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STATE OF ILLINOIS
Pollution Control Board

ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	
PROVISIONAL VARIANCES FROM	)	R01-31
WATER TEMPERATURE STANDARDS:	)	(Rulemaking - Water)
PROPOSED NEW 35 Ill. Adm. Code	)	
301.109	)	

NOTICE OF FILING

TO: Ms. Dorothy M. Gunn
Clerk of the Board
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601
(VIA FEDERAL EXPRESS)

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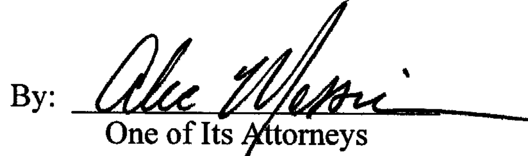
Chicago, Illinois 60601
(VIA FIRST CLASS MAIL)

(PERSONS ON ATTACHED SERVICE LIST)

PLEASE TAKE NOTICE that I have filed today with the Clerk of the Illinois Pollution Control Board an original and nine copies of the **PRE-FILED TESTIMONY OF DEIRDRE K. HIRNER,** copies of which are herewith served upon you.

Respectfully submitted,
ILLINOIS ENVIRONMENTAL
REGULATORY GROUP,

By: 
One of Its Attorneys

Dated: August 8, 2001

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CERTIFICATE OF SERVICE

I, Robert A. Messina, the undersigned, certify that I have served a copy of the

PRE-FILED TESTIMONY OF DEIRDRE K. HIRNER upon:

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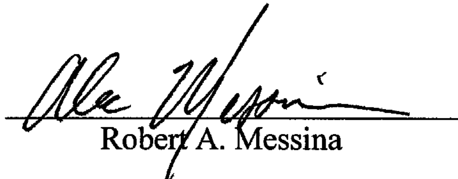
SEE ATTACHED SERVICE LIST.

by depositing said documents in the United States Mail and Federal Express in

Springfield, Illinois on August 8, 2001.



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Pollution Control Board

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
)
PROVISIONAL VARIANCES FROM)
WATER TEMPERATURE STANDARDS:)
PROPOSED NEW 35 Ill. Adm. Code)
301.109.)
)

R01-31
(Rulemaking-Water)

PRE-FILED TESTIMONY OF DEIRDRE K. HIRNER

NOW COMES the ILLINOIS ENVIRONMENTAL REGULATORY GROUP ("IERG"), by one of its attorneys, Robert A. Messina, and submits the following Pre-Filed Testimony of Deirdre K. Hirner for presentation at the August 23, 2001, hearing scheduled in the above-referenced matter:

TESTIMONY OF DEIRDRE K. HIRNER

My name is Deirdre Hirner and I am the Executive Director of IERG. IERG is a not-for-profit Illinois corporation comprised of 70 member companies engaged in industry, commerce, manufacturing, agriculture, trade, transportation or other related activity, and which persons, entities, or businesses are regulated by governmental agencies which promulgate, administer, or enforce environmental laws, regulations, rules or policies. IERG was organized to promote and advance the interests of its members before governmental agencies such as the Illinois Environmental Protection Agency ("IEPA" or "Agency") and the Illinois Pollution Control Board ("Board"). IERG is also an affiliate of the Illinois State Chamber of Commerce, which has more than 4,000 members in the State.

On behalf of IERG, I want to express our appreciation to the Board for allowing IERG the opportunity to offer testimony on this very important subject.

My testimony today will focus on the general impact of and need, or lack thereof, for a proposal of this nature, and related policy and precedent issues. I also will raise IERG's concerns regarding the scope of the proposal's applicability and the proposed role of the Illinois Department of Natural Resources ("IDNR") in the regulatory process. As a statewide association, IERG represents many of the facilities having thermal discharges that are, or may in the future, be subject to the provisions of this proposal. IERG believes that many such facilities are not aware of the implications of this proposal and my testimony will thus concentrate on the general issues applicable to all thermal dischargers. Those facilities that are clearly intended to be covered by this proposal, all of whom we believe are members of IERG, will offer testimony or comments regarding, among other issues, the feasibility, impact, and reasonableness of the specific language of the proposal.

At the outset, I am compelled to state that, for reasons that are unclear, the process surrounding development of this proposal is unlike any of the others in which we have participated recently. First, quite frankly, the regulated community is uncertain what actions precipitated the need for the changes that are the subject of this proposal and, unlike the vast majority of Agency proposals – air, land and water-based – with which I have had the privilege of being involved, this proposal was not the subject of pre-filing discussions. Indeed, it is this aspect of the filing that I perhaps find most troubling.

IERG believes that all parties benefit from pre-proposal dialogue. In this informal context, the regulators, the regulated and other interested parties have had the opportunity to discuss proposed requirements, understand their potential for impact on industry-wide operations, ascertain their feasibility and necessity, and advance a proposal to the Board

with clear knowledge and understanding of the areas at dispute. Having become aware of this proposal only after it was filed with the Board, the regulated community has had little time to understand the harm this proposal intends to address, the breadth of facilities it potentially covers, and perhaps more importantly, to assess its true impact on future operations – especially under emergency conditions.

In addition, the structure of the proposal itself is troublesome in that it appears to realign the role of the Agency and the Board in the area of provisional variances, seemingly contrary to the Illinois Environmental Protection Act. Moreover, it singles out thermal variances for treatment different from all other provisional variances, and does so without compelling documentation for the need – in testimony the Agency stated that, of all water related provisional variance requests, approximately only 10% are for thermal discharges (June 7, 2001, Hearing Transcript, p. 55).

THE IMPACT OF THE PROPOSAL

Clearly, the primary rationale behind provisional variances in general is the General Assembly's recognition that circumstances will arise under which a short-term variance from regulatory requirements and/or permit conditions will be warranted. The General Assembly also recognized that such situations would, on occasion, happen without advance notice, necessitating rapid action by the operator and regulatory authority. The combination of the suddenness and short-term nature of such events is at the heart of a provisional variance. And, it is the reason the Illinois Legislature, in this limited type of situation, gave the Agency, rather than the Board, the decision-making power to approve the variance, subject to the Board's ministerial and mandatory action of approving the Agency's recommendation. It therefore seems reasonable that any new

regulations governing the grant or denial of provisional variances must be measured to judge if they would either: a) facilitate the intent of the General Assembly; or b) shift the decision-making powers implied in Section 35(b) of the Act.

IERG's concern is that the proposal fails both tests and sets an unreasonable, unnecessary and unjustified process for a narrow group of provisional variance applications. If, indeed, additional regulations are needed to provide the regulated or the regulator with additional guidance in thermal – or any other – provisional variance proceedings, the logical place to provide such guidance is the Agency's existing Part 180 regulations. Again, the short-term and sudden nature of a provisional variance argues against the wisdom of having both Board and Agency regulations.

Because of IERG's belief that the regulations should be an addition to the existing Part 180 regulations, we have drafted an alternate proposal that we believe could be a possible addition to the existing Part 180 regulations – although we do not believe such an action is desirable, or even necessary at all. IERG's proposed language, which we are filing as an attachment to our testimony, consists of a brief amendment to the Board's existing Section 301.109, which simply directs the Agency to adopt "procedures and criteria" applicable to water temperature standard provisional variances, along with certain general language indicating the scope of such procedures and criteria (Exhibit A). The main body of our proposed language, which IERG has discussed with the Agency, would become an addition to the existing Agency Part 180 regulations. The proposed language attempts to, among other things address our, and members, concerns with the Agency proposal that I will discuss later in this testimony.

IERG fully understands that this proceeding cannot be the mechanism to adopt such regulations. The Agency would have to initiate this adoption procedure pursuant to the Illinois Administrative Procedure Act. Accordingly, IERG's proposed Part 180 language is submitted to the Board simply to provide an indication of what type of language we believe would be appropriate. If, however, the Board were to proceed to adopt regulatory language as its own regulations as proposed by the Agency, IERG strongly urges that our proposed language serve as the basis of such regulations.

IERG'S PROPOSED REVISIONS

Putting aside for a moment the critical questions of the need for and appropriate venue for such regulations, I would like to briefly explain the rationale for IERG's suggested changes to the Agency's proposed language. IERG's proposed Section 180.500(a), which mirrors the Agency's proposed Section 301.109(a), only contains additional language that would maintain the distinction between ordinary and emergency provisional variances. IERG's proposal would only apply to ordinary thermal provisional variance petitions. Proposed Section 180.500(a)(1) is identical to the Agency's language; Section 180.500(a)(2) is nearly identical except for the omission of language pertaining to historical weather patterns and operational conditions that IERG believes is unnecessary. Nothing precludes the Agency from considering this information in determining foreseeability, but many factors often contribute to whether the need for a provisional variance is foreseeable, and IERG believes the inclusion of only two factors will cause that information to be overvalued at the expense of other valid information.

IERG's proposed Section 180.500(b) is very similar to the Agency's proposed Section 301.109(b). Proposed Section 180.500(b)(1) contains many of the conditions

contained in the Agency's proposal – some of the language has been stricken, as will be discussed shortly, and some of the language from the Agency's proposal is combined into one broad condition. IERG's proposed Section 180.500(b)(1)(A) includes most of the requirements that are contained in the Agency's condition (A), which requires monitoring of water temperatures and visual inspection of intake and discharge areas to assess aquatic life mortality, and condition (B), which requires documentation of environmental conditions during the life of the permit. With regard to the Agency's condition (A), IERG struck the word "continuously" before the temperature monitoring language and "three times daily" before the visual inspection language. IERG believes these changes will give the Agency greater latitude to determine what is most appropriate in a provisional variance on a case-by-case basis. IERG has also stricken receiving water from the temperature monitoring language because of issues pertaining to technical feasibility. With regard to the Agency's condition (B), IERG struck the Department of Natural Resources from the requirement to document conditions, and struck the 30-day deadline for reporting those conditions. Again, IERG believes striking this arbitrary deadline will give the Agency greater latitude to determine how much time is appropriate for providing relevant information.

IERG's proposed Section 180.500(b)(1)(B) is similar to the Agency's condition (C), which requires the implementation and documentation of biological activities to characterize how aquatic life responds to the thermal conditions resulting from the provisional variance. IERG's proposal would not require immediate implementation of the activities, as the Agency's proposal would require, but would require biological activities to be implemented after consultation with the Agency. This change was made

to the Agency's language to ensure that appropriate, meaningful activities were implemented by the facility that would satisfy the needs of the Agency. Also, as above, IERG struck the IDNR from the requirement to document the activities, and struck the 30-day deadline for documenting those activities.

IERG's proposed Section 180.500(b)(1)(C) is similar to the Agency's condition (D), which requires notification of any unusual conditions and action to remedy the problem. IERG's proposal, however, would only require notification if the adverse environmental impact was greater than those identified in the provisional variance application (the Agency already requires, pursuant to Section 180.202(b)(6), that applicants provide an assessment of any adverse environmental impacts which the variance may produce). IERG does not require immediate action to be taken to remedy the problem or to investigate or document the cause and seriousness of the conditions, but IERG does require the facility to, if necessary, develop a plan to evaluate the nature and extent of the adverse environmental impacts. Once again, IERG struck all references to the IDNR from the Agency's language.

Proposed Section 180.500(b)(2), which requires the inclusion of a rationale for each condition imposed, is nearly identical to the Agency's language in proposed Section 301.109(b)(1), but has simply been moved to the end of the proposed subsection for structural reasons.

THE NEED FOR THE PROPOSAL

Quite frankly, IERG sees no need for this proposal. IERG further notes that the Agency has not stated any real justification for this proposal, let alone made a compelling case. The Agency, in its STATEMENT OF REASONS (Agency's Statement of Reasons,

p. 5) and in its testimony (Transcript, at page 11) states that, in general, the Part 180 rules have worked well. The Agency then goes on to say, "However, given the knowledge and experience that comes with 20 years of considering requests for provisional variances, the Illinois EPA is proposing additional criteria in regards to provisional variances from water temperature standards." The additional criteria are those that the Agency has proposed at Section 301.109(a)(1)-(3).

When questioned, the Agency testified at hearing that it currently has the authority to consider the factors outlined in proposed Section 301.109(a)(1)-(3) and impose any conditions it deems necessary in recommending the grant of a provisional variance. The Agency has, in fact, exercised this authority in the past (Transcript, at pages 23-26). The Agency's witness, Mr. Frevert, then went on to indicate that, as a matter of practice, the Agency has considered the Section 301.109(a)(1)-(3) factors in evaluating requests for thermal provisional variances in addition to those criteria articulated in Section 180.202(b). He stated that he believed it would be beneficial to the Agency, the regulated entities and the general public to provide clarification on the materials the Agency specifically considers, its routine way of operating, its up-front communication of the type of material the Agency is looking for (Transcript, at pages 26-29). Mr. Frevert stated it is the Agency's intent to get the issue of thermal provisional variances out in the open and into the public discussion ... to more or less put the utilities on fair notice that it is looking at the requests in a different light than it did ten years ago, "and to that extent I think we have accomplished our purpose."

Equally important as regards the need for the proposal is the question of how the existing rule impacts on future decisions of affected facilities. IERG would argue that the

existing regulation should be neither so restrictive as to make variances virtually impossible to obtain, nor so permissive as to discourage actions to reduce the need for future variances. The existing Part 180 regulations seem to have achieved the appropriate balance. This is most clearly demonstrated by the Agency's own testimony regarding provisional variances granted during the summer of 1999. As the Agency relates, the conditions encountered in the summer of 1999 led to four provisional variance requests and one extension request (Transcript, at pages 13-15). Two of the requests were never used demonstrating a key value of the provisional variance process – precautionary action to avoid possible violations. The two requests and the extension that were used led to discussions between the Agency and the facilities in question. We understand that, in both cases, the facilities installed, at considerable cost, additional cooling capacity. Thus, the Part 180 rules allowed (and should continue to allow) rapid relief when needed while at the same time prompting actions to lessen the probability that they will in fact be needed. This, IERG believes is the proper balance for a regulation of the type in question. Simply put: if it's not broken, don't fix it!

POLICY AND PRECEDENT

In its STATEMENT OF REASONS, the Agency states that the "proposal sets forth how the Illinois EPA will exercise its provisional variance authority consistent with the Act and the Illinois EPA's regulations" (Reasons, at page 2). As the proposal is structured, each of the criteria contained in Section 301.109(a)(1)-(3) are requirements placed on the Agency's recommendation to the Board and not on the regulated community. They are in essence the Agency proposing to regulate the Agency. Rather than informing the regulated community, these new criteria appear to be new standards

by which the Board judges Agency action, and are thus limiting factors that are neither articulated nor contemplated in the Act.

The criterion contained in proposed Section 301.109(a)(1) seeks to limit "arbitrary or unreasonable hardship" to that caused by "weather and operational conditions." The second criterion introduces the concept of requiring an explanation of that which is "reasonably foreseeable" based on historical events to avoid undue hardships. The regulated community is at a loss as to what this means and how it can be accomplished by the Agency. The third criteria appears to introduce a test or consideration in recommending the grant or denial of a thermal provisional variance, using past history as a test for future variances. The conditions that constitute an arbitrary or unreasonable hardship are not calendar dependant, but rather are generally the result of events beyond the control of the applicant.

The implication of these new criteria is to establish limits in terms of magnitude and time, in contrast to the General Assembly's decision to place no such limit on what constitutes an arbitrary or unreasonable hardship. It is, and always has been, the obligation of the applicant for a provisional variance to demonstrate an arbitrary or unreasonable hardship, and the obligation of the Agency to judge the validity of that claim. Expressions of criteria for administrative decision-making are appropriate but these criteria must be based in the enabling legislation. The Agency has identified no examples of areas where the regulated community was misled by or misinformed of the Agency's approach, or where Part 180 did not advise the regulated community of what was appropriate.

The combined result of the interrelated criteria contained within Section 301.109(a)(1)-(3) appears to be intended to place new and additional limits on the Agency's ability to recommend the grant of a thermal provisional variance. The Agency has stated, and IERG agrees, that a recommendation to grant a provisional variance is a *de facto* grant of the provisional variance itself. The only rationale for these limiting criteria is to adopt a Board rule to effectively dictate to the Agency what they may or may not recommend, thus implying Board power to review Agency decisions for compliance with these criteria. This would put the Board in the position of asserting authority that it was not granted under the Act, which states:

> The Board shall grant provisional variances, only upon notification from the Agency that compliance on a short term basis with any rule or regulation, requirement or order of the Board, or with any permit requirement would impose an arbitrary or unreasonable hardship. Such provisional variances shall be issued within 2 working days of notification from the Agency

(415 ILCS 5/35(b)).

The proposal next would impose a required set of conditions upon the recommendation to grant a provisional variance. It appears that the conditions listed in Section 301.109(b)(2)(A)-(E) would necessarily be included in the granting of a provisional variance absent justification from the Agency to the contrary. Once again the imposition of limitations on the Agency's discretion to identify appropriate and necessary conditions on the grant of a provisional variance is counter to the twin criteria of an expeditious process and the short-term nature of relief that are at the heart of a provisional variance petition and decision. Again, as testified to at hearing, the Agency already has the authority to impose any and all reasonable conditions on a provisional variance.

What then is the purpose of mandating a subset of possible conditions for special inclusion in a thermal provisional variance in a Board rule? The only possible reason is an attempt to somehow limit the Agency's authority and shift the decision-making powers. Further, the added requirement for the Agency to articulate rationales in a recommendation increases the time needed to prepare that recommendation and would only serve to delay the issuance of the variance, thus frustrating the need for rapid resolution of the issues at hand. I would add that, in IERG's opinion, certain of the recommendations appear to be well beyond the scope of a provisional variance and would impose responsibilities of an unknown type and duration on the regulated community.

The sole expressed reason or need for the proposal is to provide a communication to the regulated community and the citizens of Illinois of the process that the Agency goes through in recommending the grant of a thermal provisional variance. Yet, Mr. Frevert noted that the mere filing of the proposal put the regulated community on fair notice and to that extent accomplished their purpose (Transcript, at page 33). This begs the questions of whether the regulation is needed and why it is proposed to the Board. According to Mr. Frevert, it certainly is not needed in the near future. There are only a handful of entities that have requested thermal provisional variances in the past 12 years – 5 to be exact. There are only a few more likely to be subject to this proposal at any time in the future. There is an additional unknown universe of potentially affected facilities that have thermal discharges, but to date have not found it necessary to avail themselves of such relief.

There is no reason to believe that the goal of communicating the intent of the Agency cannot be accomplished in ways other than a precedent setting and statutorily uncertain regulatory proposal. Mr. Frevert stated there were a number of ways to proceed to achieve the Agency's objective to put industries on notice to expect this to be the routine way of operating in the future. The Board proceeding currently underway was selected "as the dust settled" (Transcript, at page 23). IERG maintains that the Agency's objective has been achieved, and that industry is on notice. Unless the Agency can provide, a much more defensible STATEMENT OF REASONS for the proposal, IERG would respectfully suggest that the Board dismiss the proceeding as unnecessary and unjustified, or in the alternative decline to adopt the proposal based on inadequate supporting in the record.

THE SCOPE OF THE PROPOSAL

Applicability to all thermal discharges:

As drafted, the proposal, if it were to be adopted, applies to any and all facilities that have any type of thermal discharge. These facilities and their thermal discharges range from large electric generating facilities required to make thermal demonstrations to the smallest discharge at a facility subject to the provisions of 35 Ill. Adm. Code Section 302.211(e). As previously noted, only a limited number of facilities historically have availed themselves of thermal provisional variances. In its STATEMENT OF REASONS, the Agency has said that the proposal will likely only impact electric utilities (Reasons, at page 9). However, the Agency has indicated at hearing that the proposal should be applicable to all thermal discharges. Further, the Agency acknowledged that some facilities may not have the depth and degree of information anticipated under this

proposal. IERG then must question how such dischargers can meet the proposed Part 301 requirements should a provisional thermal variance ever be needed. The uncertainty regarding the threshold and applicability language of the proposal makes it incumbent on the Agency, as the proponent of a regulation, to identify the universe of affected facilities.

Certain of IERG's member companies will offer testimony on concerns with the proposed regulations in greater detail. The testimony will primarily center on large thermal discharges. The testifying companies, as well as many others, may well have other thermal discharges that would fall under the purview of this proposal. But before they can adequately respond to the impact this proposal will have on them, the proponent must clearly provide information on who is affected, and provide an assessment of the ability of such facilities to comply. Absent such information, IERG would submit that the proposal be deferred until such input can be provided.

Applicability to regular as well as emergency petitions:

The Agency's rules at Part 180 distinguish between "regular" applications (35 Ill. Adm. Code Section 180.202) for provisional variances and emergency applications (35 Ill. Adm. Code Section 180.204). On its face, the emergency application procedure contemplates that the information required in a Section 180.202 (regular) application would not necessarily be required. Rather, Section 180.204 provides that the Agency will notify the applicant of what specific information must be supplied. Section 180.301 contemplates that the Agency will review Section 202 and Section 204 variance requests based on different information requirements.

The rationale for the differences is self-evident. There will be cases – notwithstanding the best efforts of the applicant – when the need for a provisional variance arises with little or no warning. This suddenness factor is best demonstrated by the fact that, when granted, the Agency often makes a provisional variance retroactive, effective from the date it was applied for rather than the date of the grant.

The proposal at Section 301.109 appears to attempt to render this distinction between emergency and regular provisional variances null and void. By requiring the Agency recommendations to "specifically address each of the contents required of any application for a provisional variance under 35 Ill. Adm. Code 180.202(b)" the Agency's latitude to act lacking Section 180.202(b) information is effectively removed. More important than the specific language is the intent and impact of the regulation. Woven throughout this proposal are a set of mandates and imperatives that can only serve to delay the timeline for the Agency to make a recommendation to the Board. Under Section 180.302, the Agency has 30 days from the receipt of an application to either recommend a grant or notify the applicant and the Board of a denial. The new constraints imposed on the Agency by this proposal put all parties in a difficult position.

The Agency will have a few options: 1) impose all of the conditions under Section 301.109, even if they have not had time to assess the ability of the facility to comply or the need for a specific condition; 2) pay lip service to the conditions and not impose any or all of them; or 3) deny the provisional variance. The applicant may well be forced to either accept conditions it may not be able to meet, or incur an arbitrary and unreasonable hardship thus avoiding the need for the provisional variance but facing the potential threat of an enforcement action. All of these options, for the Agency or for the

applicant, constitute bad public policy and even worse regulatory language. Unless the proposal clearly and effectively recognizes the existence of emergency situations and provides a workable mechanism to address such situations, it is fatally flawed.

THE ROLE OF THE IDNR IN THE PROPOSAL

Illinois facilities are heavily regulated in the environmental area. In numerous instances, specific state agencies other than the IEPA are given statutory authorization over a specific regulation or law. Examples include: the Illinois Emergency Management Agency ("IEMA") in the Community-Right-To-Know program; the Illinois Department of Agriculture ("IDOA") as regards agrichemical facility remediation; and the Illinois Department of Transportation ("IDOT") as regards hazardous material transportation. The list goes on, but with a common theme. The General Assembly vested authority in a specified state agency and the regulated community was so advised. A critical factor in a business's compliance strategy is knowledge of who the regulator is, and the rules that govern those regulators. This proposal attempts to elevate a state agency, the IDNR, to the role of "regulator" by formal inclusion in the decision-making process via Board action. There is no statutory provision for this and, therefore, it is an unauthorized and illegal action.

What is the proposed intended role of the IDNR in the process? Is it to simply advise the Agency or is it to direct decisions? Is the IDNR to be considered an impartial governmental consultant to the Agency, or an advocate of a specific point of view? A review of the questions asked of the Agency by IDNR representatives at the June 7, 2001, Hearing leaves little doubt as to the answer to this question. Plainly, the IDNR believes it needs a larger role in the provisional variance process, and believes that the Agency is not

performing its job. But only the General Assembly can give IDNR a role in this process and, until it does so, the Board is not authorized to involve the IDNR in provisional variance decision-making.

IERG recognizes that provisional variances are on a fast time line and the normal opportunity for input is greatly limited. We are not blind to the fact that the Agency may opt to provide the IDNR with a copy of each thermal provisional variance request. That is its option. It is also the Agency's option to accept or reject any comments that IDNR may offer. It is most emphatically not the Agency's obligation or requirement to consider or accept IDNR's input. To formally interject IDNR into regulatory language is to give it status akin to a regulator, absent statutory authorization.

As I noted above, the regulated community expects and deserves to know exactly which entity we report to, and the rules by which we have to abide. Currently, as regards to provisional variances, the answer is clear – the IEPA and 35 Ill. Adm. Code Part 180. If the State of Illinois wishes to change the entity to which the regulated community must report, IERG respectfully suggests that such a change be made by the General Assembly.

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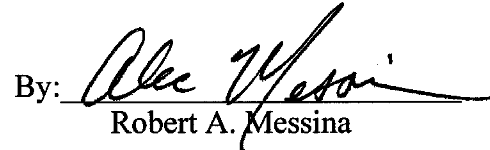
IERG reserves the right to supplement or modify this pre-filed testimony.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
REGULATORY GROUP,

By: 
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Dated: August 8, 2001

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IERG:001/R Dockets/Fil/R01-31

Exhibit A

TITLE 35: ENVIRONMENTAL PROTECTION
SUBTITLE C: WATER POLLUTION
CHAPTER I: POLLUTION CONTROL BOARD

PART 301.109 (NEW)

Section 301.109 Provisional Variances from Water Temperature Standards

The Agency shall adopt procedures and criteria specific to the applications for provisional variances from water temperature standards. Such procedures shall:

a) Identify what factors the Agency will consider when reviewing an application for a provisional variance from water temperature standards, and;

b) Identify the types of conditions that the Agency may impose in any recommendation to grant a provisional variance from water temperature standards to the Board.

TITLE 35: ENVIRONMENTAL PROTECTION
SUBTITLE C: WATER POLLUTION
CHAPTER II: ENVIRONMENTAL PROTECTION AGENCY

PART 180
PROCEDURES AND CRITERIA FOR REVIEWING
APPLICATIONS FOR PROVISIONAL VARIANCES

SUBPART E: THERMAL PROVISIONAL VARIANCES

Section 180.500 Provisional Variances from Water Temperature Standards

a) An Agency recommendation to the Board under 415 ILCS 5/35(b) regarding a request for a provisional variance from any water temperature standard set forth in 35 Ill. Adm. Code 302.211 or 303 or any other rule, permit, or Board order, must specifically address each of the contents required of any application for a provisional variance under 35 Ill. Adm. Code 180.202(b) or 180.204, as applicable. An Agency

recommendation issued in response to an application submitted pursuant to 35 Ill. Adm. Code 180.202(b) must to the extent reasonably possible:

1) Indicate if the arbitrary or unreasonable hardship results from weather and operational conditions; and

2) Indicate whether the conditions in subsection (a)(1) of this Section were reasonably foreseeable.

b) When issuing a recommendation described in subsection (a) of this Section, the Agency:

1) Shall consider the appropriate conditions to impose in its recommendation to grant a provisional variance, including the following:

A) Requiring the petitioner to monitor or assess at regular intervals intake and discharge water temperatures, to visually inspect intake and discharge areas to assess any mortalities to aquatic life, to document the results of these activities and to submit the documentation to the Agency after the provisional variance expires;

B) Requiring the petitioner to implement additional monitoring activities other than those addressed in (A) above after consultation with the Agency; and to submit the documentation to the Agency after the provisional variance expires;

C) Requiring the petitioner to immediately notify the Agency if adverse environmental impacts greater than those identified in the application in response to 35 Ill. Adm. Code 180.202(b)(6) resulting from the provisional variance are discovered; and, if necessary, to develop a plan to evaluate the nature and extent of the adverse environmental impacts, which shall be submitted to the Agency; and

2) Shall specifically address its rationale for conditions imposed in the recommendation.

(Source: Added at __ Ill. Reg. __________, effective __________.)