

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

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HEARING TAKEN BEFORE:

3

ILLINOIS POLLUTION CONTROL BOARD,

4

100 West Randolph Street

Suite 11-500

5

Chicago, Illinois 60601

(312) 814-3620

6

BY: MARIE TIPSORD

7

8 ILLINOIS POLLUTION CONTROL BOARD MEMBERS PRESENT:

9 Mr. Joel Sternstein

10 Mr. G. Tanner Girard, Ph.D.

11 Mr. Nicholas Melas

12 Ms. Kathleen Crowley

13

14 ILLINOIS ENVIRONMENTAL PROTECTION AGENCY MEMBERS
PRESENT:

15

Mr. Richard C. Warrington, Jr.

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1 I N D E X

2

PAGES:

3

GREETING BY HEARING OFFICER..... 4

4

OPENING STATEMENT BY MR. WARRINGTON..... 9

5

TESTIMONY BY MR. WARRINGTON..... 13

6

QUESTION AND ANSWER SESSION..... 17

7

CLOSING BY HEARING OFFICER..... 75

8

9

10

11

12

13

14

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1 THE HEARING OFFICER: Good morning. We're on
2 the record. My name is Marie Tipsord, and I've been
3 appointed by the Board to serve as hearing officer
4 of this proceeding entitled In The Matter Of:
5 Permitting Procedures For The Lake Michigan Basin,
6 Amendments to 35 Ill. Adm. Code 301 and 309.141.
7 The docket number is R99-8.

8 To my right is Dr. Tanner Girard, one of
9 the Board members assigned to this matter. Also
10 present is Nicholas J. Melas, who's also assigned to
11 this rulemaking. In addition, we have with us today
12 Joel Sternstein, Mr. Melas' assistant. To my
13 immediate left is Kathleen Crowley, the senior
14 attorney.

15 In addition, in the back of the room, we
16 have Anand Rao, part of the Board's technical
17 personnel; Chuck King, attorney assistant to Marili
18 McFawn; Karen Kavanagh, a member of our legal unit;
19 Cathy Glenn, who's the assistant to Ron Flemal, and
20 Dr. Flemal is in the back as well, and Amy
21 Hoogasian.

22 This is a rulemaking, and, therefore, all
23 relevant and nonrepetitious testimony will be heard
24 at this hearing and the next hearing scheduled in

1 December.

2 The order of today's hearing will be any
3 opening statements by any person who would like to
4 make one followed by the testimony of the Illinois
5 Environmental Protection Agency.

6 My understanding is that two of the
7 Agency's potential witnesses, Tom McSwiggen and Toby
8 Frevert, were unable to get up here due to inclement
9 weather today. That's also true of Claire Manning
10 and her assistant, Cindy Ervin, were unable to make
11 it.

12 Therefore, questions of the Agency, we'll
13 go ahead and have all questioning take place. What
14 Mr. Warrington can answer, he will. What he can't,
15 we'll have on the record, and we'll have them
16 prefile answers to those questions before the
17 December 8th hearing.

18 We have a prefiling deadline, I believe,
19 of November 24th on that. I'll double-check that at
20 the end of the hearing. So we'll have them prefile
21 their answers. That way if there are any follow-ups
22 based on their answers, those of you who have
23 questions today can be prepared to ask those at the
24 December 8th hearing. The December 8th hearing is

1 scheduled for Springfield, Illinois.

2 Anyone may ask a question. However, I do
3 ask that you raise your hand and wait for me to
4 acknowledge you. After I've acknowledged you,
5 please state your name and who you represent before
6 you begin your question.

7 Please speak one at a time. If you're
8 speaking over each other, the court reporter will
9 not be able to get your questions on the record.
10 Please note that any questions asked by a Board
11 member or staff are intended to help build a
12 complete record for the Board's decision and not to
13 express any preconceived notion or bias.

14 At the back of the room, there are sign-up
15 sheets for the notice and service lists. If you
16 wish to be on the service list, you will receive all
17 pleadings and prefiled testimony in this
18 proceeding. In addition, you must serve all of your
19 filings to the persons on the service list.

20 If you wish to be on the notice list, you
21 will receive all Board and hearing officer orders
22 and enrollment. If you have any questions about
23 which list you wish to be on, please see me at a
24 break. There are also copies of the current service

1 and notice lists at the back of the room and a few
2 copies of the Board's hearing -- the hearing
3 officer's order.

4 At this time, are there any questions?

5 MS. ROSEN: For the record, Whitney Wagner
6 Rosen with Illinois Environmental Regulatory Group.

7 Marie, I was just wondering if it might be
8 possible that to the degree that the Agency needs to
9 answer questions in writing that we set a date,
10 like, one week prior to the rest of the prefiling
11 testimony deadline so that we would have a chance to
12 review their answers prior to filing our own
13 testimony?

14 THE HEARING OFFICER: Rich, do you have a
15 comment on that?

16 MS. ROSEN: There's a lot of --

17 MR. WARRINGTON: Let me get my calendar. I may
18 be out of town on vacation for a certain period of
19 time. So maybe we should go through some actual
20 dates.

21 THE HEARING OFFICER: Okay. Well, why don't we
22 take -- we'll take a break later on and we'll look
23 at some dates and see if we can arrange something so
24 that people who wish to testify December 8th can

1 respond by prefilng testimony. We'll look at that

2 at a break.

3 MS. ROSEN: Okay. Thanks.

4 THE HEARING OFFICER: We'll see if we can come

5 up with some actual dates.

6 Are there any other questions? Okay. As

7 I said, we've received prefiled testimony from the

8 Agency and we'll begin with that testimony after

9 opening statements.

10 At this time, Dr. Girard, do you wish to

11 say anything?

12 MR. GIRARD: Thank you, Madam Hearing Officer.

13 On behalf of the Board, I'd like to

14 welcome all the participants to this hearing this

15 morning. I'd like to thank you for taking time from

16 your busy schedules to come and give us your

17 questions and your input.

18 This is an unusual rulemaking in terms of

19 some of the issues that have been raised, and so we

20 look forward to your participation in helping the

21 Board answer the questions and issues that have been

22 raised. Thank you.

23 THE HEARING OFFICER: Mr. Melas?

24 MR. MELAS: Yes. Just briefly, I would also

1 like to second the remarks of Dr. Tanner. We
2 welcome you all here. This is my first rulemaking.
3 As most of you know, I'm relatively new on the
4 Board. I spent a great deal of my life, a great
5 portion of my life, working and helping preserve
6 Lake Michigan in my work with the Metropolitan Water
7 Reclamation District, and, obviously, the Great
8 Lakes are a very, very important thing in my mind,
9 and I'm pleased to be here. I hope that we'll be
10 able to accomplish something that will be
11 beneficial.

12 THE HEARING OFFICER: Thank you. There are
13 copies of the prefiled testimony at the back of the
14 room if you did not get it. If no one objects, I
15 thought we would allow Mr. Warrington to summarize
16 the testimony and then we will admit it as an
17 exhibit rather than have him read the entire nine or
18 ten pages into the record.

19 Is there any objection to that? Seeing
20 none, then we'll plan on proceeding in that manner.
21 At this time, I'll allow for opening statements
22 starting with the Agency.

23 MR. WARRINGTON: Thank you, Madam Hearing
24 Officer.

1 My name is Rich Warrington. I'm with the
2 Illinois Environmental Protection Agency of the
3 Division of Legal Counsel and the Bureau of Water
4 Pollution Control.

5 On behalf of our director, Mary A. Gady, I
6 would like to express our appreciation to the
7 Illinois Pollution Control Board for scheduling this
8 hearing to receive testimony on this rulemaking
9 proposal.

10 We are here to continue the dialogue
11 between the Office of the Attorney General, the
12 Joint Committee on Administrative Rules, and our
13 Agency on the best set of rules to implement the
14 Great Lakes Initiative for Illinois.

15 Our rulemaking proposal today has three
16 parts. The first is an amendment to update the
17 edition of 40 CFR, which is Code of Federal
18 Regulations, part 136, to the 1996 edition thus
19 making it consistent with the edition incorporated
20 by reference in other rules.

21 This part of the Code of Federal
22 Regulations includes the test methods required to be
23 used by dischargers to measure the concentration of
24 contaminants. The United States Environmental

1 Protection Agency periodically updates the test
2 methods to incorporate the latest scientific
3 advances and we are here today to ask the Board to
4 do likewise.

5 The second part of our rulemaking proposal
6 consists of definitions previously adopted at 35
7 Illinois Administrative Code Part 352.104 that give
8 meaning to the rules proposed today at 35 Illinois
9 Administrative Code 309.141(h).

10 In two instances, 301.411, total maximum
11 daily load, and 301.421, waste load allocation, the
12 definitions apply to terms already used by the Board
13 in 309.141(d)(3) and 309.142.

14 The third part of our rulemaking proposal
15 contains selected sections from 35 Illinois
16 Administrative Code 352. Our role here is to ensure
17 that the Board has every opportunity for discussion
18 and review of the best rules possible to implement
19 the water quality standards for Lake Michigan.

20 I have to divert from my opening statement
21 as we apologize for not being able to bring Mr.
22 Frevert and Mr. McSwiggen to the hearing today to
23 answer questions, but understand we remain willing
24 to work with the Board, the Office of the Attorney

1 General, and other interested parties to resolve
2 concerns and to improve the quality of Lake
3 Michigan.

4 That concludes my opening statement.

5 THE HEARING OFFICER: Thank you, Mr. Warrington.

6 Ms. Rosen, did you have a question?

7 MS. ROSEN: I wanted to make a statement, but

8 I'll certainly wait until we complete. I can wait

9 until we complete the Agency's presentation. Thank

10 you.

11 MR. WARRINGTON: In summary, the Agency filed

12 prefiled testimony to give the Board and the public

13 background information on the thought processes that

14 historically went into the Agency's development,

15 filing, and eventual adoption of 35 Illinois

16 Administrative Code 352.

17 The Agency's understanding is that the

18 legislature divided the functions for environmental

19 protection in Illinois into roles to be performed by

20 the Illinois Pollution Control Board and roles to be

21 performed by the Illinois Environmental Protection

22 Agency, and the roles are basically to define and

23 implement the environmental control standards to be

24 done by the Illinois Pollution Control Board and for

1 the Agency to investigate and enforce and issue
2 permits, in this case, national pollutant discharge
3 elimination system permits, for dischargers to the
4 waters of the state. The initial --

5 THE HEARING OFFICER: Excuse me. It seems like
6 you've entered into your summary of your
7 testimony --

8 MR. WARRINGTON: Yes.

9 THE HEARING OFFICER: -- at this point? Let's
10 go ahead and have you sworn in then.

11 (Witness sworn.)

12 WHEREUPON:

13 RICHARD WARRINGTON, JR.,
14 called as a witness herein, having been first duly
15 sworn, deposeth and saith as follows:

16 THE HEARING OFFICER: Sorry about that.

17 MR. WARRINGTON: Continue. Thank you.

18 The initial federal rulemaking that gave
19 the impetus to this Board rulemaking and Agency
20 rulemaking is known as the Great Lakes Initiative
21 which was eventually adopted at 40 CFR Part 132 and
22 composed a series of water quality standards, water
23 quality criteria derivation procedures, water
24 quality values, and a set of nine implementation

1 procedures, and upon the Agency's review of this
2 federal structure, we determined that the water
3 quality standards, criteria, and values were all
4 within the regulatory authority of the Illinois
5 Pollution Control Board and so proposed them to the
6 Board as amendments to 35 Illinois Administrative
7 Code 302, 303, and 304, which the Board eventually
8 adopted in R97-25.

9 Of the nine implementation procedures, the
10 first one was for variances or temporary changes
11 from the water quality standards which under the
12 Illinois system was allocated to the Board's
13 authority. The second federal procedure was for the
14 issuance of site specific rules which, again, under
15 the Illinois or under the Agency's understanding of
16 the Illinois division of responsibilities was
17 entrusted to the Illinois Pollution Control Board.

18 The remaining seven federal implementation
19 procedures governed the application of these water
20 quality standards in national environmental --
21 National Pollutant Discharge Elimination System
22 permits, or NPDES permits, that the Agency was
23 entrusted by the legislature to issue, and would you
24 like a detail of each one of these procedures?

1 THE HEARING OFFICER: It's up to you.

2 MR. WARRINGTON: I'd say everybody I think has
3 probably heard them, and they are laid out in the
4 Agency's statement of reasons and the summary, but,
5 in short, the Agency picked those implementation
6 procedures that we would require to apply the
7 Board's water quality standards or effluent
8 limitations or water quality criteria or values to
9 dischargers and thereby set effluent standards for
10 permit limits or conditions that would be protective
11 of the Board's water quality standards, criteria, or
12 values, and in order to do that, there are certain
13 assumptions and certain mathematical calculations
14 that the Agency had to make in which the federal
15 rulemaking wants to be performed consistently
16 throughout the Great Lakes states, and, in general,
17 these calculations or procedures would involve the
18 conversion of various metal standards from being
19 measured as total or dissolved.

20 They were conversion factors to ascertain
21 the relative toxicity or carcinogenicity of various
22 forms of the polychlorinated biphenyl molecule and
23 then there were also requirements on how to do
24 mixing zone analysis and how to calculate a mass

1 balance to ensure that the discharge from a
2 particular facility didn't exceed the water quality
3 standards. I think that's a summary if anybody has
4 any questions.

5 THE HEARING OFFICER: Okay. Thank you, Mr.
6 Warrington. Do you wish to have your testimony
7 admitted as an exhibit?

8 MR. WARRINGTON: We would so move.

9 THE HEARING OFFICER: Any objections? Seeing
10 none, the testimony of Richard C. Warrington, Jr.
11 will be admitted as if read -- excuse me, will be
12 admitted as an exhibit, Exhibit No. 1, and, by the
13 way, those copies are up front rather than in back
14 of the room.

15 Okay. At this time, does anyone else wish
16 to make a statement? Ms. Rosen, you indicated that,
17 perhaps, you would like to make a statement or do
18 you want to go ahead with the questioning of the
19 Agency and then --

20 MS. ROSEN: Yeah. I'll defer until the end of
21 the Agency's questioning at this point. Thank you,
22 Marie.

23 THE HEARING OFFICER: Okay. That being the
24 case, are there any questions for the Agency?

1 MR. ETTINGER: I guess I'm first. I'm Albert
2 Ettinger. I represent the Illinois Chapter of the
3 Sierra Club. My last name is spelled
4 E-t-t-i-n-g-e-r. I have a series of questions
5 because I'm trying to probe what the Board can do
6 and what the Agency feels it can do both with regard
7 to analytical methods that you mentioned in this
8 procedure under 40 CFR 136 and also with regard to
9 the rules that are to be looked at by the Board.

10 As I understand the basis of the
11 distinction is that the Agency can set procedures
12 and the Board makes rules or standards; is that
13 correct?

14 MR. WARRINGTON: That is correct.

15 MR. ETTINGER: Okay. How, generally, would you
16 describe the distinction between a procedure and a
17 rule?

18 MR. WARRINGTON: Well, a rule is actually the
19 broader concept, and in Illinois we have what's
20 called the Administrator Procedure Act, and it
21 defines a rule as any Agency statement of general
22 applicability that -- if I could refer to the
23 definition.

24 The definition is at Five Illinois

1 Compiled Statutes 100/1-70. They define the rule as
2 each Agency statement of general applicability that
3 implements, applies, interprets, or prescribes law
4 or policy, but does not include certain things that
5 aren't relevant here.

6 So anytime any Agency, whether it's us or
7 the Pollution Control Board, has a general statement
8 that's meant to apply to more than one situation and
9 anytime they adopt some sort of consistent manner of
10 acting towards a potential universe of affected
11 facilities, under Illinois law we interpret that as
12 a rule, and then it is obligated to go through the
13 rulemaking procedures established by the
14 legislature.

15 So that's publication in the Illinois
16 Register, a comment period of at least 45 days, and
17 then a second submission known as a second notice to
18 an entity known as the Joint Committee on
19 Administrative Rules, and that's a group of, I
20 believe, eight legislators, representatives and
21 senators, that review each rulemaking proposal.

22 They review certain regulatory and
23 economic impacts of that proposal. They review the
24 Agency's response to any public comments made during

1 that 45-day notice period, and they also evaluate
2 the rule in light of any comments that the Joint
3 Committee might have received directly.

4 They then have an opportunity to have a
5 meeting, a public meeting, with the Agency to
6 express their concerns or recommendations or
7 objections and then either allow or, in some cases,
8 prohibit the law from being -- prohibit the rule
9 from being adopted, and that procedure applies both
10 to the Illinois EPA and to the Illinois Pollution
11 Control Board.

12 MR. ETTINGER: Were you finished?

13 MR. WARRINGTON: And then in terms of the
14 Agency's procedure, procedure is one of those things
15 that since it doesn't really make all that much
16 difference under the Administrative Procedure Act
17 just about anything that is procedural can be
18 required as a rule.

19 The definition we've been using comes out
20 of Black's Law Dictionary. It's the way of doing
21 things. It doesn't imply like a substantive right.
22 It doesn't -- fundamentally, it doesn't apply to the
23 outside world. It doesn't establish rights or
24 obligations, but what it does is it constrains the

1 actions of that Agency in how they do their

2 business.

3 MR. ETTINGER: Are there rules as defined by
4 the Administrative Procedure Act which the Agency
5 feels that it can promulgate as procedures?

6 MR. WARRINGTON: Yes.

7 MR. ETTINGER: What would be those?

8 MR. WARRINGTON: Well, for one instance, it
9 would be those rules we promulgated under 352, the
10 implementation procedures for the Great Lakes
11 Initiative, and basically because these are rules or
12 procedures that the Agency tries to consistently use
13 in writing these National Pollutant Discharge
14 Elimination System permits that would apply the
15 Board's water quality standards to a particular
16 discharger and so establish a discharge limit that
17 would be protective of those water quality standards
18 or criteria or values.

19 MR. ETTINGER: Now, which rules, in your view,
20 as defined by the Administrative Procedure Act have
21 to go to the Board and which can be promulgated by
22 the Agency using the general Administrative
23 Procedure Act procedure?

24 MR. WARRINGTON: I'm not familiar with the

1 general administrative.

2 MR. ETTINGER: I'm sorry. The J part of the
3 procedures. The procedure in which the -- I'm
4 sorry. The procedure in which the Agency itself
5 promulgates the rules in the Illinois Register and
6 then goes to the J part.

7 MR. WARRINGTON: Well, both agencies have to go
8 through the Administrative Procedure Act. If we see
9 a rule that we need or we see some sort of policy
10 that we need to consistently apply, we have to look
11 first to the Illinois Environmental Protection Act
12 to see which Agency has been given that
13 responsibility by the legislature.

14 Now, in the case of the Water Pollution
15 Program, both agencies have been given authority to
16 write rules under Section 11(b) and Section 39(b),
17 and in each case the legislature is discussing the
18 Federal Water Pollution Control Program, which NPDES
19 permits are a part of, and in 11(b) they direct the
20 Agency to adopt procedures necessary to secure the
21 benefits of the federal program.

22 In Section 39(b), they direct the Agency
23 to adopt filing requirements and procedures
24 necessary and appropriate to issue NPDES permits,

1 but at the same time, in even the same sections the
2 legislature talks about the Board adopting
3 regulations that are necessary for the
4 administration or the delegation of the federal
5 program and for the NPDES program.

6 MR. ETTINGER: I think you, in response to an
7 earlier question, mentioned that part of the
8 distinction was that procedures that the Agency
9 doesn't have to go to the Board on or what you call
10 procedures don't apply to the outside world. Is
11 that part of the distinction?

12 MR. WARRINGTON: They don't establish rights or
13 obligations, yes, on the outside world. Basically,
14 those would be the universe of dischargers.

15 MR. ETTINGER: What about the permitting? If
16 the permitting said I don't like this procedure, and
17 I want to use something else, would it be bound by
18 the procedure or not?

19 MR. WARRINGTON: He wouldn't be bound. The
20 Agency would be bound.

21 MR. ETTINGER: Well, let's say you denied his
22 permit because you used the procedures by which you
23 are bound?

24 MR. WARRINGTON: We used factor X instead of

1 his requested factor Y?

2 MR. ETTINGER: Correct, something like that.

3 He wouldn't get a permit, would he?

4 MR. WARRINGTON: No. The Agency would be

5 obligated to deny that permit because based on those

6 consistent calculation procedures or data of

7 handling procedures, his application would not

8 demonstrate that his or her discharge would be

9 protective of the Board's water quality standards.

10 MR. ETTINGER: Would you not feel then that he

11 was in some way bound by your procedures?

12 MR. WARRINGTON: What he's actually obligated

13 to do is to be protective or not discharge in a way

14 that would threaten or violate the Board's standards

15 or any other provisions of the Environmental

16 Protection Act.

17 That is his obligation established by the

18 legislature. His discharge can't violate Board

19 regulations, and his discharge can't violate any

20 provision of the Environmental Protection Act. If

21 it should come to pass that the application doesn't

22 demonstrate that, we would deny the permit, and then

23 the permittee would have the opportunity to appeal

24 that denial or, perhaps, a condition in that permit

1 to the Pollution Control Board.

2 MR. ETTINGER: And if he did so, let's say, for
3 example, he felt that the background level of a
4 particular pollutant should be calculated in one way
5 and you felt it should be calculated in another way,
6 and as a result of the Agency calculating it the way
7 it calculated it the permit was denied.

8 The permittee could then or the potential
9 permittee could then make an appeal to the Pollution
10 Control Board?

11 MR. WARRINGTON: And then the Pollution Control
12 Board would have the opportunity and, in fact, the
13 obligation under the Environmental Protection Act to
14 review whether or not that application regardless of
15 whatever the Agency had in terms of its procedure,
16 whether or not that application demonstrated that it
17 wouldn't violate the Board's water quality standards
18 or criteria or values.

19 MR. ETTINGER: Would you expect the Board to
20 give any sort of deference to the Agency in its
21 adoption of its procedures?

22 MR. WARRINGTON: None.

23 MR. ETTINGER: So the Board would be totally
24 free to say no to the permittee's --

1 MR. WARRINGTON: No. The Board would still be
2 constrained by their own regulations, their own
3 standards or values.

4 MR. ETTINGER: Okay. Let's look at it from the
5 other end. Let's say, for example, that a third
6 party was concerned that the Agency wasn't
7 prescribing a sensitive enough method for detecting
8 a pollutant which the third party is concerned would
9 be toxic to humans or wildlife.

10 MR. WARRINGTON: Uh-huh.

11 MR. ETTINGER: The third party then would
12 object to the permit on the grounds that this -- the
13 superior method wasn't being used.

14 MR. WARRINGTON: Uh-huh.

15 MR. ETTINGER: Assuming that your rules did not
16 call for that method, I gather you would not then
17 prescribe that method as a condition of the permit?

18 MR. WARRINGTON: That's true.

19 MR. ETTINGER: Then the third party, who is
20 interested in the permit, would be now able to
21 appeal to the Pollution Control Board; is that
22 correct?

23 MR. WARRINGTON: Assuming they made the
24 statutory standing in participation procedures, yes.

1 MR. ETTINGER: And they could complain to the
2 Pollution Control Board that that limitation that
3 they wanted for the permit wasn't there due to your
4 application of the procedure that the Agency has
5 adopted?

6 MR. WARRINGTON: That's correct.

7 MR. ETTINGER: And at that point, the Pollution
8 Control Board then would look at whether or not that
9 procedure for detecting the toxin would be
10 appropriate or not?

11 MR. WARRINGTON: That's correct.

12 MR. ETTINGER: Part of the proposal today is
13 bringing up to date 40 CFR 136 or rather adopting by
14 the Board the newest edition of 40 CFR 136?

15 MR. WARRINGTON: Or at least the 1966 version.
16 There may be one -- maybe the '98 version hasn't
17 reached the press yet, but I'm not sure.

18 MR. ETTINGER: I think you said '66. You meant
19 '96?

20 MR. WARRINGTON: '96. Sorry.

21 MR. ETTINGER: Is it -- does that adopt the
22 entire 40 CFR 136?

23 MR. WARRINGTON: Yes.

24 MR. ETTINGER: Are you aware that in 40 CFR 136

1 there is a section for application of alternative

2 test procedures?

3 MR. WARRINGTON: I think it's like .4 or

4 point --

5 MR. ETTINGER: Yeah.

6 MR. WARRINGTON: -- something like that.

7 MR. ETTINGER: I've got it. Off the record. I

8 have a couple of copies here if anybody would want

9 to see 40 CFR 136. I'm afraid I don't have enough

10 for the whole crowd.

11 Under 40 CFR 136.4, it says any person may

12 apply to the regional administrator in the region

13 where the discharge occurs for approval of an

14 alternate test -- I'm sorry, an alternative test

15 procedure.

16 Would, under the procedures that IEPA now

17 uses, IEPA ever be in a position to apply to use an

18 alternative test procedure?

19 MR. WARRINGTON: Yes.

20 MR. ETTINGER: What circumstances would those

21 come up in?

22 MR. WARRINGTON: My understanding is that these

23 provisions in Part 136.4 and its Subsections A and D

24 that it would authorize the Agency and has

1 authorized the Agency because this particular
2 subsection of Part 136 is fairly old. It is
3 incorporated by reference by the Board in their
4 early incorporation by reference to 40 CFR.

5 I believe this particular provision dates
6 back to about '76 at the latest. The Agency has, to
7 my understanding, entertained one petition for an
8 alternate test protocol, and by way of explanation
9 the procedure under this 136.4 is that if it is for
10 a particular discharging facility that application
11 is made simultaneously to the regional administrator
12 of region five and to the Agency, and the Agency can
13 review it and offer suggestions, but the ultimate
14 decision is made by the regional administrator in
15 region five. I think we have done only one in my
16 memory or in the memory of Mr. McSwiggen.

17 MR. ETTINGER: Well, let's say, for example,
18 right now you were aware of a more sensitive method
19 for detecting mercury, to use an example that's now
20 topical. You are aware of a more sensitive method
21 for using -- for detecting mercury than is
22 currently in 40 CFR 136 --

23 MR. WARRINGTON: Uh-huh.

24 MR. ETTINGER: -- or specified in that.

1 Could the Agency now specify that more
2 sensitive method for detecting mercury?

3 MR. WARRINGTON: Not without the approval of
4 the regional administrator.

5 MR. ETTINGER: Would it require the approval of
6 the Pollution Control Board?

7 MR. WARRINGTON: No.

8 MR. ETTINGER: I'd like to ask you some
9 questions now about Attachment C to the list of
10 specific criticisms, suggestions, and comments to 35
11 Illinois Administrative Code 352. Once, again, I
12 have a few extra copies. I have two extra copies if
13 the panel would like one.

14 THE HEARING OFFICER: Excuse me. Just for
15 clarification, Attachment C to the --

16 MR. ETTINGER: Attachment C. It's called list
17 of specific criticisms, suggestions, and comments,
18 35 Illinois Administrative Code 352.

19 THE HEARING OFFICER: Right, but is it
20 Attachment C to the --

21 MR. ETTINGER: No. I'm sorry. It's Attachment
22 C to the submission by IEPA to, I believe, USEPA for
23 approval of the GLI package.

24 MR. WARRINGTON: Clarifying, it's Attachment C

1 to the second notice submission to the Joint
2 Committee on Administrative Rules as part of the
3 rulemaking procedure for the adoption of 35 Illinois
4 Administrative Code 352.

5 I believe it was also forwarded to the
6 regional administrator for region five as part of
7 the GLI program submittal package.

8 THE HEARING OFFICER: Okay. We need to admit
9 this as an exhibit then.

10 MR. ETTINGER: I wish to make clear I've just
11 given you a few pages because there's only one
12 section I wish ask questions about in that
13 attachment.

14 We can either use that as the exhibit with
15 the understanding that it's part of a longer
16 document or we could admit the longer document.

17 THE HEARING OFFICER: If there's no objection,
18 I think we can --

19 MR. WARRINGTON: The excerpt would be fine.

20 THE HEARING OFFICER: -- stay with the limited
21 copy here, and we'll admit it as Exhibit No. 2 if
22 there's no objection.

23 Seeing none, we'll admit this as Exhibit
24 No. 2. Does that leave you a copy to look from?

1 MR. ETTINGER: I'm sorry?

2 THE HEARING OFFICER: Does that leave you a
3 copy to look from?

4 MR. ETTINGER: Yes. I've got the whole
5 document here, but I'm only going to be asking about
6 section or response 21.2 and, perhaps, the one above
7 it.

8 I'm interested in where it says 21.2, a
9 commentator by IERG and ComEd and then it has a
10 comment and then a discussion, and I'd just like to
11 read a little section of this to discuss the problem
12 here.

13 The discussion states that the federally
14 approved test methods at 40 CFR 136, 1996,
15 incorporated by reference at 35 Illinois
16 Administrative Code 302.510 and 35 Illinois
17 Administrative Code 352.105 do not have the
18 capability at the present time for many of the
19 contaminants regulated under GLI.

20 I'd better go up and find what the
21 capability was, but -- sorry. Let me go a sentence
22 above that and say the memorandum and the analysis
23 concluded that compliance costs would be contingent
24 on the ability of federally approved test methods to

1 detect the contaminant and measure its removal.

2 Federally approved test methods of 40 CFR

3 136 incorporated by reference at 35 Illinois

4 Administrative Code 302.510 and 35 Illinois

5 Administrative Code 352.105 do not have this

6 capability at the present time for many of the

7 contaminants regulated under GLI.

8 Consequently, until the test methodology

9 is revised, federally approved adopted by rulemaking

10 in Illinois and incorporated into a reopened NPDES

11 permit compliance costs for these presently

12 detectable contaminants will be minimal.

13 My first question is, Mr. Warrington, are

14 you prepared to answer questions with regard to that

15 statement as opposed to the witnesses that were left

16 in Springfield today?

17 MR. WARRINGTON: Our witnesses in Springfield

18 would be, I think in some cases, better than I, but

19 I'll give it a try.

20 MR. ETTINGER: Okay. Well, then let's try. As

21 I understand this, at many -- as to many of the

22 contaminants covered by the GLI, there are not now

23 specific test methods that are contained in 40 CFR

24 136. Is that a correct reading?

1 MR. WARRINGTON: There are specific test
2 methods, but each of those test methods in 40 CFR
3 136 tends to have what they call either a method
4 detection level or a level of quantification, and,
5 basically, and this is where I might be stretching
6 my technical ability a tad, is that the scientific
7 procedures and the scientific equipment that were
8 approved by USEPA when they incorporated them into
9 40 CFR 136 have limitations to their accuracy.

10 There are certain interferences with other
11 contaminants in the waste stream. There are certain
12 inabilities to detect some very small concentrations
13 of these contaminants simply because the technology
14 of the machine to test for them is unreliable at
15 some very small concentration levels, and so the
16 test procedures approved by USEPA have a definite
17 level of accuracy, and backing up a little bit for
18 the context of this, when the Board or when the
19 USEPA proposed many of these water quality standards
20 or criteria or values and the Board then adopted
21 these procedures, the calculations adopted by USEPA
22 and the Board and the uncertainty factors that were
23 required to be used in some cases drove the safe
24 level of concentration for particular contaminants

1 beyond the detection limits established in 40 CFR
2 136, when I believe it was the American Steel
3 Institute brought suit in federal court over the
4 federal Great Lakes Initiative rulemaking part of
5 the legal decision was based on the compliance costs
6 for a hypothetical discharger or I think there's one
7 municipal discharger that was mentioned by the
8 Court, and that in order to remove these very small
9 levels of these contaminants from their discharge
10 they would incur some relatively high or, in the
11 Court's opinion, unreasonable costs.

12 The Hanlin memo that I think I've referred
13 to here and we submitted to the Board as part of the
14 GLI standard rulemaking, I believe it was Exhibit 9
15 in that rulemaking, discussed what the federal court
16 had done in reaching this conclusion that the
17 removal cost would be so high, and Mr. Hanlin, who
18 is, I believe, the deputy administrator at USEPA
19 noted in his memo that these compliance costs were
20 based upon a hypothetical increase or, in this case,
21 a decrease in the detection level for these
22 particular contaminants. I believe it was mercury
23 in this particular case.

24 So that the compliance costs that the

1 federal court found unreasonable were actually based
2 on a hypothetical ability to detect them and then,
3 hence, require their removal. In the closing
4 comments for the Board rulemaking in R97-25, the
5 Agency submitted this memo and argued to the Board
6 that in their consideration of the compliance costs
7 of these new GLI standards they were adopting they
8 couldn't impose a compliance cost because no one
9 could detect noncompliance.

10 That we simply could not, with any degree
11 of scientific certainty, be able to require a
12 discharger to remove these contaminants down to the
13 level required by GLI until there is a test
14 procedure that we could know that, and based on
15 that, the Board, I believe, did accept that exhibit
16 and they did accept these fairly stringent water
17 quality standards, criteria, or values in their
18 rulemaking.

19 MR. ETTINGER: Let's imagine, for example, that
20 as to one of these chemicals for which there is a
21 more stringent water quality standard which has been
22 adopted that the Agency were aware of a detection
23 method that was not in 40 CFR 136. Could the Agency
24 use that detection method?

1 MR. WARRINGTON: The way we have structured it
2 is that if it's not in 40 CFR 136 then we would not
3 be able to use it.

4 If the, say, regional administrator of
5 region five approved it as an alternative test
6 method with an improved detection level under
7 Subsection 136.4, then we could use it because that
8 particular alternate approval method is in a
9 regulation adopted by the Pollution Control Board.

10 MR. ETTINGER: Let me see if I'm following
11 you. Let's go -- let's use mercury, which is a good
12 example in this case, although actually it's going
13 -- my understanding is that 40 CFR will be changed
14 to adopt a new mercury standard.

15 MR. WARRINGTON: I believe that is a pending
16 rulemaking on the federal level.

17 MR. ETTINGER: But let's say we had a permit
18 that came up right now last year before 40 CFR were
19 amended to put in a new mercury standard and the
20 Agency is aware of these better mercury detection
21 methods.

22 Do I understand correctly that you could
23 now use it by going to the regional administrator
24 and getting permission to use that better mercury

1 detection method?

2 MR. WARRINGTON: Well, the proponent of getting
3 this alternate approval would be someone other than
4 the Agency, I would assume, that would have that
5 knowledge, and they would have to demonstrate that
6 this alternate method is actually better, it
7 actually meets all the standards, and they'd have to
8 demonstrate that to the regional administrator's
9 approval, and whether or not the Agency approved it
10 or endorsed it wouldn't be binding on USEPA and the
11 regional administrator.

12 MR. ETTINGER: Let's assume, however, that IEPA
13 was aware of an analytical method which had a much
14 lower detection limit than the methods specified in
15 40 CFR 136.

16 Could the permit writer use that method?

17 MR. WARRINGTON: No.

18 MR. ETTINGER: And why is that?

19 MR. WARRINGTON: The Agency's authority to
20 impose particular test protocols is limited by the
21 Act, Environmental Protection Act, and by the
22 regulations adopted by the Pollution Control Board.

23 MR. ETTINGER: Okay.

24 MR. WARRINGTON: That our authority to impose

1 permit conditions doesn't include the ability to
2 independently choose a test protocol regardless of
3 whatever, you know, endorsements or advice or
4 opinions from other than USEPA or the Pollution
5 Control Board.

6 MR. ETTINGER: Well, let's -- we went over 40
7 CFR 136.4 before, and it said any person could go to
8 the regional administrator and ask for an
9 alternative method.

10 Do you construe that to mean that any
11 person does not include the permit writer at IEPA?

12 MR. WARRINGTON: Oh, theoretically, we could.

13 MR. ETTINGER: Okay. Perhaps, we're having
14 some problems here between federal law and state
15 law.

16 Talking solely as a matter of 40 CFR
17 136.4, we agree that the IEPA permit writer could
18 get permission to use this more sensitive method
19 under the Federal Code of Regulations?

20 MR. WARRINGTON: They could get permission from
21 the regional administrator.

22 MR. ETTINGER: Right.

23 MR. WARRINGTON: Right.

24 MR. ETTINGER: Now, under state law, could they

1 then use that in writing the permit?

2 MR. WARRINGTON: Under this alternative test
3 procedure adopted by the Board incorporated by
4 reference, yes, they could.

5 MR. ETTINGER: So then the Pollution Control
6 Board would never have to approve that specific test
7 procedure except insofar as it approved 40 CFR 136?

8 MR. WARRINGTON: I believe that's correct.

9 MR. ETTINGER: Okay. Well, then I'm confused
10 by this document that we marked as an exhibit, and
11 just I'm trying to straighten out the interface here
12 between what the Board can do and what the Agency
13 can do and what USEPA can do. It gets a little
14 tricky here.

15 Consequently, it's stated here or someone
16 states in this document consequently, until the test
17 methodology is revised, federally approved adopted
18 by rulemaking in Illinois and incorporated into a
19 reopened NPDES permit compliance costs for those
20 presently undetectable contaminants would be
21 minimal.

22 Do you believe that IEPA would have to by
23 rulemaking adopt any new analytical method or could
24 they simply go to the regional administrator and get

1 the new method adopted -- approved? I'm sorry.

2 MR. WARRINGTON: Under the proposed or the --
3 this particular update to the 1996 version, which
4 includes that alternate test procedure, we would
5 understand that that would be the Board rulemaking,
6 the Board rulemaking incorporating part 136.4 with
7 this alternative for federal approval would be
8 sufficient involvement by the Board for the Agency
9 to impose such a test protocol after approval by
10 USEPA.

11 MR. ETTINGER: So right now, tomorrow, somebody
12 applies for a discharge permit into Lake Michigan
13 and he's going to discharge some amount of mercury,
14 assuming that you were convinced scientifically that
15 there are alternative mercury testing methods which
16 are more sensitive than the ones now in 40 CFR 136,
17 your testimony is that the Agency could request the
18 administrator to use those alternate methods and
19 write that into the permit tomorrow?

20 MR. WARRINGTON: That's a policy question I
21 can't answer because it has a very big hypothetical
22 about whether they're scientifically defensible.
23 Whether any particular alternative test procedure
24 would be accepted by region five and the burden of

1 that would be on the proponent.

2 MR. ETTINGER: Well, assuming that they were
3 scientifically acceptable.

4 MR. WARRINGTON: Then it's still a
5 hypothetical. That's still a hypothetical.

6 MR. ETTINGER: That is the hypothetical. I
7 think in the case of mercury we know it's not a bad
8 hypothetical because they're actually proposing to
9 change the rules to use these alternative methods.

10 So in the case of mercury, we will assume
11 in the hypothetical that there is this alternative
12 method out there and you could use it tomorrow
13 without going to the Pollution Control Board for
14 approval of that particular test, you would only
15 have to go to the regional administrator to get it
16 approved.

17 MR. WARRINGTON: I believe that the currently
18 pending federal rulemaking for a mercury test
19 protocol or enhanced mercury test protocol is of, I
20 believe, national applicability, that it's not
21 limited to the Great Lake states.

22 Under that scenario and 40 CFR 136.4(d)
23 which reads an application for approval of an
24 alternate test procedure for nationwide use is made

1 directly to the regional administrator and not to
2 the Agency at all, that we would not be involved in
3 that since it's a national applicable test
4 procedure.

5 MR. ETTINGER: Let me go back to the adopted
6 rule or the rule that was submitted to the USEPA for
7 approval that's being considered here today. The
8 part -- I'll read the 352 rules. I just have a few
9 questions about section 352.700 and specifically
10 A(2) --

11 THE HEARING OFFICER: Let's go off the record
12 just a second.

13 (Discussion had
14 off the record.)

15 (Break taken.)

16 THE HEARING OFFICER: We left off with a
17 question by Mr. Ettinger.

18 MR. ETTINGER: I was -- I believe I called the
19 witness' attention to subsection two or A(2) of
20 352.700 of the -- these are the proposed IEPA permit
21 rules for the GLI; is that correct?

22 MR. WARRINGTON: That is correct.

23 MR. ETTINGER: And just to clarify the question
24 as to how these correspond with the Board rules and

1 the numbering there, these are not Board numbered
2 rules?

3 MR. WARRINGTON: These are the Board -- these
4 are the numbering system for the rules adopted by
5 the Agency. This particular section of the Agency
6 rules is not part of the Agency's proposal to the
7 Board in this rulemaking.

8 MR. ETTINGER: But it is part of the Agency's
9 submission of GLI rules to USEPA?

10 MR. WARRINGTON: That's correct.

11 MR. ETTINGER: I'd just like to look at this
12 sentence or two sentences. The permit shall specify
13 the most sensitive applicable analytical method
14 adopted by the Board and contained in or approved
15 under 40 CFR 136 or other appropriate method adopted
16 by the Board if one is not available under 40 CFR
17 136.

18 Under these circumstances, could the
19 permit writer, assuming these rules are approved by
20 region five, could a permit writer specify a more
21 sensitive method than one that is currently in 40
22 CFR 136?

23 MR. WARRINGTON: If it was an alternate
24 procedure approved by the regional administrator, he

1 or she could. If it was completely different than
2 anything in 40 CFR 136, but the Board had adopted
3 that particular test procedure, the permit writer
4 could, but if not, no.

5 MR. ETTINGER: Are you aware of any analytical
6 procedures that have been approved by the Board that
7 are not in 40 CFR 136?

8 MR. WARRINGTON: I have a -- I'd have to make a
9 speculation, but I believe in some of the other
10 media programs there have been discussions on test
11 protocols that have been adopted or at least
12 proposed to the Board that aren't currently
13 contained in a version of 40 CFR 136, but I don't
14 know the particular context or the site or their
15 status before the Board.

16 MR. ETTINGER: Because 40 CFR itself has this
17 provision for using alternate methods, the question
18 would be let us say that the permit writer knew of
19 an alternative detection method, could he then
20 invoke the alternative procedure of 40 CFR 136 to
21 specify an alternative detection method?

22 MR. WARRINGTON: Yes, like it's any person. I
23 think most people still consider the Agency persons
24 just as any other discharger or theoretically a

1 third party could propose an alternative method, but
2 they would have to justify that to the standards of
3 the regional administrator or of the national United
4 States Environmental Protection Agency
5 decision-making body.

6 MR. ETTINGER: And would that also have to be
7 approved by the Pollution Control Board?

8 MR. WARRINGTON: I believe not. If it was
9 approved by either the regional administrator or the
10 headquarters of USEPA that particular procedure
11 would be incorporated by reference in the Board's
12 incorporation by reference of 40 CFR 136.

13 MR. ETTINGER: So just to be clear, if a third
14 party or the permit writer wanted to specify a more
15 sensitive procedure, it could then apply for
16 approval by the regional administrator, and if the
17 regional administrator approved that more sensitive
18 method, that could go into the permit?

19 MR. WARRINGTON: That's correct or the
20 discharger. It's any person.

21 MR. ETTINGER: True.

22 And so those could -- and then that would
23 not have to be approved by the Board under this
24 rule?

1 MR. WARRINGTON: It would have already been
2 approved or at least that the method has been
3 approved of alternative test procedures would have
4 been already approved by the Board by incorporating
5 40 CFR 136 by reference.

6 MR. ETTINGER: And then I have one other
7 question earlier about procedures generally. As I
8 understood specifically with regard to analytic
9 methods, you indicated that if the Agency prescribed
10 an analytic method in the permit that could be
11 applied, it could be appealed to the Board and it
12 would not owe any particular legal deference to the
13 Agency in that use of that analytical procedure for
14 the permit appeal; is that correct?

15 MR. WARRINGTON: That is correct.

16 MR. ETTINGER: What about other types of
17 procedures that are adopted by the Agency? In
18 general, if the Agency adopts a procedure for
19 measuring background levels or any other procedure
20 that's in your procedural rules, is that the same,
21 but it's just an internal rule that is not binding
22 on anyone but the Agency?

23 MR. WARRINGTON: That's correct.

24 MR. ETTINGER: So as to any other procedural

1 rule, you could then appeal it to the Board and
2 there would be no particular deference owed to the
3 Agency's rule?

4 MR. WARRINGTON: That is correct.

5 MR. ETTINGER: I have no further questions.

6 THE HEARING OFFICER: Are there any other
7 questions for the Agency?

8 MS. VLAHOS: Yes. I'm Georgia Vlahos,
9 V-l-a-h-o-s, with the Department of the Navy.

10 Mr. Warrington, we've been speaking rather
11 hypothetically about the difference between
12 procedures, and just for my clarification, I want to
13 throw something out and maybe we're using a concrete
14 example and I can get a better sense of what the
15 distinction is.

16 352.200 identifies the proposals to
17 identify the bodies of water that would be subject
18 to TMDLs. That's part of the proposal that's before
19 us. Can you, using this concrete example and your
20 definitions in your prefiled testimony, please
21 clarify for me why is it that this procedure --

22 THE REPORTER: I'm sorry. I can't hear. She
23 needs to speak up.

24 THE HEARING OFFICER: Could you speak up?

1 MR. WARRINGTON: Could you speak a little
2 slower for the court reporter?

3 THE HEARING OFFICER: A little slower and a
4 little louder.

5 MS. VLAHOS: Sorry. I'm just -- I'm Georgia
6 Vlahos with the Department of the Navy, and I'd like
7 to present for discussion today a concrete, a
8 substantive question to Mr. Warrington which is the
9 following.

10 In the proposal before us, 352.200,
11 there's a proposal for what bodies of water would be
12 subject to TMDLs, and I want Mr. Warrington to
13 identify for me why this is a procedure within the
14 purview of the Agency and not within the authority
15 of the Board to adopt and why it's a procedure and
16 therefore not a rule?

17 MR. WARRINGTON: Sure. I'm looking for the
18 corresponding section in the proposal to the Board
19 that would correspond to 352.200, and I believe the
20 corresponding paragraph in the proposal to the Board
21 is 352.200(d) in the Agency rules and in the
22 proposal to the Board it's 35 Illinois
23 Administrative Code 309.141(h)(1), and basically the
24 choice of whether a particular water body segment is

1 subject to a TMDL is actually determined by our
2 Agency and the United States Protection -- United
3 States Environmental Protection Agency by procedures
4 completely separate from anything the Board has had
5 before it or that the Agency has proposed or
6 adopted.

7 The choice of TMDL, which stands for total
8 maximum daily load, is a choice made by the Agency
9 under the authority, I believe, of Section 303,
10 either (d) or (e), of the Clean Water Act that's
11 derived from an assessment or a report that the
12 Agency performs under Section 305(d) of the Clean
13 Water Act and is made wholly independent of these
14 procedures.

15 When that determination is made, the
16 Agency has to deal with that in several ways, and
17 basically the problem is is that the TMDL
18 designation isn't always done either immediately or
19 properly for the majority of stream segments in
20 Illinois.

21 So if that has not happened, the Agency
22 specifies in these procedures the procedures the
23 Agency will use to continue to write permits until
24 that TMDL designation is made, and there are several

1 fall-back activities. One is called the Lake Area
2 Management Plan or Lake Michigan Management Plan.
3 It's abbreviated as LaMP, L-A-M-P, or a Remedial
4 Action Plan, and that's abbreviated as RAP.

5 That in the derivation of these plans
6 there is an independent analysis of the
7 contamination, the sources of contamination, the
8 safe amount of contamination that can remain, and
9 the Agency can then use these procedures to write an
10 NPDES permit if one is necessary for whatever, say,
11 the Remedial Action Plan was that would protect the
12 Board's water quality standards, criteria, and
13 values for Lake Michigan, but this rule is limited
14 to what the Agency does in situations that are
15 designated by other rules not before the Board or
16 not even before USEPA as part of the GLI, and,
17 basically, these alternative means is that we use
18 the other provisions such as additivity or the
19 intake pollutants, the loading limits, method
20 detection levels, and write a permit using the best
21 available scientific approved information available
22 to the Agency at that time.

23 If during the five-year term of an NPDES
24 permit something changes, USEPA might adopt a more

1 stringent test protocol, then the Agency has the
2 option to, what they call, reopen the permit. That
3 we can then start the process of amending that
4 permit to require that better scientific
5 information, procedures, or data, and that's
6 basically what 309.141(h)(1) does.

7 Does that help you with your --

8 MS. VLAHOS: But I guess my specific question
9 is why this was the choice then for when TMDLs would
10 apply if it is on the 303(d) list or if one of these
11 fall back positions applied, correct?

12 MR. WARRINGTON: Well, once a TMDL is
13 established for a particular water body segment,
14 then the NPDES permit would follow that, but in
15 those cases where it hasn't been and, in particular,
16 Lake Michigan the TMDL or the total maximum daily
17 load is going to be an extremely complex project
18 that's going to involve the participation of all the
19 dischargers in our state which are fairly few, but
20 also a large number of dischargers out of Wisconsin
21 and Michigan, Ohio, and I think in Indiana, maybe
22 not Ohio, that's going to be, as I understand it,
23 supervised and coordinated by the United States
24 Environmental Protection Agency to derive that total

1 maximum daily limit for Lake Michigan.

2 Until that happened, though, the Agency
3 still has to write NPDES permits. So we'll use the
4 best information that we have out of the Lake
5 Michigan Management Plan and the Remedial Action
6 Plan, I believe it's for Waukegan, to write those
7 permits that are protective of the Board's water
8 quality standards, but this rule doesn't choose the
9 total maximum daily loads.

10 It says what we do either to enforce it
11 once they're otherwise approved and adopted and what
12 we do in the meantime before that happens.

13 MS. VLAHOS: I have no following -- I don't --
14 never mind.

15 THE HEARING OFFICER: Are there any other
16 questions for the Agency?

17 MS. BUCKO: For the record, my name is
18 Christine Bucko, B-u-c-k-o, and I'm the assistant to
19 the attorney general.

20 Mr. Warrington, earlier in response to
21 some questioning --

22 THE HEARING OFFICER: Excuse me. Ms. Bucko,
23 could you speak up a little bit?

24 MS. BUCKO: Certainly.

1 In response to some questioning by Mr.
2 Ettinger, you made the statement, I believe, that
3 the Illinois Environmental Protection Agency cannot
4 independently choose methodology to apply in a
5 situation.

6 That was in response to some of his
7 questioning regarding the application of 40 CFR 136,
8 and the question that I would like to pose to you is
9 it appears that a number of the concepts in the
10 Agency proposed rulemaking now are not currently
11 found anywhere in the Board regulations such as
12 projected effluent quality, reasonable potential to
13 exceed, projected effluent limitation waste load
14 allocation, and TMDLs, and I would like to know how
15 you would reconcile your earlier statement to the
16 fact that there is no current Board regulation that
17 would give the Agency authority to implement such
18 methodologies?

19 MR. WARRINGTON: Okay. Backing up a little
20 bit, there are directives in the existing Board
21 regulations for total maximum daily loads and waste
22 load allocations, and those are at -- total maximum
23 daily loads are required to be considered by the
24 Agency in permit writing by the Board's rule

1 309.141(d)(3) which reads required to meet any
2 applicable water quality standards, such limitations
3 to include any legally applicable requirements
4 necessary to implement total maximum daily loads
5 established pursuant to Section 303(d) of the Clean
6 Water Act and incorporated into the continuing
7 planning process approved under Section 303(d) of
8 the Clean Water Act and any regulations or
9 guidelines issued thereto.

10 Waste load allocations, I believe, are at
11 35 Illinois Administrative Code 309.142 wherein the
12 Board directs the Agency to set limits in NPDES
13 permits that are protective of water quality
14 standards and do a waste load allocation for that
15 calculation.

16 I think the second point of your question
17 was that the Board regulations by themselves don't
18 give the Agency authority. There's no delegation of
19 authority from the Board to the Agency, but it's a
20 question of the legislative directive for the Agency
21 to issue NPDES permits.

22 The Board sets out the general parameters
23 of the NPDES permit program, but the actual setting
24 of effluent limits or permit conditions is an Agency

1 function.

2 The Board does set requirements that we
3 are to ensure that whatever standards or conditions
4 we put in an NPDES permit are protective of the
5 Board's water quality standards, and in order to
6 implement that, the Agency has a thought process or
7 a thought procedure that goes through certain
8 definite steps, and the steps we've adopted at 35
9 Ill. Admin. Code 352 basically track the federal
10 steps that, I believe, are in common use among the
11 other permit writing states of the Great Lakes
12 Basin.

13 So in order to determine whether to set an
14 effluent limit in a permit, first of all, you have
15 to decide what parameters to choose. There's a
16 general list of parameters or contaminants that the
17 Board established the standards for. There are also
18 derivation procedures that the Board has established
19 for the Agency that calculate criteria or values to
20 prevent against the general prohibition on toxic
21 concentration.

22 So in order to do that, we have to decide
23 what contaminants to look for, and that would be the
24 starting point. Once you start looking for them,

1 you have to determine what their concentration is,
2 and it's been our experience, of course, that the
3 concentrations of these selected contaminants are
4 variable.

5 They don't stay the same every day, and
6 that's particularly true when we're talking about
7 measurements that are so close or even beyond the
8 detection level that you have to decide what the
9 projected effluent quality is likely to be, and the
10 first comparison you make is is this projected
11 effluent quality going to be higher or lower than
12 the applicable water quality standard, criteria, or
13 value, and if it's higher, of course, then you have
14 to go to the next step.

15 If it's lower, then it's not going to be
16 or that contaminant is not going to have a potential
17 to exceed the water quality standard, and these are
18 all the thought processes that the Board has to go
19 through in order to implement those Board water
20 quality standards and the Board designated NPDES
21 permit requirement.

22 So going through it again, if it's -- if
23 the projected effluent quality is higher than the
24 water quality standard criteria or value, the next

1 step is to consider whether dilution or mixing is
2 available, and the prerequisite for that is the
3 Board's requirement that the discharger provide the
4 best degree of treatment.

5 If they make that hurdle, then the next
6 step is determined whether or not there are any
7 prohibitions on mixing zones contained in the
8 Board's regulations. I forget what section that is
9 offhand, but there are about ten prohibitions where
10 mixing is simply not allowed.

11 It's where you'd be impacting an
12 endangered species, you'd be interfering with a
13 bathing beach, occluding a tributary mouth,
14 interfering with fish migration or movement
15 patterns.

16 So you'd have to exclude all of those
17 instances. If none of those prohibitions apply,
18 then there's a threshold of I believe it's a
19 two-to-one dilution ratio or mixing zone ratio that
20 it's either, and if that is met, then there, once
21 again, will be no potential to exceed the water
22 quality standard. There may be provisions available
23 for a zone of initial dilution for that particular
24 discharger, and that's the thought procedure that

1 the Agency goes through to implement those
2 requirements of the Board in setting those permit
3 limits.

4 MS. BUCKO: I appreciate your answer in
5 conjunction with that, but could you cite to a Board
6 regulation which indicates the concept of reasonable
7 potential to exceed?

8 MR. WARRINGTON: Oh. No, I can't because that
9 phrase hasn't been used in Board regulations.

10 MS. BUCKO: Could you cite to --

11 MR. WARRINGTON: The Board uses -- I don't have
12 a copy of Subtitle C handy, but I believe that it
13 should be 309 I believe 140 -- oh, thank you.

14 The phrase a reasonable potential to
15 exceed was derived from the federal regulatory
16 guidelines, and we believe that its comparable or
17 parallel --

18 MS. BUCKO: Can I just -- go ahead.

19 MR. WARRINGTON: We believe that its comparable
20 or parallel part is found in Section 304.15,
21 violation of water quality standards.

22 MS. BUCKO: Which reads?

23 MR. WARRINGTON: In addition to the other
24 requirements of this part, no effluent shall alone

1 or in combination with other sources -- to maybe
2 jump ahead to a potential question there is that
3 alone or in combination with other sources describes
4 the functional waste load allocation process because
5 you're talking about several sources that might
6 together or incrementally violate or threaten a
7 water quality standard.

8 The Board goes on to say when the Agency
9 finds that a discharge which would comply with the
10 effluent standards contained in this part would
11 cause or is causing a violation of water quality
12 standards, and that's basically the determination of
13 a potential to exceed, where the federal system uses
14 potential to exceed the Board regulations uses would
15 cause or is causing a violation of water quality
16 standards. It's a different phrase that means the
17 same thing.

18 MS. BUCKO: Is there a definition within the
19 Board rules indicating that?

20 MR. WARRINGTON: No, I don't believe there is.
21 The Board has never defined that phrase.

22 MS. BUCKO: Okay. Can I get your citation to a
23 concept of the projected effluent quality in the
24 Board records?

1 MR. WARRINGTON: There is none.

2 MS. BUCKO: Could I get --

3 MR. WARRINGTON: The functional -- the analogue

4 is when the Agency finds that a discharge which

5 would comply, there's a directive that the Agency

6 has to find or determine something, and the process

7 of making that finding a determination is the

8 reasonable potential to exceed. It's using the

9 federal language.

10 MS. BUCKO: So the Board has not given the

11 Agency a methodology to make the calculation. Is

12 that your understanding?

13 MR. WARRINGTON: No, they have not.

14 MS. BUCKO: And so I would take it that there

15 is no similar citation in Board regulations for the

16 concept of a projected effluent limitation?

17 MR. WARRINGTON: No, there is not.

18 MS. BUCKO: Or similarly add -- regarding the

19 additivity?

20 MR. WARRINGTON: No, that's not been specified

21 by the Board regulations. All the Board requires is

22 that we ensure that permits not have an aggregate I

23 believe -- I think it's a -- okay.

24 The exact phrase would be found in the

1 amendments to the Board's rules as part of the GLI,
2 but, basically, the -- as I recall, the rules
3 recently adopted by the Board in their rulemaking
4 required that no effluent or combination of
5 contaminants and effluents have a risk level of
6 greater than, I believe, one in 100,000.

7 I'm not too sure of the exact description
8 of the parameter, but the requirement or the
9 standards established by the Board has a limit of
10 one in 100,000 that has to be calculated by a
11 combination of substances.

12 The federal government has done research
13 to determine that various congeners, that's
14 c-o-n-g-e-n-e-r, which may be pronounced in a
15 different way, of the polychlorinated biphenyl
16 molecule have different toxic or carcinogenic
17 affects, and that in order to make that calculation
18 of an aggregate risk level of various mixtures of
19 these polychlorinated or PCB compounds, the Agency
20 uses that federal data and analysis of the
21 concentration of each of these congeners to
22 determine what the aggregate risk level to, I
23 believe, human health would be imposed by that
24 discharge.

1 MS. BUCKO: Okay. Could you give me the
2 citation in the Board regs to the definition of a
3 QBEL or a water quality based effluent limit?

4 MR. WARRINGTON: That's also from 304.105
5 because what the Board talks about is when the
6 Agency finds that a discharge which would comply
7 with the effluent standards, those are the effluent
8 standards of the Board, would cause or is causing a
9 violation of a water quality standard, and that's
10 what the abbreviation for a QBEL means is a water
11 quality based effluent standard.

12 MS. BUCKO: But is there a definition --

13 MR. WARRINGTON: No, there is not.

14 MS. BUCKO: Okay. So for sure we have no
15 definition of projected effluent quality, projected
16 effluent limit, additivity, nothing specific other
17 than you're saying 304.105 I believe you pointed
18 to --

19 MR. WARRINGTON: Several times.

20 MS. BUCKO: -- several times?

21 MR. WARRINGTON: The Board got a lot of mileage
22 out of that section.

23 MS. BUCKO: To cover, I believe, waste load
24 allocation, additivity, and QBELs; is that correct?

1 MR. WARRINGTON: Waste load -- waste load

2 allocation is also specified in 309.142, I believe.

3 MS. BUCKO: Okay. In any event, none of those

4 specific terms are used within those sections

5 though, are they?

6 MR. WARRINGTON: That is correct.

7 MS. BUCKO: However, this is a methodology that

8 the Agency would like to employ in order to get a

9 number; is that correct?

10 MR. WARRINGTON: It's one that we have adopted,

11 that's correct.

12 MS. BUCKO: Now, you mentioned earlier in

13 response to my questioning that the Agency does

14 derive the criteria, correct, to get to some of

15 these limits?

16 MR. WARRINGTON: No.

17 MS. BUCKO: You pointed to 352?

18 MR. WARRINGTON: Oh, you mean limits? Okay.

19 Yes, we derive criteria.

20 MS. BUCKO: Which I would like to get into a

21 little bit of the rationale on the toxic substances

22 rulemaking that the Board did and enacted Subpart

23 F --

24 MR. WARRINGTON: Correct.

1 MS. BUCKO: -- which indicated -- which was the
2 derived criteria portions, and I would like to find
3 out if you know what the Agency's rationale was at
4 that time for proposing the Subpart F derived
5 criterium methodology to the Board rather than
6 having the Agency implement it as you have chosen to
7 do at this time?

8 THE HEARING OFFICER: Excuse me, Mr.
9 Warrington. Just for confirmation, that is the
10 Board's previous rulemaking in R88-21; is that not
11 correct?

12 MS. BUCKO: I believe --

13 MR. WARRINGTON: That's correct.

14 THE HEARING OFFICER: Thank you.

15 MR. WARRINGTON: Those procedures were proposed
16 to the Board because the end result of those
17 criteria derivation procedures is a water quality
18 standard. It is a number that is comparable to all
19 of the other Board water quality standards.

20 It is a number that has to be met in the
21 receiving water, and that is a substantive
22 rulemaking within the authority of the Board to
23 establish those water quality standards or now that
24 are criteria and based on the rulemaking before the

1 Board they added another subset called value, but
2 these are all standards that have to be met by
3 dischargers in the waters of the state.

4 MS. BUCKO: So would it be fair to say that
5 these other concepts that we've previously discussed
6 would not be arriving in a number that would derive
7 from the Board water quality standards?

8 MR. WARRINGTON: They're two separate
9 functions. One is the derivation of the water
10 quality standard or a criteria I think they're
11 called under this derivation procedure or a value
12 under the GLI, and there's another function about
13 taking that information and establishing an effluent
14 limit and a permit that may or may not be the same
15 as a derived water quality criteria because what the
16 Agency does in writing permits is that they take
17 those water quality standards or criteria or values
18 adopted by the Board that have to be met in the
19 waters of the state and then write the permit where
20 the discharge from that particular point source or
21 whatever is covered by this NPDES permit can't
22 violate those water quality standards, and that's
23 basically meant to establish an effluent standard
24 that's measured at the point of discharge before it

1 mixes with the rest of the waters of the state.

2 MS. BUCKO: Well, who makes the determination
3 that the effluent limit meets the water quality
4 standards?

5 MR. WARRINGTON: That's the Agency. That's our
6 obligation under the Act.

7 MS. BUCKO: So when you set a number under your
8 additivity PEQ PEL concepts, you're setting a number
9 saying that it meets water quality, correct?

10 MR. WARRINGTON: We're setting an effluent
11 number, correct.

12 MS. BUCKO: So you're using a methodology where
13 there is none in the Board regulations; is that
14 true?

15 MR. WARRINGTON: That is correct.

16 MS. BUCKO: So maybe I'm still not clear. I
17 don't quite get the difference between why the
18 Agency chose to propose a number based -- a rule
19 that would allow the Agency to come up with a number
20 to impose on permits under Subpart F, and, yet --

21 MR. WARRINGTON: No.

22 MS. BUCKO: -- in this instance where the --
23 where there is a methodology and essentially the
24 variables in a formula to come up with a number why

1 the Agency chose the route of adopting them
2 themselves rather than going before the Board as
3 opposed to the course that they took in Subpart F,
4 which is essentially the same --

5 MR. WARRINGTON: I see the question.

6 MS. BUCKO: -- where Subpart F is giving the
7 variables that the Agency needs to apply to come up
8 with a number?

9 MR. WARRINGTON: Because they're creating two
10 different numbers. There are numbers that are
11 applicable at different places. Subpart F derives
12 water quality standards that are applicable in the
13 waters of the state. It's in the receiving stream
14 no matter where you measure it.

15 The rules that the Agency developed and
16 adopted at 352 are to set effluent standards.
17 That's the number that's applicable at the end of
18 the pipe of any particular discharger.

19 MS. BUCKO: And the water at the end of the
20 pipe goes into water, a receiving line?

21 MR. WARRINGTON: That's correct.

22 MS. BUCKO: And you said that the effluent
23 standard applies in the receiving stream, correct?

24 MR. WARRINGTON: No. The effluent standard

1 applies at the end of the pipe. The water quality

2 standard applies in the receiving stream.

3 MS. BUCKO: Were there any instances that you

4 know of where those numbers are ever different?

5 MR. WARRINGTON: Many.

6 MS. BUCKO: And what would they be?

7 MR. WARRINGTON: Those situations where a

8 mixing zone is required.

9 MS. BUCKO: And there are mixing zone

10 regulations for the Board, correct?

11 MR. WARRINGTON: The Board regulations on

12 mixing zones have approximately ten prohibitions

13 where mixing is not allowed.

14 MS. BUCKO: I understand. That's a methodology

15 that the Agency uses to determine --

16 MR. WARRINGTON: No.

17 MS. BUCKO: -- a number?

18 MR. WARRINGTON: No. Those are standards of

19 general applicability that prohibit not only the

20 Agency, but any other person from arguing that

21 mixing is allowable for a particular discharge.

22 MS. BUCKO: Now, were you involved in any of

23 the proposals that -- were you personally involved

24 in any of that earlier rulemaking on the toxic

1 substances?

2 MR. WARRINGTON: No, I don't believe so.

3 MS. BUCKO: Were you ever personally involved

4 in any legislative action? I believe you indicated

5 Section 11(b) and 39 for the Agency authorization.

6 MR. WARRINGTON: Not of any parts relevant

7 here.

8 MS. BUCKO: Okay. Have you published any

9 documents or articles in any journals or law reviews

10 concerning this issue?

11 MR. WARRINGTON: No, I haven't.

12 MS. BUCKO: Were you involved in any of the

13 actual litigation in Granite City?

14 MR. WARRINGTON: No, I was not.

15 MS. BUCKO: Were you involved in any of the

16 litigation in the Landfill case?

17 MR. WARRINGTON: No. That was, I believe, even

18 before my time with the Agency.

19 THE HEARING OFFICER: Excuse me. That's the

20 Landfill, Inc. case?

21 MS. BUCKO: Correct, that he was citing in his

22 prefiled testimony.

23 Were you ever involved in any of the

24 litigation in the Sexton case that you also cited in

1 your --

2 MR. WARRINGTON: The Village of Hillside versus
3 John Sexton?

4 MS. BUCKO: Correct.

5 MR. WARRINGTON: No, I was not.

6 MS. BUCKO: So, in other words, I mean, do you
7 have any other types of training or whatever that
8 would, aside from reading the cases, that would give
9 you any --

10 MR. WARRINGTON: No, just the reading of the
11 plain language of the cases.

12 MS. BUCKO: I can't think of any other
13 questions right at this moment, but I would ask
14 leave to recall at some point.

15 THE HEARING OFFICER: Just to clarify, Ms.
16 Bucko, would you also like those last series of
17 questions about personal involvement with 88-21
18 cases to be addressed to Mr. Frevert and Mr.
19 McSwiggen?

20 MS. BUCKO: Yes.

21 THE HEARING OFFICER: We'll put that on the
22 record then, and they can answer those.

23 Do you have follow-up?

24 MR. ETTINGER: Yes. I know everybody would

1 like to get to lunch, me in particular, but I'd like
2 to just ask one more thing about Exhibit 1,
3 specifically the sentence that speaks with regard to
4 federally approved test methods and the potential
5 for increased compliance costs from the water
6 quality standards that are more sensitive in the
7 detection level, the ones that now have the current
8 attachment to this.

9 The sentence states consequently, until
10 the test methodology is revised, federally approved,
11 adopted by rulemaking in Illinois, and incorporated
12 into a reopen NPDES permit compliance cost for those
13 presently undetectable contaminants would be
14 minimal.

15 THE HEARING OFFICER: Excuse me. That's
16 Exhibit No. 2.

17 MR. ETTINGER: I'm sorry. Exhibit No. 2.

18 Specifically, I just want to be certain in
19 line with our earlier testimony someone might have
20 an increased compliance cost based on the following
21 scenario, being that the third -- a third party or
22 the Agency would propose a revised method to the
23 regional administrator under 40 CFR 136, that that
24 was approved by the regional administrator, and then

1 that improved test method was placed in that party's
2 permit and that happened without any rulemaking by
3 this Board or other rulemaking at the state level?

4 MR. WARRINGTON: Right. The -- that's
5 correct. The USEPA could approve an alternative
6 under this alternate test procedure 136.4(a) or (d)
7 that could then be imposed in a permit after it's
8 been reopened and those procedures followed, and
9 then once the permit is issued or not issued or
10 conditioned, then it would be subject to appeal to
11 the Pollution Control Board, but the rulemaking
12 necessary would be the incorporation by reference of
13 40 CFR 136 either in the 1996 version proposed here
14 today or, I believe, it is the same alternative
15 approval option that probably already exists in the
16 version of part 136 that the Board has already
17 incorporated by reference.

18 MR. ETTINGER: So no additional rulemaking
19 would be necessary to incorporate a revised test
20 method if it was approved by the regional
21 administrator?

22 MR. WARRINGTON: That's correct.

23 MR. ETTINGER: Thank you.

24 MR. WARRINGTON: That's my understanding.

1 THE HEARING OFFICER: Are there any other
2 questions for the Agency?

3 Rich, I just have a couple of quick ones.
4 After the Board had adopted the rulemaking in
5 R97-25, the Joint Committee on Administrative Rules
6 in April sent a letter to the Board indicating
7 several typos in part 302.

8 Do you see if the Board chooses to proceed
9 with this rulemaking if -- is there any potential
10 problem with the Board opening 302 to correct those
11 typos, Mr. Warrington?

12 MR. WARRINGTON: No, there's not. Typos are
13 very simple to correct.

14 THE HEARING OFFICER: Are there any other
15 questions?

16 Okay. We had spoken earlier. Ms. Rosen
17 had asked that the written answers to the questions
18 be submitted earlier than the prefiled deadline.
19 The prefiled deadline for the December 8th hearing
20 is November 24th, 1998.

21 While we were off the record, we consulted
22 some calendars, and the date we came up with is
23 November 17th, 1998. In addition to answering any
24 questions that were left unanswered or if there are

1 any clarifications that Mr. Frevert or Mr. McSwiggen
2 would like to add to what you so avidly answered
3 today they may do so in that filing.

4 MR. WARRINGTON: If the Board can get us a copy
5 of the transcript as early as possible, we'd be
6 pleased or if any of the parties here today would
7 like particular questions answered, forward them to
8 my attention. It's Rich Warrington, Division of
9 Legal Counsel, 1021 North Grand Avenue East,
10 Springfield, Illinois, 627, my business card is here
11 somewhere, 62794, I believe.

12 THE HEARING OFFICER: Yes.

13 MR. WARRINGTON: 62794, 62794-9276.

14 THE HEARING OFFICER: Thank you very much.

15 At this time, Ms. Rosen, you indicated you
16 would like to make a statement.

17 MS. ROSEN: Yes. Thank you. I'm Whitney
18 Rosen, general counsel for Illinois Environmental
19 Regulatory Group, and I'd just like to know for the
20 record our motion to dismiss, which was filed last
21 week, I am aware that the time for filing responses
22 has outrun, and, indeed, the Attorney General's
23 Office has requested additional time to respond.

24 I would, though, like to stress our belief

1 in the importance of the ruling on this motion prior
2 to the upcoming hearing in this matter and prior to
3 the time by which submittal of testimony might be
4 due.

5 The ruling on the motion may completely
6 eliminate the proceeding or it may in some way
7 impact the issues that are under debate, and I think
8 that it would be helpful for the participants to the
9 procedure to know exactly where the procedure is
10 going before we move on. Thank you.

11 THE HEARING OFFICER: Thank you. We will be
12 sure the Board is made aware of your statement.

13 MS. ROSEN: Thank you.

14 THE HEARING OFFICER: Would anyone else like to
15 make a statement on the record today? Would anyone
16 else like to testify today?

17 Okay. Seeing none, we will start bringing
18 this to a close. I want to remind everyone the
19 second hearing has been scheduled for December 8th,
20 1998, in Springfield, Illinois, at 600 South Second
21 Street, Room 403.

22 That is the Board's office in
23 Springfield. The purpose of that hearing will be to
24 allow for comments on DCCA's decision not to conduct

1 an economic impact statement and testimony by all
2 other interested persons in addition to any
3 follow-up by the Agency at that time.

4 The testimony should be prefiled by
5 November 24th, 1998, and served on the service list
6 at that time.

7 Any other questions? I want to thank you
8 all for your participation. I appreciate it and
9 look forward to seeing you in December. I apologize
10 for any inconvenience the weather may have created
11 with not having witnesses available. Hopefully, we
12 won't have that problem in December. Thank you very
13 much. We're adjourned.

14 (Whereupon, these were all
15 the proceedings had in
16 the above-entitled matter.)

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1 STATE OF ILLINOIS)

) SS.

2 COUNTY OF C O O K)

3

4 I, GEANNA M. IAQUINTA, CSR, do hereby

5 state that I am a court reporter doing business in

6 the City of Chicago, County of Cook, and State of

7 Illinois; that I reported by means of machine

8 shorthand the proceedings held in the foregoing

9 cause, and that the foregoing is a true and correct

10 transcript of my shorthand notes so taken as

11 aforesaid.

12

13

14 _____
Geanna M. Iaquina, CSR.
Notary Public, Cook County, IL
15 Illinois License No. 084-004096

16

SUBSCRIBED AND SWORN TO

17 before me this _____ day

of _____, A.D., 1998.

18

19 _____
Notary Public

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