

1 BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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5 IN THE MATTER OF:

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7 PERMITTING PROCEDURES FOR THE

8 LAKE MICHIGAN BASIN: 35 ILL. R99-8

9 ADM. CODE 301 and 309.141 (Rulemaking - Water)

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13 Proceedings held on December 8, 1998 at 10:00

14 a.m., at the Illinois Pollution Control Board, 600

15 South Second Street, Room 403, Springfield, Illinois,

16 before the Honorable Marie E. Tipsord, Hearing

17 Officer.

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21 Reported by: Darlene M. Niemeyer, CSR, RPR  
22 CSR License No.: 084-003677

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A P P E A R A N C E S

Claire A. Manning, Chairman  
G. Tanner Girard, Ph.D., Board Member  
Nicholas J. Melas, Board Member

STATE OF ILLINOIS, OFFICE OF THE ATTORNEY

GENERAL

BY: William D. Seith  
Chief, Environmental Bureau  
100 W. Randolph Street  
Chicago, Illinois 60601  
On behalf of the People of the State of  
Illinois.

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

BY: Richard C. Warrington, Jr.  
Associate Counsel  
Division of Legal Counsel  
1021 North Grand Avenue East  
Springfield, Illinois 62794-9276  
On behalf of the Illinois EPA.

ILLINOIS ENVIRONMENTAL REGULATORY GROUP

BY: Whitney Wagner Rosen  
Attorney at Law  
215 East Adams Street  
Springfield, Illinois 62701  
On behalf of IERG.

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1            P R O C E E D I N G S

2            (December 8, 1998; 10:00 a.m.)

3    HEARING OFFICER TIPSORD: Good morning. My name  
4 is Marie Tipsord, and I have been appointed by the  
5 Board to serve as Hearing Officer in this proceeding  
6 entitled, In the Matter of: Permitting Procedures for  
7 the Lake Michigan Basin: Amendments to 35 Ill. Adm.  
8 Code 301 and 309.141. The Docket Number is R99-8.

9    To my right is Dr. Tanner Girard, presiding Board  
10 Member assigned to this matter. Also present, to his  
11 right, is Board Chairman, Claire Manning.

12    CHAIRMAN MANNING: Good morning.

13    HEARING OFFICER TIPSORD: Two over to my left,  
14 Board Member Nicholas J. Melas who is also assigned to  
15 this rulemaking.

16    BOARD MEMBER MELAS: Good morning.

17    HEARING OFFICER TIPSORD: In addition to my  
18 immediate left is a member of the Board's technical  
19 staff, Anand Rao.

20    To Mr. Melas' left is his assistant, Joel  
21 Sternstein.

22    Also with us today is Cindy Ervin, Chairman  
23 Manning's Assistant, and Kathleen Crowley, our Senior  
24 Attorney.

25    The purpose of today's hearing is twofold. First,

1 this rulemaking is subject to Public Act 90-489.  
2 Public Act 90-489 became effective January 1, 1998,  
3 and requires the Board to request that the Department  
4 of Commerce and Community Affairs, DCCA, conduct an  
5 Economic Impact Study on certain proposed rules prior  
6 to the adoption of those rules.

7 If DCCA chooses to conduct the IcIS, DCCA has 30  
8 to 45 days after such request to produce a study of  
9 the economic impact of the proposed rules. The Board  
10 must then make the IcIS, or DCCA's explanation for not  
11 conducting the study, available to the public at least  
12 20 days before a public hearing on the economic impact  
13 of the proposed rules.

14 In accordance with Public Act 90-489, the Board  
15 requested, by letter dated August 5, 1998, that DCCA  
16 conduct an Economic Impact Study for the  
17 above-reference rulemaking. The request letter  
18 referenced a letter dated June 26, 1998, from DCCA.  
19 In that letter, DCCA notified the Board that it would  
20 not be conducting Economic Impact Studies on rules  
21 pending before the Board during the remainder of FY  
22 '99, because it lacked, among other things, the  
23 financial resources to conduct such studies.

24 In the request letter the Board asked that DCCA  
25 notify the Board within 10 days of receipt of the

1 request if DCCA intended to conduct an Economic Impact  
2 Study on the proposed rules. The Board stated that if  
3 it had not been notified within 10 days, the Board  
4 would rely on DCCA's June 26 letter as the required  
5 explanation for not conducting an Economic Impact  
6 Study.

7 The 10 days for DCCA to notify the Board expired  
8 and the Board did not receive any notification from  
9 DCCA that it would conduct an Economic Impact Study on  
10 this rulemaking. Accordingly, the Board relies on the  
11 June 26th, 1998 letter as DCCA's explanation for not  
12 producing this study.

13 We will hear testimony from anyone who wishes to  
14 comment on DCCA's explanation at this hearing today.

15 Secondly, at today's hearing we will hear the  
16 prefiled testimony of Illinois Environmental  
17 Protection Agency, and allow questions to be asked of  
18 the Agency. Anyone may ask a question. However, I do  
19 ask that you raise your hand, wait for me to  
20 acknowledge you, and after I have acknowledged you,  
21 please state your name and who you represent before  
22 you begin your questions.

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

1 Please note that any questions asked by a Board  
2 Member or staff are intended to help build a complete  
3 record for the Board's decision and not to express any  
4 preconceived notion or bias.

5 As we have received no other prefiled testimony,  
6 we will allow anyone else who wishes to testify the  
7 opportunity to do so as time allows.

8 Is there anyone here who anticipates that they  
9 would like to testify at the close of the hearing  
10 today?

11 MR. SEITH: Yes.

12 HEARING OFFICER TIPSORD: Okay, Mr. Seith. I will  
13 ask that question again throughout the day in case new  
14 people come in. But we will start with you as time  
15 allows, Mr. Seith.

16 To my left there are sign up sheets for the notice  
17 and service lists. There are also current copies of  
18 both the service and notice lists. I ask anyone who  
19 intends to file final comments to be sure and pick  
20 those up. There have been changes in those lists very  
21 recently, and so you do need to pick up a new copy.

22 There are also copies of the Hearing Officer's  
23 order. And in addition, as those of you who have been  
24 here before know, the rest rooms are locked, and there  
25 are keys to the rest rooms on the table to the left.

1 In addition, we have a Coke machine back in the office  
2 if at a break anyone would like to get a Coke or  
3 something, it is available.

4 At this time I would like to ask Dr. Girard if he  
5 wishes to say anything.

6 BOARD MEMBER GIRARD: I would just like to welcome  
7 everyone to the hearing this morning, and thank you  
8 for coming. We look forward to your comments and  
9 questions. And the Board is committed to completing  
10 this rulemaking in an efficient manner, and we need as  
11 much in the record as we can to make the best  
12 decision. So thank you for your input.

13 HEARING OFFICER TIPSORD: Chairman Manning, would  
14 you like to add anything?

15 CHAIRMAN MANNING: Nothing to add. Thank you.

16 HEARING OFFICER TIPSORD: Member Melas?

17 BOARD MEMBER MELAS: Nothing to add. Thank you.

18 HEARING OFFICER TIPSORD: All right, then. Let's  
19 proceed. Let me first ask, is there anyone here who  
20 wishes to comment on DCCA's decision regarding the  
21 performance of an IcIS?

22 Seeing none, we will then proceed with the  
23 Agency. And could I ask you to introduce your  
24 witnesses, and then we will have them all sworn.

25 MR. WARRINGTON: Thank you. Would you like me to



1 reprise my opening statement from the previous

2 hearing?

3 HEARING OFFICER TIPSORD: If you would like to,

4 sure.

5 MR. WARRINGTON: Thank you. On behalf of our

6 Director, Mary A. Gatey, I would like to express our

7 appreciation to the Illinois Pollution Control Board

8 for scheduling this hearing to receive testimony on

9 this rulemaking proposal. We are here to continue the

10 dialogue between the Office of the Attorney General,

11 the Joint Committee on Administrative Rules, and our

12 Agency on the best set of rules to implement the Great

13 Lakes Initiative for Illinois.

14 Our rulemaking proposal today has three parts.

15 First is an amendment to update the addition of 40 CFR

16 136 to the 1996 edition, thus making it consistent

17 with the edition incorporated by reference in other

18 rules. This part of the Code of Federal Regulations

19 includes the test methods required to be used by

20 dischargers to measure the concentration of

21 contaminants. The United States Environmental

22 Protection Agency periodically updates the test

23 methods to incorporate the latest scientific advances,

24 and we are here today to ask the Board to do

25 likewise.

1 The second part of the our rulemaking proposal  
2 consists of definitions previously adopted, 35  
3 Illinois Administrative Code 352.104, that give  
4 meaning to the rules proposed at 35 Illinois  
5 Administrative Code 309.141(h). In two instances,  
6 301.411, total maximum daily load, and 301.421, waste  
7 load allocation, the definitions apply to terms  
8 already used by the Board in 309.141(d)(3) and  
9 309.142.

10 The third part of our rulemaking proposals  
11 contains selected sections from 35 Illinois  
12 Administrative Code 352. Our role here is to ensure  
13 that the Board has every opportunity for discussion  
14 and review of the best rules possible to implement its  
15 water quality standards for Lake Michigan.

16 Today we are pleased to announce that we have  
17 brought Mr. Toby Frevert and Mr. Tom McSwiggin to  
18 answer questions on this proposal.

19 We remain willing to work with the Board, the  
20 Office of the Attorney General, and other interested  
21 parties to resolve concerns and to improve the quality  
22 of Lake Michigan.

23 That concludes my opening statement. If you would  
24 like to swear the witnesses or myself in for any  
25 questions, we would be perfectly willing to do that.

1 HEARING OFFICER TIPSORD: All right. Would you  
2 please swear in the witnesses.

3 (Whereupon Mr. Warrington, Mr. Frevert, and Mr.  
4 McSwiggin were sworn by the Notary Public.)

5 HEARING OFFICER TIPSORD: I think it is probably  
6 easiest on the prefiled testimony, if you have no  
7 objection, just to go ahead and read the prefiled  
8 testimony, given the shortness of it, if that's okay.  
9 That way if there are any follow-ups, we will have it  
10 all in one place in the record.

11 MR. WARRINGTON: No problem. For the benefit of  
12 the court reporter, we can have a copy made available  
13 for her to correct my diction, as the case may be.

14 Good morning. My name is Rich Warrington,  
15 Associate Counsel with the Division of Legal Counsel  
16 of the Regulatory & Permit Appeals Unit for the  
17 Division of Water Pollution Control of the Bureau of  
18 Water of the Illinois Environmental Protection  
19 Agency. My testimony --

20 HEARING OFFICER TIPSORD: Excuse me, Richard. I  
21 am sorry. I meant the prefiled testimony that you  
22 filed for today's hearing.

23 MR. WARRINGTON: Oh, I am sorry. I was starting  
24 with something we already entered into the record in  
25 summary form.

1 HEARING OFFICER TIPSORD: Right.

2 MR. WARRINGTON: All right. Today we have

3 basically --

4 HEARING OFFICER TIPSORD: You answered a couple of

5 questions on the record, and you filed it as a part of

6 your response.

7 MR. WARRINGTON: Maybe if I could summarize it.

8 HEARING OFFICER TIPSORD: Do you need a copy of

9 it?

10 MR. WARRINGTON: I think we have it here

11 somewhere. Thank you.

12 At the conclusion of the last hearing, the Hearing

13 Officer asked whether certain questions from the

14 audience should be posed to the agencies who were

15 unavailable to attend that previous hearing.

16 And the question from the Hearing Officer was,

17 just to clarify, Ms. Bucko, would you also like the

18 last series of questions about personal involvement

19 with 88-21, cases to be addressed to Mr. Frevert and

20 Mr. McSwiggin. Ms. Bucko answered, yes, and the

21 Hearing Officer ordered that we will put those on the

22 record and they can answer it.

23 Since then we have referred these questions to Mr.

24 Frevert and Mr. McSwiggin. And the questions were,

25 now, were you involved in any of the proposals? Were

1 you personally involved in any of the earlier  
2 rulemaking on the toxic substances? And I answered at  
3 that hearing, no, I don't believe so.

4 And Ms. Bucko, with a follow-up question, asked me  
5 were you involved in any of the actual litigation in  
6 Granite City? And I answered I was not. And we  
7 basically posed those questions to Mr. Frevert. And  
8 Mr. Frevert has indicated that he was directly  
9 involved with the preparation, presentation, and  
10 defense of R88-21 from the proposal to review of the  
11 briefs filed in the litigation in Granite City.

12 And Mr. McSwiggin, having been posed the same  
13 questions, responded that he was not directly involved  
14 with the R88-21 proposal or litigation.

15 That's the summary of our supplemental testimony.  
16 Thank you.

17 HEARING OFFICER TIPSORD: At this time are there  
18 any additional questions of the Agency?

19 Okay. I just have one question. I am not sure  
20 which of you is the best to answer it, so I will pose  
21 it to you as a panel. We have some information on the  
22 economic justification in the rulemaking. As you  
23 know, the Board is also required to talk about the  
24 technical feasibility.

25 My question to all of you, or to whichever of you

1 wishes to answer this, do you believe that the rules,  
2 as proposed, are technically feasible?

3 MR. FREVERT: I am not sure I know what that  
4 means. This originally started as our development of  
5 the procedures that we would use for our  
6 administrative operation of the NPDES permit program,  
7 and specified how we were intending to operate to  
8 carry out our responsibility to make sure that in  
9 limiting discharges and authorizing discharges under  
10 the NPDES permit program, we would assure that we  
11 would have adequate conditions to meet the Board's  
12 water quality standard in the stream at whatever point  
13 it applied --

14 HEARING OFFICER TIPSORD: Could you speak up.

15 MR. FREVERT: Or at the end of a pipe. And as a  
16 result of that, we laid out some procedures, which I  
17 would call default procedures, that primarily the  
18 reasonably potential concept, which is a federal  
19 concept, but it basically says, in my opinion, it  
20 acknowledges in establishing permit limits to meet a  
21 water quality standard that there is never absolute  
22 certainty unless your limit is zero discharge, I  
23 guess. But it recognizes there needs to be some  
24 reasonableness to supply in permit limits that are  
25 adequate to protect the water quality standards, yet

1 don't have such extreme conservatism to them that they  
2 become a practical problem for the operator.

3 And the U.S. EPA suggested perhaps the way to  
4 approach that is with a statistical procedure that  
5 accomplishes the 95th percentile, the certainty of a  
6 95 percent limit. We have laid out a procedure to do  
7 that, and then in addition to that procedure we have  
8 also indicated it is acceptable for us for a  
9 discharger to propose another approach, if that other  
10 approach is adequate in accomplishing the same 95th  
11 percentile confidence that we get the right limit.

12 So these procedures that we have laid out, we  
13 believe are generally feasible, and in my mind they  
14 constitute a default procedure that we would  
15 essentially put the world on notice that we intend to  
16 operate by, unless somebody can propose or  
17 substantiate some other procedure.

18 And in that light, I believe we have that  
19 flexibility or allowance that it should be technically  
20 feasible virtually across the board. But it was not  
21 proposed or even adopted in our process through JCAR  
22 as an absolute, more or less a generic or default  
23 procedure that we couldn't deviate from unless the  
24 scientific justification is there.

25 I believe the same is true in the procedure where

1 we identify what we believe is the proper technical  
2 conversion between dissolved and total metals, and  
3 there is a provision in our procedures that allows an  
4 applicant to propose an alternative to those values we  
5 have established as our generic defaults if they can  
6 substantiate that scientifically other numbers are  
7 appropriate. I believe those same allowances are also  
8 in the version of this procedure that we have elevated  
9 to the Board's consideration.

10 So in that regard, I just want to make sure  
11 everybody understands these procedures are not  
12 absolute procedures. These are generic things that we  
13 can deviate from periodically. And, again, it is an  
14 estimate of what we think is necessary and appropriate  
15 and equitable to meet the water quality standards,  
16 which we believe is absolute. The water quality  
17 standard is absolute. The permit limit and the  
18 procedure that we use to set the permit limit is kind  
19 of a site specific determination of the best thing we  
20 can do to meet the absolute water quality standard.

21 And I believe that -- maybe I can bump the ball  
22 over to Tom. I believe Tom's permits he also has  
23 standard terms and procedures that do identify the  
24 absolute nature of the water quality standard. That  
25 permit limit notwithstanding. Is that correct?



1 MR. McSWIGGIN: All of our permits contain a  
2 provision that the water quality standard must be  
3 met. That is kind of a standard language. That is  
4 there to be utilized if we are having difficulty with  
5 the permitted limit meeting the water quality  
6 standard. It is kind of a fallback. It is very  
7 seldom used.

8 MR. FREVERT: Does that answer your question  
9 adequately?

10 HEARING OFFICER TIPSORD: And just also for the  
11 record, we are talking about part of a permit process  
12 and setting a permit limit in all of this?

13 MR. FREVERT: That's correct. This entire package  
14 of material is to give the public notice and to  
15 standardize the generic practice we follow in carrying  
16 out our permitting responsibilities. And how we, in  
17 doing that permitting, produce permit limits that we  
18 believe are appropriate to meet that absolute water  
19 quality standard in the Board's regulations.

20 HEARING OFFICER TIPSORD: Are there any other  
21 questions?

22 MR. RAO: Can I ask a follow-up question?

23 HEARING OFFICER TIPSORD: Yes.

24 MR. RAO: Mr. Frevert, you mentioned that some of  
25 the concepts that you have in this proposal came from

1 the federal U.S. EPA?

2 MR. FREVERT: That's correct.

3 MR. RAO: Those federal requirements, are they  
4 part of the GLI guidance document?

5 MR. FREVERT: Yes, I believe. Again, I will ask  
6 Tom to follow up. But my understanding is that the  
7 GLI guidance document was the first time these  
8 permitting procedures that we have been using since  
9 the onset of the NPDES program, 20 some years ago,  
10 were actually required to be adopted in some kind of  
11 official capacity.

12 We have been required to go through this process  
13 by federal NPDES regulations and also by 309.141 of  
14 the Subtitle C from the onset. This is the first  
15 time, in my recollection, that they wanted us to  
16 elevate that process beyond merely recognizing federal  
17 guidance, federal regulations, and actually adopt them  
18 as official state procedures.

19 Do you agree with that, Tom?

20 MR. McSWIGGIN: Yes, that's correct. For the  
21 first 20 years of the NPDES program all of the  
22 materials put out by the U.S. EPA how to go from the  
23 water quality standard to a limit has been in the form  
24 of guidance. There has been various forms of that  
25 over the years, and a lot of it was actually reflected

1 in the GLI materials, but it has never been elevated  
2 to the requirement of a standard until this point.

3 MR. RAO: So would you say the proposal  
4 requirements are consistent with what the GLI guidance  
5 required for the procedure requirements for  
6 implementing the standards?

7 MR. FREVERT: Yes.

8 MR. RAO: Thank you.

9 BOARD MEMBER GIRARD: I have a more specific  
10 question along those lines, Mr. Frevert.

11 So, for example, the statistical procedures that  
12 you were talking about, those are recommended in the  
13 GLI guidance document for carrying out this program?

14 MR. FREVERT: That's correct.

15 HEARING OFFICER TIPSORD: Anything further?

16 BOARD MEMBER GIRARD: No further questions.

17 CHAIRMAN MANNING: Does the Agency consider those  
18 procedures -- just so that I have a clear  
19 understanding of what the Agency's position is on  
20 this, Mr. McSwiggin, I think you referred to that as a  
21 standard. Does the Agency consider this to be a  
22 standard?

23 MR. FREVERT: I noticed that word, too. It is an  
24 operating standard, in terms of that is the  
25 administrative process that Tom has to adhere to in

1 running the NPDES program. But it is not a standard  
2 in the sense of the water quality standard or a  
3 specific enforceable requirement for the water body  
4 itself, for the environmental condition. It is a  
5 standard for operating the permit program. It is not  
6 a standard for a stream or a lake.

7 MR. McSWIGGIN: That is correct, if you are  
8 talking about the requirement that that procedure be  
9 applied.

10 BOARD MEMBER GIRARD: So are you saying it is more  
11 of a procedure than a standard?

12 MR. FREVERT: It is a requirement on how the state  
13 is expected and required to operate and administer the  
14 NPDES program. And that is administratively separate  
15 from the portion of the Clean Water Act of the federal  
16 program that requires states to set water quality  
17 standards for their water resources.

18 CHAIRMAN MANNING: For purposes of the record, how  
19 does the Agency determine working with the discharger,  
20 how this particular part of it is -- it sounds like  
21 there is a degree of flexibility in terms of it being  
22 more of a guidance than -- you agree to what the  
23 standards are going to be, and it goes into the permit  
24 and if there is a violation of that, then it becomes a  
25 permit violation?

1 MR. McSWIGGIN: That's correct. If you end up  
2 following this procedure, going from the water quality  
3 standard, and as a result of that effluent permit  
4 limit, once that limit is put into the permit and that  
5 permit is issued, you have then something that that  
6 discharger must live by, because he now has a specific  
7 permit limit that is enforceable. That's been the  
8 foundation of the permit program ever since I have  
9 been involved with it.

10 In fact, if you look at the way the U.S. EPA  
11 approaches it, they can't enforce it until it is in a  
12 permit limit. We have a little bit more flexibility  
13 at the state level. I don't know if I am getting to  
14 your question or not. Do we -- how do we go about  
15 putting that in there? When you sit down to write a  
16 permit there is a -- there is several things that you  
17 have to examine before you really look at what is that  
18 permit limit.

19 First of all, you have to determine whether or not  
20 there is a technology base limit in the state or  
21 federal regulation that may be more stringent than  
22 whatever limit you may develop from working with the  
23 water quality standards. If there is, then that is an  
24 exceedance of your water quality standard, if you put  
25 the more stringent limit in there. If there is no

1 categorical technology based on the limit, then you  
2 examine the water quality and look at the protocol  
3 that is applicable to go from the water quality  
4 standard to the permit limit.

5 What we are looking at in today's case is that  
6 protocol, what procedures do we apply in the  
7 development of that permit limit. As I indicated  
8 earlier, this protocol has always been in the form of  
9 guidance up to this point. There have been several  
10 documents out over the years that define how the U.S.  
11 EPA views this process to go from the water quality  
12 standard to go to a permit limit.

13 Up to this point when we get to the decision that  
14 we have to write a permit application on the water  
15 quality standard, then we follow the U.S. EPA  
16 guidance, unless the discharger has brought in, as  
17 part of his application materials, some other argument  
18 that is, in our opinion, as stringent as we would have  
19 gotten using the guidance material and in looking at  
20 the GLI, we would be looking at following a  
21 standardized procedure.

22 Once that is done, then we then go back to the  
23 applicant with the draft permit for his review.  
24 Generally that review could result in a discussion of  
25 that limit. We don't give really much, say, credence

1 to arguments to come off of that standard at that  
2 point, because at that point we generally are looking  
3 to see if we had made a mistake in interpreting his  
4 application. We can have a lot of discussion. But  
5 very seldom do we have to back off the number that we  
6 originally imposed, like I say, unless we made a  
7 mistake in interpreting the application.

8 MR. FREVERT: If I can add to that. There is the  
9 appeal prospect of the permit. If the permittee feels  
10 strongly that the procedure we adhered to and the  
11 limit that we produced from that procedure results in  
12 a product that is incompatible with the standard  
13 itself, either inadequate, too conservative, or not  
14 conservative enough. That's our job, essentially, is  
15 to find a permit limit that will protect that  
16 standard, that water quality standard with some degree  
17 of conservatism. And that that degree of conservatism  
18 is not overly burdensome to the applicant, not over  
19 necessarily burdensome to the applicant.

20 MR. RAO: Can I ask a follow-up?

21 HEARING OFFICER TIPSORD: Sure.

22 MR. RAO: How do you deal with those constituents  
23 for which there are effluent standards in the Board  
24 regulations when writing a permit?

25 MR. FREVERT: In writing a permit there are four

1 or five things, the Pollution Control Board effluent  
2 standard, discharge standard, a U.S. EPA promulgated  
3 category for industrial effluent limitation, a water  
4 quality based permit limit and perhaps there are  
5 several others. It is our job to look at all of those  
6 requirements, and the most restrictive requirement  
7 motivated by those various program elements would be  
8 the one that would probably become the permit limit.

9 And there are many times when a parameter is  
10 regulated both as a discharge limitation and also  
11 there is a water quality standard. In some instances  
12 one may govern and in another instance the other may  
13 govern. It is our job to determine which one drives  
14 the permit limit.

15 MR. RAO: Thank you.

16 HEARING OFFICER TIPSORD: Anything further?

17 KATHLEEN CROWLEY: This is a follow-up to a  
18 question that was referred to you from the last  
19 hearing.

20 The Attorney General had addressed some issues  
21 related to the R88-21 water toxics docket and the  
22 resulting court case there. Briefly, the R88-21  
23 proceeding involved a narrative standard, essentially  
24 no toxics in toxic amounts, and the Board rules went  
25 on to include criteria which had previously been



1 developed by the Agency for it use to derive the  
2 numbers that would be used in setting permit limits in  
3 enforcement cases and that sort of thing.

4 Does anyone in this panel see any real difference  
5 between those numbers and the way -- those procedures  
6 and the way they would be used in these procedures?

7 MR. FREVERT: Yes. My recollection, in my  
8 opinion, that whole proceeding was focused on a number  
9 that was derived through a toxicity evaluation  
10 procedure that would become the enforceable standard  
11 for that segment of water body. That is not a permit  
12 limit. That is a standard for a water body. And in  
13 this day and age with tens of thousands of chemicals,  
14 both the State of Illinois and the federal government  
15 recognized that there needs to be a way to regulate  
16 toxicity that is a little more administratively  
17 expedient than rulemaking for individual chemicals.  
18 So that process was put in place, and that process  
19 requires strict adherence to a statistical and a  
20 toxicity evaluation process that ultimately produces a  
21 number or a set of numbers that constitutes the water  
22 quality standard for that water body, which is  
23 fundamentally different from a permit limit that may  
24 subsequently be derived from that standard. And I  
25 believe we don't even call it a standard in that

1 instance. We call it criteria. Fundamentally, it  
2 meets the intent of being a standard in the water act  
3 requirement for the states that have water quality  
4 standards for toxic substances.

5 MR. McSWIGGIN: And once that criteria is  
6 developed in the permit development process, it is  
7 treated as if it were a water quality standard in the  
8 protocol for developing the permit, and then it is  
9 applied.

10 MR. FREVERT: Essentially we would derive a  
11 standard criteria or value. Those words are used  
12 interchangeably in the Lake Michigan Water Quality  
13 Standards, and that number would be the starting point  
14 for doing the permit analysis. The effluent limit  
15 would be the finishing point, and we have consciously  
16 made a distinction between the Board's specifying in  
17 very great detail the process to produce that water  
18 quality standard, and then a second step being the  
19 administrative process we go through to determine what  
20 that permittee needs to do to make sure he meets that  
21 water quality standard.

22 KATHLEEN CROWLEY: Thank you. I wanted to make  
23 sure that that was addressed by you.

24 HEARING OFFICER TIPSORD: Anything further?

25 Seeing nothing, then I thank you, Agency, and we

1 appreciate you coming. And at this time I think we

2 will proceed with Mr. Seith.

3 Mr. Seith, I believe you indicated that you would

4 like to testify. Let's go off the record for a

5 second.

6 (Discussion off the record.)

7 HEARING OFFICER TIPSORD: All right. Let's go

8 back on the record.

9 We will have you sworn in.

10 (Whereupon Mr. William D. Seith was sworn by the

11 Notary Public.)

12 MR. SEITH: Good morning Madam Hearing Officer,

13 Madam Chairman, Members of the Board, and staff.

14 My name is William Seith, and I am here on behalf

15 of the Illinois Attorney General's Office. I believe

16 Mr. Melas indicated last time that this was one of the

17 first hearings that he has ever participated in. On

18 regulatory matters I have to say that in ten years at

19 the Attorney General's Office, this is my first

20 opportunity to testify either for or against a

21 particular rule of procedure, so please bear with me.

22 I don't think there is any secret and, in fact,

23 the Agency has made much of it in the record, and the

24 Illinois Environmental Regulatory Group has also on

25 its motion to dismiss, that there has been a dispute

1 between the Attorney General's Office and the Illinois  
2 EPA with respect to whether or not this proceeding is  
3 necessary, whether or not the Board needs to adopt  
4 these regulations that are before you in this  
5 proceeding.

6 Quite frankly, the Illinois Attorney General's  
7 Office thought that that issue had been resolved.  
8 After much of discussion at the end of last year and  
9 through the early part of this year, we thought that  
10 we had reached a resolution and agreed upon what  
11 regulations were going to be proposed to you and that  
12 you were not going to have to deal with this issue.

13 And upon further reflection, frankly, I think it  
14 is an issue that you really do not need to deal with  
15 for the simple reason that this Board, irrespective of  
16 whether or not the Illinois EPA has the authority to  
17 promulgate the regulations, this Board clearly does  
18 have the authority to promulgate these regulations.

19 And I think that that authority can be found in  
20 Section 13 of the Act, take your pick, quite frankly,  
21 Section 13(a)(1), (2) or (3). But more importantly in  
22 Section 13(b) the statute reads, notwithstanding any  
23 other provision of this Act, and for purposes of  
24 implementing an NPDES program the Board shall adopt  
25 and then it goes on in number one to state,

1 requirement, standards, and procedures which together,  
2 with other regulations adopted pursuant to this  
3 Section 13 are necessary or appropriate to enable the  
4 State of Illinois to implement and participate in the  
5 National Pollution Discharge Elimination System  
6 pursuant to and under the Federal Water Pollution  
7 Control Act. It is now and herein after amended.

8 Well, we have an amendment, and a very significant  
9 amendment, and that's the Great Lakes Initiative that  
10 has been referred to here in the Federal Register.

11 And in the opening comments to 40 CFR, Parts 9-122,  
12 123, 131 and 132, the Agency notes that under the  
13 Clean Water Act the States of Illinois, Indiana,  
14 Michigan, Minnesota, New York, Ohio, Pennsylvania and  
15 Wisconsin must adopt, must adopt, provisions into  
16 their water quality standard and NPDES permit programs  
17 within two years, by March 23 of 1997, that are  
18 consistent with the guidance, or EPA will promulgate  
19 the provisions for them. They must adopt those  
20 regulations.

21 You have heard testimony here today that the rules  
22 and regulations that are being proposed to you are, in  
23 fact, mandated by the GLI program, and as a  
24 consequence it seems to me clear under the statute  
25 that this Board has the authority to adopt these

1 regulations. And as a consequence, the Attorney  
2 General's Office would support the adoption of those  
3 regulations.

4 And there is some precedent for doing these types  
5 of regulations. If the Board looks at its own  
6 regulations at 35 Illinois Administrative Code,  
7 Section 302.601, et seq., Subpart F, of the water  
8 pollution control standards, that is that section or  
9 series of sections, entitled procedures for  
10 determining water quality criteria. And it is a very  
11 similar set of regulations that mirror the type of  
12 regulations that are being proposed here, and I think  
13 it provides some precedent for the Board adopting  
14 these types of regulations.

15 The issue of whether or not the Agency has  
16 authority to adopt these regulations has been well  
17 briefed on IERG's motion to dismiss, and our response  
18 to that, and the Agency's response to that. But I,  
19 again, feel that it is not an issue that this Board  
20 needs to reach in order to adopt these regulations.  
21 Because, again, I think the authority is clear within  
22 the Environmental Protection Act.

23 And so the Attorney General's Office, for the sake  
24 of ensuring the enforceability of the Great Lakes  
25 Initiative Water Program and continued enforceability

1 of the State of Illinois NPDES program, the Illinois

2 Attorney General's Office, on behalf of Jim Ryan,

3 moves the adoption of the regulations. Thank you.

4 HEARING OFFICER TIPSORD: Thank you. Are there

5 any questions of Mr. Seith?

6 MR. FREVERT: I am not sure I heard his last

7 sentence. Can you read it back?

8 (Whereupon the requested portion of the record was

9 read back by the Reporter.)

10 MR. FREVERT: Prior to that.

11 (Whereupon the requested portion of the record was

12 read back by the Reporter.)

13 MR. FREVERT: Is that your opinion, that this is

14 necessary for those federal program activities that

15 are delegated to us to be enforceable?

16 MR. SEITH: It is the opinion of the Attorney

17 General's Office that there is enough of a question

18 about the Agency's ability to adopt these regulations

19 that, quite frankly, we fear that we are going to

20 continue to see this issue come up down the road when

21 the Agency submits referrals to our office or the

22 State's Attorneys Office for the enforcement of those

23 permit requirements. So it seems to me maybe perhaps

24 a belt and suspenders approach, but warrants the

25 Board's adoption of these regulations in order to

1 ensure that that is never a question.

2 MR. FREVERT: So if I am hearing you right, I  
3 think you are saying if we issue a permit with these  
4 procedures and that permit is not challenged, and it  
5 goes into effect, and over the course of time we  
6 identify some noncompliance issues based on those  
7 limits, and we refer an enforcement action to you, do  
8 you question the validity of that permit that has been  
9 issued and has been in place for some time?

10 MR. SEITH: We have faced this issue I think in  
11 similar types of enforcement actions where the Agency  
12 has adopted, for example, drinking water quality  
13 standards. Several cases come to mind, and Amoco  
14 being one of them, where through the process of  
15 attempting to enforce those regulations under Sections  
16 18 and 19 of the Environmental Protection Act, the  
17 enforceability of the Agency standards and regulations  
18 was challenged as not being a properly adopted  
19 regulation enforceable under the Environmental  
20 Protection Act.

21 I think that history, in my experience, dictates a  
22 bit of caution in this particular case in order to  
23 ensure the enforceability of the program, and the  
24 limitations that are put into an IEPA permit. It  
25 seems to me appropriate to adopt these regulations in



1 order to take that question away.

2 MR. FREVERT: We would be happy to research that.

3 I don't know that there is a direct analogy between

4 the safe drinking water program and the NPDES

5 program. We would be happy to look into that.

6 CHAIRMAN MANNING: But your point, Mr. Seith, just

7 so that I understand it, is that your concern is that

8 a separate argument could be made, a jurisdictional

9 argument could be made, regardless of the permit

10 appeal having been filed or not filed, jurisdiction is

11 an issue at all times.

12 MR. SEITH: Correct.

13 CHAIRMAN MANNING: And your concern is that some

14 discharger would come and make an argument to you

15 regarding jurisdiction in the context of an

16 enforcement case?

17 MR. SEITH: Correct.

18 CHAIRMAN MANNING: Arguing that these rules should

19 have been promulgated by the Board and not the Agency

20 and, therefore, they are invalid. Is that your

21 point?

22 MR. SEITH: Yes. Thank you. I couldn't have said

23 it better myself.

24 HEARING OFFICER TIPSORD: Any other questions for

25 Mr. Seith?

1 MR. WARRINGTON: Just one. What would prevent the  
2 alleged violator of the Act, or the Board's  
3 regulations, for raising this argument that the rules  
4 are invalid even if the Board does adopt the proposed  
5 regulations?

6 MR. SEITH: I guess I don't understand the  
7 question. I suppose for \$50.00 anybody can file a  
8 lawsuit. But it seems clear to me that the statute,  
9 the Illinois Environmental Protection Act, confers  
10 upon this administrative agency, the Pollution Control  
11 Board, the authority to adopt these regulations.

12 There is, I understand it, a position taken by the  
13 Agency that a similar authority exists with the  
14 Agency. Again, without rehashing the history of our  
15 discussions over that particular issue, there is a  
16 difference of opinion on that, and it is a difference  
17 of opinion that very well could be used against us in  
18 a future action. I don't think there is any dispute  
19 about the Board's authority to adopt these  
20 regulations. I don't think there can be any dispute.

21 MR. FREVERT: I guess I would like to explore that  
22 a little further and find out just how vulnerable we  
23 are here in the State of Illinois. There are over  
24 2,500 NPDES permit holders in the State of Illinois  
25 who we currently regulate and establish permit limits

1 based on water quality requirements with no formally  
2 adopted procedures other than 309.141 by either our  
3 Agency or the Board. The GLI approach is  
4 approximately 19 of those 2,500.

5 Are we vulnerable for the other 2,480 right now  
6 for any water quality based permit limit that is in  
7 there right now?

8 MR. SEITH: Well, I don't think the intent of my  
9 testimony today or my comments today are to apply  
10 generally to the entire NPDES program nor to suggest  
11 that the Illinois EPA's program is somehow  
12 inadequate. That is not the purpose or the thrust of  
13 my comments whatsoever. I think in this particular  
14 instance, we have a situation where the U.S. EPA has  
15 given us a clear command that these regulations be  
16 adopted.

17 Again, I think the Illinois Environmental  
18 Protection Act gives this Board clear authority to  
19 adopt those regulations. I think it is appropriate  
20 for the Board to do so.

21 MR. FREVERT: I hear you. And since those same  
22 requirements are in place for the other 2,400 plus,  
23 the lack of necessity for some kind of an official  
24 adoption process, nevertheless, it is clear in the  
25 regulations that we have the obligation to go through

1 this process although we really don't have to  
2 formalize the procedure that we use. Do you feel  
3 comfortable that we are safe in not needing an  
4 equivalent Board action to carry out that part of the  
5 program?

6 MR. SEITH: Well, again, it is not my intention  
7 through today's proceeding to issue an Attorney  
8 General's opinion with respect to the entire NPDES  
9 program. I think that is certainly a discussion we  
10 can have at a later point in time. I don't think it  
11 is necessary to take the Board's time to continue that  
12 discussion today.

13 MR. FREVERT: I just want to make sure that 19  
14 dischargers don't jeopardize the whole state-wide  
15 program.

16 MR. SEITH: I understand.

17 HEARING OFFICER TIPSORD: Is there anything  
18 further?

19 All right. Thank you, Mr. Seith.

20 MR. SEITH: Thank you.

21 HEARING OFFICER TIPSORD: At this time I would  
22 like to ask if there is anyone else who would like to  
23 testify this morning?

24 Okay. Seeing none, I would like to take a ten  
25 minute break so we can confer about final comments

1 before the Board proceeds either to first notice or  
2 dismiss any action, whichever position the Board  
3 takes. So let's take ten minutes and we will  
4 reconvene and go from there.

5 (Whereupon a short recess was taken.)

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

8 At this time I would ask if anyone else would like  
9 to make a statement on the record.

10 MS. ROSEN: Good morning. I am Whitney Rosen with  
11 the Illinois Environmental Regulatory Group and,  
12 again, Marie, I know you are preparing to announce  
13 what time period by which post hearing comments are  
14 going to be due. I would just again reiterate my  
15 request to the Board that they rule on our motion to  
16 dismiss, which was filed I believe prior to the first  
17 hearing in this matter.

18 If they could rule on the motion to dismiss at  
19 some time prior to going to first notice or, you know,  
20 so we can resolve that issue and enable us to more  
21 effectively comment on the proceeding if, in fact, you  
22 chose to go ahead with the adoption of the proposal.  
23 Thank you.

24 HEARING OFFICER TIPSORD: The Board will take that  
25 under advisement.

1 At this time, after consultation with the parties  
2 and the Board Members present, we have determined that  
3 January 14th will be the date that we will establish  
4 for post hearing comments. And they should be served  
5 to persons on the service list on that date and should  
6 be received -- let's make them received by the Board  
7 on that date as well, January 14th.

8 At this time let me ask once again, for the  
9 record, is there anyone here who wishes to comment  
10 regarding the DCCA position on the Economic Impact  
11 Study?

12 Seeing none, is there anyone else who would like  
13 to comment today?

14 Also seeing nothing further, at this time, I would  
15 like to thank everyone for their participation. And I  
16 appreciate all the well thought out comments we  
17 received today, and it has been a pleasure. Thank you  
18 very much. The hearing is closed.

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1 STATE OF ILLINOIS )  
                                  ) SS  
2 COUNTY OF MONTGOMERY)

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4                   C E R T I F I C A T E

5

6    I, DARLENE M. NIEMEYER, a Notary Public in and for  
7 the County of Montgomery, State of Illinois, DO HEREBY  
8 CERTIFY that the foregoing 38 pages comprise a true,  
9 complete and correct transcript of the proceedings  
10 held on the 8th of December A.D., 1998, at 600 South  
11 Second Street, Room 403, Springfield, Illinois, in the  
12 matter of: Permitting Procedures for the Lake  
13 Michigan Basin: 35 Ill. Adm. Code 301 and 309.141, in  
14 proceedings held before the Honorable Marie E.  
15 Tipsord, Hearing Officer, and recorded in machine  
16 shorthand by me.

17    IN WITNESS WHEREOF I have hereunto set my hand and  
18 affixed my Notarial Seal this 14th day of December  
19 A.D., 1998.

20

21

                          Notary Public and  
22                        Certified Shorthand Reporter and  
                          Registered Professional Reporter

23

                          CSR License No. 084-003677  
24 My Commission Expires: 03-02-99

25

