retain that rather than come up with some other
9 definition that would be perceived as a
10 backsliding on existing state standards.

11 It is possible that some people view
12 that language and that proposal as somewhat more
13 rigorous than the federal criteria. We can debate
14 that if you want. My point is I tried to avoid

15 that debate and stay with existing state policy on
16 that issue.

17 MS. FRANZETTI: I really am trying not to
18 debate, but rather I want to confirm or clarify
19 what the intended meaning is of your proposed
20 rules.

21 MR. FREVERT: The intended meaning is if you
22 ask for a load increase, it is potentially going
23 to move you closer to the water quality standards
24 and minimize the amount of increment that you have

L.A. REPORTING (312) 419-9292

132

1 better than water quality standards. That is that
2 a piece of that public resource, the similar
3 capacity of the state's water resource that should
4 be subject to a conscious decision of whether or
5 not you want to do that through an antidegradation
6 demonstration and a public participation process.

7 MS. FRANZETTI: The proposed regs do use the
8 phrase more than once lowering of water quality.
9 And I am -- I need to know, I am asking what is
10 the meaning of that. Why is that language there?
11 Or does it really have no meaning in the proposed
12 regulations, all you need to look at is any
13 proposed increase in loading?

14 MR. FREVERT: The proposed increase in
15 loading in our proposal will trigger some

16 conscious thought on the part of the Agency. And
17 if that consideration or that review and that
18 determination concludes that the actual instream
19 concentration is going to be better than worse,
20 then we are not going to carry any demonstration
21 beyond that and we are not going to ask the
22 applicants for any information beyond that. But
23 we will make that decision, and that is -- that is
24 a form of an antidegradation review in my mind.

L.A. REPORTING (312) 419-9292

133

1 MS. FRANZETTI: Would the Agency be
2 supportive of a proposed regulation that allows
3 for that decision to be made first before a
4 permittee would need to go ahead and make the
5 showings regarding reasonable alternatives and
6 social and economic benefit?

7 MR. FREVERT: In circumstances where that can
8 be demonstrated relatively easily and
9 straightforwardly and conclusively, yes, those are
10 the kinds of considerations we are certainly still
11 receptive to. What we are trying to avoid is a
12 lot of significance reviews or applicability
13 reviews that merely require additional steps and
14 additional resource commitments in making the
15 ultimate determination of whether or not you are
16 diminishing the public resource without public

17 input.

18 So, yes. And we struggled with that.
19 There were several attempts, I believe, to do that
20 during the workgroup session. And when the dust
21 settled, our judgment was that those things would
22 actually be more burdensome, more time-consuming
23 than doing the abbreviated review that we thought
24 would be in in order for those particular

L.A. REPORTING (312) 419-9292

134

1 examples.

2 MS. FRANZETTI: And is the burdensome issue
3 you are referring to on the permitting?

4 MR. FREVERT: It would be both. I think some
5 of those -- some of the proposed exemption
6 language or avoidance of demonstration language
7 that was presented to us looked to me like there
8 could be circumstances where that would actually
9 double or triple the workload of my people and
10 your people. Then when we are through with that,
11 all we have done now is made a decision whether or
12 not to do a demonstration without having to do a
13 demonstration. So that is what we have been
14 trying to avoid.

15 I hopefully been on record saying
16 additional ideas that come in and transparent
17 enough that everybody knows how it works, we are

18 still receptive to that.

19 MS. FRANZETTI: But you agree there will be
20 circumstances where the permittee without much of
21 any group can make the showing that they don't
22 lower water quality and it's beneficial -- and/or
23 it is beneficial to the receiving water, and you
24 can review that very quickly? That in those

L.A. REPORTING (312) 419-9292

135

1 instances you are not opposed to allowing for that
2 regulatory approach to resolving the
3 antidegradation issue?

4 MR. FREVERT: I think the distinction is I
5 would describe what you just said as actually
6 doing it and completing the review rather than
7 demonstrating an exemption from it.

8 MS. FRANZETTI: okay.

9 MR. FREVERT: Maybe this is semantics. I
10 think the same kinds of considerations you are
11 intending on -- and you call it exemption. I call
12 it a completion of a review.

13 MS. FRANZETTI: I didn't mean to call it an
14 exemption.

15 MR. FREVERT: Okay.

16 MS. FRANZETTI: If we can go back to the
17 issue of whether the water body exceeds -- the
18 quality of the water body exceeds the established

19 standards of this part language that is in
20 proposed 302.105(c)(1), what does the reference to
21 established standards of this part refer to?

22 MR. FREVERT: The water quality standards of
23 subtitle (c).

24 MS. FRANZETTI: So that would certainly

L.A. REPORTING (312) 419-9292

136

1 include general use water quality standards, for
2 example?

3 MR. FREVERT: Yes.

4 MS. FRANZETTI: Would it also include subpart
5 (f) criteria?

6 MR. FREVERT: Yes.

7 MS. FRANZETTI: Even though those don't go
8 through public notice and rulemaking?

9 MR. FREVERT: Subpart (f) is a -- it is a
10 water quality standard. It has gone through a
11 hearing adoption process. It is a standard.

12 MS. FRANZETTI: Well, I think that there is
13 board opinion that it is a criteria, not a
14 standard.

15 MR. FREVERT: Perhaps a number that we
16 determined from that standard for use in a permit
17 is a criteria. But subpart (f) is a narrative
18 standard to specify how chemically safe numbers
19 are to be derived in the absence of a numeric

20 standard. The point being, we don't have a
21 published numeric standard in the state of
22 Illinois for dioxin, I don't believe. But that
23 doesn't mean that dioxin would be -- that somebody
24 had a waste water source that had dioxin in it

L.A. REPORTING (312) 419-9292

137

1 that it would automatically be relieved at the
2 burden to look at antidegradation.

3 There are a whole plethora of chemical
4 pollutants that we are regulating now that we
5 don't have numeric standards for, and
6 antidegradation will apply to them the same as it
7 will the numeric standards.

8 MS. FRANZETTI: The last point, with respect
9 to the language in the Agency rules Part 354 and
10 it is in 101 and it is 102 and 103 of those
11 proposed agency rules, where you refer to an
12 increased loading that necessitates the issuance
13 of a new NPDES permit or recertification of an
14 existing permit, is that the same intended meaning
15 -- it seems that it is from your prior testimony
16 today -- as the language used in the Board --
17 proposed Board rule of an increased loading
18 subject to an NPDES permit?

19 MR. FREVERT: I believe it is, but I am not
20 sure I fully followed your question.

21 MS. FRANZETTI: Well, my question is there is
22 a difference in the language used about when an
23 increase in loading does trigger antidegradation
24 as between the Board rule language and the Agency

L.A. REPORTING (312) 419-9292

138

1 rule language. The Board rule language just says
2 an increase loading subject to an NPDES permit.
3 You pointed out in your testimony today that if
4 you go up from your existing loading but you still
5 stay within your permit limits, then you don't
6 trigger antidegradation review. And that seems to
7 be more clearly conveyed in the Agency rule
8 language. I just want to clarify that the intent
9 of the Board rule proposed language, albeit
10 different from the Agency rule, is the same.

11 MR. FREVERT: That's correct. The intent was
12 the same. However, I think there is a conscious
13 difference in writing style in that our procedures
14 drafted partially as sort of a road map or a
15 helpful manual to applicants and their consulting
16 engineers and the other design staff, and we may
17 have deviated from the actual legal language a
18 little more intentionally in some places to make
19 it a little more understandable to people. But
20 there is no intent to change the legal substance.
21 It is more a matter of trying to be a little more

22 user friendly.

23 MS. FRANZETTI: That is all the questions I
24 have.

L.A. REPORTING (312) 419-9292

139

1 HEARING OFFICER TIPSORD: Thank you,
2 Ms. Franzetti. Anyone else?

3 MR. ETTINGER: I have a few. Going back to
4 your original filing with regard to this, I think
5 it is part of the gold book, Exhibit A. If you
6 look at page 411 within Exhibit A, it gives a
7 series of examples of types of development and the
8 area where there has been an ONRW designation that
9 would still be possible even given that
10 designation. Do you anticipate that the sorts of
11 development in the area of a stream that had been
12 designated ONRW that is -- are judged to be
13 permissible in this gold book would be permissible
14 under your rule?

15 MR. FREVERT: Yes. Certainly it was not our
16 intent to make this more restrictive than our
17 perception of the federal requirements.

18 MR. ETTINGER: So there would be some types
19 of development that would be possible within the
20 vicinity of any water that had been designated
21 ORW?

22 MR. FREVERT: A relatively small amount of

23 specific exemptions, I believe, would apply. And
24 there is some short-term and temporary criteria

L.A. REPORTING (312) 419-9292

140

1 that apply around that.

2 Yes, there would be a few things
3 allowed. But relative to other things, a lot of
4 other things would be precluded.

5 MR. ETTINGER: Now, turning to the rule, I am
6 looking at -- actually, I am looking at your --
7 the draft agency rule that is part of Exhibit B.
8 Just looking now at Section 354.103, it talks
9 about any increase in pollutant loading that
10 necessitates the issuance of a new NPDES permit.
11 Do you have a rule somewhere that specifies or
12 sets forth when a new NPDES permit should be
13 issued or when that is necessary?

14 MR. FREVERT: Are you saying what types of
15 activities would trigger a modification and what
16 the types of activity changes are?

17 MR. ETTINGER: Yes. What rule is that?

18 MR. FREVERT: That is the Tom McSwiggin rule.
19 I will let Tom answer that.

20 MR. McSWIGGIN: Generally, a new NPDES
21 permit, that term is probably -- if you are
22 looking at the NPDES relations versus practical
23 use, you are probably going to find yourself in a

24 little bit of difficulty trying to understand what

L.A. REPORTING (312) 419-9292

141

1 that means. Perhaps if you got an existing permit
2 you are going to increase your load, the proper
3 term should have been modify permit because you
4 need to increase, in other words, change the
5 envelope described by the permit to accommodate
6 the increase in the load.

7 MR. ETTINGER: Actually, my question was more
8 simple minded. Just looking at this rule, it
9 talks about any increase in pollutant loading that
10 necessitates the issuance of a new NPDES permit
11 modification or existing NPDES permit or involves
12 an activity such as agency certification. Is
13 there any rule written down that sets forth when
14 it is necessary to have a modification in a new
15 permit?

16 MR. McSWIGGIN: No. There is no rule that
17 says when you must modify or issue a new permit.

18 MR. ETTINGER: Do you have an understanding
19 as to when that is necessary?

20 MR. McSWIGGIN: General practice is to modify
21 unless there is something that is really
22 significant changes in permit that cause us to go
23 back and start over.

24 MR. ETTINGER: Just reading now 302.105(b)

1 under outstanding resource waters, and then
2 (b) (2) (a) speaks of any activity listed in
3 subsection (b) (1) for proposed increase in
4 pollutant loading must also meet the following
5 requirements (a), all existing uses of the water
6 will be fully protected. That applies across the
7 board for ORWs that all existing uses will be
8 protected in existing ONRWs?

9 MR. FREVERT: Yes.

10 MR. ETTINGER: Looking now at subsection (d)
11 of this rule where it talks about activities not
12 subject to an antidegradation demonstration, is it
13 intended that activities will be subject to an
14 antidegradation demonstration if existing uses
15 will be effected?

16 MR. FREVERT: I am not sure I understand the
17 question, if existing uses will be effected.

18 MR. ETTINGER: Let me give -- this is perhaps
19 a better example. One of the activities not
20 subject to an antidegradation demonstration are
21 short-term temporary, i.e., weeks or months,
22 lowering of water quality. Assuming I was
23 proposing a short-term lowering of water quality
24 that was, for instance, running a large amount

1 of cyanide through the system, but it would be
2 washed through quickly after killing everything
3 there, I presume that that would still -- that
4 that would not fall within this exception for
5 antidegradation.

6 MR. FREVERT: Well, the main reason it
7 wouldn't fall within the exception is we wouldn't
8 let you do it.

9 MR. ETTINGER: I appreciate that. But my
10 point is if I were to do something which would
11 have an effect on an existing use, that would not
12 fall within this set of exceptions for activities
13 not subject to an antidegradation demonstration?

14 MR. FREVERT: You still have to meet water
15 quality standards, which is generally viewed as
16 protective of those uses. It is a short-term and
17 temporary thing within those bounds, you can't go
18 to the point that you actually preclude those uses
19 by violating the water quality standards. But
20 that is the intent of the language here. And this
21 language is taken directly word for word from
22 federal guidance. And I believe there is some
23 discussion at some other documents about some
24 examples of that.

1 That is the general inclination. You
2 can have some short-term, temporary incremental
3 loading as long as you don't violate water quality
4 standards without a review if that is short-term
5 and temporary and it goes away after time.

6 MR. ETTINGER: And does not affect existing
7 uses?

8 MR. FREVERT: Right. And I believe inherent
9 to the water quality standards for the most part
10 is what I believe we are going to use, it is a
11 demonstration that it hasn't affected existing
12 water uses. Unless there is some information or
13 reason to believe otherwise. And then I think the
14 debate would take on a different tone and
15 discussion of that degradation, it would take on a
16 tone of pollution compliance and orientation.

17 MR. ETTINGER: I have a few questions, sort
18 of practical questions regarding the proposed rule
19 on petitions for outstanding resource waters.
20 Under Section 106.992, there is a list of persons
21 that are to be given notice of the petition. The
22 first line here says "any person may submit a
23 written protection for the adoption, amendment or
24 repeal of an ORW." Is it anticipated that the

1 same people would get the notice of a repeal
2 petition as who receive a notice of a petition to
3 designate an ORW?

4 MR. FREVERT: One more time, what was the
5 question?

6 MR. ETTINGER: Would the same list of people
7 get a copy of the petition for repeal as get a
8 petition to designate an ORW?

9 MR. FREVERT: I don't know that I can give
10 you a direct answer. I will have to consult with
11 Connie on that. Connie, do you have an answer to
12 that?

13 MS. TONSOR: Yes.

14 MR. ETTINGER: And it is possible to repeal
15 an ORW, obviously, under this rule; is that
16 correct?

17 MS. TONSOR: True.

18 MR. ETTINGER: And now you also talk about
19 the notice has to be given to current NPDES permit
20 holders. I assume that is list of those that
21 someone who wanted to petition to designate an ORW
22 could obtain from IEPA; is that true?

23 MR. FREVERT: I believe that's correct, yes.

24 MR. ETTINGER: Would there be a way to get a

1 list of NPDES permit applicants from the IEPA?

2 MR. FREVERT: People that don't have a permit
3 but have an active application, I would think you
4 can get that information from the public section,
5 yes.

6 MR. ETTINGER: How would I go about doing
7 that?

8 MR. FREVERT: I would call Tom McSwiggin.
9 They have a database and they would be happy to
10 honor those requests.

11 HEARING OFFICER TIPSORD: Could I ask a quick
12 follow-up? Is it the Agency's policy to require
13 those as a FOIA, Freedom of Information Act,
14 request, or do you just do it generally?

15 MR. FREVERT: We certainly would recognize
16 FOIAs, but we try to accommodate those things
17 without those burdens.

18 HEARING OFFICER TIPSORD: Thank you.

19 MR. ETTINGER: The last phrase of the list of
20 people to be notified says "and to other persons
21 as required by law." Do you know who those other
22 persons who we might be required to give notice to
23 are?

24 MR. FREVERT: I believe -- and Connie can

1 correct me if I am wrong. But I believe the way
2 we drafted this is we took existing language from

3 the Board's procedural rules as a starting point
4 and said your existing procedures for this type of
5 activity seems to be at the right level of rigger.
6 I don't believe we are the original draftsmen of
7 that language. It means whatever the Board
8 intended it to mean.

9 MR. ETTINGER: Turning now to (c) on the -- I
10 am sorry, (e), it refers to current verifiable
11 information. What is intended by current
12 verifiable information here?

13 HEARING OFFICER TIPSORD: Excuse me,
14 Mr. Ettinger, could you be more specific? Are you
15 talking about 106.994(e) or are you back in 302?

16 MR. ETTINGER: I am sorry, 106.994(e), that's
17 correct.

18 HEARING OFFICER TIPSORD: Thank you.

19 MR. FREVERT: I think the intent there was
20 that you ought to -- the petition ought to include
21 some level of assurance to the Board that the
22 information you are submitting is, indeed,
23 representative of existing conditions.

24 MR. ETTINGER: Are you intending that it be

L.A. REPORTING (312) 419-9292

148

1 verified in some particular way?

2 MR. FREVERT: Some way it can be dealt with,
3 either factually documented or corroborated by

4 other parties. It is merely a matter of something
5 the Board can rely on as accurate enough to move
6 forward.

7 MR. ETTINGER: It then talks about verifiable
8 impact to the regional economy. Do you have any
9 idea how a citizen group would determine or
10 develop verifiable information as to the impacts
11 on the regional committee of an ORW designation?

12 MR. FREVERT: Again, I think that would vary
13 in the specific application. But in other parts
14 of the country that I am familiar with, where they
15 have attempted to do this, it is almost
16 exclusively on publicly-owned property. It is
17 pretty easy to verify that there would be no
18 commercial or industrial activity in jeopardy
19 there that you would need to quantify, to what
20 extent, are we taking away somebody's ability to
21 make a living or are we reducing property values,
22 things of that nature.

23 So the level of effort to do that is
24 going to vary depending on the water body you are

L.A. REPORTING (312) 419-9292

149

1 talking about and the water shed and the land use
2 within it. I would think that would be a
3 relatively simple thing to document. If you are
4 talking about a water body whose entire drainage

5 basin is in some form of public ownership and so
6 two or three public bodies, I think you need to
7 determine that. If it is three blocks west of
8 here in an urban area with all sorts of property
9 owners and all sorts of potential commercial
10 activities, obviously, that is a lot different.
11 We felt it was necessary in circumstances like
12 that if you are proposing a classification that
13 has fairly strict ramifications that you go to a
14 little more effort to show who might come up on
15 the short end of that classification and to what
16 extent that is or is not the case.

17 MR. ETTINGER: Then it talks about in (f)
18 under proposed 106.994 "state in describing the
19 existing and anticipated uses of specific surface
20 -- specific surface water or segment thereof of
21 which the ORW designation is requested." How
22 would one in a citizen group determine the
23 anticipated uses of the water?

24 MR. FREVERT: Well, I think typically some of

L.A. REPORTING (312) 419-9292

150

1 it is going to be things like agricultural
2 drainage, potential navigational issues,
3 obviously, aquatic resource and water supply and
4 the other protective use classifications, extent
5 to which that area is designated and managed and

6 protected as a preservation area or a natural
7 area, something like that. Those are the types of
8 land use issues and water use issues we
9 anticipated that you sort of need to bring in as a
10 starting point to open the dialogue.

11 It is kind of like characterizing
12 there. I think the national flow from that, if --
13 you know, if one of the primary uses of that water
14 body is going to be agricultural drainage, then
15 one would have to probably give a little more
16 information on the nature of that drainage and to
17 what extent it either does or does not allow for
18 the outstanding uses that we are trying to
19 acknowledge and do they really exist and to what
20 extent are they being impacted or impaired by some
21 of these activities.

22 MR. ETTINGER: I got a few more questions to
23 sort of follow up on earlier questions posed
24 today. One related to Region 5 objections to

L.A. REPORTING (312) 419-9292

151

1 permits that Ms. Hodge asked about. Are you aware
2 of any agreements or understandings with Region 5
3 as to how many permits they will review in a year
4 or under what circumstances they will review an
5 IEPA issued permit?

6 MR. FREVERT: Yes, I am, but Tom is probably

7 more aware of that. I will let him answer the
8 question.

9 MR. McSWIGGIN: Because of resource
10 limitations on the part of the USEPA, they
11 identify each federal fiscal year out of a list we
12 provide them of the permits that are possibly to
13 be considered in the next year, a list of about 16
14 municipal, 16 industrial permits for this year.
15 This list has varied from year to year as
16 resources have changed.

17 They are free to add to that list at
18 any time if some interest is brought to their
19 attention. Perhaps one of the latest examples is
20 Black Beauty Coal was added to the list because of
21 letters they received from the public. So there
22 is nothing really solid on granite, stone, so to
23 speak. At the beginning of the year, it is a
24 little bit more flexible than that.

L.A. REPORTING (312) 419-9292

152

1 MR. ETTINGER: It is in the ballpark of three
2 dozen a year?

3 MR. McSWIGGIN: Yes.

4 MR. ETTINGER: There was also a question that
5 fascinated me relating to discharges now that are
6 not listed in the permit and what would happen if
7 there was an increase in the discharge of some

8 parameter that wasn't currently limited in the
9 permit. I guess my question is what if the
10 current discharge is illegal, how would that
11 affect the antidegradation analysis?

12 MR. FREVERT: I suppose it would depend on
13 the basis for the illegality. Antidegradation,
14 the whole concept is sort of a prior approval,
15 review and authorization. To the extent that
16 something that is already been done illegally
17 would be subject to an after-the-fact
18 antidegradation review, I am not sure what would
19 be accomplished by that. I would think more
20 likely it would be some kind of an enforcement or
21 compliance-oriented activity that would address
22 that issue. And to the extent it shouldn't have
23 happened to begin with, it would be ordered to
24 correct it or cease that without that function.

L.A. REPORTING (312) 419-9292

153

1 And if that compliance resolution allowed that
2 load to stay in place, then I believe the
3 considerations that were intended under the
4 antidegradation would have been addressed in that
5 compliance resolution.

6 MR. ETTINGER: So if they are illegally
7 discharging for years, they won't have to do an
8 antidegradation analysis, but they will go to

9 prison?

10 MR. FREVERT: I don't know why I would want
11 to spend a lot of time deciding whether to
12 authorize something that already happened. I
13 guess I would rather spend my time deciding what
14 to do about it and whether they should go to
15 prison.

16 MR. ETTINGER: There were some questions too
17 on what the criteria would be of a review by the
18 Pollution Control Board of a decision that an
19 applicant had failed to -- it failed to make a
20 showing or failed to submit the documents
21 necessary under a -- for antidegradation
22 proceeding -- or I am sorry, antidegradation
23 analysis that I believe Mr. Harrington asked. And
24 I guess my question is whether the Board in

L.A. REPORTING (312) 419-9292

154

1 reviewing that would use the criteria that are set
2 forth by the proposed rule in 302.105(c) as to
3 whether this demonstration had been made.

4 MR. FREVERT: You are asking me to speculate
5 on what the Board may or may not rely on?

6 MR. ETTINGER: No, I am asking you what this
7 rule means so that I guess there was -- the
8 question was that -- there was a question as to
9 whether under the proposed rule the Board would

10 have criteria to look at to determine whether or
11 not the permit should have been denied or not.
12 And my question is is whether under the proposed
13 rule these lists of things that the applicant
14 should be -- should demonstrate would not set
15 forth this criteria.

16 MR. FREVERT: I would certainly think so.
17 That is our intent, to layout the standard in the
18 substance of that standard. I think the debate
19 got at is how much specificity, if any specificity
20 beyond that.

21 MR. ETTINGER: So if hypothetically an
22 applicant just refused to supply the information
23 required by 302.105(c)(2)(b)(i) here, then the
24 Board would be able to determine whether or not

L.A. REPORTING (312) 419-9292

155

1 they had, in fact, made that demonstration or not?

2 MR. FREVERT: I think that is correct. But I
3 guess I would like to change that a little and get
4 back to what I think is an earlier theme that I
5 believe the real fundamental burden here is that
6 the Agency make a determination to the extent it
7 has been complied with. And we have indicated a
8 capability and even a desire to make that
9 determination. And we have proper information,
10 whether or not that information was contained in a

11 specific demonstration from the applicant or we
12 got it elsewhere.

13 So I would hope if there are any of our
14 determinations that are contested, it is contested
15 on the merits of our determination, not whether or
16 not the information we relied upon came in a
17 stand-alone demonstration document or it was
18 information we gathered from other sources.

19 MR. ETTINGER: But to get back to the
20 hypothetical that was posed, let's say the Agency
21 decided that the demonstration as to one of these
22 things was not made and then the applicant appeals
23 to the Board, it would then be for the Board to
24 determine based on the list of things that are set

L.A. REPORTING (312) 419-9292

156

1 forth here whether, in fact, the demonstration had
2 been made or not?

3 MR. FREVERT: In that example, if the
4 applicant claimed that they had provided -- that
5 there is adequate information for us to determine
6 that the standard had been complied with and we
7 have failed to make that determination, yes, I
8 think they could appeal that.

9 MR. ETTINGER: One last question. Are you
10 aware of circumstances or do you believe there are
11 circumstances wherein a change in the flow regime

12 of a stream could affect existing uses or degrade
13 water quality?

14 MR. FREVERT: Such as building a reservoir?

15 MR. ETTINGER: Such as building a reservoir.

16 MR. FREVERT: Sure, yes.

17 MR. ETTINGER: Or pumping large amounts of
18 ground water and putting it into a flow stream?

19 MR. FREVERT: Yes, I think those types of
20 activities have some potential degrading effect,
21 and I think that is one of the significant things
22 we look at in the course of our routine 401
23 certification analysis.

24 MR. ETTINGER: Thank you.

L.A. REPORTING (312) 419-9292

157

1 HEARING OFFICER TIPSORD: Are there any other
2 questions? Mr. Harrington?

3 MR. HARRINGTON: Some follow up in questions
4 that were just asked.

5 HEARING OFFICER TIPSORD: Just a second.
6 Mr. Ettinger, did you have something?

7 MR. ETTINGER: I thought we were done with
8 Toby. I wanted to talk to you about where we go
9 from here, but it seems that Mr. Harrington has
10 more questions.

11 HEARING OFFICER TIPSORD: Let's go off the
12 record.

13 (Discussion had off the
14 record.)
15 (Short recess taken.)
16 (Whereupon Lenore Beyer-Clow,
17 Mr. Jerry Paulson, Mr. Jack
18 Darin, Mr. Edward Michael,
19 Ms. Cynthia Skrukrud and
20 Mr. Jeffrey Swano were sworn
21 into the record.)

22 MR. ETTINGER: Please state your name for the
23 record.

24 MR. Swano: My name is Jeffrey S. Swano.

L.A. REPORTING (312) 419-9292

158

1 MR. ETTINGER: And you know this is the
2 prefiled testimony of Jeffrey S. Swano that you
3 prepared for this proceeding?

4 MR. Swano: Yes, it is.

5 MR. ETTINGER: Any questions?

6 HEARING OFFICER TIPSORD: Okay. At this time
7 would you like to move that to be admitted an
8 exhibit?

9 MR. ETTINGER: I hereby move his prefiled
10 testimony be admitted.

11 HEARING OFFICER TIPSORD: Any objection?
12 Seeing none, we will move Jeffrey Swano's
13 testimony as Exhibit No. 2. And he is ready for

14 any questions.

15 (Whereupon Exhibit No. 2 was
16 marked into the record.)

17 HEARING OFFICER TIPSORD: Are there any
18 questions for Mr. Swano? He is executive director
19 of Salt Creek Water Shed network. Any questions?
20 Seeing none, thank you very much.

21 MR. ETTINGER: I think Lenore and Jerry want
22 to get in. I have two witnesses here on one
23 testimony. But why don't you state your names?

24 MS. CLOW: I am Lenore Beyer-Clow, the

L.A. REPORTING (312) 419-9292

159

1 executive defender of the McHenry County Defender.

2 MR. PAULSON: Jerry Paulson, the chairman of
3 the McHenry County Water Resources Committee and
4 the president of the Kishwaukee River Ecosystem
5 Partnership.

6 MR. ETTINGER: And did you prepare this
7 prefiled testimony as Lenore Beyer-Clow and Jerry
8 Paulson behalf of the McHenry County Defenders?

9 MS. CLOW: Yes.

10 MR. ETTINGER: I hereby move the prefiled
11 testimony of Lenore Beyer-Clow and Jerry Paulson
12 on behalf of McHenry County Defenders into
13 evidence.

14 HEARING OFFICER TIPSORD: Is there any

15 objection? Seeing none, we will mark that as
16 Exhibit No. 3.

17 (Whereupon Exhibit No. 3 was
18 marked into the record.)

19 MR. ETTINGER: Do you have further
20 clarifications you want to make into the record?

21 MS. CLOW: We just have one clarification.
22 In addition to the high quality resource waters we
23 have in the area, we have a number of high quality
24 wetlands that have also been identified and we

L.A. REPORTING (312) 419-9292

160

1 would like our comments to generally apply to
2 those wetlands as well.

3 HEARING OFFICER TIPSORD: Thank you. Are
4 there any questions?

5 MS. LIU: Good afternoon. When I read
6 through your testimony, I noticed a reference to a
7 biological stream characterization evaluation
8 system. I am not familiar with what that is.
9 Could you explain what that is?

10 MR. PAULSON: That is a system that the
11 state, both the DNR and the Illinois EPA, uses to
12 characterize streams that have high biological
13 significance. And we can provide you with the
14 documentation for that, if you would like to see
15 it.

16 MS. LIU: Could you, please? Do you know
17 what an A, B or C rating means when they classify
18 those?

19 MR. PAULSON: Yes. The numbers -- actually
20 another person who is testifying could probably
21 give you more specifics on the numbers. But they
22 go through this rating system and they come up
23 with a numerical class. The class A streams are
24 the -- as it applies, the highest quality. I

L.A. REPORTING (312) 419-9292

161

1 can't tell you where the breakoff is of the
2 numbers. Class B are still biologically
3 significant, but of less quality. Class C are
4 pretty degraded. I can't say if they would be
5 classified as impaired waters on the 303(d) list,
6 but some of them are. And D and E are the worst
7 qualities. Most streams in McHenry County are
8 class A and B.

9 MS. LIU: You also make some reference to
10 storm water management plans not being uniformly
11 implemented throughout the county. Do you see a
12 place in this rulemaking to include something
13 along the lines of storm water management?

14 MR. PAULSON: Well, the reference to that is
15 because storm water is shown to be one of the
16 primary factors for degrading streams in urban

17 areas, McHenry County has been in the process, as
18 are other counties in the Chicago area, of
19 developing countywide storm water management plans
20 and ordinances. Our plan has been adopted. The
21 ordinance is still being debated. That would give
22 us a uniform approach to maintaining water
23 quality.

24 And one of the factors that is in that

L.A. REPORTING (312) 419-9292

162

1 plan and in the ordinance is protecting water
2 quality and wetland, high quality wetlands. Do
3 you want to say more?

4 MS. CLOW: I think the implication there is
5 the way the antidegradation standards are written,
6 that this is something that is a threat to our
7 high quality water, is the storm water runoff.
8 And to integrate -- the fact that we don't have a
9 recourse through a widely adopted ordinance is
10 impaired some way in how that is designed.

11 MS. LIU: Would the storm water be
12 necessarily restricted to things that come out of
13 a storm sewer or could they be just general
14 runoff?

15 MS. CLOW: Runoff.

16 MR. PAULSON: It is an issue we think should
17 be addressed in here and the permitting process.

18 Because, as we know, expanded sewage treatment
19 plants lead to more runoff. And it is an issue
20 that we were in development which leads to more
21 runoff. And it is an issue we raised continuously
22 in our permit reviews and have not really been
23 satisfactorily addressed. If there is a way to
24 tie it in better with this proceeding, we would

L.A. REPORTING (312) 419-9292

163

1 support that.

2 MR. ETTINGER: You said more sewage treatment
3 plants lead to more runoff. I think you meant to
4 say more development leads to more runoff.

5 MR. MELAS: I didn't hear the question, hear
6 the question nor the response.

7 MR. PAULSON: I meant to say when you expand
8 sewage treatment plants, it leads to more
9 development and that leads to more runoff, which
10 can degrade water quality in urban areas.

11 MR. MELAS: Thank you.

12 HEARING OFFICER TIPSORD: Any additional
13 questions?

14 MS. BUCKO: My name is Christine Bucko. I am
15 an assistant attorney general. And just as a
16 follow up to the questioning that Alysa had, on
17 the storm water management, are you folks
18 comfortable with the section where there is a

19 blanket exemption?

20 MR. PAULSON: No.

21 MS. BUCKO: Would you have any proposed
22 alternative proposals?

23 MR. PAULSON: I think we will probably be
24 making some proposals in the final comments, but I

L.A. REPORTING (312) 419-9292

164

1 think that there are developments -- as an
2 example, the Del Webb development in Huntley,
3 which flows into the Kishwaukee River, such
4 magnitude or even a series of smaller projects
5 that would have significant impact from storm
6 water that they should not be categorically
7 exempted from antidegradation review. And I think
8 in terms of the specifics, we would have to think
9 about that and how to make the additional
10 requirements. But it is a significant threat to
11 our water quality.

12 HEARING OFFICER TIPSORD: Anything further?

13 MR. GIRARD: I have a question. On page 3 of
14 your testimony in the last paragraph, you discuss
15 in the rules in the petition for outstanding
16 resource waters designation and the extensive
17 economic information required in the present
18 proposal, and then you go on to recommend that the
19 section should be removed or simplified. Do you

20 have any specific recommendations for simplifying?

21 MS. CLOW: I think the way -- from our
22 perspective as a citizen group who might want to
23 bring up a water resource as an out -- to be
24 designated outstanding resource water, the way

L.A. REPORTING (312) 419-9292

165

1 that the regulations are written makes it very
2 difficult for us to pursue them, would to a
3 certain extent and from discussions earlier today
4 where the burden of proof falls is turning out to
5 be on a public participant to show how much
6 economic value there is or something like that.
7 Do we have specifics regarding how to revise that?
8 I would just bear in mind the fact the direction
9 that a citizen group is coming from does not
10 necessarily have all the proof available to put
11 together a significant designation -- burden or
12 proof that would show that versus what we would be
13 operating against, which potentially could be an
14 organization with reams of economic statistical
15 analysis. That is what we are objecting to.

16 MR. FLEMAL: I can understand your dilemma,
17 but you wouldn't want us making that decision in
18 the absence of that information, would you?

19 MS. CLOW: No.

20 MR. FLEMAL: So there has to be some source

21 for that information.

22 MS. CLOW: Yes. I think there has to be some
23 sort of value to judge against. It is just that
24 the way it is coined makes it significantly

L.A. REPORTING (312) 419-9292

166

1 difficult for us to do it.

2 MS. LIU: Would it be burdensome if you are
3 to, say, provide a form letter to people that
4 might be affected asking further input to provide
5 economic impacts and things along those natures so
6 that you can include that in your petition? You
7 wouldn't have to go out and get the data yourself,
8 but they would offer the data to you.

9 MS. CLOW: That is an alternative.

10 MS. McFAWN: To follow up on Mr. Girard's
11 question, when I read this, I thought you were
12 suggesting that the businesses produce the
13 economic impact information, is that right or
14 wrong?

15 MS. CLOW: Yes.

16 MS. McFAWN: That is right, you think they
17 should provide the economic information?

18 MS. CLOW: Yes.

19 MS. McFAWN: Then it would be weighted in
20 your favor?

21 MR. PAULSON: Arguably.

22 MS. McFAWN: Okay. Would that be your
23 solution or do you have a suggestion or solution?
24 Is that one of those suggestions?

L.A. REPORTING (312) 419-9292

167

1 MR. PAULSON: I think we need to think about
2 that more.

3 MS. McFAWN: Okay. That would be fine and we
4 welcome your input, follow-up input, I should say.

5 HEARING OFFICER TIPSORD: Anything further?
6 Okay. Thank you very much.

7 MR. ETTINGER: Please state your full name
8 for the record?

9 MR. MICHAEL: My name is Edward Michael. I
10 am associated with the Illinois Council of Trout
11 Unlimited.

12 MR. ETTINGER: Did you prepare the testimony
13 of Edward L. Michael on behalf of the Illinois
14 Council of Trout Unlimited concerning the proposed
15 amendments to 35 Administrative Code Section 106,
16 302 and 303?

17 MR. MICHAEL: I did.

18 MR. ETTINGER: I move the admission of this
19 prefiled testimony into the record.

20 HEARING OFFICER TIPSORD: Any objection?
21 Seeing none, we will mark this as Exhibit No. 4.

22 (Whereupon Exhibit No. 4 was

23 marked into the record.)

24 HEARING OFFICER TIPSORD: Are there any

L.A. REPORTING (312) 419-9292

168

1 questions of Mr. Michael? Okay. Seeing none,
2 thank you very much.

3 MR. ETTINGER: Please state your name for the
4 record.

5 MS. SKRUKRUD: Cindy Skrukruud,
6 S-k-r-u-k-r-u-d. I am president of Friends of the
7 Fox River.

8 MR. ETTINGER: Did you prepare the prefiled
9 testimony of Cynthia L. Skrukruud?

10 MS. SKRUKRUD: Yes, I did.

11 MR. ETTINGER: I hereby move the admission of
12 the prefiled testimony of Cynthia L. Skrukruud into
13 the record.

14 HEARING OFFICER TIPSORD: Any objection?
15 Seeing none, we will mark that as Exhibit No. 5.

16 (Whereupon Exhibit No. 5 was
17 marked into the record.)

18 MR. ETTINGER: Do you have anything you want
19 to add to your testimony?

20 MS. SKRUKRUD: No.

21 HEARING OFFICER TIPSORD: Are there any
22 questions? I have some. Specifically, you cite
23 to several sources in your testimony, including on

24 page 2 the Illinois Department of Natural

L.A. REPORTING (312) 419-9292

169

1 Resources Office of Realty and Environmental
2 Planning; Fox River, an Inventory of the Region's
3 Resources, I was wondering if it would be possible
4 for you to provide us with copies of these
5 resource documents.

6 MS. SKRUKRUD: Yes, I can.

7 HEARING OFFICER TIPSORD: There are two of
8 them listed on page 2, and I believe then one on
9 page 3 to 4. I think those are the only ones.

10 MS. SKRUKRUD: Yes. Now, there is three
11 documents at the bottom of page 2, the second
12 paragraph on page 2.

13 HEARING OFFICER TIPSORD: Yes, thank you.

14 MS. SKRUKRUD: Do you want those too?

15 HEARING OFFICER TIPSORD: Yes, any of the
16 reference documents that you referred to as
17 authority we would appreciate having copies of.

18 MS. SKRUKRUD: Okay. I can do that.

19 HEARING OFFICER TIPSORD: Are there any other
20 questions? Thank you very much.

21 MS. SKRUKRUD: Thank you.

22 MR. ETTINGER: Please state your full name
23 for the record.

24 MR. DARIN: My name is Jack Darin, D-a-r-i-n.

1 I am the director of the Sierra Club, the Illinois
2 chapter.

3 MR. ETTINGER: And did you prepare the
4 prefiled testimony of Jack Darin, director Sierra
5 Club, Illinois chapter?

6 MR. DARIN: I did.

7 MR. ETTINGER: I hereby move the prefiled
8 testimony be admitted into the record.

9 HEARING OFFICER TIPSORD: Is there any
10 objection? Seeing none, we will enter that as
11 Exhibit No. 6.

12 (Whereupon Exhibit No. 6 was
13 marked into the record.)

14 HEARING OFFICER TIPSORD: Are there any
15 questions? Actually, I just have one slight one.
16 I believe it is a typo on page 2 of your
17 testimony, proposed 303.25(b), it is sub (b)
18 towards the bottom of the page.

19 MR. DARIN: Yes.

20 HEARING OFFICER TIPSORD: That should be
21 205(b); is that correct?

22 MR. DARIN: Without having that in front of
23 me, I have to check. You are probably right.

24 HEARING OFFICER TIPSORD: I just know some of

1 the federal stuff is only two digits after the
2 decimal, so I wanted to be sure. It is on page 2.

3 MR. ETTINGER: Yes, I found the typo. I am
4 trying to find the reference.

5 HEARING OFFICER TIPSORD: It is the zero load
6 flow streams in 303.

7 MR. ETTINGER: Yes. Yes, there is a 0
8 missing.

9 HEARING OFFICER TIPSORD: It should be
10 303.205(b)?

11 MR. DARIN: Yes, you are correct.

12 HEARING OFFICER TIPSORD: Thank you.
13 Anything further?

14 MS. LIU: Mr. Darin, I have a question. In
15 your prefiled testimony you mentioned that
16 requiring that a huge list of people be given
17 copies of the petition would be very wasteful.
18 Would it be acceptable to you to be able to put
19 the petition in full in a public place, at a
20 public library for viewing and then simply send
21 out the notification to those parties effected?

22 MR. DARIN: I think that would be more
23 reasonable, yes.

24 MS. LIU: You also mentioned that the

1 economic evidence would be burdensome as well. I
2 had asked the group earlier if they would consider
3 it burdensome to simply notify the effective
4 parties what they are considering doing and
5 designating an ORW and asking them to provide or
6 file any economic information for you to include
7 in your petition. How do you feel about that?

8 MR. DARIN: I think that could be a good
9 approach. Hopefully, we can rely on property
10 owners and other people with a financial interest
11 in the water shed to bring forth evidence of how
12 they feel they might be impacted by a designation.
13 And then we would expect that if there were bias
14 as we brought up earlier in this kind of
15 information, that the proponents and other
16 participants would have an opportunity to respond
17 and perhaps present their own evidence in response
18 to that.

19 MR. FLEMAL: At the bottom of page 2 in the
20 last complete paragraph, the last sentence there
21 poses a question, why should the notice for
22 establishing special protections for waters be
23 stronger than that for seeking variance of site
24 specific standards, NPDES permits, or 401

1 certifications? Do you have an answer for your
2 own question there?

3 MR. DARIN: As to why the notice -- I think
4 we -- I was trying basically there to -- since
5 this is going to be a Board proceeding, we are
6 looking at what the standard is in other similar
7 types of cases that come before this body are, and
8 we are wondering why there would be such a
9 disparity between the burden of proof in the
10 different types of proceedings.

11 MR. FLEMAL: This morning Mr. Frevert
12 characterized his perspective on the ORW
13 applications as having them be a really quite
14 significant change in the character, and I assume
15 from how he stated it his feelings were that this,
16 in fact, was something different from inspection,
17 he would be putting perhaps a greater
18 demonstration of that. Do you accept that
19 characterization at all?

20 MR. DARIN: Not a wholesale. I think that
21 certainly there are some of these types of
22 proceedings that come before this body that are
23 very simple and the ORWs may not be. So in some
24 cases, yes, it could be more significant, but

1 probably not in every one.

2 HEARING OFFICER TIPSORD: Mr. Harrington?

3 MR. HARRINGTON: Excuse me, were you here
4 when Mr. Frevert testified as to how he believed
5 these applications, nondegradation permits would
6 be processed?

7 MR. DARIN: I was here for the majority of
8 Mr. Frevert's testimony and I was here, I believe,
9 for when you are pursuing that line of
10 questioning, yes.

11 MR. HARRINGTON: And is it your understanding
12 that the Agency will be in the position to rely on
13 its own data and determine that there is no
14 significant degradation and approval permit
15 without requiring the applicant to address, for
16 example, alternatives?

17 MR. ETTINGER: So is your question whether
18 they will be able to do that in every case or in
19 some cases?

20 MR. HARRINGTON: In some cases, given that
21 authority allows them that authority to make that
22 decision.

23 MR. DARIN: To rely on their own data to
24 decide whether or not the alternative threshold

1 has been met?

2 MR. HARRINGTON: No. Whether they have to
3 reach the alternatives threshold or the community
4 impact threshold?

5 MR. DARIN: I am not sure I understand the
6 question. I am having trouble imagining a
7 scenario like that.

8 MR. HARRINGTON: Well, one of the examples I
9 think that was given this morning is somebody
10 comes in and is going to add a loading of ammonia
11 to the river, but it actually may improve the
12 water quality. In this case we can decide that
13 was enough data, we don't need any further data.
14 We will get to alternative control technologies or
15 community impact.

16 MR. DARIN: The question is do you think that
17 that would be the appropriate decision in that
18 case?

19 MR. HARRINGTON: Yes. That is part of the
20 question.

21 MR. DARIN: I don't think I can answer that
22 question without knowing more of the details of
23 the specific case. I think if -- it depends what
24 other data would be available out there. I think

L.A. REPORTING (312) 419-9292

176

1 that if there were recognized and accepted data
2 about the receiving waterway that for some reason

3 were not being considered in the scenario you
4 described, I would not find that acceptable.

5 MR. HARRINGTON: Assume they have all the
6 water quality data, they know the discharge will
7 not reduce the water quality because they have
8 been placed with inadequate data, they decide that
9 that is the end of the review, they don't need to
10 go further.

11 MR. DARIN: If they -- if they don't need to
12 go further in seeking additional data?

13 MR. HARRINGTON: Seeking additional data or
14 seeking data on other elements of the
15 demonstration such as alternative control
16 technologies and community impact.

17 MR. DARIN: I can guess it would depend on --
18 you mentioned they had all the available data.

19 MR. HARRINGTON: On water quality.

20 MR. DARIN: I guess I would have to say it
21 would depend on how much data all the available
22 data was.

23 MR. HARRINGTON: Thank you very much.

24 HEARING OFFICER TIPSORD: Anything further?

L.A. REPORTING (312) 419-9292

177

1 MS. McFAWN: I have one question. Back to
2 page 2 of your testimony, in paragraph A, you
3 state that Section 302.105(d)(6) should be deleted

4 and you give one example. Could you give some
5 more examples of this?

6 MR. DARIN: General permit activities?

7 MS. McFAWN: Uh-huh.

8 MR. DARIN: Well, I think, you know, for
9 instance that there was some discussion earlier
10 about storm water activities, some storm water
11 permitting activities have been covered under
12 general permits in the past. There are also
13 different general permits under the federal act
14 regarding hydrologic changes to rivers and
15 streams, wetlands, fills that may still require
16 certification by the Agency. Those kinds of
17 things clearly have an impact on the quality of
18 the streams. We would like to see them
19 potentially considered under these procedures.

20 MS. McFAWN: So these activities would come
21 up in a different context before the Agency would
22 be aware that they could then visit the issue?

23 MR. DARIN: Right. For instance, through the
24 certification process under Section 401, the Clean

L.A. REPORTING (312) 419-9292

178

1 Water Act.

2 MS. McFAWN: And that covers storm water?

3 MR. DARIN: No, I don't believe that does
4 cover storm water. I think Section 401 covers the

5 process for state certification of Army Corps
6 permits.

7 MS. McFAWN: In these examples -- well, the
8 one about construction activity, and maybe some
9 others that you can give us, how would the Agency
10 be aware that this activity is going to take place
11 so it knows to even visit this issue if is allowed
12 under its current NPDES permit?

13 MR. DARIN: Well, I think if it is allowed
14 under its current NPDES permit, if it is something
15 that is wholly covered by the permit, then I would
16 anticipate that it would have been subject to
17 review at the time that that permit was granted,
18 at least after these procedures are in place.

19 MS. McFAWN: And that is true about the
20 example you gave us?

21 MR. DARIN: Well, the example is a
22 hypothetical. It may or may not be covered by an
23 NPDES permit for construction activities in the
24 area of a nature preserve. It could be -- there

L.A. REPORTING (312) 419-9292

179

1 are a lot of different general permits that might
2 be applicable to that. For instance, a filling of
3 a wetland under a certain amount of acreage, that
4 qualifies for exemption from general Section 404
5 of the Clean Water Act process, but it may still

6 be subject to a certification process. That would
7 be outside of the NPDES program but still under
8 the auspices of the Clean Water Act.

9 MS. McFAWN: You have to bear with me on
10 this. I am a little confused. 6 has to do with
11 NPDES permit and activity currently under it.
12 That is the one you propose be changed. So when
13 you start talking about these other activities or
14 other permits and certifications, I get confused.
15 Could you give me some examples in addition to --
16 now you said maybe the construction is not part of
17 the NPDES permit. Could you maybe today or at
18 some other time give us some examples of -- to
19 support further your proposal that this section be
20 deleted?

21 MR. DARIN: Yes, I would be happy to do that
22 in the future. I would like to go through and
23 review this. But I think the general concern here
24 is activities that are covered by a general permit

L.A. REPORTING (312) 419-9292

180

1 that may not be covered by the NPDES permitting
2 process. So I would like to go back and review
3 that section and can see if I can provide specific
4 examples.

5 MS. McFAWN: That would be very helpful.
6 Thank you.

7 HEARING OFFICER TIPSORD: Is there anything
8 further?

9 MS. TONSOR: I have a question just to
10 clarify a misunderstanding, and with your
11 permission, I would like to direct it to Tom.
12 Because I think there is a misunderstanding as to
13 what general permits cover. And Tom can explain
14 to us what general permits cover.

15 MR. McSWIGGIN: General permits that the
16 Agency issues are all under Section 402 of the
17 Clean Water Act. There is another category of
18 permits out here under Section 404 that the Corps
19 issues called nationwides, and they are a
20 different piece altogether.

21 A general permit -- and the Agency has
22 general permit authority authorized by the
23 legislature which is issued prior to receiving an
24 application. When we have recognized that there

L.A. REPORTING (312) 419-9292

181

1 is a group of similar activities out there that we
2 can write one permit to cover a group, we go ahead
3 and do that. Storm water runoff is -- during
4 construction is a very prime example. Storm water
5 runoff from industrial properties is another one.
6 We are contemplating one for livestock waste once
7 the USEPA finalizes the guidance on it. So what

8 we have is a process where we issue a permit up
9 front. It goes through a public notice process.
10 It goes through a USEPA review. And within the
11 terms of that permit, it establishes a process by
12 which the applicants that wish to come under that
13 permit submit what is a notice of intent.

14 That process then is the main operative
15 during the life of the permit for putting people
16 under it. The Agency has the option at any time
17 to reject a notice of intent and to make that
18 particular applicant, if there is reasons to do
19 so, to apply for a site specific permit. Just
20 because we have issued a general permit doesn't
21 mean that everybody should be put under it, even
22 though they may find themselves under this
23 particular definition.

24 If there is another reason for a set of

L.A. REPORTING (312) 419-9292

182

1 circumstances with an agency to go site specific,
2 we have that right.

3 MR. ETTINGER: We are kind of out of order
4 here, but could I ask him a question now?

5 HEARING OFFICER TIPSORD: Sure.

6 MR. ETTINGER: So then you do get a notice or
7 you should get a notice from everyone who is
8 operating under a general permit?

9 MR. McSWIGGIN: That's correct.

10 MR. ETTINGER: So you would know of one
11 operating under a general permit, and you could
12 decide at that point whether further analysis like
13 antidegradation analysis would be appropriate in
14 that case. Only, I guess, in your rubric you
15 would say that you were not allowing them to
16 operate under the general permit; is that right?

17 MR. McSWIGGIN: That's right. Make it site
18 specific.

19 MS. McFAWN: So under the language where he
20 proposes at 6 where it says discharges permitted,
21 that permission only comes after the notice of
22 intent?

23 MR. McSWIGGIN: That is correct.

24 MS. McFAWN: Thank you very much for that

L.A. REPORTING (312) 419-9292

183

1 clarification. I hope that will help you as well.

2 MR. DARIN: It does. Thank you, Tom.

3 HEARING OFFICER TIPSORD: Anything further?
4 Thank you very much, Mr. Darin.

5 MS. TONSOR: Mr. Frevert wanted to make an
6 additional comment. It relates to this issue.

7 HEARING OFFICER TIPSORD: Okay. Just one
8 second. Mr. Ettinger, that was the end of the
9 prefiled, right? Mr. Moore is going to testify in

10 Springfield?

11 MR. ETTINGER: Right. We may prefile some
12 more in light of what we have seen here.

13 HEARING OFFICER TIPSORD: Thank you.

14 Mr. Frevert, go ahead.

15 MR. FREVERT: I want to go and comment and
16 supplement what Tom said, and that is these
17 general permits also include with them some
18 operating limitations, and they are referred to as
19 storm water BMPs. And we believe in virtually all
20 of these circumstances that is the type of
21 alternative analysis, the type of antidegradation
22 restrictions that is consistent with the intent of
23 the standard. And as such, we sort of do a
24 generic antidegradation review in the context of

L.A. REPORTING (312) 419-9292

184

1 drafting that general permit. And if there is a
2 particular situation where the square peg doesn't
3 fit the round hole, as Tom said, we have the
4 option to refuse allow them to operate under the
5 general permit and make them get a site specific
6 permit.

7 HEARING OFFICER TIPSORD: Mr. Ettinger?

8 MR. ETTINGER: Just to follow up on that, we,
9 meaning the citizens, would not know when you had
10 decided to allow them to run under a general

11 permit, would we? I am sorry, that wasn't one of
12 my better questions.

13 MR. FREVERT: As a notification process?

14 MR. ETTINGER: If you got a notification that
15 someone was going to operate under a general
16 permit and they were, I don't know, going to build
17 a dynamite factory next to a nature preserve and
18 decided that that did qualify under the general
19 permit, would the public get any notice of that?

20 MR. McSWIGGIN: There is no notice of intent.
21 The public process, public input has all been up
22 front when the general permit itself was issued.

23 MR. ETTINGER: So we had to make sure that
24 the general permit made clear that it didn't give

L.A. REPORTING (312) 419-9292

185

1 you discretion to accept something like my
2 scenario under the general permit?

3 MR. McSWIGGIN: The group definition doesn't
4 say dynamite next to nature preserves.

5 MR. ETTINGER: Thank you.

6 HEARING OFFICER TIPSORD: Mr. Paulson, you
7 had a follow-up question as well?

8 MR. PAULSON: Earlier it was said that you
9 intend to admit the proposal.

10 MR. FREVERT: Can I interrupt for one minute?
11 Before Tom leaves, maybe it would be helpful if we

12 estimate how many storm water permits we have to
13 do if we didn't have the general approach on an
14 annual basis.

15 MR. McSWIGGIN: There is two basic for storm
16 water. The construction site runoff permit, we
17 have about 750 annualized a year depending on what
18 Mr. Greenspan has done. It is very sensitive to
19 interest rates. Industrial side of the house, we
20 have maybe 100, 175 in there. Because a lot of
21 small businesses don't survive, unfortunately, and
22 we go out in and out quite frequently. So we have
23 a lot of activity there.

24 So we are dealing with NPDES activity

L.A. REPORTING (312) 419-9292

186

1 there that is about 800, maybe a little higher in
2 a given year. Whereas the total balance of the
3 other NPDES activity in a year is 400 to 600.

4 MR. FREVERT: So it is a workload issue.

5 MR. McSWIGGIN: Very heavy workload.

6 HEARING OFFICER TIPSORD: Mr. Paulson, go
7 ahead.

8 MR. PAULSON: Earlier you said your intent
9 was to amend your proposal to include the general
10 permits -- the nationwide permits under the 404.
11 And my question -- is that correct, right?

12 MR. FREVERT: That's correct. And I am

13 working on numbers, but it is created in the storm
14 water permits. It is likely to be in the
15 thousands.

16 MR. PAULSON: My question is now when the
17 general permits are promulgated for Illinois, you
18 do do a 401 certification for those. Do you also
19 do an antidegradation review for the nationwide
20 permits as are promulgated?

21 MR. FREVERT: The spin I would put on it, the
22 interpretation I put on it, the conditions and
23 restrictions that we incorporate into our generic
24 certification are designed to accomplish what we

L.A. REPORTING (312) 419-9292

187

1 believe the intent of antidegradation is. So,
2 yes, we considered that issue what we can do about
3 it in terms of alternatives in order to minimize
4 pollutant discharge under those general permits
5 without basing it in a generic sense. We don't
6 say meet the water quality standard, we don't care
7 about anything else. We try to incorporate
8 management practices and construction techniques
9 as requirements that we believe will accomplish
10 the intent of that antidegradation.

11 MR. PAULSON: Thank you.

12 MR. MICHAEL: I have a question regarding the
13 site matter. What is the frequency with which the

14 notification process to you under a general permit
15 results in a denial or a modification that they
16 have to procure a site specific permit?

17 MR. FREVERT: I am sorry, I don't have an
18 answer there. Well, keep in mind I don't do these
19 reviews. Tom may be able to give you the numbers.

20 MR. MICHAEL: How about a ballpark?

21 MR. FREVERT: Seldom such is a weird duck
22 asks for a general permit. Obviously, you are not
23 eligible for this. This is beyond our intent.
24 Seldom do we get applications that, I think, we

L.A. REPORTING (312) 419-9292

188

1 say, no, you have filed a tradition permit
2 application, go back and submit it. But I know it
3 has happened. I know it has happened. I don't
4 know the numbers. Tom has been through that.

5 MR. MICHAEL: Then this would give you a
6 mechanism of say you had a general permit
7 application in the area of a high -- or
8 outstanding resource water, to do that, would
9 there be any difference? Would you exercise any
10 different judgment about --

11 MR. FREVERT: I can almost guarantee you
12 right now if there is a water body that is
13 designated as outstanding water, we are not going
14 to issue a general permit for anything going on

15 with that water. There is no such classification
16 now. Hopefully there will be a classification.
17 Maybe some day a water body will be placed in a
18 classification. That is clearly a different set
19 of operating parameters than what we designed the
20 general permit for. So they would not get one.
21 It probably wouldn't be in the standard either.

22 HEARING OFFICER TIPSORD: Just as a point of
23 clarification, Mr. McSwiggin will be in
24 Springfield; is that correct?

L.A. REPORTING (312) 419-9292

189

1 MS. TONSOR: One of the things, Mr. McSwiggin
2 has a conflict with the December 6th hearing.
3 However, he will be available to provide
4 information so that we can bring that information
5 and will try and see how flexible his scheduling
6 is on December 6th. I believe he is going to be
7 out of state on December 5th and was going to be
8 traveling the 6th.

9 We will provide the information of how
10 often we would deny a general permit or someone
11 seeking a general permit. I don't know the answer
12 to that question either.

13 MR. FREVERT: If we know the specific
14 questions and issues, he can either answer them
15 ahead of time and have the answer. Tom is not the

16 only one that can address the issues.

17 MS. McFAWN: Is there anyone else at the
18 Agency that could come in his place that would
19 have a general knowledge of the permitting system?

20 MS. TONSOR: He undoubtedly has a staff
21 person who has knowledge of the general permit
22 process.

23 MS. McFAWN: Or any of the NPDES permitting,
24 perhaps they can be there is my suggestion.

L.A. REPORTING (312) 419-9292

190

1 MS. TONSOR: Oh, sure.

2 MR. FREVERT: Sure.

3 MS. McFAWN: Could we get a copy of that
4 general permit or some of your general permits
5 that you have adopted or issued?

6 MR. FREVERT: I think that is a request
7 rather than a question. Yes, we can get you it.
8 Certainly, we can get those to you.

9 HEARING OFFICER TIPSORD: Okay. Let's go off
10 the record for just a minute.

11 (Discussion had off the
12 record.)

13 HEARING OFFICER TIPSORD: Let's proceed.

14 MS. FRANZETTI: Talking about reasonable
15 alternatives, Toby. When an antidegradation
16 review is, in fact, triggered for a POTW, let's

17 assume --

18 HEARING OFFICER TIPSORD: Excuse me,
19 Ms. Franzetti? Could you please stand?

20 MS. FRANZETTI: Assume an antidegradation
21 review has, in fact, been triggered for a POTW.
22 Could you give us some examples, if you know them,
23 of what sort of alternatives should the POTW
24 consider in the alternative analysis that it would

L.A. REPORTING (312) 419-9292

191

1 provide to the Agency?

2 MR. FREVERT: Sure, I would be happy to. The
3 POTW is typically they go through a facility
4 planning stage anyway where they look at
5 alternatives to serving their future needs. They
6 are usually looking at different types of proven
7 treatment technology. Some of them they look in
8 our discharge and technology like when an
9 application is -- it works in some situations, it
10 doesn't work in all situations. There are
11 different forms of biological treatment.

12 In many cases they actually have
13 alternative locations they can look at for
14 discharge. So obviously they need to treat sewage
15 and discharge treated waste water somewhere.
16 There may be a receiving body that is more
17 appropriate to receive that water than another

18 one. That happens more often than you would
19 imagine, actually.

20 Not everybody right on a big river can
21 do it, but other people have that option. Then
22 there are other things like tweaking or beefing up
23 design criteria. You have slightly oversizing and
24 things of that nature.

L.A. REPORTING (312) 419-9292

192

1 Typically, unless there is an extremely
2 pressing environmental need or some obvious
3 ramification, we stop short of wholesale add-on
4 additional technology. We believe that is
5 generally more properly addressed in terms of
6 technology treatment standards in the course of
7 state and federal policies set in effluent
8 standards or arenas.

9 But in terms of better treatment
10 systems, maybe beefed up designs, maybe additional
11 controls on discharge, not only discharge
12 location, but discharge timing, how you can
13 accomplish these things would be even less impact
14 than perhaps what is environmentally acceptable
15 impact anyway, how do we minimize that to a
16 reasonable cost. That is the sort of thing we
17 look at.

18 MS. FRANZETTI: Does a POTW have to in order

19 to have fulfilled its obligation look at
20 reasonable alternatives? Does it have to go
21 upstream and look at what all its industrial
22 users can do or, no, that isn't necessarily
23 required?

24 MR. FREVERT: A lot of the larger POTWs have

L.A. REPORTING (312) 419-9292

193

1 pretreatment programs, and we usually address the
2 industrial user issues with those programs. To
3 the extent that somebody may have had a blatantly
4 inadequate pretreatment plan, we may ask them to
5 spruce that up.

6 But routinely we do a whole separate
7 review in consideration of pretreatment ordinance,
8 pretreatment requirements. And that is considered
9 -- for the most part, that is pretty much accepted
10 as the best way to manage those sources, and we
11 don't review it again the second time in the
12 context of antidegradation.

13 MS. FRANZETTI: Thank you. That is all I
14 have.

15 HEARING OFFICER TIPSORD: Mr. Harrington,
16 would you like to proceed now?

17 MR. HARRINGTON: Couple of questions, cooling
18 water discharges do not contain any additives or
19 not -- or are exempt from the antidegradation

20 review; is that correct?

21 MR. FREVERT: We are proposing that cooling
22 water, once the cooling water discharges without
23 any additives, not be required to do a stand-alone
24 demonstration or not require the Agency to make a

L.A. REPORTING (312) 419-9292

194

1 separate determination. They are subject to the
2 standard, and we are saying that that type of
3 operation sort of categorically meets the subject.
4 They are subject to the standard; they are not
5 subject to a review.

6 MR. HARRINGTON: If they do contain cooling
7 water additives, which many do, when they go --
8 are they then required to go through an
9 antidegradation review if there is an increase in
10 the cooling water discharge?

11 MR. FREVERT: What we do in those cases is a
12 review of the additives. It is toxicological
13 properties and the process on how the facility
14 selected that additive versus another additive.
15 And there have actually been instances where after
16 entering the dialogue with the discharge, when
17 they had multiple slime control or scale control
18 additives, they can go through based on
19 toxicologic or toxicity data, which I interpret as
20 a type of antidegradation in giving that example,

21 I have selected other alternatives that have been
22 economically and functionally viable for them.

23 MR. HARRINGTON: That is the standard review
24 you have been employing in the Agency for several

L.A. REPORTING (312) 419-9292

195

1 years with cooling water additives; is that right?

2 MR. FREVERT: That's right.

3 MR. HARRINGTON: So would they be subject to
4 the requirements of these rules for high quality
5 waters if there is an increase in cooling water
6 discharge and there is an additive that you have
7 already permitted? Or would they be subject to
8 the categorical exemption, not exemption, but the
9 categorical review that is already contained here?

10 MR. FREVERT: I think the practical answer to
11 your question is if we review and decide that is
12 the proper and acceptable additive to that cooling
13 water and they propose to rampup the amount of
14 cooling water they discharge, it has made some
15 incremental addition of that additive, then that
16 is the antidegradation review we would do. We
17 have made the decision already that is an
18 acceptable substance with those concentrations and
19 that waste water and increment more on a true need
20 for additional cooling water.

21 Yes, they are subject to review, but I

22 just told you what the review is. We were not
23 going to send you out on a witch hunt for all
24 sorts of new data.

L.A. REPORTING (312) 419-9292

196

1 MR. HARRINGTON: And the thermal component of
2 the discharge, would that have to go through
3 additional review?

4 MR. FREVERT: It is possible, but that review
5 is posed on meeting the thermal standards.

6 MR. HARRINGTON: Obviously, the presumption
7 here is it is going to meet water quality
8 standards. The question is would it have to go
9 through the antidegradation portion of the review.

10 MR. FREVERT: I would anticipate no
11 supplemental review for the thermal component of
12 that.

13 MR. HARRINGTON: Thank you very much.

14 HEARING OFFICER TIPSORD: Any further
15 questions?

16 MS. HODGE: I have just a few, and one is
17 related to this same section that Mr. Harrington
18 had just asked about, proposed Section
19 302.105(d)(5), which is the activity that would be
20 -- that the Agency has already conducted an
21 antidegradation review, noncontact. Please
22 explain what is meant by the term without

23 additives? What about in a situation where a
24 cooling water was initially chlorinated but then

L.A. REPORTING (312) 419-9292

197

1 subsequently treated by dechlorination prior to
2 being discharged, would the Agency consider that
3 cooling water to be without additives?

4 MR. FREVERT: The bottom line is that again
5 dechlorination has to do with the alternatives
6 analysis and that would be acceptable to you. We
7 probably document that it is an additional load
8 planned for this facility. They are chlorinating
9 for whatever purposes. The alternatives show even
10 in the sense of the Clean Water Act shows they are
11 dechlorinating, there may be some incidental
12 increase in chloride or some other component.
13 But I don't anticipate that we would carry our
14 antidegradation review of any significant
15 additional consideration of those components.

16 You would get your permitted increase
17 and we document our logic and our thought on the
18 fact sheet, end of story.

19 MS. HODGE: With respect to the proposed
20 Section 302.105(d)(6), which would be the
21 discharges covered by current general NPDES
22 permit, does the word current refer to the
23 discharge already being in possession of the

24 general permit? Or is it meant to refer to the

L.A. REPORTING (312) 419-9292

198

1 Agency's general permit being present?

2 MR. FREVERT: That means a permit that is
3 valid at that time. I think these general permits
4 even expire and have to be renewed. And also the
5 term of application of those general permits may
6 expire. If you had a general permit and let it
7 expire, you are not covered by a permit.

8 MS. HODGE: But this would be -- the Agency's
9 general permit is current or the applicability to
10 the discharge?

11 MR. FREVERT: Well, it would have to be both.
12 It doesn't apply to the discharge that has
13 expired.

14 MS. HODGE: Suppose an industrial facility
15 has an individual NPDES permit as opposed to the
16 general with an outfall from storm water runoff
17 from one or more industrial areas at the facility.
18 What sort of physical modifications to the
19 facility would trigger the need for the permittee
20 to apply for an antideg review? For example,
21 would installing a new 500 diesel oil tank on the
22 land trigger an antidegradation review?

23 MR. FREVERT: What I would view the intent of
24 antidegradation to do in that instance is to make

1 sure the diesel storage tank was designed and
2 constructed and operated in the same way as any
3 other fuel storage tank within that -- covered
4 under that permit would. The same management
5 practices, the same rational protection would be
6 in play.

7 So I guess you could say the instant
8 that general permit applies to that piece of
9 property, those pollution control alternatives
10 apply to that piece of property and that is the
11 answer.

12 MS. HODGE: It is not a general permit, this
13 is a facility specific.

14 MR. FREVERT: Even those facility specific
15 permits have some kind of management requirements
16 in them for storm water. I am saying that company
17 X is doing, you know, A, B and C. Here is your
18 process discharge requirements. Here is your
19 storm water management requirements. And as you
20 add new facilities or expanded facilities in the
21 same general type that adhere to these management
22 requirements for that storm water, that is the
23 intent of antidegradation there in my mind.

24 We are managing that storm water in

1 such a way with management alternatives that
2 minimizes the amount of additional contaminants
3 that need to go into the stream.

4 MS. HODGE: So would the activity to install
5 this new 500 diesel tank, would that trigger an
6 antidegradation review, would that trigger first a
7 permit application and then an antidegradation
8 review by the Agency?

9 MR. FREVERT: I don't even know that you need
10 a construction permit. That is a fuel storage
11 facility. You wouldn't need a construction
12 permit. You may need a permit from the local fire
13 district. You don't need authorization from us.
14 If that piece of property is contained in a
15 service area for the storm water permit that is
16 existing, as long as you adhere to those storm
17 water management practices, you don't need
18 anything from us.

19 MS. HODGE: Would your answer be the same for
20 a construction of new sidewalk or expanding
21 employee parking lot?

22 MR. FREVERT: Well, if I ever get the staff
23 to review parking lots and sidewalks, I would be
24 in hog heaven. Yes, we don't intend to do a use

1 on those things.

2 MS. HODGE: That is all I have. Thank you
3 very much.

4 HEARING OFFICER TIPSORD: Yes.

5 MR. MOORE: Robert Moore, executive director
6 of the Prairie Rivers Network. What is the
7 current procedure for nominating outstanding
8 natural resource waters in Illinois?

9 MR. FREVERT: That classification doesn't
10 even exist in Illinois programs, so there is -- I
11 suppose the procedure would be you propose to the
12 Board, you create a classification with a
13 particular water body in it.

14 MR. MOORE: So that is one of the -- that is
15 one of the shortcomings of Illinois current
16 antidegradation policy that this proposal is
17 intended to address, is the creation of a
18 recognition of the outstanding resource water?

19 MR. FREVERT: An outstanding resource water
20 is not a unique difficult issue in the state of
21 Illinois. It is difficult in a lot of places.
22 There are states that have an outstanding resource
23 classification with absolutely no waters in that
24 classification because it is the same difficulties

1 that we are talking about. Nevertheless, they
2 have created the category, even though there is
3 nothing in the category to get through the federal
4 review and approval process.

5 MR. MOORE: For the designation of
6 outstanding resource water, is there anything in
7 the federal guidance or in the federal regulations
8 that describes the economic analysis which is
9 described in the proposal?

10 MR. FREVERT: I don't believe so. But I do
11 believe there has been significant pressure and
12 campaigning to the USEPA for a number of years to
13 try to develop some criteria or some yardsticks to
14 deal with that issue and they haven't gotten it
15 done yet.

16 MR. MOORE: That is all the questions --

17 MR. FREVERT: Some things even they see as
18 difficult enough, they pass off to the states.

19 MR. MOORE: That is all the questions I have.

20 HEARING OFFICER TIPSORD: Anything from
21 anyone else in the audience? Mr. Paulson?

22 MR. PAULSON: Jerry Paulson. Toby, do you
23 think there are in your opinion any streams in
24 Illinois that would qualify as outstanding

1 resource waters?

2 MR. FREVERT: I think this is a significant
3 enough issue that I would really like to separate
4 creation of the category from nomination of water
5 segments to go in it. Therefore, I wouldn't share
6 my opinion with you even if I had one.

7 We need to get down to ground rules for
8 what constitutes an outstanding resource water,
9 everybody understands the ramifications of it and
10 come up with what we think is a workable process
11 to entertain nominations. And I think that is a
12 big enough chore that I don't want to pick on the
13 risk of getting spun off into identifying whether
14 water body A or B should not be in that category
15 yet.

16 MR. FLEMAL: A follow up on that, you start
17 off by saying you know of no -- the question first
18 was regarding stream segments. Then you switch
19 the term to water body. You are allowing that the
20 ORW designation to apply to something other than
21 streams, does not apply to waters of the state
22 generally?

23 MR. FREVERT: Yes. And I think perhaps some
24 of the top candidates will not be streams, they

L.A. REPORTING (312) 419-9292

204

1 will be other types of water bodies. I was
2 probably using those two terms interchangeably,

3 even though I know they are different.

4 For instance, I also think there was
5 some criticism that we suggested the Board not
6 consider even as nominations or candidates for
7 that classification streams of 7 Q 10 and less
8 than 0.

9 Lakes, reservoirs and wetlands may not
10 have any flow in them, but they are not streams.
11 And that language was not to exclude them from
12 consideration.

13 HEARING OFFICER TIPSORD: Okay. I just have
14 one quick question. And the Board does have
15 several questions, but I think the discussion we
16 had up here, I think we are going to prefile those
17 for you to give you more of an opportunity to
18 respond more fully to those questions.

19 MR. FREVERT: I haven't been responding fully
20 enough?

21 HEARING OFFICER TIPSORD: We are trying to
22 give you a break. The one minor question I have
23 and I toss out for you to also think about. You
24 have proposed to the Board that Section 303.206 be

1 reserved to list outstanding resource waters as
2 they are developed. As a general policy, the
3 Illinois Secretary of State prefers that we not

4 reserve sections. So I just wonder if you have
5 any other suggestions. I mean, certainly if it is
6 possible, we could put some language in there that
7 says this section shall be used to list all
8 outstanding resource waters and they are or shall
9 be used to list. I think we did something like
10 that with the regulated recharge actually.

11 So just as a thought on what you might
12 prefer.

13 MR. FREVERT: I don't think it is a big deal
14 for me. I think the important thing is when and
15 if you do designate those things, they be housed
16 somewhere in Part 3, which is the use designation
17 subpart (c). Whether you have to reserve a
18 number, you know, it doesn't matter to us. It
19 would be nice to know where they belong, but deal
20 with it as best you can.

21 HEARING OFFICER TIPSORD: Okay. Thank you.
22 Anything else?

23 As I indicated, the Board does have
24 several questions and will prefile those on

L.A. REPORTING (312) 419-9292

206

1 November 28th and we will send those to the
2 service list and they will be on the Board's web
3 page. If we get them done sooner, we will try and
4 get them out sooner.

5 At this time I would like to note that
6 the second hearing has been scheduled for 10:00
7 a.m. December 6, 2000, in Springfield, Illinois,
8 at the Board's offices. That address is actually
9 Room 403, 600 South Second Street.

10 We will begin with, I believe, the
11 prefiled testimony that we have already received,
12 which is Mr. Robert Moore's, and then we will go
13 to probably Agency follow-up, depending upon how
14 it works out when we see the other prefiled
15 testimony. We can set that schedule more firmly
16 on the day of the hearing.

17 Testimony should be prefiled by
18 November 28th, 2000. That is in the Board's
19 offices. The mailbox rule will not apply to
20 filing with the Board. We will allow you to serve
21 it by mail on that date to the members of the
22 service list.

23 Please contact my secretary Natalie
24 Williams at 217-245-9062 in Jacksonville to get

L.A. REPORTING (312) 419-9292

207

1 the most current and up-to-date service list. It
2 is still a list that is changing fairly rapidly
3 for us.

4 The Board's transcript from this
5 hearing will be on the Board's web page, which is

6 located at www.ipcb.state.il.us.

7 And are there any other questions at
8 this time?

9 MS. TONSOR: I have a question. If
10 necessary, I will make it as a motion. Due to the
11 shortness of the time and the holiday, is it
12 permissible that we do our filing electronically?
13 If it needs to be in the Board's offices here in
14 Chicago on the 28th, that means we are going to
15 have to effectively get it in the mail before.

16 HEARING OFFICER TIPSORD: Actually, if you
17 call me that day, I will authorize fax filings.
18 We don't yet have anything actually in place to do
19 E-mail in those kinds of filings. So if you do
20 run up against a problem with getting them into
21 the Board's office, please give me a call and I
22 will be happy to authorize you a fax file to be
23 followed up by a hard copy.

24 I thank you all very much. I think we

L.A. REPORTING (312) 419-9292

208

1 got a lot accomplished today, and I look forward
2 to seeing you in December. Thank you.

3 (Whereupon the proceedings in
4 the above-entitled case were
5 adjourned until December 6,
6 2000, at 10:00 a.m.)

8 taking of said hearing and that the foregoing is a
9 true, complete, and correct transcript of my
10 shorthand notes so taken as aforesaid, and
11 contains all the proceedings given at said
12 hearing.

13

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Notary Public, Cook County, Illinois
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