



1 PRESENT:

2 HEARING TAKEN BEFORE:

3 Illinois Pollution Control Board  
4 100 West Randolph Street  
5 Room 11-512  
6 Chicago, Illinois 60601  
7 (312) 814-3620,  
8 BY: MR. JOHN C. KNITTLE

9 -----

10 CHUHAK & TECSON, P.C.  
11 BY: MR. DANIEL J. BIEDERMAN  
12 MS. JULIE A. DOYLE  
13 225 West Washington Street, Suite 1300  
14 Chicago, Illinois 60606  
15 (312) 444-9300,

16 appeared on behalf of Heritage  
17 Environmental Services, LLC;

18 ILLINOIS ENVIRONMENTAL PROTECTION  
19 AGENCY  
20 BY: MR. ROBERT J. SCHERSCHLIGT and  
21 MR. MARK V. GURNIK  
22 1021 North Grand Avenue East  
23 P.O. Box 19276  
24 Springfield, Illinois 62794-9276  
(217) 782-5544,

appeared on behalf of the  
Illinois Environmental Protection  
Agency.

20 ALSO PRESENT: Ms. Alisa Liu, Illinois Pollution  
21 Control Board Engineer

22 Miss Emilea Lindgren

23

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1 HEARING OFFICER KNITTLE: My name is John  
2 Knittle. I am chief hearing officer with the  
3 Illinois Pollution Control Board.

4 We are here for a hearing today in  
5 Pollution Control Board docket number Adjusted  
6 Standard 2000-15 entitled in the matter of  
7 Petition of Heritage Environmental Services  
8 Incorporated for an adjusted standard from  
9 35 Illinois Administrative Code 702.126(d)(1).

10 It is approximately 10:00 a.m. on  
11 September 5th, 2000. I want to note for the  
12 record that there are no members of the public  
13 here.

14 Before we get started on the hearing  
15 proper and before I go off on my prehearing  
16 statements that I have to make, we have had a  
17 request from the petitioner to delay this matter  
18 for 30 minutes. We have got Ms. Doyle here,  
19 correct?

20 MS. DOYLE: Correct.

21 HEARING OFFICER KNITTLE: Is that correct,  
22 Ms. Doyle, you are requesting a 30-minute  
23 continuance due to an unavoidable delay, if I am  
24 not mistaken?

1 MS. DOYLE: Yes, that's correct.

2 HEARING OFFICER KNITTLE: Do we have any  
3 objection on that from the Environmental  
4 Protection Agency?

5 MR. GURNIK: No objection.

6 HEARING OFFICER KNITTLE: In light of the  
7 request and the lack of objection, we are just  
8 going to continue this off the record for 30  
9 minutes and we will meet back here at 10:30 and  
10 start up again.

11 (Short recess taken.)

12 HEARING OFFICER KNITTLE: We are back on the  
13 record. It is approximately 10:30 a.m.

14 As I have already stated, my name is  
15 John Knittle with the Illinois Pollution Control  
16 Board. It is September 5th of the year 2000.

17 We had a brief delay in the beginning.  
18 We had a request for a 30-minute continuance,  
19 which we granted, no objection from the Illinois  
20 Environmental Protection Agency.

21 As I stated, this is a hearing on  
22 Adjusted Standard 2000-15 in the matter of  
23 Petition of Heritage Environmental Services, Inc.,  
24 for an adjusted standard from 35 Illinois

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1 Administrative Code 702.126(d)(1).

2                   We are going to run this hearing  
3 pursuant to 102(j) of the Board's regulations,  
4 which provides for hearings for regulatory  
5 matters. We are running it that way because this  
6 is a RCRA matter. It is seeking adjusted standard  
7 of 702.126 which falls in the specified  
8 regulations in 106.410.

9                   So that being said, I note there are no  
10 members of the board being present here, other  
11 than Alisa Liu, and your title, ma'am?

12                  MS. LUI: Environmental scientist and  
13 professional engineer.

14                  HEARING OFFICER KNITTLE: She is with the  
15 Board's technical staff. I don't think there are  
16 any members of the public here. Are we going to  
17 count her?

18                  MR. BIEDERMAN: Sure.

19                  HEARING OFFICER KNITTLE: That is one of the  
20 witnesses' daughters, correct?

21                  MR. LINDGREN: Emilea Lindgren.

22                  HEARING OFFICER KNITTLE: Does she want to  
23 provide any public comment here today?

24                  MR. LINDGREN: No.

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1                  HEARING OFFICER KNITTLE: Aside from one of

2 the witnesses' daughters, there are no members of  
3 the public present. Everyone else is affiliated  
4 with the parties. If there were members of the  
5 public, they, of course, would be able to provide  
6 public comment and we would allow for that at the  
7 end of cases-in-chief. We may also allow a  
8 written public comment period, which we will  
9 discuss when we discuss briefing schedules.

10                   Could we have the parties starting with  
11 the petitioner introduce themselves, then we will  
12 get started?

13           MR. BIEDERMAN: My name is Daniel Biederman  
14 on behalf of Heritage.

15           MS. DOYLE: My name is Julie Doyle on behalf  
16 of Heritage as well.

17           HEARING OFFICER KNITTLE: Thank you.

18           MR. GURNIK: Mark Gurnik on behalf of the  
19 Illinois EPA.

20           MR. SCHERSCHLIGT: And Robert Scherschligt  
21 also Illinois EPA.

22           HEARING OFFICER KNITTLE: And Mr. Biederman,  
23 I think you wanted to indicate that there were two  
24 members of Heritage Environmental Services here.

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1           MR. BIEDERMAN: Actually, here with us today  
2 is Mr. Gary Lindgren from Heritage Environmental

3 Services. And also present is Mr. Carlton Lowe on  
4 behalf of the Metropolitan Water Reclamation  
5 District of Greater Chicago.

6 I will refer to that entity throughout  
7 this morning as the District.

8 HEARING OFFICER KNITTLE: Okay. All right.  
9 Let's get started.

10 Mr. Biederman, do you have an opening  
11 statement that you want to provide?

12 MR. BIEDERMAN: We do. And I would like my  
13 colleague, Ms. Doyle, to provide that opening.

14 HEARING OFFICER KNITTLE: Ms. Doyle?

15 OPENING STATEMENT

16 BY MS. DOYLE:

17 To summarize, Heritage is the owner and  
18 operator of a RCRA facility. The District owns  
19 the real property upon which the facility is  
20 located and, therefore, is required to sign the  
21 RCRA permit.

22 The District is a governmental entity.  
23 It does not have the statutory authority to sign  
24 the permit.

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1 Heritage today is seeking an adjusted  
2 standard from 35 Illinois Administrative Code

3 702.126(d)(1). Section 702.126(d)(1) is derived  
4 from 40 CFR 270.11. For the remainder of this  
5 hearing, we will refer to this regulation as the  
6 certification requirement.

7 Section 28.1 of the Illinois  
8 Environmental Protection Act allows the Board to  
9 adopt an adjusted standard if the factors relating  
10 to the applicant are substantially different from  
11 those relied upon by the Board in adopting the  
12 regulation and that those factors justify an  
13 adjusted standard.

14 The Board must also examine health  
15 effects and consistency with federal laws. In  
16 determining whether an adjusted standard is  
17 justified, the Board must act within the  
18 boundaries of its delegated authority as defined  
19 by Section 27(a) of the Environmental Protection  
20 Act. Pursuant to 27(a), the Board should be  
21 reasonable in its decision making, taking into  
22 account the use factors relative to individual  
23 petitions.

24 As I have stated, the District is a

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1 governmental entity vested with limited, very  
2 distinct powers. It does not have the statutory  
3 authority to sign the certification. Neither the

4 Board, nor the U.S. EPA considered an entity such  
5 as the District when it enacted the certification  
6 requirement. For this reason the adjusted  
7 standard sought by Heritage was justified.

8           Furthermore, the adjusted standard  
9 Heritage seeks is consistent with federal law  
10 based on the decision by the Ninth Circuit in the  
11 case of Systech versus U.S. EPA.

12           Finally, the adjusted standard, if  
13 granted, will not result in any adverse effects to  
14 health or the environment.

15           Based on all the documents of record and  
16 the testimony that Mr. Lowe and Mr. Lindgren will  
17 provide and comments by Mr. Biederman and myself,  
18 Heritage urges the Board to grant Heritage the  
19 adjusted standard it is seeking today. Thank you.

20           HEARING OFFICER KNITTLE: Thank you,  
21 Ms. Doyle.

22           Mr. Gurnik, do you have an opening  
23 statement?

24           MR. SCHERSCHLIGT: Just briefly, Bob

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1 Scherschligt, Illinois EPA.

2           OPENING STATEMENT

3 BY MR. SCHERSCHLIGT:

4                   The Agency will be filing a brief in  
5 this matter. But just very briefly, we would  
6 submit that the factors that the Board and that  
7 the U.S. EPA relied upon is that there are no  
8 factors unique or unique to MWRD or Heritage that  
9 would justify an adjusted standard in this  
10 particular case. Specifically, I would cite to  
11 the level of justification in Section 28.1(c)(1)  
12 of the Illinois Environmental Protection Act.

13                   And further, the Agency submits that  
14 the adjusted standard as proposed in the petition  
15 is, in fact, inconsistent with federal law.

16                   And having said that, I have nothing  
17 further.

18                   HEARING OFFICER KNITTLE: Thank you,  
19 Mr. Scherschligt.

20                   I do want to note for the record, and  
21 this is my error, Ms. Doyle handed me beforehand  
22 documents included in the record. We went over  
23 this off the record, and we are of the opinion  
24 that all of these documents are included in the

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1 Board's record to this point. Ms. Doyle,  
2 Mr. Biederman, do you want to make this an  
3 exhibit?

4                   MR. BIEDERMAN: I would like that, yes.

5 HEARING OFFICER KNITTLE: We have marked this  
6 now as Petitioner's No. 1. Just for the record  
7 the Illinois Environmental Protection Agency did  
8 not have an objection to this, correct?

9 MR. SCHERSCHLIGT: Correct.

10 HEARING OFFICER KNITTLE: And you are  
11 offering this into evidence?

12 MR. BIEDERMAN: Yes.

13 HEARING OFFICER KNITTLE: This will be  
14 accepted as Petitioner's No. 1. And you may now  
15 proceed with your case-in-chief.

16 (Whereupon document so offered  
17 was received in evidence as  
18 Petitioner's Exhibit No. 1.)

19 MR. BIEDERMAN: Mr. Knittle, I would like to  
20 call my first witness, and that is Mr. Carlton  
21 Lowe of the District, who is seated to my left.

22 HEARING OFFICER KNITTLE: Thank you.  
23 Mr. Lowe, we are going to have you sworn in by the  
24 court reporter.

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1 (Witness duly sworn.)

2 HEARING OFFICER KNITTLE: Mr. Biederman.

3 CARLTON LOWE,

4 called as a witness herein on behalf of Heritage

5 Environmental Services, LLC, having been first  
6 duly sworn, was examined and testified as follows:

7 DIRECT EXAMINATION

8 BY MR. BIEDERMAN:

9 Q. Good morning, sir. Would you state  
10 your name for the record, please?

11 A. My name is Carlton Lowe, L-o-w-e.

12 Q. Mr. Lowe, by whom are you employed?

13 A. The Metropolitan Water Reclamation  
14 District of Greater Chicago.

15 Q. So that the record is clear on this  
16 point, is it acceptable if I refer to that entity  
17 as the District throughout this morning?

18 A. Yes, that would be fine.

19 Q. If I refer to it as the District, you  
20 will know who I am referring to?

21 A. That's correct.

22 Q. Thank you.

23 Sir, how long have you been employed by  
24 the District?

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1 A. Approximately ten years, since  
2 February 4th, 1991.

3 Q. Mr. Lowe, what is your current position  
4 with the District?

5 A. My current title is principal assistant

6 attorney.

7 Q. Could you briefly state your  
8 educational background for us today?

9 A. I have my Bachelor's degree from  
10 Illinois Wesleyan University. I have my juris  
11 doctorate degree from Northwestern University.  
12 And I am licensed to practice law in the state of  
13 Illinois.

14 Q. Can you just briefly describe for us  
15 your duties and responsibilities as a District  
16 attorney?

17 A. Well, I am in charge of what we refer  
18 to as the asset management section of the real  
19 estate division of the law department. My primary  
20 duties and responsibilities are to supervise and  
21 oversee the leasing of District real estate to  
22 private parties and municipal corporations.

23 Q. Can you give us, Mr. Lowe, some  
24 background information regarding the District's

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1 history and the services that it performs for the  
2 general public?

3 A. Okay. Well, the District was created  
4 by the Illinois General Assembly in 1889, I think  
5 it is, to protect the water quality of Lake

6 Michigan. We performed that responsibility by  
7 treating and managing waste water. We cover  
8 approximately -- or our area of responsibility is  
9 approximately 850 square miles, which is just  
10 about all, but not quite all in Cook County.

11           We have pretty close to 600 miles of  
12 intersecting sewers. We manage and control the  
13 deep tunnel by which we store and treat waste  
14 water. We own real estate in Fulton County, which  
15 we also use in conjunction with our corporate  
16 purposes.

17           But what we primarily do is to treat  
18 waste water to make sure that the drinking water  
19 quality is not compromised in any way.

20           I should also add that many years ago  
21 in order to accomplish this purpose, the District  
22 with the assistance of the Army Corps of Engineers  
23 dug a very complicated canal interconnecting  
24 canals and channels by which we disperse this

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1 waste water.

2           In the process of building those canals  
3 and channels, we condemned and acquired more land  
4 than was absolutely necessary for the channels.  
5 So in addition to managing and controlling the  
6 waste water through the channels, we owned a great

7 deal of real estate on both sides of the channel.

8           The general assembly authorized the  
9 District in situations where it owned land and was  
10 not required for its corporate purposes, it could  
11 make that land available for lease to private and  
12 public entities pursuant to a specific statute  
13 which set forth how these lands are to be made  
14 available.

15           So my section pretty much take cares of  
16 leasing lands in accordance with our leasing  
17 statute.

18           Q.    Is it fair to say, Mr. Lowe, then that  
19 the Board's authority is limited in its scope in  
20 connection with the properties that it leases?

21           A.    That is correct.

22           Q.    Mr. Lowe, are you familiar with the  
23 facility located at 15330 Canal Bank Road in  
24 Lemont, Illinois?

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1           A.    Yes, I am.

2           Q.    And can you describe for us how you are  
3 familiar with that facility?

4           A.    Well, as I indicated before, one of my  
5 duties and responsibilities is to manage the  
6 leasing of District property to third parties.

7 This particular site became part of my portfolio  
8 back in the early 1990s when one of the -- an  
9 entity that was occupying District property had  
10 requested that we approve an assignment of a  
11 lease. So that is how this particular file first  
12 came to my attention.

13 Q. Describe for us the decisions the --  
14 the District's decision to lease the property to  
15 Heritage.

16 A. Okay, I am not quite sure when you say  
17 describe.

18 Q. You indicated in your testimony that  
19 there was a particular entity that approached the  
20 District to assign the lease to the District.

21 A. Yes.

22 Q. Can you give us more information on  
23 that assignment and the District's decision in  
24 accepting the assignment of that lease?

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1 A. Okay. The particular property in  
2 question, if my recollection serves me correctly,  
3 was leased -- about 65 acres was leased to an  
4 entity called the Lemont Industrial District back  
5 in the 1960s for a 99-year lease.

6 In 1980 the Lemont Industrial District  
7 subleased approximately, I think, about 17 acres

8 to Heritage Environmental Services. In the 1990s  
9 we were approached by the lessee, Lemont  
10 Industrial District, as well as the sublessee,  
11 Heritage, about the possibilities of Heritage  
12 entering into direct privity for the occupancy of  
13 that property with the District by the assignment  
14 or the spinning off that portion of the leasehold  
15 directly to Heritage so they can be in direct  
16 privity with the District.

17 Q. Mr. Lowe, do you know when the current  
18 lease expires?

19 A. Yes. It was a 99-year lease, so it  
20 expires in 2060, I think.

21 Q. Mr. Lowe, can you describe for us the  
22 District's understanding of the general nature of  
23 the operations at the facility?

24 A. Yes. It is our understanding that

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1 Heritage treats and stores hazardous waste  
2 materials at the -- at that particular facility.

3 Q. And what is the basis of your  
4 understanding of Heritage's activity on this  
5 property?

6 A. I guess it is two-fold. It is  
7 information that has been provided to us by

8 Heritage before agreeing to assign the lease.  
9 Naturally, we made sure we were aware what they  
10 were doing at the property. And also we have our  
11 own police department and our own real estate  
12 investigator who periodically patrol our lease  
13 properties.

14 So based upon information that Heritage  
15 has provided us and our own observations, we are  
16 comfortable that that is what they do with that  
17 particular site.

18 Q. Mr. Lowe, are you personally familiar  
19 with the lease that expires in approximately 2060?

20 A. Yes, I am.

21 Q. And you have reviewed a copy of that  
22 lease?

23 A. Yes.

24 Q. Okay. Did you bring a copy of that

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1 lease with you today?

2 A. Yes, I did.

3 Q. I would like to mark this as the second  
4 exhibit.

5 MR. BIEDERMAN: For the record we have  
6 identified Petitioner's No. 2 document.

7 BY MR. BIEDERMAN:

8 Q. Mr. Lowe, would you take a look at that

9 document?

10 A. Okay.

11 Q. Are you familiar with that document?

12 A. Yes, I am.

13 Q. And what is that document, sir?

14 A. This is the agreement by which the

15 assignment and assumption of lease was made to

16 Heritage.

17 Q. Is the lease attached to that document?

18 A. Yes. The underlying lease is attached.

19 Q. And you are familiar with both of those

20 documents that have been identified as

21 Petitioner's Exhibit No. 2?

22 A. Yes.

23 Q. Is it your understanding and opinion

24 that the lease that currently existed between the

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1 District and Heritage requires that Heritage

2 operate its facility in a manner that complies

3 with all applicable environmental laws and

4 statutes?

5 A. That's correct.

6 Q. And I believe, Mr. Lowe, that you

7 testified that the District understands that the

8 facility that Heritage operates at the facility is

9 a facility that is regulated under the Resource  
10 Conservation Recovery Act; is that correct?

11 A. That is correct.

12 Q. And as an operator of a facility under  
13 the Resource Conservation Recovery Act -- and I  
14 will also refer to that statute as the RCRA  
15 statute. So when I refer to that statute as RCRA,  
16 you will understand the statute that I am  
17 referring to?

18 A. Yes.

19 Q. And it is the District's understanding  
20 as an operator under the RCRA statute that it  
21 possesses a part A and a part B permit for that  
22 facility; is that correct?

23 A. That is correct.

24 Q. Let me ask you, does the District own

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1 other properties other than the property that we  
2 have been discussing located at Canal Bank Road  
3 upon which a RCRA permitted facility is located?

4 A. Well, we own several thousand acres of  
5 real estate, several hundred leases. But this is  
6 the only RCRA facility on District property.

7 Q. Thank you. Could you describe for me,  
8 Mr. Lowe, the District's involvement with the  
9 activities or operations of Heritage at this

10 facility?

11 A. Well, naturally, as the owner of the  
12 property, the District has an intense interest in  
13 being certain that its tenant is in compliance  
14 with its lease terms. And so, therefore, we have  
15 our own police department who periodically patrol  
16 the site. We have a real estate investigator who  
17 goes out to the site to see if there -- observe  
18 anything that would be in violation of the lease.  
19 And naturally what would violate the law would  
20 violate the lease.

21 But our role is to just make sure that  
22 there are, in fact, no violations of the lease  
23 agreement.

24 Q. Okay. Is it fair to say that the

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1 District has not in the past become involved in  
2 the day-to-day operations of the Heritage facility  
3 from a RCRA perspective?

4 A. No, we have not.

5 Q. Thank you.

6 Can you describe for me, Mr. Lowe, the  
7 steps Heritage has taken to ensure the District  
8 that the District is made aware of the nature and  
9 operation of the facility that is located at the

10 site?

11 A. Well, first of all, you know, Heritage  
12 has the ability and in the past has been engaged  
13 in direct discussions with the District at any  
14 time on many issues. We are provided with any  
15 public notices that are required for the facility,  
16 any changes in the operations, the lease  
17 requirements. If there are any problems or any  
18 issues, any spills or any releases, we are to be  
19 provided that information immediately.

20 So we do have a mechanism in place  
21 where -- that Heritage at any time in any way can  
22 contact the District, and we do insist that they  
23 keep us apprised as to what is taking place of any  
24 changes at that facility.

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1 Q. Is it fair to say, Mr. Lowe, that the  
2 District is well advised of the nature of the  
3 operations that are being conducted at the  
4 facility?

5 A. We take -- again we -- the District  
6 takes the position that it has a responsibility to  
7 the public to manage its land efficiently and  
8 consistently. So we do take great pride in being  
9 aggressive and being aware of what is going on in  
10 the property, not only Heritage, but any situation

11 where we lease land to a third party.

12 Q. Mr. Lowe, is it fair to say that the  
13 District understands the nature of liability that  
14 is imposed by the RCRA statute?

15 A. Absolutely, maybe not happy about it,  
16 but we do understand that we are, as a land owner  
17 -- the District is jointly and severally liable  
18 for the acts and operations of the Heritage  
19 facility, no question about it. We made it very  
20 clear to our Board of Commissioners that the law  
21 imposes that liability, yes. So we are aware of  
22 that.

23 Q. Mr. Lowe, you are familiar with the  
24 certification that appears in the regulations that

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1 were referred to earlier by Ms. Doyle. You are  
2 familiar with that certification; is that correct?

3 A. Yes, I am.

4 Q. And that certification has been the  
5 topic of numerous discussions with you and myself  
6 and with representatives of the Illinois  
7 Environmental Protection Agency; is that correct?

8 A. That is very true.

9 Q. Okay. And I notice, Mr. Lowe, that you  
10 have a copy of that certification in front of you

11 today; is that correct?

12 A. That is true.

13 Q. And that is the certification that  
14 appears in the regulations that have been referred  
15 to today; is that correct?

16 A. That is my understanding, yes.

17 Q. Would you object if we identify that as  
18 an exhibit for the record?

19 A. No, not at all.

20 HEARING OFFICER KNITTLE: This is  
21 Petitioner's No. 3, Mr. Biederman.

22 MR. BIEDERMAN: And I apologize, I don't have  
23 an extra copy, but I think it is a document that  
24 you will both recognize.

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1 MR. SCHERSCHLIGT: Mr. Biederman, is this  
2 used for demonstrative purposes, evidentiary?

3 MR. BIEDERMAN: I would like to admit it into  
4 evidence. I would like Mr. Lowe to testify from  
5 this document and refer to this document.

6 MR. SCHERSCHLIGT: Well, I guess it may be  
7 premature, but, I mean, I would prefer that we  
8 just stipulate to the language in the regulation.  
9 That has verbatim the certification language that  
10 is at issue here. And, you know, I don't know  
11 what kind of foundation you are prepared to lay

12 for this, but I do notice that it has been  
13 modified. There are markings on it. It is -- so  
14 we would probably be inclined to object if it were  
15 offered into the record. It is hearsay.

16           There are -- I guess it is not clear to  
17 the Agency for what purpose the exhibit is being  
18 offered, but that may become more clear as  
19 Mr. Biederman attempts to lay foundation for it.

20           MR. BIEDERMAN: I would like to state that I  
21 believe that this document has previously --  
22 without any notations that have been made on the  
23 document has been previously stipulated to and has  
24 been entered into the record as part of the

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1 documents that are attached to our petition.

2           MS. DOYLE: I don't know if that is true.

3           MR. SCHERSCHLIGT: If that is the case, then  
4 I would prefer that you just refer to the already  
5 proffered exhibit as opposed to marking this as a  
6 separate exhibit, knowing that it has been  
7 modified and marked on.

8           MS. DOYLE: Exhibit A to our petition is the  
9 statute at issue here, if you just want to stick  
10 with that.

11           MR. BIEDERMAN: That is fine.

12 MR. SCHERSCHLIGT: Thank you.

13 MR. BIEDERMAN: I can also refer -- just off  
14 the record.

15 HEARING OFFICER KNITTLE: Off the record.

16 (Discussion had off the  
17 record.)

18 HEARING OFFICER KNITTLE: On the record.

19 BY MR. BIEDERMAN:

20 Q. Mr. Lowe, I would like you to turn your  
21 attention to page 6 of the petitioner's petition  
22 for adjusted standard, in particular the  
23 certification language that appears on that page.

24 A. Okay.

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1 Q. You are familiar with the certification  
2 language that appears on page 6?

3 A. Yes, I am.

4 Q. Has the District ever executed the  
5 certification in its exact form as it appears on  
6 that page?

7 A. Not to my knowledge, no.

8 Q. Thank you.

9 Are you aware that the District has, in  
10 fact, executed alternative certification language?

11 A. Yes.

12 Q. Okay. Can you explain your

13 understanding of the alternative certification  
14 language that the Board has executed?

15 MR. SCHERSCHLIGT: Objection to relevance. I  
16 think the adjusted standard as being proffered  
17 here is clear from the petition. And any language  
18 or lax language or ultimate language that may have  
19 been accepted in the past really is not relevant  
20 for purposes of these proceedings.

21 HEARING OFFICER KNITTLE: Mr. Biederman?

22 MR. BIEDERMAN: I would state that the  
23 history of this facility, this facility's  
24 compliance with applicable regulations, the

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1 certifications that the District has made in the  
2 past are clearly relevant to each of the four  
3 factors that the petitioner is required to prove.

4 In particular, one of the factors that  
5 we intend to prove is that the existence of the  
6 factors that exists justifies an adjusted  
7 standard. Relevant to that is the compliance  
8 history of the facility. We intend to prove that  
9 we have operated under an alternative  
10 certification and that our operation under that  
11 alternative certification has not caused any  
12 detrimental health effects.

13 I would refer to the four factors that  
14 are required for us to prove our petition. One of  
15 those factors is that the requested standard will  
16 not result in environmental or health effects  
17 substantially and significantly nor adverse than  
18 the effects considered by the Board in adopting  
19 the rule of general applicability.

20 I think that it is very relevant what  
21 conditions this facility has been operating under  
22 in the past, and I would like to continue this  
23 line of questioning.

24 MR. SCHERSCHLIGT: I am sorry, if I may

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1 respond?

2 HEARING OFFICER KNITTLE: Sure.

3 MR. SCHERSCHLIGT: Previously executed  
4 certification language has absolutely nothing to  
5 do with present or past compliance of the  
6 petitioner. I might note that the petitioner in  
7 this case is Heritage Environmental, not MWRD.

8 And in terms of being consistent with  
9 any applicable federal law, that has absolutely  
10 nothing to do with what MWRD may have signed in  
11 the past. The question is is the certification  
12 language in this petition, is the evidence at this  
13 hearing going to meet that level of justification

14 for that certification language. And what was  
15 proffered or executed in the past has no relevance  
16 whatsoever.

17 MR. BIEDERMAN: May I respond?

18 HEARING OFFICER KNITTLE: Yes.

19 MR. BIEDERMAN: I view our obligation here in  
20 this petition for adjusted standard to be greater  
21 than simply compliance with federal law. As I  
22 indicated, I believe one of our -- the  
23 requirements that we must prove is that if the  
24 Board grants this adjusted standard, that it will

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1 not result in any environmental health effects  
2 that are substantially and significantly more  
3 adverse than the effects considered by the Board.

4 I think that the proof will show, the  
5 evidence will show that Heritage has been  
6 operating under the co-permittee alternative  
7 certification and that there is no likelihood or  
8 no possibility that simply continuing an alternate  
9 certification would affect the compliance history,  
10 the compliance nature of that facility or impact  
11 in any way environmental or health effects of that  
12 facility.

13 HEARING OFFICER KNITTLE: Anything further

14 Mr. Scherschligt?

15 MR. SCHERSCHLIGT: This is not a retroactive  
16 adjusted standard. What they have been operating  
17 under as far as certification language may be the  
18 subject of dispute, I don't know. But it doesn't  
19 make any difference what they have been operating  
20 under. What is relevant is what they are  
21 proposing to be operating under from the point in  
22 time if and when the Board adopts the adjusted  
23 standard and into the future.

24 You know, if the agency in the past has

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1 accepted alternate certification language, then  
2 that would clearly be error on the part of the  
3 agency. And the fact that the agency may have  
4 erred in the past does not mean that it should  
5 perpetuate its error. I think the Board has made  
6 that clear in State Bank of Whittington.

7 MR. BIEDERMAN: The purpose of the evidence  
8 concerning certifications that may have been  
9 executed in the past is not to point out any  
10 error. The sole purpose and relevancy of those  
11 certifications is just simply to prove that  
12 operation under an alternative certification in  
13 the future will not have any adverse effects on  
14 the environment or health.

15 MR. SCHERSCHLIGT: Well, then let's -- I am  
16 sorry.

17 MR. BIEDERMAN: If the agency is willing to  
18 stipulate to that fact, I would be willing to  
19 strike from the record -- I want to think about  
20 this for a minute. Can we go off the record for a  
21 minute?

22 HEARING OFFICER KNITTLE: Yes.

23 (Discussion had off the  
24 record.)

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1 HEARING OFFICER KNITTLE: We are back on the  
2 record after a short discussion off the record  
3 still debating -- well, we have had an objection  
4 by Mr. Scherschligt. We haven't actually had this  
5 exhibit offered into evidence at this point. This  
6 all by might be a little premature.

7 Mr. Biederman, are you planning on  
8 introducing this into evidence?

9 MR. BIEDERMAN: This is in evidence, this --  
10 the certification that we have been discussing.

11 HEARING OFFICER KNITTLE: So,  
12 Mr. Scherschligt, what are you objecting to  
13 exactly?

14 MR. SCHERSCHLIGT: What number is that,

15 Mr. Biederman?

16 MS. DOYLE: It is Exhibit B.

17 MR. SCHERSCHLIGT: Plaintiff's exhibit --

18 MR. BIEDERMAN: I am referring directly to  
19 the certification language as it appears in the  
20 regulation.

21 MR. SCHERSCHLIGT: As long as Mr. Biederman  
22 is referring to the certification language in the  
23 petition and not the single page that was marked  
24 as an exhibit, I have no objection to him

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1 referring to that.

2 HEARING OFFICER KNITTLE: All right.

3 MR. SCHERSCHLIGT: But my objection was to  
4 Mr. Biederman referring to certification language  
5 that the Agency may have accepted in the past. I  
6 object on the basis of relevance. I object on the  
7 basis of it assumes facts not evidence. And I  
8 object on the basis of it being hearsay. Because  
9 there is absolutely nothing to demonstrate what  
10 that is.

11 HEARING OFFICER KNITTLE: Okay. And we have  
12 had extensive discussion on this. And,  
13 Mr. Biederman, I will allow you one last response,  
14 then we are going to rule on it and get moving.

15 MR. BIEDERMAN: I want to make sure that I am

16 very clear on the line of testimony that we are  
17 addressing here. The certification I have been  
18 addressing with the witness, Mr. Lowe, is the  
19 certification as it appears on page 6 of our  
20 petition. I have asked Mr. Lowe if alternative  
21 language has been executed on behalf of the  
22 District. And I believe that Mr. Lowe testified  
23 that, yes, in fact, alternate language has been  
24 executed. I am making no offer of proof as to

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1 whether that certification -- that language was  
2 approved by the IEPA.

3 MR. SCHERSCHLIGT: I object to hearsay then.  
4 Produce it. If there has been past certification  
5 language, lay the foundation and produce it. But  
6 for Mr. Lowe to testify what that was or if it  
7 even occurred is hearsay and, not to mention,  
8 irrelevant and assumes facts not in evidence.

9 HEARING OFFICER KNITTLE: Let me jump in. I  
10 am not so concerned about the hearsay at this  
11 point, but I don't see how it is relevant,  
12 Mr. Biederman.

13 MR. BIEDERMAN: I would like to point out  
14 that the alternate certification that has been  
15 executed on behalf of the District is, in fact,

16 part of our evidentiary record and it appears in  
17 our petition as the last page of Exhibit B. So I  
18 believe that this certification language is, in  
19 fact, part of this record. Again, I --

20 HEARING OFFICER KNITTLE: A relevant part of  
21 the record? That is what I am concerned about.

22 MR. BIEDERMAN: Yes, absolutely.

23 HEARING OFFICER KNITTLE: Tell me why it is  
24 relevant.

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1 MR. BIEDERMAN: It is relevant because it  
2 speaks to the condition under which the facility  
3 has operated in the past. It has operated in the  
4 past under an alternate certification executed by  
5 the District. And I believe that there is no  
6 evidence to suggest that if the facility were to  
7 continue operating under an alternate  
8 certification that it would not have any adverse  
9 effects on the compliance record of the facility  
10 or environmental or health effects of the  
11 facility.

12 I believe that is relevant and  
13 important because I believe and I understand one  
14 of the requirements that we must prove is that the  
15 existence of the factors that are different  
16 justified an adjusted standard.

17 MR. SCHERSCHLIGT: It is prospective. It is  
18 not retroactive relief. There has been no  
19 foundation laid for anything that may already  
20 exist in that exhibit. To the extent you want to  
21 try and lay foundation and introduce it somewhere  
22 down the line, that is fine. But this is not  
23 about retroactive relief. This is about is this  
24 certification language proposed in the petition,

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1 does it satisfy the level of justification. And  
2 any past certification language should not justify  
3 or validate the certification language that is  
4 being proposed.

5 HEARING OFFICER KNITTLE: I am going to  
6 overrule the objection, Mr. Scherschligt. I think  
7 that at least it is potentially relevant to  
8 whether there is going to be a health or safety  
9 issue down the road based on past performance. I  
10 am going allow it in, but I am not going to allow  
11 a lot of questions along this line. Because I do  
12 agree with Mr. Scherschligt that it is prospective  
13 relief you are speaking of here. Although I think  
14 it is at least tenuously relevant, I am not so  
15 sure that I want to go too far into it.

16 MR. BIEDERMAN: And I would agree. In fact,

17 the evidence that I want in the record I think is  
18 now complete and I am prepared to move on.

19 MR. SCHERSCHLIGT: And, Mr. Hearing Officer,  
20 if I may just reserve my right to -- first of all,  
21 I guess I would just ask for your ruling on my  
22 objection for lack of foundation for this  
23 alternate certification language that  
24 Mr. Biederman is referring to in the exhibit. And

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1 secondly, I would also reserve my right to object  
2 at a later time as well.

3 HEARING OFFICER KNITTLE: Mr. Scherschligt, I  
4 think, though, the language he is referring to is  
5 part of the petition, correct? See, he is no  
6 longer referring to -- at least it is my  
7 understanding that this is no longer Petitioner's  
8 Exhibit 3 --

9 MR. BIEDERMAN: That's correct.

10 HEARING OFFICER KNITTLE: -- from the hearing  
11 he is referring to.

12 MR. BIEDERMAN: That's correct.

13 HEARING OFFICER KNITTLE: He is referring to  
14 an exhibit that is attached to the petition filed  
15 before the Board in this case.

16 MR. BIEDERMAN: Correct.

17 MR. SCHERSCHLIGT: To the extent that he just

18 wants to point out that that page exists in the  
19 exhibit, I guess I don't have a problem with that.  
20 Then I would question for what purpose are you  
21 offering that?

22 HEARING OFFICER KNITTLE: Mr. Biederman, you  
23 are not offering that to my understanding at all,  
24 are you?

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1 MR. BIEDERMAN: Well, I want to be very  
2 clear. I don't believe that there is a need to  
3 offer this into evidence because I believe that  
4 the certification language that has been executed  
5 is part of the evidentiary record.

6 I was just simply asking this witness  
7 if he was familiar with the fact that alternative  
8 certification language had been executed on behalf  
9 of the District in the past. I believe that the  
10 witness, Mr. Lowe, responded in the affirmative  
11 and said that he was familiar.

12 HEARING OFFICER KNITTLE: Okay. To the  
13 extent that that is the only question,  
14 Mr. Scherschligt, I don't see that any foundation  
15 would --

16 MR. SCHERSCHLIGT: We will stipulate that  
17 there is a page in that exhibit that refers to

18 some other certification language is what is being  
19 offered in this case.

20 HEARING OFFICER KNITTLE: Sufficient,  
21 Mr. Biederman?

22 MR. BIEDERMAN: Absolutely.

23 HEARING OFFICER KNITTLE: Mr. Scherschligt?

24 MR. SCHERSCHLIGT: That is fine.

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1 HEARING OFFICER KNITTLE: Let's move on.

2 MR. BIEDERMAN: Thank you.

3 If I could have one moment here.

4 HEARING OFFICER KNITTLE: Do you need to go  
5 off the record?

6 MR. BIEDERMAN: No.

7 BY MR. BIEDERMAN:

8 Q. Mr. Lowe, let me direct your attention  
9 now to page 14 of the petitioner's petition for  
10 an adjusted standard, and in particular I will  
11 refer your attention to the proposed alternative  
12 certification language that appears on that page.

13 A. Okay.

14 Q. Are you familiar with that language,  
15 sir?

16 A. Yes.

17 Q. Is it your understanding that the  
18 District is willing to execute such language?



19 Q. Can you answer that question?

20 HEARING OFFICER KNITTLE: You can answer that  
21 question. Can you answer his question?

22 THE WITNESS: Yes, I think I can.

23 HEARING OFFICER KNITTLE: Mr. Scherschligt,  
24 do you have an objection?

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1 MR. SCHERSCHLIGT: I will withdraw the  
2 objection based on the answer.

3 THE WITNESS: My involvement with respect to  
4 the language that has been pointed out is that  
5 when matters come into the District that requires  
6 the signature of the corporate authorities for the  
7 District, which is the general superintendent, it  
8 comes to the law department to review and approve  
9 that language before it is submitted for execution  
10 by the general superintendent.

11 The original certification language is  
12 the law department's point of view that the  
13 general superintendent cannot execute that  
14 language because it requires the District to  
15 attest to facts which are not, in fact, true, that  
16 is that the District did not direct and supervise  
17 the preparation of the application. And it is our  
18 position that the District cannot -- it is a  
19 public -- the District is a governmental entity.

20 It cannot go into Heritage and directly supervise  
21 the preparation of that application.

22 We have advised Heritage of that and  
23 have indicated that we have no difficulty in  
24 certifying to language that is true and, in fact,

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1 correct, but we cannot certify or recommend to the  
2 general superintendent to certify language that is  
3 false.

4 So that resulted in some discussion  
5 with Heritage and Mr. Biederman as to how we can  
6 satisfy the purpose of the certification  
7 provisions in a manner that allows the District to  
8 attest truthfully and allow it to do so in a way  
9 where it does not exceed its authority.

10 BY MR. BIEDERMAN:

11 Q. Mr. Lowe, is it your testimony today  
12 that the certification that appears on page 14 of  
13 the petitioner's petition for an adjusted  
14 standard, that that certification is within the  
15 authority of the District to execute?

16 A. Yes. We have carefully reviewed that  
17 language, and it is our opinion that we can  
18 recommend the general superintendent execute that  
19 language, that's correct, or certify to that

20 language.

21 Q. Mr. Lowe, is the District attempting in  
22 any way to distance itself from its obligations  
23 under RCRA by seeking to execute the alternative  
24 certification language that appears on page 14?

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1 A. No, absolutely not. The District's --  
2 the District's goal is two-fold: One that it must  
3 operate within its statutory authority, and, two,  
4 whatever it is that is certified to must be true  
5 or fact. Those are the only two objectives.

6 Q. And you believe that those objectives  
7 are accomplished with this alternative  
8 certification language?

9 A. That is correct.

10 Q. Mr. Lowe, does the District remain  
11 willing to work with the Board and/or the IEPA  
12 and/or Heritage in alternative certification  
13 language that is acceptable to all parties and  
14 meets the needs and goals of the District?

15 A. Yes. I think we have been very clear  
16 on that point throughout the process.

17 MR. BIEDERMAN: Thank you. Could I have just  
18 one minute?

19 HEARING OFFICER KNITTLE: Yes.

20 MR. BIEDERMAN: I have no further questions

21 on direct and reserve my right to redirect at the  
22 completion of the cross.

23 HEARING OFFICER KNITTLE: Mr. Scherschligt or  
24 Mr. Gurnik, do you have cross?

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1 MR. GURNIK: Yes.

2 CROSS-EXAMINATION

3 BY MR. SCHERSCHLIGT:

4 Q. Mr. Lowe, you have testified that MWRD  
5 does not have the authority to sign the permit  
6 application?

7 A. No, I haven't testified to that. What  
8 I have attempted to testify to is that we do not  
9 have the authority to certify the language as it  
10 appears on page 4 of the petition.

11 Q. The District has filed permit  
12 applications in the past with the Illinois EPA on  
13 unrelated matters, hasn't it?

14 MR. BIEDERMAN: Objection. It addresses  
15 evidence that is not in the record. It is also  
16 outside the scope of the direct examination.

17 HEARING OFFICER KNITTLE: Overruled.

18 BY MR. SCHERSCHLIGT:

19 Q. Have you filed permit applications in  
20 the past?

21           A.     Yes.  It is my understanding that the  
22 District has.

23           Q.     And they have signed those permit  
24 applications, have they not?

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1           A.     They have a clear distinction, though.

2           Q.     But have they signed those permit  
3 applications?

4           A.     Sure.

5           Q.     Those permit applications also contain  
6 certification language?

7           A.     Sure.  But the question is sort of  
8 misleading, though.  Those are --

9           Q.     Your counsel will have the opportunity  
10 to ask you any redirect.

11          A.     Okay.

12          Q.     You have testified that other than  
13 assurances or -- verbal or written assurances that  
14 you may receive from Heritage and police patrols,  
15 are there any other measures that the District  
16 undertakes in ascertaining compliance with  
17 Heritage's permit or any other environmental laws  
18 or regulations?

19          A.     When Heritage makes application for  
20 modifications or new permits, we do have those  
21 documents reviewed by the District's research and

22 development department.

23 Q. And do they have expertise in the  
24 contents or the proposals in those permit

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1 applications?

2 A. I would say that they -- yes, they  
3 review them. So I would assume that there is some  
4 level of expertise.

5 Q. So they provide some oversight to the  
6 permit application process?

7 MR. BIEDERMAN: Objection. That assumes  
8 facts not in evidence and --

9 MR. SCHERSCHLIGT: I am asking him.

10 MR. BIEDERMAN: If I can finish my objection.

11 HEARING OFFICER KNITTLE: You can finish your  
12 objection.

13 MR. BIEDERMAN: And I think it  
14 mischaracterizes the witness's testimony.

15 HEARING OFFICER KNITTLE: Mr. Scherschligt?

16 MR. SCHERSCHLIGT: I asked if they provide  
17 any oversight to the application permit process.  
18 I am asking for evidence to that effect.

19 HEARING OFFICER KNITTLE: I will allow the  
20 question to stand.

21 If you can answer, sir.

22 THE WITNESS: When a document is submitted by  
23 Heritage for the District's execution, we do  
24 review those documents. That is correct.

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1 BY MR. SCHERSCHLIGT:

2 Q. What terms of compliance measures does  
3 the District undertake in making sure that the  
4 lessee, Heritage, is in compliance with its  
5 permits and with the environmental laws and  
6 regulations?

7 A. What we don't do is that -- let me tell  
8 you what we do do. And what we do do is what I  
9 indicated earlier. We patrol the property both  
10 with our police department and our real estate  
11 investigation staff. We pay attention to any  
12 documents that are submitted by Heritage and have  
13 them reviewed by our technical people. We pay  
14 attention to public notices that are submitted.  
15 We do what we think the landlord would ordinarily  
16 do. We don't get into the Heritage day-to-day  
17 operations.

18 Q. Are your police officers experts in  
19 environmental laws and environmental compliance?

20 A. Absolutely not.

21 Q. So they wouldn't really know if that  
22 facility were operating in the confines of its

23 permits or the law and regulations; is that  
24 correct?

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1 A. That is true.

2 Q. Now, the certification language --  
3 first of all, it is true that MWRD is not a party  
4 to this action; is that correct?

5 A. That's correct.

6 Q. But MWRD, you would agree, does have a  
7 vested interest in the outcome of this action?

8 MR. BIEDERMAN: Objection to the form of the  
9 question.

10 BY MR. SCHERSCHLIGT:

11 Q. Does MWRD have a vested interest in the  
12 outcome of this action?

13 MR. BIEDERMAN: I would renew my objection.

14 THE WITNESS: I am not sure --

15 HEARING OFFICER KNITTLE: Let me rule. I  
16 have got to overrule. I think this goes to  
17 credibility on cross-examination.

18 MR. BIEDERMAN: My objection spoke to the  
19 issue of -- could you read the question back,  
20 please?

21 HEARING OFFICER KNITTLE: Hold on. Ask me to  
22 ask her to read the question back. I don't want



24

You can answer, sir.

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1 THE WITNESS: Okay. We perceive it as  
2 providing no benefit at all to the District. Our  
3 position is simply this, that the language that we  
4 certified to must, in fact, be true. We don't  
5 perceive it as providing us a benefit or harm or  
6 any other way.

7 BY MR. SCHERSCHLIGT:

8 Q. Forgive me, it is to alleviate the  
9 District's concerns, would that be a fair  
10 statement?

11 A. No. It is to make sure the District  
12 can certify truthfully and legally to a statement.  
13 It is not an issue of concern.

14 Q. So it benefits the District to that  
15 end?

16 A. We don't refer to it as benefiting the  
17 District. If, in fact, your position is that  
18 compliance with the law or testifying truthfully  
19 is beneficial to the District, yes, in that sense  
20 it benefits the District. If your suggestion is  
21 that we somehow derive some other types of  
22 benefits, absolutely not.

23 Q. The former was what I was getting it

24 and you have answered my question. Thank you.

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1 I would like to go over the  
2 certification language in the petition on page 14  
3 of the petitioner's petition for adjusted  
4 standard. There is no reference in that language,  
5 is there, to certifying under penalty of law or  
6 penalty of purgery; isn't that correct?

7 A. That's correct.

8 Q. And there is no language in there  
9 with respect to any acknowledgment of joint and  
10 several liability on the part of MWRD; isn't that  
11 correct?

12 A. No, but neither is there any such  
13 language --

14 MR. SCHERSCHLIGT: Mr. Hearing Officer, I  
15 would ask that you instruct the witness to answer  
16 the question that has been asked. And if his  
17 attorney wants to elaborate at a later time, that  
18 is his right.

19 HEARING OFFICER KNITTLE: Sir, if you could  
20 try to refrain from adding additional information  
21 than what is asked.

22 THE WITNESS: Okay.

23 HEARING OFFICER KNITTLE: I would direct you  
24 to do so.

1 THE WITNESS: Okay.

2 BY MR. SCHERSCHLIGT:

3 Q. And, Mr. Lowe, there is no  
4 acknowledgement of any joint responsibility for  
5 compliance of the facility, is there?

6 A. In the statement itself, no.

7 Q. And there is no assertion that there  
8 has been due diligence or good faith with respect  
9 to the truth of the contents of the permit  
10 application; isn't that correct?

11 A. Oh, I think that is fairly clearly  
12 implied.

13 Q. How is it implied, sir?

14 A. You are certifying that it was prepared  
15 by a professional engineer.

16 Q. So you would submit that --

17 A. You are certifying that you have  
18 confirmed with the operator. You are certifying  
19 that it is to the best of your knowledge that it  
20 is true. Surely that implies that.

21 Q. But there is no reference to due  
22 diligence, is there?

23 MR. BIEDERMAN: Objection, argumentative.

24 HEARING OFFICER KNITTLE: Mr. Scherschligt?

1 MR. SCHERSCHLIGT: I can ask it in a  
2 different tone if that would help.

3 BY MR. SCHERSCHLIGT:

4 Q. Is there any reference to due diligence  
5 in that proposed certification language?

6 A. The language surely sets forth a  
7 process of due diligence. It does not use the  
8 words due diligence.

9 Q. Thank you. That was my question.

10 Are you familiar with the Ninth Circuit  
11 Court of Appeals opinion that the petitioner has  
12 attached as an exhibit to its petition for  
13 adjusted standard?

14 A. I have read it, but I wouldn't say I am  
15 familiar with it, no.

16 Q. Do you acknowledge that Congress and  
17 the U.S. EPA felt that there was a policy  
18 objective that owners share in the responsibility  
19 for compliance at a particular facility?

20 MR. BIEDERMAN: Objection. It is outside the  
21 scope of direct. It also assumes facts that are  
22 not in evidence.

23 MR. SCHERSCHLIGT: It goes to the question of  
24 whether it is consistent with federal law.

1 MR. BIEDERMAN: Again, it was --

2 MR. SCHERSCHLIGT: Petitioner is asserting  
3 that this petition is consistent with federal law.  
4 And as part of the petition, they have attached a  
5 Ninth Circuit Court of Appeals opinion that goes  
6 to compliance.

7 MR. BIEDERMAN: Does it go to compliance or  
8 does it go to the issue of the nature and extent  
9 of federal law? Again, I believe it is outside  
10 the scope of direct.

11 HEARING OFFICER KNITTLE: I am going to  
12 sustain the objection. I don't think we covered  
13 this in direct examination.

14 MR. SCHERSCHLIGT: I think he asked him about  
15 compliance, past and present compliance in the  
16 facility. And I would limit any question and  
17 offer it only to the extent that it goes to  
18 compliance at the facility -- present compliance  
19 at the facility.

20 HEARING OFFICER KNITTLE: But the question  
21 about the attached case, Mr. Scherschligt?

22 MR. SCHERSCHLIGT: I guess my question is  
23 does MWRD acknowledge that it has joint  
24 responsibility for compliance at the facility.

1 HEARING OFFICER KNITTLE: I will allow that  
2 question to stand.

3 THE WITNESS: We are very much aware that  
4 they are jointly and severally liable.

5 BY MR. SCHERSCHLIGT:

6 Q. But are you also aware that you are  
7 jointly and severally responsible for compliance?

8 MR. BIEDERMAN: Objection. It calls for a  
9 legal conclusion.

10 MR. SCHERSCHLIGT: I will rephrase.

11 HEARING OFFICER KNITTLE: Mr. Scherschligt?

12 MR. SCHERSCHLIGT: I will rephrase.

13 BY MR. SCHERSCHLIGT:

14 Q. I will just ask it this way. Does the  
15 District view itself as being jointly responsible  
16 for compliance at the facility? I won't ask what  
17 the law requires. I will ask does the District  
18 view itself as being jointly responsible for  
19 compliance measures at the facility?

20 A. The District views itself as jointly  
21 and severally liable for any failures of the  
22 facility to comply with the law, sure.

23 Q. So if the law were that you were  
24 jointly responsible for compliance itself, you

1 would dispute that?

2 MR. BIEDERMAN: I am going to object to  
3 the --

4 THE WITNESS: I think I am answering your  
5 question. When you say jointly responsible, I am  
6 not really sure what -- what I am certain of is  
7 that we are jointly and severally liable. I am  
8 not sure what you mean when you say jointly  
9 responsible.

10 BY MR. SCHERSCHLIGT:

11 Q. I appreciate that. And that was one of  
12 my other questions, whether you acknowledge joint  
13 and several liability, and I think you already  
14 have.

15 But even before we get to the issue of  
16 liability, in the event of a violation, do you  
17 also acknowledge that you are jointly -- that the  
18 District is jointly responsible for the compliance  
19 activities at that facility for making sure that  
20 it does stay in compliance?

21 MR. BIEDERMAN: I would object to the  
22 question. I believe it calls for a legal  
23 conclusion.

24 MR. SCHERSCHLIGT: It asks whether the

1 District recognizes a joint responsibility, not  
2 what the law requires. I simply want to know do  
3 they recognize that, do they subscribe to that?

4 HEARING OFFICER KNITTLE: I will overrule the  
5 objection.

6 THE WITNESS: Do we subscribe to what?

7 BY MR. SCHERSCHLIGT:

8 Q. Do you subscribe to the policy that  
9 MWRD is jointly responsible for compliance at that  
10 facility?

11 A. And I am not answering your question  
12 when I say we are jointly and severally liable?

13 Q. I don't want to know what you view your  
14 liability. I want to know if you view it your  
15 responsibility to make sure that that facility is  
16 in compliance?

17 MR. BIEDERMAN: I am going to again object to  
18 this question. It is vague. It has been asked  
19 and answered.

20 MR. SCHERSCHLIGT: It has not been asked and  
21 answered.

22 MR. BIEDERMAN: And it calls for a legal  
23 conclusion.

24 MR. SCHERSCHLIGT: It is not vague. It is

1 right out of the attachment to the petitioner's  
2 petition. They attach a copy of the Ninth  
3 District Court of Appeals in their petition.

4 HEARING OFFICER KNITTLE: I think there is a  
5 difference in the two questions. I would like to  
6 hear the witness answer it once.

7 Do you need the question read back,  
8 sir?

9 THE WITNESS: No. I need -- when you say  
10 joint --

11 MR. SCHERSCHLIGT: I will rephrase the  
12 question.

13 THE WITNESS: Are you saying responsible to  
14 making sure on a day-to-day basis that the  
15 facility is properly staffed, that we are  
16 responsible for checking whenever any particular  
17 barrel or hazardous waste facility comes into the  
18 facility?

19 BY MR. SCHERSCHLIGT:

20 Q. I will rephrase the question, Mr. Lowe.  
21 Do you acknowledge a responsibility to provide  
22 supervision in any fashion to make sure that that  
23 facility is operating in accordance with the law  
24 and its permits?

1           MR. BIEDERMAN: I am going to object to the  
2 form of the question. Again, I think it assumes  
3 facts not evidence and it is outside the scope of  
4 the direct.

5           HEARING OFFICER KNITTLE: Yes, your objection  
6 is noted for the record, but I will allow the  
7 question to go forward.

8                       To the best of your ability, sir.

9           THE WITNESS: What level of responsibility?

10 BY MR. SCHERSCHLIGT:

11           Q. Any responsibility?

12           A. Are we responsible for failures of  
13 the facility, yes, we are. Are we responsible to  
14 make sure that each and every day the facility is  
15 properly staffed, we take a position that is not  
16 our responsibility. Are we responsible on each  
17 and every day to check each drum that comes into  
18 the site, we don't view that as our  
19 responsibility.

20           Q. If you become aware of a violation at  
21 the facility, do you feel that the District has an  
22 obligation to correct that violation?

23           A. We take a position, absolutely, that  
24 any violation should be corrected. Our first

1 position is that Heritage should correct it. But  
2 if Heritage does not immediately do it,  
3 absolutely.

4 Q. What measures do you undertake to find  
5 out whether or not the facility is, in fact, in  
6 compliance, other than police patrols and verbal  
7 assurances or written assurances that you may  
8 receive from Heritage?

9 MR. BIEDERMAN: Objection, asked and  
10 answered.

11 HEARING OFFICER KNITTLE: Mr. Scherschligt,  
12 have you asked and answered this?

13 MR. SCHERSCHLIGT: I don't think he has  
14 answered the question I just asked him.

15 HEARING OFFICER KNITTLE: I don't recall this  
16 question, Mr. Biederman. But I will admit that I  
17 may not have an entirely accurate recollection  
18 myself at this point.

19 I will allow this question to stand.

20 THE WITNESS: I am sorry, Bob, what was the  
21 question again?

22 MR. SCHERSCHLIGT: Can we repeat it back?

23 HEARING OFFICER KNITTLE: Yes.

24 (Record read as requested.)

1 THE WITNESS: That is pretty much it.

2 BY MR. SCHERSCHLIGT:

3 Q. Does the District go on-site and  
4 conduct any periodic inspections of the facility  
5 to ascertain compliance with the lease agreement,  
6 the permit or any other environmental laws and  
7 regulations?

8 A. No, we do not.

9 Q. Does the lease give MWRD the right to  
10 enter the property?

11 A. It is my understanding that it does.  
12 And even if it doesn't, we do that.

13 Q. Has MWRD ever offered to hire outside  
14 environmental consultants to review the contents  
15 of applications for permits submitted by Heritage  
16 Environmental Services?

17 A. Yes.

18 MR. BIEDERMAN: I am going to object to the  
19 question. It assumes facts not in evidence. It  
20 is also outside the scope of the direct.

21 MR. SCHERSCHLIGT: Well, Mr. Hearing Officer,  
22 one of the issues here is whether or not the Board  
23 should accept relaxed certification language. And  
24 the purpose for that question is to inquire as to

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1 exactly what the District would be willing to do

2 in terms of providing supervision to the  
3 preparation of permit applications. So I think  
4 that is entirely relevant here and it is  
5 information, really, that the Board, I presume,  
6 would like to know.

7 HEARING OFFICER KNITTLE: Could you read the  
8 question back?

9 (Record read as requested.)

10 HEARING OFFICER KNITTLE: I would overrule  
11 the objection. I don't think it is beyond the  
12 scope. I think it is relevant. My concern was  
13 whether it was beyond the scope of direct  
14 examination, and I think we touched on that in  
15 direct examination. The question is allowed.

16 Did you answer the question yes, sir?

17 THE WITNESS: I answered the question, but  
18 his comment -- at the end he made a comment that  
19 sort of modified the question. His comment after  
20 he gave the question was with respect to the  
21 supervising and preparation of the application. I  
22 heard him initially ask --

23 MR. SCHERSCHLIGT: I will strike that part of  
24 my comment or question or whatever it was.

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1 HEARING OFFICER KNITTLE: Is that acceptable,

2 Mr. Biederman?

3 MR. BIEDERMAN: Yes, it is.

4 BY MR. SCHERSCHLIGT:

5 Q. Is it fair to say that the District's  
6 only interest and involvement in this facility is  
7 to collect rent pursuant to the lease agreement?

8 A. Could you say it again?

9 Q. Is it fair to say that the District's  
10 only interest and involvement in the facility is  
11 to collect rent pursuant to the lease agreement?

12 A. No. It is also to make sure that the  
13 public property is not misused or compromised in  
14 any way.

15 Q. Is it also true that -- would you say  
16 it is fair to say that the District does not  
17 possess any expertise whatsoever in the operations  
18 and permitting requirements of the RCRA facility?

19 A. We have a very competent, professional  
20 staff. I am not going to make a generalization  
21 about all of the engineering.

22 Q. Do you have any professional engineers  
23 on staff?

24 A. Oh, hundreds of them.

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1 Q. Do you have lawyers on staff?

2 A. Yes.

3 Q. Do you have any biologists, chemists?

4 A. Yes.

5 Q. Do you have any geologists?

6 A. I don't think we have any geologists.

7 Q. Would you say that any of your experts  
8 on staff are at least somewhat familiar with the  
9 RCRA program?

10 A. Yes. I would be surprised if some of  
11 our technical staff wouldn't have some knowledge  
12 in this area.

13 Q. And you have testified that as a  
14 governmental entity you don't believe that MWRD  
15 has the authority to sign the certification  
16 language as is, is that correct, as it currently  
17 exists in the regulation?

18 A. Yes, because it requires that the  
19 District direct and supervise the preparation of  
20 that application.

21 Q. I would like you to please turn to  
22 page 2 of the petition for adjusted standards. I  
23 just want to make sure that I understand what  
24 language the District has a problem with.

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1 And I believe it is -- is it your  
2 testimony that you don't believe the District has

3 the authority to certify under penalty of law that  
4 the application and attachments were prepared  
5 under its direction or supervision?

6 A. That's correct.

7 Q. But it would be possible for the  
8 District to hire an outside consultant or consult  
9 with its own experts with respect to the contents  
10 of the petition and its attachments; isn't that  
11 fair to say?

12 A. With respect to the direction and  
13 supervision or the actual contents after it has  
14 been prepared?

15 Q. Yes. I would like to single out the  
16 word supervision in the law as it exists.

17 Is it fair to say that the District  
18 could provide supervision of the application  
19 process by simply reviewing the application and  
20 reviewing the attachments, whether that would  
21 require outside or internal consultants?

22 A. Okay, I am not quite sure if I am  
23 understanding what you are asking.

24 Q. Along the lines of providing

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1 supervision to the permit application and all  
2 attachments that are being submitted to the  
3 Illinois EPA, would it be possible for MWRD to

4 provide review of those documents via outside  
5 environmental consultants or internal experts,  
6 whether it be your lawyers, you chemists, your  
7 biologists, your certified professional engineers,  
8 or whatever the case may be?

9 A. In the preparation of these documents  
10 you are talking about?

11 Q. Yes.

12 A. We would take the position that a  
13 governmental entity, such as the District, should  
14 not direct or supervise the preparation of the  
15 documents that relate to a private operation that  
16 is not related to its corporate purpose.

17 Q. I understand that you don't think that  
18 is your place. My question is would it be  
19 possible for you to provide that review of those  
20 documents?

21 A. Well, if we don't -- see, you keep  
22 switching your language. Surely we can review  
23 documents that Heritage has prepared, and we can  
24 hire somebody to do that. The certification

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1 speaks to the preparing of the documents. We  
2 don't believe that we can send public people, even  
3 hiring a consultant, and go to a private firm and

4 direct and supervise the preparation of documents  
5 that relate to this private entity's operation.

6 Q. Well, you are the landlord of the  
7 facility, correct?

8 A. Surely.

9 Q. You have joint and several liability  
10 for any violations that may occur at the facility,  
11 correct?

12 A. That's correct.

13 Q. And that would include conditions of a  
14 permit, correct?

15 A. That's correct.

16 Q. And other environmental laws and  
17 regulations?

18 A. Sure. But the law imposes that  
19 liability.

20 Q. I understand.

21 A. So the District has -- I mean, so it  
22 doesn't matter whether it falls within the state  
23 charter or not.

24 Q. But you have testified that the

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1 District has offered to have the permit  
2 application reviewed by an outside environmental  
3 consultant, correct?

4 A. A permit application that has been

5 prepared by Heritage, yes.

6 Q. Already been prepared?

7 A. Yes.

8 Q. Just to review it to make sure that the  
9 District didn't see any obvious problems with it  
10 or --

11 A. Surely, absolutely.

12 MR. SCHERSCHLIGT: That is all I have. Thank  
13 you very much, Mr. Lowe.

14 HEARING OFFICER KNITTLE: Do we have any  
15 redirect, Mr. Biederman?

16 MR. BIEDERMAN: Yes.

17 REDIRECT EXAMINATION

18 BY MR. BIEDERMAN:

19 Q. Mr. Lowe, you testified on  
20 cross-examination that the District has signed  
21 permit applications. Do you recall that  
22 testimony?

23 A. Yes.

24 Q. Can you explain to us the nature of

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1 those applications that are signed by the  
2 District?

3 A. We are in the business of treating  
4 waste water. And there are -- I don't know the

5 specifics, but I am aware of the fact that there  
6 are several different types of permits that we  
7 must apply for. But those permits under my -- to  
8 my understanding are related to our corporate  
9 purposes and are permits issued directly to the  
10 District, not related to some private entity's  
11 operations.

12 Q. So it would be fair to say then that  
13 the documents, the permit applications, et cetera,  
14 that are executed on behalf of the District, that  
15 those documents were, in fact, prepared under the  
16 direction and supervision of a District employee;  
17 is that correct?

18 A. That is correct.

19 Q. I would like you to turn your attention  
20 to the proposed alternate certification section in  
21 the petition appearing on page 13. I would like  
22 to direct your attention to two requirements that  
23 the petitioner is recommending be required when  
24 the Board grants the petition.

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1 Those requirements are, first, that a  
2 licensed Illinois professional engineer sign the  
3 permit application on behalf of Heritage and, two,  
4 that Heritage demonstrate to the District that it  
5 is, in fact, in compliance with all applicable

6 environmental laws and regulations.

7 MR. SCHERSCHLIGT: I am going to object  
8 simply because -- and, Mr. Biederman, you may want  
9 to rephrase -- there is nothing in there to the  
10 effect that it be signed by a professional  
11 engineer. I believe it says that it is prepared  
12 by a professional engineer.

13 MR. BIEDERMAN: And I would ask -- fine.  
14 Then I would qualify my question with the exact  
15 language that appears on page 13, that the  
16 application be prepared by -- and it does say  
17 prepare and sign on behalf of Heritage.

18 MR. SCHERSCHLIGT: Well, perhaps I am not  
19 looking at the right page.

20 MS. DOYLE: It is one page before that,  
21 Bob, page 13.

22 MR. SCHERSCHLIGT: Because on page 14 I think  
23 is what you are proposing.

24 MS. DOYLE: No, no. That is what we are

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1 proposing, but it is not what we are looking at  
2 now.

3 MR. SCHERSCHLIGT: Well, do you want to ask  
4 your question about what you are proposing that  
5 the adjusted standard be?

6 MR. BIEDERMAN: I am looking at page 13,  
7 section 7, paragraph numbered 1, which reads "that  
8 the District is willing to impose the following  
9 requirements in the certification, one, require  
10 that a professional engineer licensed with the  
11 state of Illinois prepare the permit application,  
12 request and sign on behalf of Heritage." I would  
13 like you to direct your attention to that  
14 language.

15 THE WITNESS: Okay.

16 MR. SCHERSCHLIGT: Then I apologize. I was  
17 looking at the wrong language. I withdraw the  
18 objection.

19 MR. BIEDERMAN: Thank you.

20 BY MR. BIEDERMAN:

21 Q. Secondly, on page 14, the second bullet  
22 point reads "require Heritage to demonstrate to  
23 the District that it is in compliance with all  
24 applicable environmental laws and regulations that

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1 apply to the facility." Do you see those two  
2 conditions?

3 A. Yes, I do.

4 Q. Do you believe that those conditions  
5 assist the District in understanding and making a  
6 good faith effort in determining the accuracy of

7 the certification that the District is willing to  
8 sign?

9 A. Yes, I would think so.

10 Q. I would like to direct your attention  
11 to the certification on page 6. Mr. Lowe, do you  
12 see a statement in there that discusses joint and  
13 several liability?

14 A. No, I do not.

15 Q. Do you see a statement in there  
16 relating to due diligence specifically?

17 A. No, I do not.

18 Q. Do you see a statement in there  
19 requiring good faith efforts?

20 A. No, I do not.

21 Q. Now, Mr. Lowe, you testified that it is  
22 your belief that the District must, in fact,  
23 assure itself of the two conditions that I earlier  
24 referred to and, in fact, have a good faith basis

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1 for executing the certification as it appears in  
2 the amended form in this petition; is that  
3 correct?

4 A. That is true.

5 Q. Do you believe that the good faith  
6 efforts that are required of the District in

7 executing the alternate certification are the same  
8 as the good faith efforts that would be required  
9 in signing the certification that appears at  
10 page 6?

11 MR. SCHERSCHLIGT: I am going to object.  
12 That is kind of a conclusion. That is really a  
13 question for the Board to decide.

14 HEARING OFFICER KNITTLE: Mr. Biederman?

15 MR. BIEDERMAN: He has testified as to the  
16 good faith efforts that the District is willing to  
17 undertake in assuring itself of the accuracy of  
18 the certification. I think that this witness is  
19 competent to testify and, in fact, has testified  
20 as to what the good faith efforts are that the  
21 District intends to undertake prior to signing the  
22 certification that appears at page 14. And I am  
23 just simply trying to ascertain that the good  
24 faith efforts really required by each of these two

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1 certifications are no different. I think he is  
2 competent to testify to that.

3 HEARING OFFICER KNITTLE: The objection is  
4 overruled.

5 You can answer, sir.

6 BY MR. BIEDERMAN:

7 Q. Mr. Lowe, do you understand my

8 question?

9 A. Could you read it again just because of  
10 the discussion?

11 Q. Sure. I am simply going to ask whether  
12 you believe that the good faith requirements that  
13 the District is willing to undertake prior to  
14 executing the alternate certification at page 14,  
15 those good faith efforts are really no different  
16 than what would otherwise be required in the  
17 certification appearing at page 6; is that  
18 correct?

19 A. With respect to the accuracy of the  
20 information?

21 Q. Yes.

22 A. Yes.

23 Q. You have testified, Mr. Lowe, that the  
24 District does not possess the authority to execute

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1 the certification at page 6. My question for you,  
2 sir, is do you feel that that problem can be  
3 overcome by hiring outside consultants to advise  
4 you?

5 A. No, absolutely not. Our problem is in  
6 the directing and supervising the preparation of a  
7 private entity in matters that is not related to

8 the District corporate purposes. We -- the law  
9 department takes a position that that is acting  
10 outside the District's scope of authority.

11 Q. And if the District doesn't have that  
12 scope of authority, would you agree that it would  
13 be unable to delegate that authority to a third  
14 party such as a consultant?

15 A. Surely, we couldn't. We can't get  
16 around our authority by authorizing a private  
17 party to act on our behalf. That doesn't work.

18 MR. BIEDERMAN: Mr. Hearing Officer, could I  
19 have just a minute?

20 HEARING OFFICER KNITTLE: Yes.

21 MR. BIEDERMAN: I have no further questions  
22 at this time.

23 HEARING OFFICER KNITTLE: Mr. Scherschligt,  
24 do you have a recross?

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1 MR. SCHERSCHLIGT: Just a moment. Could I  
2 have just a few seconds?

3 HEARING OFFICER KNITTLE: Let's go off the  
4 record.

5 (Short pause in proceedings.)

6 HEARING OFFICER KNITTLE: We are back on the  
7 record.

8 Mr. Scherschligt, do you have any

9 recross examination?

10 MR. SCHERSCHLIGT: Just a couple.

11 RECCROSS-EXAMINATION

12 BY MR. SCHERSCHLIGT:

13 Q. Mr. Lowe, you would acknowledge, would  
14 you not, sir, that the certification language says  
15 "I certify under penalty of law that this document  
16 and all attachments were prepared under my  
17 direction or supervision"; isn't that correct?

18 A. That is correct.

19 Q. So it is disjunctive; it is direction  
20 or supervision, correct?

21 A. That's correct.

22 Q. And would you acknowledge that having  
23 the application and any attachments reviewed by  
24 consultants or experts of your own or having it

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1 reviewed by consultants or experts outside of the  
2 District, would you acknowledge that that would be  
3 one form of supervision of the application  
4 process?

5 A. If, in fact, what you are asking is  
6 after the application has been prepared we review  
7 that, I don't see that as compliance with that  
8 language. I see that language requiring the

9 supervising of the actual preparation of the  
10 document, not the review of the finished product  
11 of the document.

12 Q. If the Board, and again, if the Board  
13 were to conclude that doing exactly what you are  
14 willing to do by reviewing the application  
15 in-house or seeking advice of experts or  
16 consultants outside of MWRD, if the Board were to  
17 find that that were adequate supervision for  
18 purposes of this certification language, would  
19 MWRD be amenable to doing that?

20 A. If, in fact, we got a letter from the  
21 IEPA giving us that interpretation or --

22 Q. Or if the Board issued an opinion to  
23 that effect?

24 HEARING OFFICER KNITTLE: I think you are

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1 referring to the Pollution Control Board,  
2 Mr. Scherschligt?

3 MR. SCHERSCHLIGT: Yes.

4 BY MR. SCHERSCHLIGT:

5 Q. If the Illinois Pollution Control Board  
6 were to find that it is sufficient supervision for  
7 the District to review the application, all  
8 attachments, review it in good faith and then to  
9 make the assertion that to the best of its

10 knowledge it believes the statements to be true  
11 and correct under penalty of perjury, would that  
12 be acceptable to MWRD?

13 A. If we got -- if we received a binding  
14 statement that we view as a binding statement as  
15 to that interpretation, then yes.

16 MR. SCHERSCHLIGT: Thank you.

17 HEARING OFFICER KNITTLE: Anything further,  
18 Mr. Scherschligt?

19 MR. SCHERSCHLIGT: No. Thank you.

20 HEARING OFFICER KNITTLE: Mr. Biederman, any  
21 re-redirect?

22 MR. BIEDERMAN: No.

23 HEARING OFFICER KNITTLE: Sir, you can step  
24 down.

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1 Let's go off the record for a second.

2 (Discussion had off the  
3 record.)

4 (Whereupon the hearing was  
5 recessed until 1:00 p.m. this  
6 date, September 5, 2000.)

7 - - - -

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

9 HEARING OFFICER KNITTLE: We are back on the

10 record after a lunch recess. It is 1:00 o'clock  
11 in the afternoon. And I want to note for the  
12 record that there are still no members of the  
13 public, aside from the next witness's daughter,  
14 present.

15 Mr. Biederman, it is still your  
16 case-in-chief. You can call your next witness.

17 MR. BIEDERMAN: My next witness will be Gary  
18 Lindgren.

19 HEARING OFFICER KNITTLE: Could you swear  
20 him?

21 (Witness duly sworn.)

22 HEARING OFFICER KNITTLE: Mr. Biederman, your  
23 witness.

24 MR. BIEDERMAN: Thank you.

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1 GARY LINDGREN,  
2 called as a witness herein on behalf of Heritage  
3 Environmental Services, having been first duly  
4 sworn, was examined and testified as follows:

5 DIRECT EXAMINATION

6 BY MR. BIEDERMAN:

7 Q. Sir, would you state your name for the  
8 record, please?

9 A. My name is Gary Frank Lindgren.

10 Q. Mr. Lindgren, by whom are you employed?

11           A.     I am employed by Heritage Environmental  
12 Services.

13           Q.     And how long have you been employed by  
14 Heritage Environmental Services?

15           A.     In a few weeks it will be 15 years.

16           Q.     And where do you reside?

17           A.     I reside in Zionsville, Indiana.

18           Q.     Could you review for us your  
19 educational background, please?

20           A.     I have a Bachelor of Science and a  
21 Master's degree in environmental policy from  
22 Indiana University.

23           Q.     What is your current position with  
24 Heritage?

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1           A.     I am vice president of operations and  
2 compliance.

3           Q.     And how long have you served in this  
4 capacity?

5           A.     I have been vice president of  
6 compliance, a portion of it, since 1992. I have  
7 been vice president of operations for roughly a  
8 year and a half.

9           Q.     Are you familiar with the facility that  
10 is located in Lemont, Illinois?

11 A. Yes, I am.

12 Q. Can you describe for us your  
13 responsibilities with respect to that facility?

14 A. My responsibilities for that is general  
15 review of its performance and direct supervision  
16 of the management team outside.

17 Q. Do you have occasion to visit that  
18 facility on a periodic basis?

19 A. Yes, I do.

20 Q. And explain to us what the nature of  
21 your visits are.

22 A. The nature of my visits are for several  
23 reasons. We would conduct management operations  
24 reviews where we would deal with our safety

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1 record, our compliance issues and with our  
2 financial performance. Also we have customer open  
3 houses and various other employee events that  
4 cause me to visit the facility.

5 Q. Are there individuals that are employed  
6 at the Lemont facility that report to you  
7 directly?

8 A. Yes, there are.

9 Q. Can you describe that for me?

10 A. The plant manager, whose name is Dave  
11 Manley, is a direct report to me. The plant

12 compliance manager, whose name is Kent Percel, dot  
13 line reports to me. As VP of operations, all of  
14 those -- the employees there at the treatment  
15 center would be within my chain of command.

16 Q. Is it fair to say that you are  
17 responsible within the organization for that  
18 facility?

19 A. It would be fair to say that in a  
20 general sense.

21 Q. Okay. Mr. Lindgren, could you tell us  
22 how long Heritage has owned and operated that  
23 facility?

24 A. Heritage has owned and operated the

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1 improvements to the property and the tank farms,  
2 for example, since roughly 1987 through a joint  
3 venture -- initially through a joint venture with  
4 another company called Petrokemp Services, which  
5 Heritage purchased on or about 19 -- the mid '80s  
6 and subsequently bought out all the interest of  
7 Petrokemp Services and has operated it as Heritage  
8 Environmental Services since that time.

9 Q. Can you also tell us, Mr. Lindgren, who  
10 owns the real property upon which the facility is  
11 located?

12           A.     The real property is owned by the  
13 Metropolitan Water Reclamation District.

14           Q.     But the improvements to that facility  
15 have all been made by Heritage Environmental  
16 Services?

17           A.     The improvements have all been made by  
18 Heritage and the predecessor owner of the  
19 facility, Petrokemp.

20           Q.     Mr. Lindgren, are you familiar with the  
21 various permits that have been issued to Heritage  
22 with respect to the Lemont facility, including the  
23 facility's RCRA permits?

24           A.     Yes, I am generally familiar with

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1 those.

2           Q.     And how have you made yourself aware of  
3 those permits?

4           A.     I manage what we call the corporate  
5 compliance department, which is the people who  
6 physically prepare those -- the permit  
7 application. I review draft versions of it, ask  
8 questions and see that whatever changes are needed  
9 get made in the final version that goes to the  
10 agency.

11           Q.     So you would be that person within the  
12 organization who is most familiar with the

13 compliance history of that facility?

14 A. Yes, generally.

15 Q. Can you describe for us the compliance  
16 history of this facility?

17 A. I think the facility has an excellent  
18 compliance history, not without blemishes, but we  
19 have routine inspections by the Illinois  
20 Environmental Protection Agency. And its more  
21 often than not the results of the inspection are  
22 that the company's activities are in compliance  
23 with the permit as determined by the inspector.

24 Q. And what measures have -- what measures

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1 has Heritage implemented to ensure that the  
2 facility is in compliance with applicable  
3 regulations?

4 A. Okay. First, we hired, for our  
5 management staff especially, qualified people with  
6 experience. We have a person whose sole function  
7 is to be what we call the plant compliance  
8 manager. That person straight line reports to the  
9 plant manager and dot line reports to me, has my  
10 -- in my function of overseeing corporate  
11 compliance at this facility and other facilities.

12 We have active training programs,

13 including advanced interactive CD-rom training to  
14 ensure that not only our management staff but also  
15 our employees are up-to-date on what we expect  
16 them to know and to do.

17           We also have an internal audit program,  
18 which is performed by one of my staff members,  
19 whose function is to audit all of our facilities  
20 and maintain compliance.

21           Q.     Can you briefly describe for us the  
22 nature of the operations at the Lemont facility  
23 including control equipment that are utilized by  
24 that facility?

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1           A.     The Lemont facility is a waste storage  
2 treatment and transfer facility where we manage  
3 hazardous waste there, various types in containers  
4 -- largely in containers, some in bulk. There is  
5 no disposal that takes place on-site. But we  
6 blend various types of organic liquids together to  
7 make a fuel that is sent to a cement kiln.

8           We pack and we repackage various  
9 laboratory chemicals for off-site disposal. And  
10 then trains ship materials to other facilities,  
11 some of which are owned by Heritage and some of  
12 which are owned by other companies, for such  
13 purposes as incineration, waste water treatment,

14 things of that nature.

15 Q. Do you know in general how many  
16 different hazardous waste facility permits a  
17 facility is to receive?

18 A. In the hundreds as outlined in our  
19 part A and part B permit application and permit  
20 documents, different codes.

21 Q. Can you describe for us some control  
22 equipment that is present in the facility that  
23 will assist in complying with RCRA regulations?

24 A. Starting with the facility's own

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1 bedrock, all of our waste management activities  
2 are performed on paved areas. Our storage  
3 activities are within secondary containment. We  
4 have engineering controls for storm water run-off  
5 as well as -- you know, concrete dikes that  
6 capture run-off that would directly touch a  
7 container or a storage tank.

8 We also have air emission control  
9 devices which include activated carbon filters.  
10 And we have a boiler which combusts aerosol can  
11 propellants.

12 Q. And it is your opinion, sir, that today  
13 Heritage is in compliance with all applicable

14 environmental laws and regulations with respect to  
15 the Lemont facility?

16 A. We are in material compliance with  
17 applicable laws, rules, regulations. That is our  
18 goal.

19 Q. And, sir, is it also your opinion that  
20 the facility possesses systems of internal  
21 controls to continue to evaluate its compliance  
22 and assure that it remains in material compliance  
23 with all applicable environmental laws and  
24 regulations?

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1 A. It is my opinion that the facility when  
2 combined with the corporate oversight role  
3 possesses such systems.

4 Q. Now, Mr. Lindgren, you have discussed  
5 the corporate oversight role. Does Heritage own  
6 and manage other facilities other than the one in  
7 Lemont?

8 A. Heritage owns and operates seven other  
9 part B permitted facilities across the country.

10 Q. Would you also be -- would you be  
11 responsible for compliance at those seven other  
12 RCRA facilities?

13 A. Yes.

14 Q. Can you briefly describe the other

15 facilities for us?

16           A.     We have a facility in Burlington,  
17 Vermont, which is a container storage facility.  
18 We have a facility in Charlotte, North Carolina,  
19 which is a treatment and storage facility. We  
20 have a facility in Indianapolis, Indiana, which is  
21 a treatment and storage facility. We have a  
22 facility near Roachdale, Indiana, which is a land  
23 disposal facility.

24                     We have a facility in Kansas City,

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1 Missouri, which is a treatment disposal facility.  
2 We have a facility outside Phoenix, Arizona, which  
3 is a storage facility. We have a facility in  
4 Caldwell, Texas, which is currently inactive,  
5 which is a storage facility.

6           Q.     Mr. Lindgren, can you describe for us  
7 the operations of the Lemont facility and the  
8 periodic need for permit modifications of its RCRA  
9 permit?

10           A.     Okay. I think I have generally  
11 discussed the operations of the Lemont facility  
12 previously. We accept waste materials in tank  
13 trucks and containers, but there are three general  
14 causes for us to reevaluate our permits and

15 whether we can or need to or want to modify those.

16           The first cause is changes in rules and  
17 regulations which might add waste codes or impose  
18 additional or changed requirements upon the  
19 facility. The second requirement or second  
20 instance where we would want to evaluate our  
21 permit, whether we might need to modify it would  
22 be changes in technologies available. There has  
23 been changes in computer technology that are  
24 available that would make our activities at the

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1 facility more efficient, for example. And also  
2 there is changes in the marketplace. As  
3 manufacturing firms have minimized their waste,  
4 there are changes, not necessarily in the waste  
5 codes that apply to the waste materials, but what  
6 type of matrix they are, they are presented to us  
7 as.

8           For example, instead of clear liquids,  
9 we receive a lot of sludges and muck, for lack of  
10 a better term, because people have minimized their  
11 waste on-site and present us with the same waste  
12 but in a different physical state.

13           Q.    Is it fair to say that the part B  
14 permit that Heritage has is very detailed in the  
15 description of the operations that it permits and

16 that any deviation from those operations as  
17 described in your permit -- part B permit would  
18 require a modification of that permit?

19 A. It is detailed. And in many instances  
20 just to give you an example, we are required to  
21 provide the name, home addresses, home phone  
22 numbers, pager numbers, cellphone numbers for  
23 management personnel that might be called upon to  
24 respond in case of an emergency at the facility,

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1 so detailed that we would be required to submit a  
2 permit modification if the area code was changed,  
3 for example, at the facility to change that part  
4 of our permit that specifies those members of our  
5 -- of those employees that have that  
6 responsibility.

7 Q. Describe for me, if you will, the  
8 process of modifying that permit. What is  
9 entailed in modifying that permit, and in  
10 particular, what signatures need to be obtained in  
11 submitting that permit modification to the  
12 appropriate regulatory agencies?

13 A. In general there is three different  
14 classes of modifications. You know, I guess you  
15 can say minor, moderate and major. But you know,

16 it is different states use different nomenclature,  
17 class I, class II, class III.

18 In terms of the protocol, obviously,  
19 the petition has to be made to the Illinois EPA to  
20 change something. That petition in Illinois has  
21 to be signed by both the owner and operator. And  
22 so it has to be signed by Heritage, typically by  
23 myself. And it has to be signed by a  
24 representative of the water district in order for

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1 it to be, you know, automatically accepted as a  
2 valid petition for modification by the Illinois  
3 EPA. And then depending on what level of permit  
4 it is, there may or may not be a public hearing or  
5 public meeting, comments, things of that nature.

6 Q. So is it true to say that even a change  
7 in the cellphone number of an individual that is  
8 responsible for emergency response would entail a  
9 permit modification and require the signatures of  
10 both Heritage and the owner of the real property  
11 where the facility is located?

12 A. That is my understanding.

13 Q. In your experience how many permit  
14 modifications are typically required in managing  
15 such a facility over a period of time? And let's  
16 focus on a period of time of being one year.

17           A.     Well, again, depending on changes in  
18 the rules, on changes in technology and changes in  
19 the marketplace, you know, it wouldn't be  
20 impossible to have three modifications in a year  
21 of varying levels. And that assumes a stable  
22 management team, stable area code numbers and  
23 people that don't -- you know, emergency  
24 coordinators and manager team members that don't

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1     move from one place to another within the general  
2     area.

3           Q.     Are you aware of the fact that Heritage  
4     has had difficulty in obtaining such permit  
5     modifications in the past?

6           A.     Yes, I am aware.

7           Q.     And can you describe for us the  
8     difficulties that Heritage has had?

9           A.     The difficulties largely have been  
10    obtaining a signature of the owner of the real  
11    property.

12          Q.     Is it fair to say that if a resolution  
13    is obtained to the certification of the owner of  
14    the property, that that resolution will allow  
15    Heritage to operate this facility in a compliant  
16    manner and that, in fact, the state of the

17 operations and perhaps even the compliance would  
18 benefit as a result of the owner's ability to sign  
19 permit modifications?

20 MR. SCHERSCHLIGT: Objection, no foundation.

21 HEARING OFFICER KNITTLE: I will sustain the  
22 objection.

23 BY MR. BIEDERMAN:

24 Q. Mr. Lindgren, you have testified that

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1 you are familiar with the permit that is held by  
2 Heritage at the Lemont facility; is that correct?

3 A. That's correct. I am generally  
4 familiar with the permit at the Lemont facility.

5 Q. And you are familiar with permit  
6 modifications that are required on a periodic  
7 basis; is that correct?

8 A. I am familiar with RCRA permit  
9 modifications, yes.

10 Q. Specific to the Lemont facility?

11 A. Yes.

12 Q. And you are familiar with the process  
13 of obtaining a permit modification at the Lemont  
14 facility?

15 A. Yes, I am.

16 Q. And you are also familiar with the  
17 relationship that Heritage enjoys with the owner

18 of the property, the owner being the Metropolitan  
19 Water Reclamation District; is that correct?

20 A. I am generally familiar with that, yes.

21 Q. And you are aware of the needs of the  
22 facility in terms of a compliance perspective; is  
23 that correct?

24 A. Yes, I am.

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1 Q. Is it fair to say that if Heritage is  
2 able to readily obtain the signature of the owner  
3 of the facility that it would enhance the  
4 performance of this facility?

5 A. I would say it would both not only  
6 enhance the performance of the facility, but would  
7 allow for additional investment at the facility.

8 Q. Can you explain that?

9 A. As the nature of wastes change, the  
10 nature of the equipment necessary to most  
11 efficiently process the waste also changes. I  
12 mentioned just one example, instead of easily  
13 pumpable materials, we get less than easily  
14 pumpable materials. So we would be able to invest  
15 in different and better pumps, shredders, sizing  
16 equipment and things of that nature that would  
17 allow us to take a broader range of waste

18 materials that would carry the exact same codes  
19 and even the same shipping descriptions.

20 Q. Are you familiar with how the District  
21 has been involved with the facility and in  
22 particular with assuring itself that the  
23 provisions of the lease that was executed between  
24 the District and Heritage are being met?

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1 MR. SCHERSCHLIGT: Objection. I would object  
2 to this witness being able to testify what MWRD  
3 believes with respect to acquiring permits or  
4 signatures or -- I am not real sure what the  
5 question is calling for. But it is asking for  
6 MWRD's understanding or impression.

7 HEARING OFFICER KNITTLE: Could you read it  
8 back for us?

9 (Record read as requested.)

10 MR. SCHERSCHLIGT: I would only object to the  
11 second part of that question. I have no objection  
12 to asking him if he is -- I don't know if you want  
13 to --

14 HEARING OFFICER KNITTLE: I think  
15 Mr. Biederman was withdrawing the second part of  
16 the question.

17 MR. BIEDERMAN: Yes. And in fact, let me  
18 withdraw the question and ask the question in a

19 different way.

20 HEARING OFFICER KNITTLE: Okay.

21 BY MR. BIEDERMAN:

22 Q. You are familiar with the relationship  
23 that Heritage enjoys with the District, the owner  
24 of the property; is that correct?

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1 A. Yes.

2 Q. And can you describe for us what  
3 Heritage does in order to inform the District of  
4 Heritage's compliance with the law and with the  
5 lease that was executed between the parties?

6 A. There has been various meetings and  
7 conversations between various officers and  
8 managers of Heritage and representatives of the  
9 District. We certainly copied -- you know, we  
10 copied them on correspondence to the agency. We  
11 are under the impression that the agency also  
12 copies them on correspondence from the agency to  
13 Heritage.

14 I have been informed that there have  
15 been representatives of the District on the Lemont  
16 property for various purposes. The specifics of  
17 which, you know, evidently weren't out of the  
18 ordinary because they weren't relayed to me, only

19 that the District has been on-site.

20 Q. Mr. Lindgren, you are familiar with  
21 the alternative certification that Heritage has  
22 proposed, and that certification is included in  
23 the petition at page 14; is that correct?

24 A. That's correct.

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1 Q. You are also familiar with the  
2 certification that appears in the regulations, and  
3 that certification is laid out at page 6 of the  
4 petition; is that correct?

5 A. That's correct.

6 Q. Based upon your understanding of the  
7 nature of the compliance and the compliance  
8 efforts that are undertaken at this facility, is  
9 it true to say that the adjusted standard, if it  
10 is granted by the Board, will have no effect on  
11 the nature of the operations in the compliance of  
12 the facility?

13 A. That is true. You know, an alternative  
14 certification grant in the District will not alter  
15 our operating philosophies or our compliance  
16 practices or resources allocated to them or the  
17 nature of what we do at that facility.

18 Q. So that I am clear, is it your  
19 testimony that if the Board grants the adjusted

20 standard that Heritage is seeking, that that will  
21 not result in any environmental or health effects  
22 that are different than the current operations  
23 today?

24 A. Yes, that is my understanding.

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1 Q. Is it true to say that an alternative  
2 certification that will provide a more timely  
3 permit modification process will allow you to  
4 remain competitive in the marketplace?

5 A. That is true. I would further state it  
6 is necessary to the long-term viability of the  
7 facility. For example, if the District doesn't  
8 sign our permit renewal application and the  
9 Illinois EPA doesn't accept, you know, a modified  
10 standard or any altered signature, then we are out  
11 of business there.

12 Q. How many people are employed at the  
13 Lemont facility?

14 A. I would say rough -- right around  
15 70 people all told, which would include  
16 professionals, field personnel and plant  
17 personnel.

18 MR. BIEDERMAN: I would like just a moment to  
19 review my notes, but I think I am finished.

20                   Subject to any redirect, I have no  
21 further questions.

22                   HEARING OFFICER KNITTLE:   Okay.

23                   Mr. Scherschligt, do you have cross?

24                   MR. SCHERSCHLIGT:   Just very briefly, I

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1 believe.

2                   CROSS-EXAMINATION

3 BY MR. SCHERSCHLIGT:

4                   Q.    Mr. Lindgren, am I saying that right?

5                   A.    Uh-huh.

6                   Q.    To your knowledge, are there any  
7 periodic or regular inspections, compliance  
8 inspections conducted by MWRD at the Heritage  
9 facility?

10                  A.    I have been unable to detect any  
11 pattern that would cause me to say they are  
12 routine like, for example, monthly or quarterly or  
13 semiannually.

14                  Q.    Have you ever known MWRD to send  
15 somebody to your facility and actually do a  
16 compliance inspection with a checklist and a copy  
17 of the permit to ascertain compliance with that  
18 permit or other laws and regulations?

19                  A.    No, I am unaware of that. I am sure I  
20 would have been told if that were the case.

21 Q. Just so I understand what Heritage is  
22 asking for, am I correct in my understanding that  
23 Heritage itself is willing to sign a permit  
24 application with the current certification

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1 language as it is in the regulation?

2 A. Absolutely.

3 Q. So this adjusted standard, this relaxed  
4 certification language, if you will, is mainly for  
5 the benefit of MWRD so that it will feel  
6 comfortable in signing a permit application; is  
7 that correct?

8 A. I guess I would look at it from a  
9 different angle, that it is for the benefit of  
10 Heritage so we can continue our activities there.

11 Q. But it is MWRD who has a problem with  
12 the certification language as it exists in the  
13 regulation; isn't that correct?

14 A. That is my understanding, yes.

15 Q. Now, the adjusted standard as is  
16 proposed or the language that is being proposed on  
17 page 14 of your petition, there is no  
18 representation in that language such that these  
19 certifications are being made under penalty of law  
20 or penalty of perjury, correct?

21           A.     Not being a lawyer, I don't know how to  
22 answer the last part of that with --

23           Q.     Well, do you see any language in there  
24 to the effect that it is being certified under

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1 penalty of law, any words penalty of law in there?

2           MR. BIEDERMAN: Object to the question. The  
3 language speaks for itself.

4           HEARING OFFICER KNITTLE: Yes, I would  
5 sustain that.

6           MR. SCHERSCHLIGT: Okay. Fair enough.

7 BY MR. SCHERSCHLIGT:

8           Q.     In the past when you have submitted  
9 permit applications to the agency on behalf of  
10 Heritage, has MWRD taken a liberty to read and  
11 review those permit applications and provide  
12 comment?

13          A.     I know we have submitted draft versions  
14 of them to the District. I cannot recall getting  
15 comments back.

16          Q.     So you never, to your knowledge, have  
17 -- to your knowledge -- and I am not asking  
18 anybody else at the facility. But to your  
19 knowledge, they have never provided comment or any  
20 proposed revisions to the permit applications?

21          A.     I would say yes to my knowledge, but I

22 have a full-time engineer that actually does the  
23 details and would better know the answer to that  
24 question.

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1 Q. You testified that sometimes you may  
2 find it necessary to do a permit application to  
3 change the cellphone number of an emergency  
4 response personnel --

5 A. Uh-huh.

6 Q. -- is that correct?

7 A. Yes.

8 Q. You would certainly want MWRD to know  
9 the number of that person, would you not, if it  
10 changed?

11 A. Yes, I would.

12 Q. You would want them to review that  
13 application and take note of the change in number,  
14 would you not?

15 A. We would want them to know that we have  
16 made that change?

17 Q. Yes.

18 A. I mean, the emergency coordinator list  
19 is basically Heritage personnel and Heritage  
20 subcontractors we would call in to respond to an  
21 emergency.

22 Q. But would you certainly expect MWRD to  
23 want to know the names and numbers of those  
24 individuals as well, wouldn't you?

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1 MR. BIEDERMAN: Object to the form of the  
2 question. It calls for speculation.

3 HEARING OFFICER KNITTLE: Mr. Scherschligt,  
4 response?

5 MR. SCHERSCHLIGT: Well, if MWRD is signing  
6 the permit application and they are the ones who  
7 -- seemingly they would want to review that permit  
8 application and know that there is going to be a  
9 change.

10 HEARING OFFICER KNITTLE: I have no flaw with  
11 your logic, but I have to sustain the objection  
12 because this witness can't testify to that.

13 MR. SCHERSCHLIGT: Thank you. Just one  
14 moment.

15 I don't have anything further.

16 HEARING OFFICER KNITTLE: Mr. Biederman, do  
17 you have a redirect examination?

18 MR. BIEDERMAN: I have no redirect  
19 examination at this time.

20 HEARING OFFICER KNITTLE: Sir, thank you for  
21 your time. You are no longer under oath.

22 Mr. Biederman, do you have any other

23 witnesses you wish to call in this case?

24 MR. BIEDERMAN: No, I do not.

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1 HEARING OFFICER KNITTLE: Mr. Scherschligt,  
2 do you have any witnesses for the Illinois  
3 Environmental Protection Agency?

4 MR. SCHERSCHLIGT: I don't believe so. We  
5 don't -- we are not going to put on a  
6 case-in-chief.

7 HEARING OFFICER KNITTLE: Okay. Before we  
8 get started on closing arguments, I do note that  
9 we have three exhibits that have been discussed  
10 anyway. We have Petitioner's Exhibit No. 1, which  
11 was the document talking about what has been  
12 included in the record. That was admitted. But  
13 Petitioner's 2 and Petitioner's 3 have never been  
14 offered.

15 MR. BIEDERMAN: I thought I offered  
16 Petitioner's Exhibit No. 2 and I withdrew  
17 Petitioner's Exhibit No. 3.

18 HEARING OFFICER KNITTLE: Was that your  
19 intention?

20 MR. BIEDERMAN: Yes.

21 MR. SCHERSCHLIGT: Just so we are clear,  
22 No. 3 is that single-page --

23 HEARING OFFICER KNITTLE: -- certificate.  
24 MR. SCHERSCHLIGT: Fair enough.

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1 HEARING OFFICER KNITTLE: Let's take them one  
2 by one because I haven't ruled on them.

3 Petitioner's No. 2 is the lease. You  
4 are offering that now?

5 MR. BIEDERMAN: Yes.

6 HEARING OFFICER KNITTLE: Mr. Scherschligt,  
7 do you have any objection to that?

8 MR. SCHERSCHLIGT: No objection.

9 HEARING OFFICER KNITTLE: That is admitted.

10 (Whereupon document so offered  
11 was received in evidence as  
12 Petitioner's Exhibit No. 2.)

13 HEARING OFFICER KNITTLE: And Petitioner's  
14 No. 3 was withdrawn; is that correct?

15 MR. BIEDERMAN: That's correct.

16 HEARING OFFICER KNITTLE: So we won't worry  
17 about that.

18 I want to note one last time for the  
19 record that no members of the public are present.  
20 Were they here, they would be given an opportunity  
21 to provide public comment, which the Board is  
22 always eager to receive on any particular case.  
23 But there being no members of the public here, we

24 will skip over that portion and I move right to

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1 closing arguments.

2           Mr. Biederman, Mr. Scherschligt, you  
3 have the opportunity to make a closing argument or  
4 you can waive it and cover it in your briefs or  
5 you can do both.

6           MR. BIEDERMAN: I would like to make a very  
7 brief closing argument.

8           HEARING OFFICER KNITTLE: Go right ahead.

9           MR. BIEDERMAN: Thank you.

10                           CLOSING ARGUMENT

11 BY MR. BIEDERMAN:

12           Mr. Hearing Officer, representatives of  
13 the IEPA, first of all, let me thank you for your  
14 patience and in particular for IEPA's patience and  
15 assistance throughout the course of the years that  
16 this matter has been considered.

17           Heritage is proud of the  
18 state-of-the-art RCRA facility that it has built  
19 in Lemont, Illinois. Heritage's facility is  
20 managed by trained professionals and offers the  
21 marketplace a safe choice for the disposal, the  
22 management of hazardous waste. It is within the  
23 public interest that generators of hazardous waste

24 have as an alternative Heritage's management of

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1 their waste at this facility and that they  
2 continue to operate within the framework of the  
3 RCRA regulations.

4           This facility must not be forced to  
5 cease operations due to a blind application of the  
6 regulations forcing the District to undertake the  
7 burdensome task of either co-supervising  
8 Heritage's application process, a process that,  
9 according to the testimony today, the District  
10 does not have the legal authority to undertake,  
11 or, alternatively, to simply commit purgery.

12           A legal result that one federal circuit  
13 court has called irrational and perverse, the  
14 United States Court of Appeals for the Ninth  
15 Circuit would not require such a result and  
16 instead allowed an alternative certification in  
17 keeping with Congress's intent and one that  
18 satisfies the underlying objectives of the RCRA  
19 regulations. We ask for nothing more here today.

20           The record is now complete. Included  
21 within the record is evidence on each of the four  
22 requirements that Heritage must prove in obtaining  
23 its adjusted standard. And I will briefly  
24 summarize each of those four requirements. The

1 first of the four requirements states: "Factors  
2 relating to that petitioner are substantially and  
3 significantly different from the factors relied  
4 upon by the Board in adopting the general  
5 regulation applicable to that petitioner." I  
6 submit to you that the factors relating to this  
7 petitioner are very unique and justifies an  
8 adjusted standard in this case. In the instant  
9 case Heritage leases the property from a  
10 governmental authority that is not authorized to  
11 execute the certification as it appears in the  
12 regulations. There can be no doubt that neither  
13 the Board nor U.S. EPA considered such  
14 circumstances.

15           The circumstances in the instant case  
16 are, in fact, unique and do justify relief by this  
17 Board.

18           The second of the four factors is that  
19 "the existence of these factors justifies an  
20 adjusted standard." The unique situation of  
21 having an owner of the facility as a governmental  
22 entity that is unable to execute the certification  
23 in and of itself justifies this adjusted standard.  
24 Moreover, the public policy behind what we are

1 seeking also justifies an adjusted standard. We  
2 have indicated earlier today through testimony  
3 here before you that it is in the public interest  
4 that this facility be allowed to continue to  
5 operate. It provides the marketplace with an  
6 alternative for the management of hazardous waste  
7 and an alternative that is compliant with the  
8 spirit and the letter of the RCRA regulations.

9           As proven by the evidence, Heritage is  
10 a responsible and compliant operator. The  
11 marketplace needs such facilities. The fact that  
12 the Board is not -- that the District is not  
13 empowered to execute the certification justifies  
14 this Board in granting Heritage's adjusted  
15 standard.

16           The third requirement is "the requested  
17 standard will not result in environmental or  
18 health effects substantially and significantly  
19 more adverse than the effects considered by the  
20 Board in adopting the rule of general  
21 applicability." You have heard the testimony of  
22 Mr. Gary Lindgren who has testified that if its  
23 co-permittee, the District, is allowed to execute  
24 the proposed alternate certification, it will have

1 no effect on the compliance history of this  
2 facility. It will have no effect on the  
3 compliances -- on the facility's compliance and  
4 protection of human health and the environment in  
5 the future.

6           The last requirement is that the  
7 adjusted standard is consistent with applicable  
8 federal law. Heritage has proposed an alternative  
9 certification that Mr. Carlton Lowe has testified  
10 is acceptable to the District. The proposed  
11 certification complies with applicable federal  
12 law. United States Court of Appeals for the Ninth  
13 Circuit carefully analyzed the regulatory history  
14 of this certification and analyzed the federal law  
15 in the public policy behind that certification.

16           After considering the regulatory  
17 history of this requirement, the court held, and I  
18 quote, a simple certification setting forth the  
19 owner's knowledge of the activity on his property  
20 and his liability for that activity would satisfy  
21 both EPA's and Congress's objectives. You have  
22 heard the testimony of Mr. Carlton Lowe. We have  
23 here today a co-permittee that is very  
24 sophisticated. The District understands and the

1 testimony here today proves that the District  
2 understands the liability that results from the  
3 ownership of real property wherein a RCRA  
4 management facility is located. There can be no  
5 doubt and the record is clear on that point.

6           The certification proposed by Heritage  
7 satisfies both EPA's and Congress's objectives.  
8 We ask that the Board relieve the District of the  
9 requirement that it execute a certification  
10 attesting to a fiction that does not advance the  
11 objectives of the RCRA regulations.

12           Heritage's adjusted standard is  
13 conditioned on the requirement that an Illinois  
14 licensed professional engineer execute the  
15 certificate and that Heritage must demonstrate to  
16 the District that it is in material compliance  
17 with all applicable environmental laws and  
18 regulations, thus fulfilling the District's  
19 requirement that it have a good faith belief in  
20 the certification that it signs.

21           The proposed conditions assure the  
22 District that the District establishes a good  
23 faith belief in the truth of the application it  
24 executes. I believe that the record is clear and

1 is compelling, and we would ask that the Board  
2 grant the proposed certification language as  
3 identified in our petition for an adjusted  
4 standard. Thank you.

5 HEARING OFFICER KNITTLE: Thank you.

6 Does anybody from the Illinois  
7 Environmental Protection Agency have a closing  
8 argument they wish to make at this point?

9 MR. SCHERSCHLIGT: Yes.

10 CLOSING ARGUMENT

11 BY MR. SCHERSCHLIGT:

12 Mr. Hearing Officer, Mr. Biederman,  
13 Ms. Doyle, Mr. Gurnik, members of the Illinois  
14 Pollution Control Board, we would submit that the  
15 petition for adjusted standard falls substantially  
16 short of the level of justification that is  
17 required by Section 28.1(c) of the Illinois  
18 Environmental Protection Act. And I too will go  
19 down the list.

20 There are four subparts to that section,  
21 and the first being factors relating to that  
22 petitioner are substantially and significantly  
23 different than the factors relied upon by the  
24 Board in adopting the general regulation

1 applicable by the petitioner. The Illinois EPA  
2 would submit that the evidence that we have heard  
3 here today, the factors that we have heard here  
4 today, relate not really to the petitioner, but to  
5 MWRD. And that is in large part why the Illinois  
6 EPA in its response to the petition asserts that  
7 this really should be dismissed because the  
8 interested party here is MWRD and they are not a  
9 party to the action.

10           What we have heard basically is that  
11 MWRD does not believe that it has the authority,  
12 although we weren't really given any specific  
13 reasons for their belief, but they assert that  
14 they don't have the authority to sign the  
15 certification language as it exists when, in fact,  
16 those are factors -- those are specific factors  
17 that the Illinois -- or that the United States  
18 Environmental Protection Agency and Congress took  
19 into consideration when they adopted the federal  
20 RCRA regulations. In fact, the Agency's response  
21 cites to volume 45 of the Federal Register,  
22 page 33169. And I would encourage the Board to  
23 read that part of the Federal Register because  
24 Congress and U.S. EPA does take into consideration

1 the fact that sometimes there will be an absentee  
2 land owner.

3           But because of Congress's policy  
4 consideration and because of USEPA's policy  
5 consideration that land owners be joint -- not  
6 only jointly and severally liable for any  
7 resulting violations, but that they also be  
8 jointly and severally responsible for compliance,  
9 I would submit that MWRD has no way of being  
10 jointly responsible for compliance if they are not  
11 willing to adequately read and review any permit  
12 application that is submitted by Heritage to the  
13 Illinois EPA. And if they are going to be jointly  
14 responsible, it is necessary for them to take an  
15 active -- a proactive role, approach to the  
16 facility to make sure that they know what is going  
17 on at the facility. Not that they take more of a  
18 hands-off approach, but that they know exactly  
19 what is going on on their property because they  
20 are jointly responsible for compliance and they  
21 are jointly responsible and liable for any  
22 violations.

23           Then with respect to item No. 2, "the  
24 existence of those factors justifies an adjusted

1 standard," well, I would submit that that has not  
2 been met simply because there has been no  
3 demonstration that the factors relating to the  
4 petitioner were substantially and significantly  
5 different than the factors relied upon by U.S.  
6 EPA, Congress and the Board when they adopted them  
7 as pass-through regulations. So No. 1 and 2 have  
8 not been met.

9           With respect to item No. 3, "requested  
10 standard will not result in any environmental or  
11 health effects," well, if MWRD does not have  
12 knowledge or can certify to the contents of the  
13 applications for permits, then how are they going  
14 to be able to police or supervise the activities  
15 that occur at their property? So it is very  
16 conceivable that there could be adverse  
17 environmental or health effects if they are not  
18 activity involved in the permitting process.

19           And finally, we would submit that the  
20 Ninth District Federal Court of Appeals case is  
21 the law of that one particular case. It is not  
22 the federal law. The federal regulation has  
23 remained the same and the state regulation is  
24 identical to that federal regulation.



1 justified in seeking the adjusted standard so that  
2 its co-permittee can certify in a timely fashion  
3 RCRA documents in order for this facility to  
4 operate in a compliant manner in an ever-changing  
5 marketplace.

6 I believe that that is a fair result  
7 and that that is a result that public policy and  
8 the citizens of the state of Illinois deserve.

9 I have nothing further.

10 HEARING OFFICER KNITTLE: Thank you, sir.  
11 Let's go off the record.

12 (Discussion had off the  
13 record.)

14 HEARING OFFICER KNITTLE: We are back on the  
15 record after talking about briefing schedules off  
16 the record. Briefs will be due as follows: First  
17 off, there will be a written public comment  
18 period. Written public comments will be due at  
19 the Board on or before September 20th.  
20 Petitioner's brief will be due on or about  
21 September 27th, with the Illinois Environmental  
22 Protection Agency's brief due on or before  
23 October 11th, and the petitioner's reply brief due  
24 on or before October 18th.

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1 We didn't talk about the mailbox rule,

2 but let's just get all the briefs into the Board  
3 office on the dates that I have set out. There  
4 will be no mailbox rule. So mailing it doesn't  
5 cut it. It has to be in the Board's offices on  
6 that day. And I would ask for maybe a courtesy  
7 copy, you can work it out amongst yourselves, as  
8 to whether a copy delivered via U.S. Mail will be  
9 sufficient. But you may want to give the EPA an  
10 overnight copy so they can get it and start  
11 working on their brief.

12 MR. GURNIK: Would submittal to the  
13 Springfield office be acceptable?

14 HEARING OFFICER KNITTLE: No. We don't allow  
15 that. It has to be filed in the Chicago office.

16 MR. SCHERSCHLIGT: Do the Board rules  
17 specifically -- I mean, what do the rules say with  
18 respect to the mailbox rule?

19 HEARING OFFICER KNITTLE: There is a  
20 presumption --

21 MR. SCHERSCHLIGT: I don't anticipate that  
22 even being a problem.

23 HEARING OFFICER KNITTLE: There is a  
24 presumption of filing that says if there is a date

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1 and it is -- there is a four-day presumption of

2 filing that we take into account. They don't take  
3 into account any mailbox rule, per se, other than  
4 that. It is just standard case law. And  
5 generally the hearing officer at the hearing  
6 decides under light of the circumstances whether  
7 or not it is warranted or not. If you need it, if  
8 you guys think you need it, we can work it in.

9 MR. SCHERSCHLIGT: I don't think it will be a  
10 problem. If it is necessary, we will file  
11 appropriate motions for an extension, but I don't  
12 think it will.

13 HEARING OFFICER KNITTLE: Right. I don't  
14 have a -- it is a lot cleaner if we don't have to  
15 worry about it at all.

16 MR. GURNIK: I would like to make an  
17 suggestion since we were not going to be applying  
18 the mailbox rule, if we could move the Agency's  
19 brief due date one day later to the 12th and  
20 Heritage's date to the 19th. Columbus Day is the  
21 9th. And if we are going to have a problem  
22 getting signatures, it is going to occur on the  
23 10th, and we are going to have to have it out of  
24 our office on the 10th in order to get it here

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1 overnight on the 11th. If we have that extra day,  
2 I think that will be beneficial.

3 MS. DOYLE: That is fine.

4 MR. BIEDERMAN: We have no objection to that.

5 HEARING OFFICER KNITTLE: I think that is  
6 fair. Let's do that. October 12th for the Agency  
7 brief and October 19th for the petitioner's reply  
8 brief. And that will be set out in a hearing  
9 officer order summarizing the hearing today. That  
10 is all I have.

11 Once again, no members of the  
12 public are present. I do want to note that we had  
13 two witnesses testify. Based on my legal judgment  
14 and experience, I did not find any credibility  
15 issues with either witness.

16 I thank you both -- and by both I  
17 mean both parties -- very much.

18 MR. BIEDERMAN: Thank you.

19 MR. SCHERSCHLIGT: Thank you.

20 (Discussion had off the  
21 record.)

22 HEARING OFFICER KNITTLE: We are back on the  
23 record briefly. It turns out there is a clerical  
24 mistake. We don't have a copy of Petitioner's

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1 Exhibit 2. The first witness took it with him.

2 Mr. Scherschligt has given us his copy to

3 substitute for Petitioner's No. 2.

4 Mr. Scherschligt, do you have any  
5 objection if we use this copy?

6 MR. SCHERSCHLIGT: None whatsoever.

7 HEARING OFFICER KNITTLE: Mr. Scherschligt  
8 says no.

9 Is that sufficient for you,  
10 Mr. Biederman?

11 MR. BIEDERMAN: Yes, it is.

12 HEARING OFFICER KNITTLE: This will be  
13 accepted as Petitioner's Exhibit No. 2. And that  
14 is the end of the hearing.

15 (Whereupon the proceedings in  
16 the above-entitled cause were  
17 concluded.)

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1 STATE OF ILLINOIS )  
2 ) SS:  
3 COUNTY OF LAKE )

3 I, Cheryl L. Sandeck, a Notary Public

4 within and for the County of Lake and State of  
5 Illinois, and a Certified Shorthand Reporter of  
6 the State of Illinois, do hereby certify that I  
7 reported in shorthand the proceedings had at the  
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.

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Notary Public, Cook County, Illinois  
C.S.R. License No. 084-03710

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