

1 BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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In the Matter of:)	
)	
PROPOSED AMENDMENTS TO PUBLIC)	
PARTICIPATION RULES IN 35 ILL. ADM.)	R03-19
CODE PART 309 NPDES PERMITS AND)	
PERMITTING PROCEDURES.)	

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7 TRANSCRIPT OF PROCEEDINGS held

8 in the hearing of the above-entitled matter,
9 taken stenographically by STACY L. LULIAS, CSR,
10 before MARIE E. TIPSORD, hearing officer, 100 West
11 Randolph Street, Room 9-040, Chicago, Illinois, on
12 the 17th day of March, A.D., 2003, at 10:05 a.m.

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

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HEARING TAKEN BEFORE:

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Illinois Pollution Control Board,
100 West Randolph Street
Room 9-040

4

Chicago, Illinois 60601
(312) 814-4825

5

6 BY: MS. MARIE E. TIPSORD, Hearing Officer

7

ILLINOIS POLLUTION CONTROL BOARD MEMBERS:

8

Mr. G. Tanner Girard, Ph.D.

9

Mr. Michael Tristano

10

Mr. Richard R. McGill, Jr.

11

Ms. Doris C. Karpel

12

13 ALSO PRESENT:

14 Mr. Sanjay Sofat

15 Mr. Toby Frevert

16 Mr. Roy M. Harsch

17 Mr. Robert A. Messina

18 Mr. Albert Ettinger

19 Ms. Cindy Skrukrud, Ph.D.

20 Ms. Beth Wentzel

21

22 NOTE: Various public participants also present,
but not duly identified in the record.

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1 HEARING OFFICER TIPSORD: Good
2 morning. My name is Marie Tipsord, and I have been
3 appointed by the Board to serve as hearing officer
4 in this proceeding entitled in the Matter of
5 Proposed Amendments to Public Participation Rules in
6 35 Ill. Adm. Code Part 309 NPDES Permits and
7 Permitting Procedures. The docket is docket number
8 R03-19.

9 To my immediate left is Dr. Tanner
10 Girard, the lead board member assigned to this
11 matter. Next to Dr. Girard to his left is Board
12 Member Michael Tristano, and at the far end is Board
13 Member Doris Karpriel, who's has been assigned to
14 this matter. Between Member Tristano and Member
15 Karpriel is Richard McGill, who is serving at this
16 time as an assistant to Doris Karpriel.

17 Also with us are Anand Rao and
18 Alisa Liu, who are members of our technical unit;
19 Amy Antonioli, assistant to Nicholas Melas; and
20 William Murphy, assistant to Michael Tristano.

21 This is the first hearing to be
22 held in this proceeding. The purpose of today's
23 hearing is twofold. First, we will allow anyone who
24 wishes to make an opening statement, then we will

1 hear the pre-filed testimony of the Proponent in
2 this matter and allow questions to be asked of the
3 Proponent.

4 There are two persons who will be
5 testifying on behalf of the Proponent,
6 Cynthia Skrukrud and Beth Wentzel.

7 MR. ETTINGER: Three.

8 HEARING OFFICER TIPSORD: Oh, I'm
9 sorry. Albert Ettinger will also be offering
10 testimony this morning.

11 As the pre-filed testimony is not
12 lengthy, we will have the testimony read into the
13 record. We will allow all of the Proponent's
14 witnesses to testify before questions are asked.

15 When we get to the questioning
16 period, anyone may ask a question; however, I do ask
17 that you raise your hand, wait for me to acknowledge
18 you. After I have acknowledged you, please state
19 your name and who you represent before you begin
20 your questions.

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

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

6 At the side of the room are
7 sign-up sheets for the notice and service list. If
8 you wish to be on the service list, you will receive
9 all pleadings and pre-filed testimony in the
10 proceeding.

11 In addition, you must serve all of
12 your filings on persons on the service list. If you
13 wish to be on the notice list, you will receive all
14 Board and hearing officer orders in this
15 rulemaking.

16 If you have any questions about
17 which list you wish to be on, please see me at a
18 break. There are also copies of the current service
19 and notice list at the back of the room.

20 I would note that there's already
21 one address change that needs to be made to those,
22 so if you pick them up, check with me tomorrow.
23 There will be an address change.

24 At this time, Dr. Girard, would

1 you like to say good morning.

2 BOARD MEMBER GIRARD: Yes, good
3 morning. On behalf of the Board, I would like to
4 welcome everyone to the hearing this morning as we
5 consider changes to Part 309 of the Board's water
6 regulations.

7 We would like to thank the
8 Environmental Law and Policy Center of the Midwest,
9 the Illinois Chapter of the Sierra Club, the Prairie
10 Rivers Network, and the 225 citizens who bring this
11 proposal to us.

12 The essence of the proposal is to
13 clarify the public participation requirements for
14 issuance of NPDES permits.

15 The Board always has a keen
16 interest in improving our rules, so we look forward
17 to the testimony and questions in the hearing today.
18 Thank you.

19 HEARING OFFICER TIPSORD: Member
20 Tristano, Member Karpriel, do you have anything you'd
21 like to add?

22 BOARD MEMBER TRISTANO: No.

23 BOARD MEMBER KARPIEL: No.

24 HEARING OFFICER TIPSORD: Then at this

1 time, we'll begin with an opening statement by
2 Mr. Ettinger.

3 MR. ETTINGER: I don't have a long
4 opening statement.

5 I would just say that I don't
6 believe that these changes that are proposed would
7 have much effect on the day-to-day Agency
8 operations. In fact, I believe it's only the rare
9 case in which the proposed changes will have a
10 significant effect on the Agency's operations at
11 all.

12 However, in those cases in which
13 there is a significant controversy and there is a
14 tendency to have problems, this will spell out the
15 rules for those cases.

16 HEARING OFFICER TIPSORD: Thank you.

17 At this time, would anyone else like
18 to make an opening statement?

19 Mr. Messina, go ahead.

20 MR. MESSINA: Thank you.

21 Good morning my name is
22 Alec Messina, and I'm the General Counsel for the
23 Illinois Environmental Regulatory Group.

24 IERG has reviewed the materials

1 presented by the various environmental group
2 Proponents in this matter and has several concerns
3 with the proposal that has been advanced regarding
4 the procedures by which the Illinois EPA issues
5 NPDES permits.

6 Most of IERG's member companies
7 conduct activities governed by these permits issued
8 by the Illinois EPA, and thus, IERG members have an
9 interest in the procedure by which such permits are
10 issued.

11 There are just a few points I have
12 that I'd like to briefly highlight today.

13 First and foremost, IERG is
14 concerned with the stated justifications of this
15 rulemaking proposal in general, and specifically,
16 for that portion of the proposal that deals with
17 re-noticing permits after changes are made.

18 In short, the Proponents argue
19 that these changes are necessary to remedy the
20 supposed inadequacies of Illinois' regulations
21 regarding the opportunities for public
22 participation.

23 It is important to note that
24 Illinois' NPDES regulations were adopted by this

1 Board to enable the State of Illinois to administer
2 the National Pollutant Discharge Elimination System.

3 Subsequent to their adoption,
4 those regulations were reviewed by the USEPA. Those
5 regulations were improved by the USEPA. This
6 approval extended to all facets of Illinois'
7 program, permit issuance, compliance monitoring,
8 enforcement, and it's the reason for the delegation
9 of the entire program by USEPA in the State of
10 Illinois.

11 Since it's delegation, there have
12 been no changes in the federal requirements, states
13 must comply with people having the program delegated
14 to it.

15 There have been no changes
16 necessitating the review or amendment of Illinois'
17 and USEPA's delegation agreement with regards to the
18 rules for public participation.

19 Finally, in delegating the
20 NPDES program to Illinois, the USEPA has already
21 determined that Illinois public participation
22 opportunities are sufficient and consistent with the
23 Clean Water Act. IERG therefore believes no changes
24 are warranted.

1 Setting aside the dubious needs
2 for these changes, IERG has more specific concerns
3 with the proposal.

4 Much of the language is either
5 vague or contradictory. For instance, significant
6 and substantial, those two terms are used
7 interchangeably throughout the proposal signifying
8 the trigger or the need for re-noticing a permit
9 after changes are made. Neither term is defined.

10 If the Board finds that the
11 Proponents have shown a need for this proposal, IERG
12 believes that changes must be made to the language
13 to clarify it's requirements.

14 Also, IERG is concerned that this
15 proposal in its current form would add significant
16 time and cost to what is currently required by the
17 NPDES permitting process.

18 These new requirements could add
19 to the cost and time the Agency uses to notice and
20 review permits and conduct hearings using resources
21 currently used elsewhere. This, in turn, will add
22 to the time it currently takes for IERG members to
23 obtain new NPDES permits and renewals.

24 Finally, IERG appreciates the

1 opportunity to bring these issues to the attention
2 of the Board and we do look forward to participating
3 in this process as it moves forward. Thank you.

4 HEARING OFFICER TIPSORD: Thank you.
5 Would anyone else like to make an opening statement?

6 MR. HARSCH: My name is Roy Harsch.
7 I'm here today on behalf of the Illinois Association
8 of Wastewater Agencies. The Illinois Association of
9 Wastewater Agencies is an association that
10 represents a lot of the major publicly-owned
11 treatment works spread throughout Illinois, and in
12 such, has a keen interest in the issuance of NPDES
13 permits in a timely and cost-effective manner.

14 We share the Illinois
15 Environmental Regulatory Group's belief that these
16 rules are unnecessary. The NPDES permit regulations
17 have been on the books for a long period of time.
18 The regulations were carefully written taking into
19 consideration the difference that Illinois has
20 because we have a system where we have the Illinois
21 Environmental Protection Agency and the Illinois
22 Pollution Control Board.

23 We strongly recommend that the
24 Board read the opinion that accompanies the adoption

1 of the NPDES permit regulations in the mid 1970s.
2 As counsel for IERG has pointed out, nothing has
3 changed at the federal level.

4 We believe these regulations have
5 proved workable for a long period of time, and we
6 counsel the Board to look carefully before you adopt
7 changes. We are dealing in a period of time where
8 we have very large budget deficits that have to be
9 dealt with. Adding other layers of cost and delay
10 will have a propound effect potentially at the state
11 level.

12 HEARING OFFICER TIPSORD: Thank you.
13 Mr. Sanjay?

14 MR. SANJAY: Good morning. I'm
15 Sanjay Sofat. I'm an attorney with the Illinois
16 Environmental Protection Agency. With me today is
17 Toby Frevert, who is the manager of the Division of
18 Water Pollution at the Illinois EPA.

19 We are here today to provide the
20 Agency's initial remarks regarding the rulemaking
21 proposal that amends Part 309, NPDES Permits and
22 Permitting Procedures of the Board regulations.

23 The Agency appreciates the sincere
24 efforts of the proponents of this proposed

1 rulemaking. The Agency believes that there are
2 several provisions that would provide clarity to the
3 existing language of the NPDES permit regulations,
4 and would also document some of the Agency's
5 existing practices related to the NPDES permitting
6 process.

7 The Agency believes that several
8 provisions of the proposal, as filed with the Board,
9 lack clarity regarding the scope of the proposed
10 provisions and thus makes it difficult for the
11 Agency to provide a clear standing on each of the
12 proposed provisions.

13 Also, the proposal fails to
14 provide any details regarding the cost of
15 implementing the proposed provisions. The Agency
16 hopes that today's hearing and the upcoming hearing
17 or hearings would supplement the proposal to allow
18 the Agency and other stakeholders to have a clear
19 understanding about the Proponents' expectations
20 behind the proposal. Once such proposal is
21 established, the Agency would provide its detailed
22 perspective regarding this proposal.

23 Based on the initial review, the
24 Agency groups the proposal into the following three

1 categories:

2 The first category contains those
3 provisions that provide clarification to the
4 existing language of the regulations or Agency
5 practices or are required by the federal NPDES
6 regulations.

7 The Agency, in general, agrees
8 with these provisions. The Agency may, however,
9 propose to modify the language of some of the
10 proposed provisions to reflect a more accurate
11 statement of the regulatory requirement.

12 The second category contains those
13 provisions that are vague and difficult to
14 understand and thus no conclusions can be made at
15 this time about the meaning, intent or the proposed
16 requirement. The Agency would like to understand
17 the scope, context, and intent behind these
18 provisions at this hearing in order for the Agency
19 to provide its input to the Board.

20 The third category contains those
21 provisions that appear to fundamentally change the
22 existing NPDES permitting system. The Agency has
23 serious concerns with these provisions. These
24 proposed provisions are quite complex, cumbersome,

1 in come cases, unnecessary and contrary to the
2 statutory obligations of the Illinois NPDES program,
3 and has the potential to seriously impair the
4 Agency's statutory authority to issue NPDES permits.

5 The Agency is quite interested in
6 hearing the Proponents and the other stakeholders'
7 arguments in support or opposition of these
8 provisions. This would allow the Agency to further
9 consider the significance of these proposed
10 provisions.

11 At future hearings, the Agency
12 intends to provide testimony supporting its
13 position. Thank you.

14 HEARING OFFICER TIPSORD: Anyone else?

15 At this time, we will have the
16 Proponents sworn in and we'll let you begin with
17 your testimony.

18 (Witnesses sworn.)

19 MS. WENTZEL: My name is Beth Wentzel,
20 and I am the Watershed Scientist for Prairie Rivers
21 Network, a statewide river conservation organization
22 and National Wildlife Federation's Illinois
23 affiliate.

24 Prairie Rivers Network supports

1 the proposed changes to the existing regulations.
2 It is the intent of the Clean Water Act that the
3 public has full and fair opportunity to participate
4 in the NPDES permitting process.

5 The public should be allowed to
6 understand the basis for and comment on all terms
7 and conditions of the permits. For this to occur,
8 the changes and clarifications to the regulations
9 that are proposed should be adopted to ensure that
10 the public always fully understands how to
11 participate. Information demonstrating that the
12 permits satisfy all federal and state laws must
13 always be available to the public as part of the
14 record, and all terms and conditions of the permit,
15 including monitoring requirements, must be available
16 to the public for comment prior to issuance of the
17 permit.

18 The existing law requires that a
19 permit may not be issued that allows a discharge to
20 cause or contribute to water quality standards
21 violations; therefore, permit writers must currently
22 conduct appropriate analyses to determine that
23 permit conditions satisfy this requirement.

24 It is necessary to conduct all

1 such analyses prior to releasing the draft permit
2 for public comment, and it is only fair that such
3 analyses be made available to interested members of
4 the public.

5 Public participation is not
6 meaningful if people are allowed to see only the
7 terms of the comment without access to the
8 derivation of those terms and assurance that those
9 terms protect the waters of their communities.
10 Therefore, we emphasize our support for the proposal
11 to require that all information justifying permit
12 terms and conditions be incorporated into the
13 record.

14 In the case that information is
15 not available to justify all terms and conditions of
16 the permit at the time of the first draft, the
17 permit should not be finalized until such
18 information is available, and the permit should be
19 re-noticed prior to issuance in order that the
20 public has the opportunity to examine and comment on
21 additional information and modified terms. Fair
22 participation requires that the public have the
23 opportunity to raise concerns to the IEPA regarding
24 every term of the permit.

1 This opportunity for public
2 participation should be required for all terms and
3 conditions, including discharge monitoring
4 requirements. Because discharge monitoring is the
5 most effective, and in many cases, the only means of
6 determining compliance with effluent limitations,
7 the monitoring regime is an extremely important
8 condition of permits. To ensure that no permit is
9 finalized without this critical element of the
10 permit fully described, we feel that the proposed
11 changes to Section 309.146 are very necessary.

12 Finally, while many of the
13 regulatory changes proposed would not cause a change
14 in Agency practice for most permits, it is
15 appropriate that these requirements be formalized by
16 incorporation into the regulations rather than left
17 to the discretion of Agency staff. Public
18 participation in the NPDES process is too important
19 to subject unnecessary or inappropriate limitation.

20 Prairie Rivers Network urges the
21 Pollution Control Board to adopt these changes to
22 ensure that the public will always have full and
23 fair opportunity to participate in this process.

24 MS. SKRUKRUD: My name is Cindy

1 Skrukruud. I'm employed as the Clean Water Advocate
2 for the Illinois Chapter of the Sierra Club. I have
3 reviewed and commented on NPDES permits for the Club
4 since 2000.

5 I first began to study NPDES
6 permits issued in the Fox and Kishwaukee watersheds
7 in 1996 while employed by the McHenry County
8 Defenders, a county-based environmental
9 organization. I have participated in commenting on
10 a number of draft permits and participated in a
11 number of hearings on draft NPDES permits. This is
12 true, although McHenry County Defenders and the
13 Sierra Club comment on only a small fraction of the
14 draft permits that are noticed, and hearings on
15 draft NPDES permits are fairly rare.

16 The Sierra Club, Illinois Chapter,
17 along with Prairie Rivers Network, is proposing
18 amendments to Part 309, Subpart A, of the Illinois
19 Administrative Code Title 35 Environmental
20 Protection Act in order to better ensure full public
21 participation in the issuance of NPDES permits in
22 Illinois.

23 The process of the issuance of
24 NPDES permits necessitates that the Illinois EPA and

1 the information about the receiving water the Agency
2 is using to base its decision. Because members of
3 the public may have more intimate knowledge of a
4 water body than the Agency does, they may be able to
5 provide information about the water body and its
6 uses, which the Agency lacks.

7 This information could include
8 site specific knowledge of the use of the water body
9 by children (a factor important to the Agency's
10 consideration of disinfection requirements in the
11 permit) or by endangered and threatened species of
12 aquatic and other terrestrial life.

13 The public needs to be able to
14 fully understand the conditions of the permit. That
15 the public has the opportunity to review and comment
16 on the conditions that will appear in the final
17 permit is critical. The public must be able to know
18 about and comment on what will be discharged, the
19 limits on the discharge, and how these limits are to
20 be monitored.

21 Over the time period for which an
22 NPDES permit is issued (typically five years), the
23 monitoring requirements are the only means by which
24 the public (and the Agency) can gauge the impact

1 which the discharge is having on the receiving water
2 body. A special condition that is not properly
3 monitored under the permit is just a hollow promise.

4 The public should be able to
5 understand from the administrative record how the
6 conditions in the draft permit were derived and how
7 they will be monitored for compliance. Any
8 significant changes made in the draft permit after
9 it is gone out for public review should result in a
10 new public notice of the modified permit detailing
11 the changes which have been made.

12 The Illinois Chapter of the Sierra
13 Club believes that the amendments that we have put
14 forward will allow the public to better understand
15 and more fully participate in the review of NPDES
16 permit issuance in the State of Illinois.

17 The proposed amendments, if
18 adopted, will improve the Illinois process, improve
19 the public's ability to participate in the process,
20 improve Illinois permits and improve water quality.

21 MR. ETTINGER: I am Albert Ettinger.
22 I am senior staff attorney at the Environmental
23 Law & Policy Center of the Midwest and Water Issues
24 Coordinator and General Counsel for the Illinois

1 Chapter of the Sierra Club.

2 I've worked in Illinois on matters
3 relating to water pollution and implementation of
4 the federal Clean Water Act since 1982. I am the
5 primary drafter of the petition to amendment
6 Part 309, Subpart A.

7 Earlier drafts of the petition
8 were discussed with officials of Illinois EPA and
9 members of various interest groups concerned with
10 the NPDES permitting process. Various changes were
11 made to the draft in response to views expressed in
12 these discussions, but no consensus was reached as
13 to the proposal.

14 The proposal amends the most
15 recent version of the rule as published on the
16 Board's web site.

17 I would be pleased to answer any
18 questions by the Board or members of the public
19 regarding the proposal, the reasons that it is being
20 offered, or its expected effect.

21 I'd also, at this time, would like
22 to correct. Unfortunately, there were a couple of
23 typos in the brief in terms of referring to numbers.

24 On page seven, there's a reference

1 to 40 CFR 124.10(d)(5). That is a correct citation
2 for much of the language that was the source of the
3 rule. However, other language that was in the rule
4 comes from 124.8(b)(6). The 124.8 relates to fact
5 sheets. 124.10 refers to public notices. It
6 doesn't make any substantive difference which should
7 go under Illinois, because they, under the current
8 system, put out a combined fact sheet and public
9 notice.

10 HEARING OFFICER TIPSORD: Excuse me.
11 Mr. Ettinger, let me clarify that that is page seven
12 of the statement of reasons that you --

13 MR. ETTINGER: Yes, I'm sorry. Page
14 seven, the statement of reasons.

15 Another -- this has no substantive
16 meaning, but there's a typo. On page 14,
17 40 CFR 122.4(a), if you look at the -- I guess it's
18 three-fourths of the way down the page it says, the
19 Board could incorporate 40 CFR 122.4(a), although
20 above I refer to 122.44. That was, in fact, the
21 correct citation there. Where it says 4(a), it
22 should say 44(d)(1)(5) as the provision that could
23 be incorporated by reference.

24 On the following page, we do refer

1 to 122.48, which is in a similar situation and is
2 straight from the federal regulations and could be
3 incorporated, that we believe, as I state in the
4 statement of reasons, that these provisions are
5 central enough, the protections of the NPDES
6 program, that they should be contained in the
7 Illinois books. Thank you.

8 HEARING OFFICER TIPSORD: Before we go
9 to questions, could we go off the record for a
10 second?

11 (Whereupon, a discussion
12 was had off the record.)

13 HEARING OFFICER TIPSORD: Ready for
14 questions then? Are there any questions?

15 MR. ETTINGER: They said they had
16 questions in their opening statements. I guess our
17 testimony answered them all.

18 MR. SOFAT: Not too fast, okay.

19 WHEREUPON:

20 ALBERT ETTINGER
21 called as a witness herein, having been first duly
22 sworn, deposeth and saith as follows:

23

24

1 E X A M I N A T I O N

2 BY MR. SOFAT:

3 Q. I'm looking at your proposal,
4 Section 309.108(c).

5 A. Yes.

6 Q. Could you please explain the scope of
7 this proposed amendment?

8 A. I think it's stated that the statement
9 of the basis of the conditions is this preexisting
10 language. All this does is actually elaborate on
11 the previous clause. So it says, including a
12 description of how the conditions of the draft
13 permit were derived as well as the statutory or
14 regulatory provisions are appropriate supporting
15 references.

16 So what this would say is that --
17 it basically just provides further detail as to the
18 statement or the basis for EPA permit conditions
19 listed in Section 309.108(b).

20 Actually, this is my only copy of
21 this, but it might be useful to mark it, so maybe
22 we'll have to make copies of this. I happen to have
23 here a sample of IEPA's latest permit, or a draft
24 permit notice that they put out. And actually, I

1 think in many cases what you're doing now with the
2 permit notice already does what we're talking about
3 here. It says, for the affluent limit, and then it
4 states in the regulation where it comes from.

5 In some cases, there's a
6 calculation involved, for instance, with ammonia
7 limits. And generally, there is some sort of
8 attached document for what you're doing now that
9 describes how those calculations were made. In this
10 case, the anti-degradation statement went out with
11 the public notice. In fact, it explains some of the
12 basis that we're talking about.

13 Q. Okay, thank you.

14 HEARING OFFICER TIPSORD: Let's mark
15 that as an exhibit. We'll run and make
16 copies of this and then we'll mark that
17 Exhibit Number 1, if there's no objection.

18 Seeing no objections, we'll mark
19 that as Exhibit Number 1.

20 (Document marked as
21 Exhibit No. 1 for
22 identification, 3/17/03.)

23 BY MR. SOFAT:

24 Q. So in other words, there is no

1 additional requirement or additional expectations
2 you have other than what the Agency is already
3 doing?

4 A. Well, I think that's probably the case
5 in most cases. I -- no, I don't buy what you're
6 doing as to every permit, but many of the permit
7 notices I've seen would certainly satisfy this.

8 Q. Next section I'm looking at is
9 309.110(f)(3).

10 A. (F)(3), yes.

11 Q. Could you explain what you mean by
12 this additional requirement?

13 A. Well, actually, that was taken
14 verbatim from the federal regulations. And I
15 included it because this was the language that came
16 directly from 128.8(b)(6).

17 Obviously, if there are no
18 additional procedures that the public has other than
19 what you're already stating, this would have no
20 substantive effect.

21 If there are other procedures by
22 which the Agency feels that there could be public
23 comment or the public could participate in the final
24 decision, then those should be stated.

1 Q. So it's more of outlining what the
2 statutory or regulatory menus are for the
3 public to participate?

4 A. Exactly. What the federal regulation
5 calls for and what this calls for is that the public
6 be informed how they can participate in the process.
7 You're already doing much of this. The Agency is
8 already doing much of this.

9 What I did in drafting this
10 section was slavishly copy the language from the
11 federal regulation to track that.

12 The point here was not to change
13 your procedure in a normal case, but to assure that
14 this -- all of the things that are necessary and
15 have generally been recognized by the Agency as
16 necessary would continue to go forward and there
17 would be rules that assured that corners would not
18 be cut in the future.

19 Q. Okay. Thank you.

20 HEARING OFFICER TIPSORD: Before you
21 move on, I actually have a couple questions
22 about Subsection F as well.

23 One of those is when you refer to
24 a brief description of the formulation of

1 final determination, do you mean the
2 derivations used in determining the affluent
3 limits? Basically, what type of formulations
4 are you referring to?

5 THE WITNESS: What we're talking about
6 here is the procedures for coming up with the
7 final determinations. What we're looking at
8 now is a draft permit, so what we want is a
9 brief description as to how we're going to go
10 from the draft permit to the final permit.
11 So the language here simply calls for a brief
12 description of the procedure used in going
13 from the draft permit to the final permit,
14 which includes the public comment procedures.

15 HEARING OFFICER TIPSORD: So this
16 would then not be a description of, like,
17 derivations that you use to come up with the
18 tentative determinations?

19 THE WITNESS: No. The language that
20 Mr. Sofat referred to earlier is the language
21 that discusses that point in which we give
22 the public some idea how we came up with
23 these numbers, then the point of this is to
24 give the public some idea as to how to

1 participate further in the process if they
2 have questions or comments about the initial
3 numbers.

4 HEARING OFFICER TIPSORD: Thank you.

5 BY MR. SOFAT:

6 Q. Next section I have is 309.113(a)(5).

7 Could you explain the scope and
8 intent of this amendment?

9 A. This is a brief description of the
10 significant factual, legal, methodological and
11 policy questions considered in preparing the draft
12 permit. Is that the portion you're referring to?

13 Q. Yes.

14 A. That language, again, comes directly
15 from federal-required language and fact sheets,
16 which is in 124.8(a), which states the fact sheet
17 shall briefly set forth the principal facts and the
18 significant factual, legal, methodological and
19 policy questions considered in preparing the draft
20 permit. These are federal requirements that -- what
21 I believe the federal government intended was just
22 what it says, a brief description of major
23 questions.

24 I think in most cases, the

1 anti-degradation sheet in cases where there are
2 anti-degradation seems to fulfill that requirement
3 under your current practice.

4 I think the intent of the federal
5 procedure, and I've seen this in permits with other
6 states is that the Agency highlight for the public
7 in the fact sheet what the big issues are so that
8 there would be a brief description saying, you know,
9 please notice there's an important new mercury limit
10 in here or -- most of this permit is cookie cutter
11 in the way they handle every other POTW permit.

12 However, in this case, because of
13 the unique elements of the receiving water, we
14 considered the further additional elements.

15 So I would think that basically it
16 says exactly what the federal government meant to
17 say, which is that you should highlight the major
18 issues involved in the permit, and if there aren't,
19 I would expect it would be a very brief section.

20 Q. If you look at 309.113(a)(3) --

21 A. Is this my procedure or the current
22 rule?

23 Q. That says the tentative determinations
24 required under Section 309.108.

1 Do you think that section you are
2 amending, that is, 309.113(a)(5), is covered under
3 the existing 309.113(a)(3), because that requires a
4 detailed packet of determination under 309.108?

5 A. I'm sorry. Find me the --

6 Q. I'll try it one more time.

7 A. All I need is the part of 309.108.

8 Q. My question is, by adding
9 309.113(a)(5), are we duplicating what is already
10 existing?

11 A. I think to a large degree you are not
12 duplicating what's already existing, but I think a
13 lot of what you're already doing is covering that,
14 and some of the language here does overlap with what
15 is in the existing rule.

16 Q. That is your understanding?

17 A. That's my understanding. I think
18 there is some -- there is some language here in the
19 federal rule that's not -- the flavor of it at least
20 is not captured in the existing rule in terms of
21 discussions of policy questions and things like
22 that, which does not seem to be in the existing rule
23 and is in the federal requirement.

24 I don't think, however, that I

1 agree with you certainly in the cases in which
2 there's an anti-degradation analysis now. I don't
3 think this would add anything to what you're doing
4 assuming you continue what you are doing.

5 Q. Next section I have is 309.105(f).

6 A. Yes.

7 Q. Could you explain how this amendment
8 would be implemented?

9 A. I'm sorry. 309 -- oh, we're back to
10 the beginning.

11 Q. Yes.

12 A. 309.105(f)?

13 Q. Yes.

14 A. It would not be implemented by the
15 Agency except in making sure that the public had a
16 fair opportunity to comment on the entire permit,
17 would chiefly be implemented by the Pollution
18 Control Board in those relatively rare cases in
19 which something went wrong in the Agency proceeding.
20 And it's hard to predict what that would be. All
21 sorts of things can go wrong in a tough case. This
22 would give the Board a handle in the rule to
23 overturn the Agency action in that relatively rare
24 case in which something went wrong.

1 This was the handle that the Board
2 found it did not have in the Black Beauty case in
3 which the Appellate Court found that the Board did
4 not have in the Black Beauty case.

5 If you read about case law or in
6 agencies or in front of courts, all sorts of strange
7 things happen. It doesn't say anywhere in the
8 Illinois Code that judges shouldn't fall asleep on
9 the bench, but every once in a while, they do. And
10 when they do, the Appellate Court goes under a
11 general principle saying this wasn't a fair trial
12 because the judge fell asleep on the bench even
13 though they don't have a specific rule to point to
14 saying the judge must be awake at all times on the
15 bench.

16 And what this does really is give
17 an opportunity for the Board to oversee the
18 proceeding if they feel something really went wrong.
19 It's a candid fundamental fairness review that takes
20 place under SB 172 procedures that -- and the county
21 boards underestimate 172 -- there's been a handful
22 of cases. I forgot. It's like ten over 20 years in
23 which a county board -- there's something that was
24 so far off that the Board felt that they were

1 fundamentally unfair.

2 And although this doesn't track
3 that procedure exactly, that's the story of
4 implementation that I would expect in which the
5 Board said, gee, the hearing officer sure shouldn't
6 have cut off everybody after one second of speaking,
7 or it's too bad that during the public hearing the
8 building caught fire, that they really needed to
9 have a second public hearing given what happened.

10 You can't anticipate what would go
11 wrong in the beginning. That's why we have these
12 sort of cover-all provisions, like the one under the
13 fairness provision, which looks at the overall
14 procedure.

15 Q. Is this a requirement exactly from
16 federal regulations?

17 A. It is not -- some of the things we've
18 talked about in terms of federal regulations are a
19 direct quote of federal regulations. I believe,
20 however, that this is a federal requirement in the
21 sense that the Clean Water Act requires it.

22 I think it's quite clear that the
23 expectation of the Clean Water Act is that the
24 public would have this, and according to my

1 admission of the Clean Water Act, the fact that it's
2 made clear and that Congress intended the public
3 have a very full role in looking at the terms of
4 these permits.

5 So while this is not a verbatim
6 quote of federal regulation, I think it puts into
7 place in a more -- a principle which is a
8 requirement of the federal Clean Water Act.

9 Q. How will we make a determination that
10 this is a fair -- that there was a fair opportunity
11 to comment, do you have any guidelines?

12 A. I think what we're going to be looking
13 at generally is that the Agency is normally going to
14 be doing what it generally does.

15 I think it's a very rare case in
16 which this is going to come up, frankly. The
17 problems in Agency procedures have only shown up in
18 recent periods because it's only recently that the
19 public has had much role in this case, and it's only
20 recently in which the public could take
21 third-party appeals.

22 So when we look at 20 years --
23 that these rules have been in effect 20 rules,
24 that's really not true. The third-party appeal

1 provision has been in effect only a few years, and
2 the first time it was used, we found problems.

3 The way the Agency would implement
4 this is trying to be fair. And I think actually if
5 you go back and look at your record and what the
6 Agency used to do when they made changes in permits
7 which they thought were significant, they re-noticed
8 them. I have many, many re-noticed permits that the
9 Agency did as a result of the changes in the ammonia
10 rules.

11 What the problem is is that the
12 way the law is now as it has been interpreted, in
13 that rare case in which the Agency may have made a
14 mistake and improperly cut off public participation,
15 there's apparently no avenue for review. So this
16 creates that avenue.

17 Q. But you agreed that there may be
18 chances there where the Agency believes to be a fair
19 way of doing business could be interpreted as not so
20 fair to others?

21 A. Correct. In those cases, I would
22 expect the Pollution Control Board would be the
23 decision-maker who would decide whether the Agency
24 was correct or not.

1 Q. Would you explain what you mean by all
2 substantial terms?

3 A. Well, pretty much all the terms of the
4 permit should be subject to comment.

5 Now, what we're talking about is
6 if there had been a last public notice or something,
7 you decide to add a comma or a semicolon where there
8 used to be a colon or something, I think that that
9 point you'd say, we didn't need a right to comment
10 on that. Futhermore, of course, it would be pretty
11 silly to somebody to bring an appeal on the basis of
12 something like that.

13 But essentially, the whole permit,
14 I think there's a lot of parts to the permit,
15 obviously, the affluent limits. The monitoring is
16 very important because without the monitoring, the
17 affluent limits may be meaningless.

18 The special conditions in some
19 cases would be very significant and how the special
20 conditions are monitored may be very important to
21 the public, and it may make the difference between
22 it being a protective permit and being a worthless
23 permit, and so I think that's what's intended there.
24 I know that's what's intended.

1 Q. The next section I have is 309.105(g).

2 A. Right.

3 Q. Could you explain how and who will
4 make the determination that the permit or the permit
5 conditions or procedures used to draft or issue the
6 permit are not consistent with the federal law?

7 A. Well, this is similar to that in that
8 it is a guiding principle, which I believe should
9 direct how the Agency does its business in the first
10 place, and, in fact, how I think the Agency has
11 always tried to do its business. In fact, I may
12 offer an exhibit later showing -- or statements in
13 which the Agency has told region five that they
14 follow this now. They believe that the federal
15 regulations do track -- or rather, that the State
16 regulations do track federal requirements.

17 What I think will happen in the
18 first place is that the Agency will continue to do
19 what it claims to be doing, which is following the
20 federal Clean Water Act. How it will be enforced in
21 the second instance is it's the Pollution Control
22 Board. And again, if the Agency deviates from the
23 federal requirements, it will then be the duty of
24 the Pollution Control Board to decide whether or not

1 there was a significant enough deviation or there
2 was a deviation such that the permit should be
3 overturned. And then, given our appeal, the
4 procedure would then be the Appellate Court, if
5 somebody still wanted to take this further.

6 I don't think this is going to
7 be -- it's an overall guidance principle. It's
8 something that the Agency is already trying to
9 implement now. Unfortunately, under the rules as to
10 what the current State of Illinois law is, the Board
11 and the Appellate Court feel that they cannot apply
12 this principle in reviewing Agency decisions. So
13 although the Agency has always felt it had to comply
14 with federal law, apparently, the Board and the
15 Appellate Court believe that they don't have to
16 comply with these provisions in the federal law, and
17 thus, State law could diverge from federal law.
18 And, in fact, the Appellate Court seems to be saying
19 fairly clearly, if you think State law has emerged
20 from federal law, that two remedies can come here to
21 the Pollution Control Board or you can go back to
22 USEPA and try and get the program changed that way.
23 I think this is the better way to do it.

24 Q. So the proposed 309.105(g) would

1 require the Agency to first make a determination, at
2 least make an attempt, to see whether or not this is
3 consistent with the applicable federal law?

4 A. It wouldn't require any finding. It
5 would require that you do what you're already trying
6 to do, which is comply with federal law.

7 Q. Then we won't need this proposal,
8 right?

9 A. Well, the problem is is that in the
10 cases in which there's a disagreement as to whether
11 or not --

12 Q. I understand.

13 A. -- you have complied with federal law,
14 there's currently no appeal.

15 MR. FREVERT: Ask the witness to
16 re-state that. What did he say?

17 THE WITNESS: What I said is, if
18 there's currently a disagreement as to
19 whether or not the Agency has applied federal
20 law properly, you cannot appeal the permit to
21 the Pollution Control Board, because the
22 Pollution Control Board believes the Black
23 Beauty decision that it's only free to follow
24 the layer of its own rules, and so if there's

1 no provision like this and the Board rules,
2 it cannot review the permit for sufficiency
3 of compliance with federal law. And
4 apparently, the Appellate Court also believes
5 that. So the only relief that -- basically,
6 no relief from a permit which would violate
7 federal law under the current system, you can
8 go to federal government, they do not
9 generally review NPDES permits. That's
10 also -- even if one would wish to do that,
11 that's a very complex and ugly procedure that
12 I don't think we want to use on a systemic
13 basis due to its potential to really clog up
14 the entire State system.

15 BY MR. SOFAT:

16 Q. Thank you.

17 The next section is 309.113(a)(8).

18 A. Yes.

19 Q. Could you please explain the purpose
20 for requiring a summary for the re-issued permits,
21 summary of the changes that are made to the permit
22 for the re-issued permits, not the modified permits?

23 A. I will explain on that that the
24 terminology used by the Agency in its permits has

1 not always been completely consistent.

2 There has been a -- yes. Some
3 cases you'll have a renewed permit or a permit which
4 is re-issued at the end of its five-year period, so
5 if it's not a modified permit within the five years,
6 we're now looking at essentially the renewal of the
7 old permit.

8 However, the terminology I believe
9 used by the Agency in the cases of those is a
10 re-issued permit even though some changes have been
11 made.

12 So let's say we have a discharger
13 who has been discharging under a particular permit
14 with a particular set of affluent limits and
15 conditions for five years. If you modify the permit
16 in the middle of the five years, it will be a
17 modified permit for change. However, if you renew
18 the permit, at the end of five years, there might be
19 changes in that renewal, and I believe that would
20 still be called a re-issued permit by the Agency.
21 And that has confused a number of members of the
22 public who assume when it's re-issued that it's
23 re-issued verbatim from the earlier permit. But
24 sometimes there have been changes in the re-issued

1 permit that we haven't caught because we didn't see
2 that there were changes between the last permit and
3 the new permit.

4 Q. So your expectations are that the
5 Agency should summarize the changes between the
6 re-issued permit and the immediate permit before
7 that, not all the permits prior to that?

8 A. Well, they should flag them in some
9 way, because what happens now is you've got a draft
10 permit and it just says re-issued permit, and the
11 general expectation when it said re-issued permit
12 was that that meant that was the same permit that
13 they had before and nobody should give much thought
14 to it because we were simply issuing the same permit
15 out again. That hasn't been the case, and I know
16 for a fact that people have been confused about
17 that.

18 Q. What do you think people would like to
19 see in that summary, the substantive changes or
20 everything and anything?

21 MS. SKRUKRUD: If the limits have
22 changed.

23 BY THE WITNESS:

24 A. Yeah, a summary of changes if the

1 limits have changed and --

2 MS. SKRUKRUD: Well, one thing is I
3 think that if you have a re-issued permit and
4 there have been changes between the current
5 permit, if that information is put in the
6 fact sheet, it actually saves us having to
7 contact the Agency and request a copy of the
8 current permit. I think it -- by just
9 highlighting the changes in the fact sheet,
10 it will actually save the Agency effort in us
11 -- it would eliminate us having to follow up
12 to determine if there's been those kinds of
13 changes.

14 BY MR. SOFAT:

15 Q. Next I have Section 309.108(e).

16 A. Yes.

17 Q. Could you please elaborate on the
18 requirement that a draft administrative record be
19 prepared by the Agency?

20 A. Well, essentially what it means is
21 that you should keep track of the documents that you
22 have based the draft on, and that these documents or
23 other materials should support the tentative
24 decision. Thus, you will have a file such that we

1 know what's in the records supporting the draft
2 decision.

3 Q. Is this requirement different than
4 what the Agency is already doing with this
5 requirement?

6 A. I wouldn't have thought so; however,
7 there have been cases, at least one case, in which
8 we had a permit appeal and there was some ambiguity
9 as to what was contained in the Agency record, and a
10 lawyer for the permit applicant wanted to offer
11 various charts and maps, and there was some debate
12 in the record as to whether or not this was part of
13 the Agency record or not. I might add this is not
14 an -- I don't believe the IEPA has been a particular
15 problem in this. We have this all the time with the
16 Core, in which the Core of Engineers doesn't know
17 what's in this Agency record.

18 So what we would simply want to
19 know, particularly since any appeal is limited to
20 the Agency record, what is in the records. So you
21 should have a collection of documents or other
22 materials which support your initial decision.

23 Q. As you know, the Agency already
24 maintains those records, like permit files. This is

1 not a separate record that we are talking about, is
2 it?

3 A. Well, it would not necessarily be a
4 separate record, it would be a separate enumeration
5 perhaps within the record. I don't know exactly
6 what the Agency maintains. All I'm saying is that
7 later on in the process, when it comes to saying
8 what is the record on which you based your decision,
9 we want to be able to see that record.

10 Q. Thank you. The next section I have is
11 309.109(a).

12 A. Yes.

13 Q. What would be the utility in requiring
14 re-noticing of a substantially changed draft permit?

15 A. We're getting to this overall problem.
16 This is the first place in which there's a reference
17 to this procedure.

18 Q. Right.

19 A. This -- obviously, there's a whole set
20 of rules that relate to this overall issue, which
21 has been the interest here, or one of the major
22 elements of interest here.

23 If the permit has changed
24 substantially, then the public has not had a chance

1 to comment on those changes. And so the need to
2 allow public comment is there to re-notice it so
3 people can see how it has changed.

4 If you go in, there are a number
5 of ways, but as I believe, it's described pretty
6 well in the decision by Administrator Whitman in
7 regard to a different permit that if you show the
8 public one permit and then you change it after you
9 show it to them in a way that's significant enough
10 so that you can say, we really didn't get to see
11 this permit before, then you've got to show it to
12 him again or else he will deny the public the
13 opportunity to comment on the terms in the final
14 permit.

15 Q. Would extending the comment period be
16 serving the same purpose?

17 A. No, it wouldn't, if it was still
18 extending the comment period on the draft permit
19 people saw before.

20 So if I put out a draft permit
21 that says the mercury limit shall be one milligram
22 per liter, that's way higher than it would ever be.
23 So let's say the ammonia limit should be one
24 milligram per liter, then after thinking about it

1 for a while we decide to double that ammonia limit
2 to two milligrams per liter, the public never got a
3 chance to comment on that second limit. Probably
4 there may be people who would be totally
5 unconcerned about one milligram per liter who would
6 become concerned at two milligrams per liter, in
7 fact, that might well be the case. So if you slide
8 through a public notice which says this and then you
9 produce that without giving the public a chance to
10 look at it, you're really denying the public the
11 opportunity to comment on the program.

12 Q. Thank you. The next section I have is
13 309.120.

14 A. Did you ask a question?

15 Q. No, not yet.

16 Q. Could you explain the concept and
17 the purpose behind this provision?

18 A. Well, the concept and the purpose is
19 to put up or shut up. That everybody who has a
20 comment on the permit has to make the comments
21 during the comment period, and that allows the
22 Agency finality on what the comments are. And I
23 don't think it's fair to the Agency for people who
24 hold back comments and try to make them after the

1 end of the comment period.

2 Q. That is the sole purpose for this
3 whole provision?

4 A. That's basically it. I mean, I
5 haven't -- I'd have to re-read the whole thing. I
6 haven't memorized this provision, but that's the
7 basic thrust of this provision is that if you're
8 going to have a comment period, the comments need to
9 be made during the period. I think that's already
10 encapsulated in the State law regarding reviews to
11 the Pollution Control Board that it's going to be on
12 the Agency record and that you need to raise the
13 points below in some way before you can come to the
14 Pollution Control Board and complain about something
15 the Agency's done, you need to give the Agency a
16 chance to correct it itself.

17 So for example, it would be
18 completely unfair to everyone for the Agency to go
19 through working on a permit, not knowing that there
20 was some sort of swimming use in the water
21 downstream that it was unaware of and then for
22 somebody to raise their hands after the public
23 comment period was over and say, oh, I go swimming
24 there every once in a while, now I want you to

1 change the disinfection rules. I don't think that
2 would be allowed under current State law when it
3 should be made explicit in the rules so that people
4 know that they have to put up during the Agency
5 comment period or they won't be allowed to raise the
6 issue later.

7 Q. Is there any requirement of this
8 provision I'm talking about, 309.120 --

9 A. Yes.

10 Q. -- as a whole that would be
11 contradicting the State law? Do you think there is
12 any provision or requirement?

13 A. No, I do not. There is a provision, I
14 believe, in the permit -- well, I guess the answer
15 is no.

16 Q. Next is Section 309 --

17 HEARING OFFICER TIPSORD: Excuse me.

18 I have a few housekeeping questions about
19 that section, 309.120.

20 There are two references to EPA in
21 309.120. Is that USEPA or did you mean that
22 to mean the Agency?

23 THE WITNESS: That is meant to be IEPA
24 in this context. I apologize for that. As

1 you probably have figured out, what I did
2 here was lift that whole sale of provision,
3 which is in the federal regulations,
4 governing how federal permits are handled.

5 This regulation is not mandatory
6 on the State; however, I believe it is a
7 model as to how the federal government
8 handles its own NPDES comments in cases in
9 which it is the considering agency. And ICI
10 didn't catch one or two of the references to
11 EPA that happened --

12 HEARING OFFICER TIPSORD: You also
13 have a parenthetical at the end of that
14 section, do you mean for that to be a
15 requirement or is that more of a Board note?

16 THE WITNESS: That, again, is from the
17 federal rule, and I think it is -- actually,
18 it's implicitly already contained in the
19 Board rules, which talk about at least a
20 30-day comment period. So this essentially
21 would not do much to your current rules,
22 which suggest implicitly that a comment
23 period later than 30 days might be necessary
24 in some cases.

1 Again, what I did here, as we did
2 in many cases, was we had actually gone
3 through a number of drafts beginning
4 sometime last August on this. So that
5 language came from Prairie Rivers, some of it
6 came from Cindy, some of it came from me.

7 But in this case, what we did do,
8 again, is take the federal language and use
9 it as guidance as to how we should at least
10 look at the federal language as a way that we
11 might want to operate here in the cases of
12 these thorny issues that we have thought
13 through.

14 HEARING OFFICER TIPSORD: Thank you.

15 BY MR. SOFAT:

16 Q. Section 309.121.

17 A. Yes.

18 Q. If possible, could you give an example
19 when this section would be triggered? What would
20 trigger the section's application?

21 A. You go through the public notice and
22 issue a draft permit, and then somebody comes in
23 with a comment that an endangered species or some
24 threatened endangered species directly below the

1 discharge that you weren't aware of and now you
2 might want to re-open the record to consider how
3 sensitive that critter was. Maybe there is a
4 swimming use you weren't aware of when you first
5 noticed the permit. There are a number of
6 circumstances in which it might be thought useful by
7 the Agency to reconsider the matter in light of new
8 information that you found after issuing the initial
9 draft.

10 Q. Do you think this provision would put
11 additional procedural and resource burden on the
12 Agency?

13 A. I don't think so. I think -- first of
14 all, it says may order. In most cases, the Agency
15 is not going to do this. It's going to be a fairly
16 rare case in which you would want to actually
17 re-open the record. It would have to be a case in
18 which something was overlooked in the original
19 situation. The Agency does not make that mistake
20 very often.

21 I have seen cases in which the
22 Agency on its own motion re-opened the record
23 currently in circumstances like that. Sometimes
24 something that's happened, I don't know if it's

1 happened as much recently, but something you would
2 see a lot was just plain typos in the permit.

3 I had one in which the limit -- I
4 forgot, but it was 100 times or ten times the
5 arsenic limit. And it wasn't that the Agency
6 intended to put ten times more arsenic in the water
7 than what their own workshop said. This was a
8 typing mistake. So that was re-noticed. And
9 there's a lot of cases like that.

10 A favorite trick used to be to put
11 the acute limits in the chronic column and the
12 chronic limits in the acute column. Quite a number
13 of those. In those cases, they were generally
14 re-noticed, and there was another notice put out and
15 the record then was re-opened with the correct
16 public notice showing the numbers as they were
17 actually intended to be by the Agency in this case.

18 Q. Thank you. Last section is 309.122.

19 Just as you did for 309.121, could
20 you explain what this provision would trigger?

21 A. Well, it would trigger basically in
22 the situation in which the Agency has, on the basis
23 of whatever information, decided to substantially or
24 significantly modify the permit, and it would have

1 to then give people a chance to look at the modified
2 permit.

3 As I said, this was fairly clearly
4 illustrated in the case that was handled by
5 Administer Whitman referring to an air permit in
6 which the air permit was put out for comments, they
7 got a lot of comments, USEPA decided to change the
8 permit substantially in response in some ways to the
9 comments that were made, but Administer Whitman felt
10 that they should again show the permit again to the
11 public because it wasn't the same permit that they
12 had seen in the first place.

13 The word significantly, frankly,
14 is somewhat vague. However, I will point out it's
15 used already throughout the Illinois rules. That
16 doesn't mean that the Board was incompetent when it
17 used significantly in other portions of the Board
18 rules. But what they did -- what the -- in many
19 cases, it's just -- well, like in 309.115(a)(1),
20 significant occurs, in 309.119, the Board again uses
21 the word significant in terms of whether or not you
22 should have a public hearing when it's a significant
23 showing of public interest. And that's because we
24 can't spell out everything exactly in the words of

1 the statute or the words in the regulation.

2 There's all sorts of instances in
3 the law in which we simply have to say probable
4 cause or reasonable doubt, and we use a term which
5 is somewhat vague because we can't spell out
6 everything in advance. The law is in constant
7 conflict between trying to spell out all the
8 details, knowing that if you spell out the details
9 too much, then there will be cases that don't fit
10 within the pigeon holes which you have, and having
11 language which is so general that it doesn't mean
12 anything.

13 And so what this language does
14 here is it gives in this case a direction as to when
15 you should do it. In most cases, I'm certain the
16 Board would defer to the Agency's judgment.
17 However, it may happen in the course of Agency
18 permitting that sometime the Agency will decide to
19 do one thing and the Board will decide the Agency
20 really blew it, and that will be the case that we'll
21 discuss, but it happens all the time in order of
22 conflicts.

23 And right now the Board -- the
24 Agency can decide not to hold a public hearing on

1 the grounds that the Agency felt that there was not
2 a significant showing of public interest. But with
3 their complaint, then that very same word,
4 significant, would be the key question that the
5 Board would have to decide what was a significant
6 level of public interest.

7 Q. So in other words, there won't be any
8 guidelines to determine what is significant under
9 309.122?

10 A. I don't think that's true. I believe
11 the Agency has always operated under common sense.
12 And in most cases, it's knowledge as to what's an
13 important change, it's knowledge as to permitting
14 give it a great deal of guidance, the same way that
15 the other places in which the Agency has had to
16 decide what does cause or contribute mean, what does
17 significant mean, when is there a reasonable
18 likelihood of a violation of something. These are
19 all inherently great terms, but the Agency applies
20 it in its expertise, in using its experience in
21 handling these matters, and it's very rarely
22 requested on these issues. And that's the same
23 guide as we'd have to use in other things.

24 MR. SOFAT: Thank you. I don't have

1 any further questions.

2 HEARING OFFICER TIPSORD: Are there
3 any further questions?

4 MR. HARSCH: Albert, I have a
5 clarifying question. It's a real world
6 question.

7 E X A M I N A T I O N

8 BY MR. HARSCH:

9 Q. On, for example, the Fox River Water
10 Reclamation District NPDES permit hearing, you will
11 recall that you objected on those NPDES permits up
12 there arguing that they shouldn't get credit for
13 dilution water, calculating -- I'll simplify the
14 issue for the Board.

15 Dilution water for calculating all
16 these numbers --

17 A. Okay.

18 Q. -- and submitted comments to the
19 Agency on the permit.

20 A. Right.

21 Q. And Fox River submitted comments to
22 the Agency, and the Agency ultimately issued the
23 permit.

24 Let's assume that the Agency had

1 public notice of a permit that had an ammonia limit,
2 of your example of .1, and you had -- had your
3 comment been accepted that the limit would have been
4 .05, and because of Fox River's great comment, they
5 ultimately issued -- the Agency accepted Fox River's
6 comments, technical arguments, and decided that they
7 wanted to re-issue a permit with .2.

8 So we had comments from you on an
9 ammonia limit that would have issued a permit,
10 technically, a much more restrictive permit, Fox
11 addressed the amount determined to be less
12 restrictive than that which was originally public
13 noticed.

14 Under your rule, proposed Section
15 309.122, would the Agency issue that permit without
16 going back out to public notice?

17 A. I think you'd have to look at that in
18 context. I think in that case the safer thing to do
19 would probably be to public notice it. However, if
20 there are reasons not to, you might try not to.

21 Q. That's part of the problem that we've
22 got. Your issue is properly addressed currently
23 before the Agency, it's been public noticed --

24 A. I believe in that case that the Agency

1 could probably put out the final permit with .2
2 saying that this doesn't significantly vary from the
3 draft permit because the issues had all been raised.

4 Q. In answer to one of your questions, it
5 seemed like the only way it would not be a
6 substantive change, with all due respect, is if the
7 Agency was issuing a permit that did not have a
8 lessening of change in it?

9 A. Right. I think what you have to do is
10 look at the entire situation in context, and that's
11 what the Agency would, in fact, do.

12 If they had put out -- let's just
13 make it one, two, three. Let's say they had put out
14 one in the first place -- or they put out two in the
15 first place, you wanted three, we wanted one, then
16 the issue has been joined, so to speak.

17 If they put out two in the first
18 place, there were no comments on that, then they
19 went to three, I think there'd be a problem with
20 that. Because of the way the process works, the
21 public only looks at what the draft permit is and
22 they only comment on things that they have
23 objections to.

24 I hope you don't want us to be put

1 in a situation which we are in effect forced to file
2 a comment letter as to every affluent limit and say,
3 we like this one, we like this one, we like this
4 one, because then they'll get an infinite number of
5 comment letters.

6 Q. That --

7 A. Because then -- that's what the
8 situation would be.

9 So I think what you've got to do
10 in that case is basically if you deviate on an issue
11 that hasn't been explored, that's going to be a
12 significant change.

13 I think that all the cases that we
14 talk about or that talk about it in the federal
15 context, in another context, of changes on whether
16 it's within the scope of what was considered by the
17 initial comment period would have to be looked at.

18 HEARING OFFICER TIPSORD: Anything
19 further?

20 BOARD MEMBER GIRARD: I have a
21 question.

22 Looking at Section 309.107, this
23 is where you say when the Agency determines
24 that an application for an NPDES permit is

1 complete, it shall -- and what I'm looking at
2 is Subsection C where you say, subject to any
3 memorandum of agreement between the Agency
4 and the IDNR notified IDNR, I just wonder if
5 you could give us a better idea of what is
6 involved in that notification.

7 MR. ETTINGER: We believe that the
8 State should call upon all of the biological
9 expertise that's available to it. In many
10 cases, that's IDNR, particularly, the State
11 Water Survey or the State Natural History
12 Survey, and those people have a lot of
13 information. And it's important that they
14 get notices of draft permits so that they can
15 look at it based on the information that they
16 have.

17 There have been problems like that
18 in the past in which they discovered only
19 very late or too late that a permit was being
20 proposed to discharge in an area where there
21 were important State endangered species that
22 might be injured by that discharge.

23 What this is intending to do is to
24 assure that the Agency get notice. I

1 understand, however, that the -- I'm sorry.

2 That the Department get notice.

3 I understand, however, that the
4 Agency and the Department, however, are aware
5 of that problem and want to address it, and
6 at the time this was being drafted, I was
7 told they were actually negotiating a
8 memorandum of understanding whereby DNR would
9 specify what types of permits it wanted to
10 see. Perhaps later when it comes time for
11 the Agency to give its views on this, they
12 could tell us where those discussions stand.
13 But the idea here was to make sure that DNR
14 got notice subject to this memorandum of
15 understanding, which, I believe, if it hasn't
16 already been worked out is being worked out.

17 MR. FREVERT: I can answer that now,
18 if you want?

19 HEARING OFFICER TIPSORD: Sure. Swear
20 him in.

21 (Witness sworn.)

22 MR. FREVERT: My name is Toby Frevert.
23 I'm the manager of the Division of Water Pollution
24 Control of the Illinois EPA.

1 In specific reference to Albert's
2 question, we have a draft memorandum of
3 understanding with DNR addressing how we relay and
4 exchange information to one another on permitting
5 issues. That MOU will be hopefully expanded and
6 finalized as rapidly as reasonable.

7 Quite frankly, the whole process
8 has slowed down significantly due to staff and
9 budgetary limitations primarily with DNR, but also
10 with our Agency. They simply don't have as many
11 staff around to deal with issues. But the intent is
12 there and the program is going forward. In the
13 meantime, there is an existing program in place
14 where all application receipts are communicated to
15 them and they are attempting to identify those high
16 priority applications if they have the staff, time
17 and expertise to address it.

18 BOARD MEMBER GIRARD: Thank you.

19 HEARING OFFICER TIPSORD: Anything
20 else?

21 BOARD MEMBER GIRARD: No.

22 HEARING OFFICER TIPSORD: I have one
23 clarifying question.

24 In 309.121, that language is

1 pretty much verbatim from 40 CFR 124.14. The
2 exception is that in what -- in 309.121, I
3 believe you have it one, you've re-numbered
4 the page as it goes forward.

5 You talk about any person may file
6 a written response to the material filed by
7 any other person by a date, a date not less
8 than 30 days after the date set for filing of
9 the material.

10 I believe the federal language
11 allows for 20 days. Is there -- could you
12 explain why you felt 30 days was more
13 appropriate?

14 THE WITNESS: I guess the quick answer
15 is no, I can't remember why I used 30 rather
16 than 20 there. And frankly, I had a memory
17 that that change had been made, so I -- most
18 things done in Illinois are either 30 days or
19 35 days. I don't know where the 35 comes
20 from. I guess the Bible someplace or
21 something. But the 20 days -- if the 20 days
22 is the federal rule and somebody feels it
23 should be 20, I don't think that would be a
24 problem for us.

1 HEARING OFFICER TIPSORD: Thank you.

2 Are there any further questions? All
3 right, thank you. Could we go off the record
4 for just a minute?

5 (Whereupon, a discussion
6 was had off the record.)

7 HEARING OFFICER TIPSORD: And we'll
8 let Toby go ahead.

9 MR. FREVERT: Thank you.

10 We've worked with Albert and his
11 people on this draft for several months now, and, in
12 general, I think we're in full agreement with the
13 areas where we can update and refine the language of
14 the program are those pieces of the program that I
15 believe are reasonably functional and acceptable to
16 everybody.

17 I'd say the single major concern I
18 have is in language that implies an obligation to go
19 back to public notice and perhaps hearing a second
20 and third and fourth time on a draft permit when
21 perhaps -- well, specifically, the issues being
22 contested have fully been out there in the open and
23 commented on both written comment or at public
24 hearing, and we make some kind of a change to the

1 permit to address that issue that we've now had
2 everybody's input on. And it may change a condition
3 of the permit, but it still addresses a feature that
4 was in the permit from day one.

5 From my experience in this area, I
6 would say the vast majority of times we go so far as
7 a public hearing, something gets changed in that
8 permit. It doesn't turn night into day or day into
9 night, but something gets changed.

10 For that to be the basis to go
11 back and start a whole public comment process over
12 and allow an opportunity for acrimony -- the other
13 thing I'll offer for the record is a lot of times
14 when we have controversial permits where the
15 controversy has nothing to do with the issues that
16 the regulations in the NPDES permit address itself.

17 For instance, a lot of times, it's
18 a NIMBY conversation. I don't want that facility in
19 my neighborhood. And that is not unique to water
20 pollution permits. Highway people deal with it, air
21 pollution people deal with it. Everybody deals with
22 it.

23 I want to make sure we sort
24 through the language and come up with the proper

1 language for the public comment period that doesn't
2 allow the angry neighbor to abuse the system and
3 deprive one individual from getting in their point.

4 Beyond that, I'm not sure there
5 are many, if any, fundamental disagreements between
6 the Agency and this proposal. We see some areas of
7 control. That's an issue we still have concern
8 over. And I'm not comfortable with the language
9 being proposed, but we define the language, we can
10 live it. But the whole notion is as long as there's
11 still a citizen out there that disagrees with the
12 way we've handled an issue and we have to go back
13 to public hearing bothers me.

14 One other issue that I know Albert
15 and I have debated a little and maybe have some
16 fundamental disagreements over is setting special
17 conditions and requirements in a permit where some
18 analysis is to be done and some reporting later and
19 then follow-up activity based on it.

20 At one time conceptually, some of
21 the environmentalists thought every specific aspect
22 of consideration ought to be sorted out and hammered
23 down on the record before the permit is issued. A
24 lot of permits couldn't get issued that way.

1 If you look at some of the federal
2 programs, you'd see their guidance is designed
3 around the concept of the permit drives the program
4 to do studies and identify solutions. It doesn't
5 require every last comma and dot at the point of the
6 solution to be in place the day the permit is
7 issued.

8 The new phase two storm water
9 permits are a great example. That permit basically
10 puts in place an obligation that over the course of
11 the permit's life, the permittee develop the storm
12 water pollution prevention plan, not that he have a
13 plan finalized and in place the day the permit takes
14 effect.

15 There's a major new initiative in
16 region five and I believe some of the other regions
17 to drive another round of reviewing and identifying
18 the adequacy of combined sewer overflow controls.
19 Again, that's a program we don't necessarily know
20 what's coming out the other end, but you know you're
21 going to be creating some studies, some engineering,
22 and there are going to be other requirements coming
23 later. That's necessary to make the program
24 operate.

1 And I believe with the exception
2 of those two issues, the general concept in this
3 rulemaking of cleaning up and updating the language
4 in Part 9 rules is a good thing, and we look forward
5 to working with them and continue to work with them.

6 So everybody in the room should be
7 on notice what the Agency's heartburn is and ought
8 to be able to bring their questions and their
9 testimony to me at the next hearing without a whole
10 lot of delay. I don't want the lack of pre-filed
11 testimony to be perceived as the agency's lack of
12 desire to communicate its position.

13 HEARING OFFICER TIPSORD: Thank you.

14 BOARD MEMBER TRISTANO: Between the
15 two of you, maybe you can help me understand this a
16 little bit better, and I think this is a key issue.

17 Obviously, when you go off to
18 public comment, there's going to be public comment.
19 And hopefully, the Agency is paying attention to
20 that public comment and they're going to make some
21 modifications.

22 But I think the issue that's
23 driving this is the word substantial and what is a
24 substantial -- I understand your example you gave if

1 you're doubling -- what was your example, you --

2 MR. ETTINGER: I gave an example in
3 which you doubled the affluent limit.

4 BOARD MEMBER TRISTANO: Right. And it
5 seems to me there in that example that -- I don't
6 think anybody here would disagree that that's a
7 significant change the public may wish to comment
8 on.

9 But the word substantial, I think,
10 is troubling to people. I think that that is the
11 basis of what you're saying, right, because there's
12 a lot of tweaking going on during the
13 public process.

14 MR. FREVERT: I don't have the
15 capacity to entertain public participation forever
16 with staff, but I've got an obligation and the
17 desire to take on a lot of the big issues identified
18 so people have a chance to weigh in on them.

19 If they weighed in on them and
20 they provided all the input they made and I just
21 blow it by making a bad decision, I believe that's
22 what the Board and the appeal process is for, not to
23 go back and start all over and have me --

24 BOARD MEMBER TRISTANO: I guess what

1 I'm saying is, it might be helpful if there's some
2 way to get more clarification, because I understand,
3 and I'll use very bad words, tweaking, as opposed to
4 substantial -- I would say the way that -- actually,
5 I've forgotten -- in some cases substantial is used
6 and in some cases significant is used.

7 MR. ETTINGER: I think on that
8 specific area, again, I think I -- I took the
9 federal language and I loosened it, gave them more
10 flexibility than the federal government does in it's
11 own reconsideration.

12 I will say also, we tried to work
13 with the Agency on this, and maybe in the next few
14 weeks we'll try and come up with a language that
15 captures a little better what there is.

16 But the problem now is
17 particularly the way the Board and the Appellate
18 Court read the rule, even in that case where we
19 agreed that you might want to see it where they've
20 doubled the affluent limit, there's been a holding
21 that you can't have a new public hearing under those
22 circumstances. So clearly something has to be
23 fixed.

24 Under the current regime, a case

1 which we agreed there should be additional comment,
2 there can't be. So now what we need to do is find
3 the language that addresses that. And I want to
4 work with the Agency on that and take care of that,
5 that problem.

6 I think we frankly got it here. I
7 don't think we're that far off. I think that given
8 the limits in language, you know, the Agency
9 basically -- Toby knows what the issue is. Given
10 the flexibility with language, which is perhaps a
11 little vague, they're going to get it right almost
12 all the time, and those few times in which they
13 don't, then it will be an issue for you. But it's
14 not going to come up very often. That's the problem
15 we have with language though. Sometimes you have to
16 be vague in order to give sufficient flexibility to
17 capture the odd situation.

18 Having said that, I'd be thrilled
19 to work with them and see if there's some way that
20 we can spell that out a little better.

21 MR. FREVERT: I have clarified my
22 position. I believe we have the authority, the
23 right, to go back, do another round of public
24 commenting, another round of public hearing. I'm

1 hoping that's not what the debate is over. I
2 thought the debate was over under what circumstances
3 we have an obligation to exercise that authority and
4 the extent to which determination of that is the
5 discretion of my director and the discretion of --

6 MR. ETTINGER: Well, I think you
7 better go back and re-read the decision, because I
8 don't think you have the discretion right now to do
9 another round of public comment no matter how much
10 the --

11 MR. FREVERT: Well, I know that
12 historically we have gone back to public notice on
13 issues. So if you're telling me that my
14 predecessor --

15 MR. ETTINGER: I'm telling you I lost
16 my case.

17 MR. FREVERT: I'll bear that in mind.

18 If we can agree on the language
19 allowed, if we can do that --

20 HEARING OFFICER TIPSORD: Anything
21 further?

22 And seeing nothing further, I will
23 note that we have a second hearing scheduled for
24 April 2nd, 2003 in Springfield. The hearing is

1 scheduled to begin at 10:00 a.m. It is in room 403
2 at 600 South Second Street. Persons wishing to
3 testify should pre-file that testimony by
4 March 26th, 2003.

5 If there is nothing further, I
6 thank you all for your time and attention this
7 morning. Happy St. Patrick's Day. We're adjourned.

8 (Which were all the proceedings
9 had in the above-entitled cause
10 on this date.)
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1 STATE OF ILLINOIS)
) SS.
2 COUNTY OF DUPAGE)

3

4 I, STACY L. LULIAS, CSR, do hereby
5 state that I am a court reporter doing business in
6 the City of Chicago, County of DuPage, 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

Stacy L. Lulias, CSR
Notary Public,
DuPage County, Illinois

15

16

17 SUBSCRIBED AND SWORN TO
before me this ___ day
18 of _____, A.D., 2003.

19

Notary Public

20

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24

