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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:

REVISIONS TO ANTIDEGRADATION

RULES: 35 ILL. ADM. CODE 302.105, R01-13
303.205, 303.206, and (Rulemaking-Water)
106.990-106.995

Proceedings held on December 6, 2000, at 10:00 a.m., at the
Illinois Pollution Control Board, 600 South Second Street, Suite
403, Springfield, Illinois, before Marie Tipsord, Hearing
Officer.

Reported by: Darlene M. Niemeyer, CSR, RPR
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A P P E A R A N C E S

G. Tanner Girard, Ph.D., Board Member
Ronald C. Flemal, Ph.D., Board Member
Marili McFawn, Board Member
Alisa Liu, Environmental Scientist

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ILLINOIS ENVIRONMENTAL PROTECTION AGENCY PANEL
PRESENT:
Toby Frevert
Stephen F. Nightingale

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1 P R O C E E D I N G S

2 (December 6, 2000; 10:00 a.m.)

3 HEARING OFFICER TIPSORD: Good morning, everyone. I am
4 Marie Tipsord and I have been appointed by the Board to serve as
5 the Hearing Officer in this proceeding, entitled, In the Matter
6 of: Revisions to Antidegradation Rules: 35 Ill. Adm. Code
7 302.105, 303.205, 303.206, and 106.990 through 106.995. This has
8 been docketed as R01-13.

9 With me today, to my immediate right is Dr. Tanner Girard,
10 presiding Board Member in this matter.

11 Then to his right is Dr. Ronald C. Flemal.

12 To my immediate left is Alisa Liu, of our technical staff.

13 And to her left is Board Member Marili McFawn.

14 BOARD MEMBER McFAWN: Good morning.

15 HEARING OFFICER TIPSORD: At this time, Dr. Girard, is
16 there anything you would like to say?

17 BOARD MEMBER GIRARD: Yes. Good morning. On behalf of the
18 Board, I welcome everyone to the second hearing on the proposed
19 amendments to the Board's water antidegradation regulations. We
20 want to thank all of the participants, both for attendance at
21 these hearings and for the time and effort reflected in the
22 excellent prefiled testimony. Both the testimony and questions
23 that follow will be carefully considered by the Board, and
24 hopefully will give us a clear picture when drafting the first

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1 notice proposal. Let's get to work. Thank you.

2 HEARING OFFICER TIPSORD: The purpose of today's hearing is
3 to hear answers to the prefiled questions submitted to the
4 Agency. And also to hear prefiled testimony by Robert J. Moore,
5 Executive Director of the Prairie Rivers Network. Also Deirdre
6 K. Hirner, with the Illinois Environmental Regulatory Group.
7 Also Robin L. Garibay -- is that correct? Am I close? Principal
8 of the Advent Group. And the Illinois Association of Wastewater
9 Agencies. And I believe that's all of the prefiled testimony
10 that I have at this time. That will be the order that I
11 anticipate taking the presenters.

12 As time goes on today, we will see how long the questioning
13 takes and we will make a decision at that time as to whether or
14 not we will take the testimony as if read or if we will have the
15 testimony read into the record.

16 I would like to point out that on November 29th the Board
17 received prefiled questions from the Illinois Steel Group, and we
18 also received prefiled testimony from the Illinois Association of
19 Wastewater Agencies. I will allow both of those filings in.
20 However, I will wait until the end of the day to hear the
21 testimony of the Illinois Association of Wastewater Agencies.
22 And it has also been asked that we wait until the end of the day
23 to listen to the questions from the Illinois Steel Group.

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1 prefiled questions, and then we will proceed with the remaining
2 prefiled testimony. Anyone may ask a question of the testifiers,
3 including the Agency. I ask that you raise your hand and wait
4 for me to acknowledge you, identify yourself for the record, then
5 ask your question. I ask that you speak one at a time. If you
6 speak over one another, the court reporter will not be able to
7 get your questions.

8 Please note that any questions asked by a Board Member or
9 staff are intended to help build a complete record and not to
10 express any preconceived notions or bias. If there is anyone
11 here who wishes to testify, but did not prefile testimony, I ask
12 that you see me at a break. That will only happen if we have
13 time at the end of the day. And based on what I have seen, I am
14 not sure that is going to be possible. But please see me, and we
15 will see what we can work out.

16 At the side of the room there are signup sheets for the
17 notice and service lists. I will have copies of the current
18 service and notice lists available for you. I don't think they
19 are out there quite yet. If you wish to be on the service list,
20 you will receive all pleadings and prefiled testimony. You must
21 also serve your filings upon all persons on the service list. If
22 you are on the notice list, you will receive all Board orders and
23 Hearing Officer orders.

24

Also, pending before the Board is a motion for a third

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1 hearing. I will not be ruling on that motion today, as it was
2 directed to the Board. The time to respond to that motion also
3 runs today. Under Board procedures you have seven days to
4 respond to a motion. If anyone needs additional time to respond
5 to the motion, I can grant an additional time to respond to the
6 motion. So if that's the case, I ask that you please let me
7 know. And I think that there -- was there something that you
8 wanted to discuss right now, Mr. Ettinger?

9 MR. ETTINGER: Well, not necessarily right now, but I guess
10 I wanted to talk about how we might best go through the rest of
11 the hearing in the most orderly manner and in a way that would be
12 most useful for the Board to present the ideas that the various
13 parties have made for alternative language or additional
14 exceptions that they wanted.

15 My first inclination, when I received the motion by IERG,
16 was to object to it. But I think that we are clearly going to
17 have to have some further discussions here. I am not sure
18 whether a hearing is the right way to go. What we might want to
19 do is instead set up a briefing schedule that would then be
20 followed with a hearing or an oral argument, however you want to
21 phrase it, in which the Board Members would ask people who have
22 made specific proposals about those proposals, so that the Board

23 would have the maximum amount of information available to it.

24 So I don't know whether -- it has been brought up now. I

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1 don't know whether you want to discuss it now. I do think that
2 we are not that far apart as to suggestions for procedures. I
3 don't want another open-ended hearing, but I think after we brief
4 the thing and the various parties who have specific word changes
5 or proposals or exceptions proposed and have had an opportunity
6 to put those down on paper, that there should be another
7 proceeding then after that in which the Board can ask about those
8 proposals.

9 HEARING OFFICER TIPSORD: So if I hear you correctly, what
10 you would have me take to the Board on your behalf is that you do
11 not necessarily object to a third hearing, but what you would
12 like to see is it limited in scope.

13 MR. ETTINGER: What I would like basically is to see a
14 briefing schedule first. I don't know if you want to call it a
15 briefing schedule, a schedule for filing written testimony or
16 briefs, say, in mid January. Then sometime in February, after
17 the Board has had time to digest that and go through everyone's
18 list and say we don't want to use this word here and we would
19 rather use this word, and strike this phrase, you would then be
20 able to ask people about that, and then we would be able to wrap
21 this up.

22 HEARING OFFICER TIPSORD: Okay. Are there any other

23 comments?

24 MS. HODGE: I would just like to respond briefly to Mr.

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1 Ettinger. My name is Katherine Hodge and I represent the
2 Illinois Environmental Regulatory Group. I did file the motion
3 for the third hearing on behalf of IERG. I don't have any huge
4 problem with what Mr. Ettinger has suggested, except that that
5 next process, to me, sounds very much like another hearing, an
6 opportunity for not only the Board to ask questions, but for
7 other members of the public, Agency representatives, other
8 participants to ask questions.

9 As we stated in our motion, IERG does intend to come
10 forward with some revisions to the Agency's proposal that is
11 before the Board right now. We thought that the best means to be
12 able to present that and then to allow others to ask questions of
13 IERG and its witnesses would be in a hearing. I don't think we
14 have any great objection to maybe limiting the scope a little
15 bit. But I feel like we still need that public participation
16 process where others do have an opportunity to ask questions, and
17 we have an opportunity to offer the support that we think is
18 necessary for our proposed revisions.

19 MR. ETTINGER: I don't think we disagree much at all except
20 to say a lot of this -- it is a kind of odd proceeding, in that
21 generally the Board is dealing with scientific questions of fact.

22 A lot of the things are like that, you know, does this particular
23 chemical affect children. And those are scientific questions,
24 and most of your witnesses are fact witnesses.

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1 Here in many cases we are really discussing how to best
2 word matters, how things fit in best with statutes, and the legal
3 questions are actually -- in a set of procedures, the legal
4 questions are actually more significant than the factual
5 questions, which in many cases are fairly limited.

6 So what I would like to see is for us all to make sure that
7 before we have another hearing everyone has briefed their
8 proposal, put specific language in front of the Board on all of
9 the points that they want to raise, so that we don't have another
10 sort of, you know -- not that we have -- everything to this point
11 has been useful. But what I don't want is a sort of nebulous set
12 of additional hearings in which people emote on the Agency
13 proposal without putting forth specific language of their own.
14 That I would object to.

15 HEARING OFFICER TIPSORD: If the Board were to agree to a
16 third hearing -- and this is all hypothetical. I have to be
17 perfectly honest. I have not even discussed this with my own
18 Board Member at any length at this time. I guess so that we
19 could proceed in a timely fashion, if the Board were to grant the
20 motion, which they could arguably do even tomorrow at the Board
21 meeting, what kind of time frame? You mentioned mid January for

22 filing of any additional, what I would consider testimony,
23 basically, or language. You mentioned mid January.

24 So my question to all of you is does mid January work with

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1 a potential hearing in February? Is that going to give enough
2 time? I certainly think that the Board wants to proceed as
3 expeditiously as we can while doing a complete record here. So I
4 don't want to push it back much further than that if the Board
5 agrees to a third hearing. But I don't also want to put us in a
6 position where we can't do anything at a third hearing. So for
7 what it is worth, is January feasible?

8 MS. TONSOR: I think that the Agency needs to state its
9 position on the motion, just to clarify. The Agency also hopes
10 that this proceeding will proceed as expeditiously as it can and
11 as soon possible. And, therefore, we think that we should keep
12 to a schedule if we need to set a third hearing of doing so. If
13 IERG does propose amendments or proposes alternate language, I
14 think that the Agency will need to talk about that language and
15 clarify it through a hearing process.

16 The scheduling of it becomes important in that depending
17 upon what their language is, we will need more than a week or two
18 to fully analyze the language and then prepare responses to it.
19 February, for my purposes, I am going to be gone for a week of
20 that month. I have a board hearing that is going to take two

21 days on that month, and then I am the hearing officer in another
22 proceeding, the Agency facility planning area.

23 So scheduling another set of hearings in February with
24 responses due may be not a good month. If we could do so in

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1 January, it would probably work out. However, that also cuts us
2 short in actually responding. So I think we first need to know
3 from the regulatory group when they think they can get their
4 proposal put together and filed if they are going to file it.

5 HEARING OFFICER TIPSORD: I do apologize. I realize this
6 is highly speculative since the Board has not ruled. But I
7 really, as I said, want to do this as expeditiously as possible.
8 If the Board were to, by chance, rule tomorrow, I hope we could
9 have something set up fairly quickly after that.

10 So, Ms. Hodge, do you think -- when does the regulatory
11 group anticipate their ability to have any potential language?

12 MS. HODGE: I think we could certainly submit something in
13 January. Again, you know, I am concerned with the upcoming
14 holidays and people's availability. But I think we could submit
15 something. I think to submit something and then have a hearing
16 in January is really pushing it for everybody, though. So I
17 would ask that, you know, the hearing time be postponed just a
18 little bit. But, again, we are not interested in delaying this
19 either. We are interested in seeing this move along quickly. I
20 think we could commit to getting something in sometime in mid to

21 late January.

22 HEARING OFFICER TIPSORD: Okay. That being said, let me
23 just then clarify for the record that I see that with
24 reservations expressed by Mr. Ettinger that there does not appear

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1 to be an objection to a third hearing as long as it is a focused
2 procedure and that we do proceed expeditiously. Is that --

3 MR. ETTINGER: Yes. I guess I would like to see a
4 requirement that the third hearing is based on filings which the
5 parties have made in advance of mid January that are specific and
6 contain proposals for changes.

7 HEARING OFFICER TIPSORD: All right. Is there anyone else
8 who wants to weigh in on this issue so that we can take this
9 information to the Board?

10 MR. ETTINGER: I just have one more question by way of
11 information for the Board. Ms. Tonsor, you know, described
12 problems she has in February, and it seems like we do have a
13 little scheduling issue here, because it does seem like February
14 would be the logical time to have this third hearing.

15 I guess I would ask Ms. Tonsor when is the earliest she
16 could have the hearing after January would be so that we can wrap
17 this up as soon as possible.

18 MS. TONSOR: The first week of February is open with me.

19 HEARING OFFICER TIPSORD: All right. Let's do this. If

20 the Board decides to hold the third hearing, if you would like to
21 be involved in a conference call with me to set up a scheduling
22 time, please see me at a break and I will get all of your phone
23 numbers, and if the Board does grant the motion and we do hold a
24 third hearing, I will hold a conference call with all interested

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1 persons and we will nail down the time frames, so that we can get
2 it so that everyone has got enough time but that we keep this
3 moving. And I think that is the interest of all of the parties.
4 So if you will get in touch with me at break.

5 Are there any other questions or comments before we begin?
6 All right. Then could we have the Agency witness sworn in and we
7 will proceed with questions of the Agency.

8 MS. TONSOR: Okay. Toby has been sworn in so --

9 HEARING OFFICER TIPSORD: I would prefer that we swear all
10 of the witnesses again today.

11 MS. TONSOR: Okay. I have two Agency persons with me. One
12 is Toby Frevert and the other is Steve Nightingale. Steve is a
13 manager in the permits unit, and is available to answer
14 questions, should the need arise, on the general permit process
15 as well.

16 (Whereupon Toby Frevert and Stephen
17 Nightingale were sworn by the Notary Public.)

18 HEARING OFFICER TIPSORD: How best do you want to
19 proceed? Do you want to have the questions read and then you

20 answer them, or would you just rather generally like to go ahead
21 and --

22 MR. FREVERT: We have prepared written responses to those
23 questions, and I think they are available to everyone in the
24 room. I am assuming, based on those written responses, there may

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1 be some follow-up questions. I would be happy to deal with that.
2 I would prefer not to read the entire document.

3 HEARING OFFICER TIPSORD: Okay. Do you want to enter that,
4 then, as an exhibit at this time?

5 MS. TONSOR: Yes.

6 HEARING OFFICER TIPSORD: Okay.

7 MS. HODGE: Ms. Tipsord?

8 HEARING OFFICER TIPSORD: Yes.

9 MS. HODGE: Excuse me, but I have not seen these written
10 responses.

11 MS. TONSOR: Toby's -- the written responses are over
12 there. The written responses are as an aid to the Board. Toby
13 is available to talk and answer the questions verbally, as well.
14 There is copies of them.

15 MR. ETTINGER: I saw written responses to the Board's
16 questions. Are there also written responses to the other
17 questions?

18 MS. TONSOR: No.

19 MR. FREVERT: These are the only questions that we
20 received.

21 HEARING OFFICER TIPSORD: Yes. I would note that the
22 Agency did not receive the questions from the Illinois Steel
23 Group, and that is one reason why we are postponing those until
24 the end of the hearing.

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1 MR. ETTINGER: Okay.

2 HEARING OFFICER TIPSORD: All right. If there is no
3 objection, we will enter these as an exhibit and then we will
4 discuss how best to proceed with them. They will be admitted as
5 Exhibit Number 7.

6 (Whereupon said document was duly marked for
7 purposes of identification as Hearing Exhibit 7
8 and admitted into evidence as of this date.)

9 MS. TONSOR: As a note of clarification, the written
10 questions from the Board skipped a couple of numbers in the
11 questions. We followed the Board's numbering. So when you see
12 we have skipped a number, of course, we are just correlating them
13 with the written questions that the Board had filed.

14 HEARING OFFICER TIPSORD: Okay. Sorry about that.

15 MS. TONSOR: That's okay. I just didn't want confusion to
16 develop that there was an omitted answer.

17 HEARING OFFICER TIPSORD: Thank you. I appreciate that. I
18 am the one responsible for the skipped numbers, so I apologize.

19 You know, I know time is a factor, but I just have some
20 concerns that no one has had a chance to pre-review these. So it
21 is going to be a little difficult to try to come up with
22 follow-up questions without either taking a break for an hour and
23 letting everyone look at them, which is not something that I
24 would prefer, or proceeding with Toby reading in the questions.

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1 So I guess I would also put that out to all of you.

2 I think it is probably best to proceed with him answering
3 the questions -- or reading the answers in. I think it is just
4 -- I think that's the only way we are going to be able to
5 legitimately see if there are any follow-ups by anyone. Since
6 the questions were seen by the other people for the first time as
7 well I think that is probably best.

8 MS. TONSOR: That is entirely acceptable, and what we had
9 intended to do with these.

10 HEARING OFFICER TIPSORD: All right.

11 MR. FREVERT: Okay. I will proceed. I want to make one
12 point. This response, Exhibit Number 7, actually paraphrases the
13 questions. It does not present the questions word for word.

14 HEARING OFFICER TIPSORD: That's fine.

15 MR. FREVERT: I presume people have copies of the questions
16 so that they can go back to see the exact language of the
17 questions.

18 My name is Toby Frevert and I have previously submitted
19 testimony on behalf of the Agency in this rulemaking proposal.
20 On November 28 the Board submitted written questions to the
21 Agency for response at today's hearing. This document contains
22 written answers to those questions. I am available to further
23 clarify and respond to these questions.

24 The first question pertained to some reference in the

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1 Federal Water Quality Standards Handbook regarding communication,
2 cooperation between the state and the federal agencies in the
3 process of developing these requirements.

4 My answer is the Agency has been in communication with the
5 U.S. EPA's Region 5 Office throughout the entire developmental
6 process. We secured a preliminary review of the proposal prior
7 to filing with the Board and intend to maintain communication
8 through the remainder of this initiative.

9 I might supplement that by reminding people that we
10 actually had an employee representative of U.S. EPA available at
11 the prior hearing in case any questions would come up that were
12 appropriate for him. If in the future there is some benefit in
13 having a federal representative participate in this hearing, I
14 would attempt to coordinate and make that person available as
15 well, particularly if there is a third hearing and something
16 would come up today that would warrant such a step.

17 The second question dealt with examples of degradation as

18 language presented in our proposal.

19 HEARING OFFICER TIPSORD: Excuse me. Go ahead.

20 MS. HODGE: I am not sure how you wanted to handle follow
21 up. Do you want them to go through all of the answers or do the
22 follow-up --

23 HEARING OFFICER TIPSORD: I think follow-up after each
24 question if there is follow-up, just so that we can keep the

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1 record together. So was there any follow-up?

2 MS. HODGE: I have a follow-up question.

3 HEARING OFFICER TIPSORD: Okay.

4 MS. HODGE: Mr. Frevert, when I look at the Board's
5 question, I guess the second part of this they had asked if you
6 could describe the comments that you may have received from the
7 U.S. EPA. Could you do that, please?

8 MR. FREVERT: There were some suggested changes in the
9 wording regarding those lists of activities that we are proposing
10 not to subject to an individual review for determination of
11 compliance of the standard. Other than that, the indication was
12 that there appeared to be no failed flaws or anything in the
13 proposal that they could identify early on as an obstacle of
14 federal approval.

15 My intent is as modifications come forward to the extent
16 that the language of this proposal gets modified, I would also

17 want to coordinate so that they could see that and if there is
18 something that gets added to this that would clearly be
19 unapprovable, they could notify us to that affect. Hopefully we
20 are all aware that the U.S. EPA is not going to dictate a
21 solution or interfere too much with the state rulemaking process.
22 But they certainly are willing to work with us and identify
23 things that they believe clearly are unapprovable.

24 MS. HODGE: Thank you. Have any of U.S. EPA's comments

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1 been in writing or are these primarily oral comments?

2 MR. FREVERT: I think they are primarily oral and maybe
3 even exclusively oral. The other thing I might point out is that
4 the U.S. EPA had representation I think at virtually every one of
5 our work group meetings and we even brought in a headquarters
6 antidegradation expert to address the work group in one of these
7 sessions. And they fairly liberally participate in the
8 discussions that took place in those work group sessions.

9 So I am comfortable that we have a good working
10 relationship. To the extent that any confusion about the federal
11 requirements came up, they were there to answer them throughout
12 the process. I have a full expectation that they are willing to
13 continue that type of cooperation.

14 MS. HODGE: Thank you.

15 HEARING OFFICER TIPSORD: Anything further? Okay. Let's
16 move on to question number two.

17 MR. FREVERT: The second question dealt with the examples
18 of degradation as contained in the proposed language.

19 My response is, the intent of the proposed language was not
20 to define measures of degradation, but to specify that
21 degradation cannot progress to the point of eliminating an
22 existing use. The specific examples offered were incorporated
23 into the Agency proposal because there may be multiple uses and
24 interpretations of the term aquatic life use. In 35 Illinois

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1 Administrative Code 302.202 aquatic life is used as a single
2 category in a listing of designated general uses. That is not
3 the intent within proposed Section 302.105(a). Rather, the
4 intent of this subparagraph is to clarify that existing
5 individual aquatic life uses must be protected. It was the
6 Agency's intent to encompass the concepts of ecosystem diversity,
7 productivity, stability, and protection for various life stages
8 within the language of Section 302.105(a). However, we are
9 receptive to suggestions for better language if additional
10 clarification is necessary. Perhaps we erred in the use of the
11 word "degradation" in the body of the paragraph Section
12 302.105(a) whereas the words "loss" or "elimination" may have
13 been more appropriate. Subsections 302.105(a)(1) and (a)(2) are
14 examples of loss of a use, rather than degradation of a use.

15 If the Board believes that additional language is necessary

16 to define or otherwise clarify degradation or measures of
17 degradation, I believe the proper place to do that would be in
18 Section 302.105(c)(1). The Agency proposal leaves the measure of
19 degradation consistent with the existing Board regulation "waters
20 of the State whose existing quality exceeds established standards
21 be maintained in their present high quality unless...". The
22 Agency believes this language accomplishes the intent of the U.S.
23 EPA's guidance on this aspect of the antidegradation policy.

24 HEARING OFFICER TIPSORD: Okay. Thank you. Just for the

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1 record, there are also now copies of the Board's questions if you
2 don't have a copy. We just put some on the table.

3 Are there any follow-ups? Okay. Seeing none, we will
4 proceed to question number three.

5 MR. FREVERT: Question number three, again, I believe that
6 is language -- an issue of clarification of some language. This
7 deals with Section 302.105, Paragraph (a)(2).

8 This subsection is intended as an example not an exhaustive
9 list. Nevertheless, I interpret the terms "resident and
10 indigenous" as adequate to include "threatened, endangered and
11 migratory".

12 Perhaps that is just an issue of semantics but, again, it
13 was not intended as a definitive or exhaustive list so much as an
14 example.

15 HEARING OFFICER TIPSORD: Okay. Any follow-ups? Okay.

16 Question number four.

17 MR. FREVERT: This has to do with loss of a species that
18 may be the result of an action that would be subject to approval
19 either through permitting, NPDES permitting or Section 401
20 certification.

21 There are any numbers of ways an aquatic species may be
22 extirpated from a particular aquatic community, including
23 lethality. There are some obvious examples where this will be
24 intentional, such as nuisance species control, i.e., Zebra

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1 mussel, blue green algae, active fisheries management in a state
2 park lake, etcetera. Those are activities where you are
3 intentionally doing away with a species. Other perhaps not so
4 obvious examples would be something like dredging and channel
5 maintenance where benthos and other food chain organisms, which,
6 incidentally, are aquatic life, may be physically removed from
7 the stream and deposited on land where desiccation and other
8 phenomenon produce death. Of course, these are examples of the
9 extreme and the outcome of a review may be relatively
10 predictable. In other circumstances, such as damming a stream to
11 create a reservoir, there will be a shift over time from a lotic
12 to a lentic community.

13 The essential result there is certain species of the
14 aquatic community would decline over time and move out and they

15 would be replaced by other species.

16 U.S. EPA follows two fundamental tracts in developing
17 criteria for water quality standards. In the case of human
18 health issues the system is designed to protect the individual,
19 safe levels are based on the most at risk sector of the
20 population. On the other hand, aquatic life criteria are derived
21 to protect the integrity and sustainability of the overall
22 community. Data used in deriving criteria are selected to
23 protect 95 percent (not 100 percent) of the population within a
24 species and derivation formulas are designed to represent the

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1 various biological trophic levels within a healthy and diverse
2 aquatic community. It is not based on nor does it require that
3 every possible species within every trophic level be protected.
4 Superimposed on this criteria setting approach is the
5 supplemental requirement to protect individual species that are
6 of particular value to the overall health of the ecosystem or
7 some other specific use such as important recreational or
8 commercial value and federally classified endangered species.

9 Perhaps a simple example would be helpful here. Algae are
10 typically an important component of an overall healthy aquatic
11 community. There are numerous species of algae that perform the
12 same function within an aquatic community. It is possible and
13 plausible that an individual species of algae could be extirpated
14 from a healthy and diverse aquatic community without undermining

15 the overall health of the community and without substantially
16 affecting diversity. This type of shift in aquatic community
17 structure is not precluded by federal water quality standards
18 criteria. In fact, we know that certain types of activities will
19 result in some species being replaced by other species. If you
20 turn a stream into a reservoir some species will leave, and
21 others will move in.

22 HEARING OFFICER TIPSORD: Any follow-up?

23 MS. LIU: Mr. Frevert, you stated that data used in
24 deriving the criteria are selected to protect 95 percent of the

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1 population. Where does that standard come from?

2 MR. FREVERT: That is part of the statistic procedures used
3 in the federal criteria derivation process. The U.S. EPA uses an
4 approach like that in publishing their individual numeric
5 criteria for certain chemicals. And it is also a similar concept
6 used in a narrative standard and the procedures that come along
7 with the narrative standard, such as our Subpart F, the toxics
8 component of the Board's water quality standards.

9 MS. LIU: Thank you.

10 HEARING OFFICER TIPSORD: Okay. Proceed with question
11 number five.

12 MR. ETTINGER: I have something.

13 HEARING OFFICER TIPSORD: Oh, I am sorry.

14 MR. ETTINGER: I have a question here that I guess I would
15 like you to address a little bit. I think it is clear that in
16 certain cases you would actually want to get a particular species
17 out of a particular area, for example, Zebra mussels. There are
18 other cases, and I think this is part of the concern of the
19 Board, that some species which may not have a commercial value
20 are native species and we would want to protect that species
21 there, most obviously, an endangered natural species, not a Zebra
22 mussel but a native Illinois mussel. How do you propose to
23 distinguish those cases in the rulemaking that you have drafted
24 here?

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1 MR. FREVERT: I think that the proper response to that is
2 -- and I believe I stated that -- superimposed on this federal
3 model, and I believe we have this language, for instance, in our
4 Subpart F procedures, is the understanding and the authorization
5 to protect an individual species even though it may not be a
6 threat to the overall health of the aquatic community, if that
7 individual species has a particular value. Certainly endangered
8 species rise to that stature.

9 MR. ETTINGER: Okay.

10 MR. FREVERT: So I believe there is the authority and the
11 obligation to address and assure that when a species rises to
12 that status, it is protected and an activity cannot be authorized
13 that would result in that species elimination.

14 MS. LIU: Mr. Frevert, would the 95 percent factor apply to
15 threatened or endangered species as well?

16 MR. FREVERT: I guess my first response is that most of the
17 endangered species I doubt that you have enough toxicity data or
18 statistic data to even answer that. I think in reality you would
19 set -- you would probably take a much more conservative approach
20 and virtually protect -- do what you felt would protect every
21 individual species -- or every individual within that species.
22 But I can't say that I have ever sat around discussing that
23 particular aspect of it with the federal standards experts
24 either. I believe that's the way it would be dealt with. That

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1 would be my intent on dealing with it on a state level.

2 MS. LIU: Okay.

3 HEARING OFFICER TIPSORD: Okay.

4 MR. FREVERT: Okay. So where are we, on number five. This
5 regards circumstances where there is a need for demonstration.

6 Activities within an Outstanding Resource Water are
7 essentially precluded except for very limited areas, and that
8 limited number of areas is delineated in Section 302.105(b)(1).
9 Even those activities are allowable only upon determination of
10 compliance with the broader criteria as provided in Section
11 302.105(b)(3). Section 302.105(b)(2) is intended to build upon
12 and be additive to the demonstration/determination for High

13 Quality Waters. Therefore, Section 302.105(b)(3) accomplishes
14 what you had suggested in the addition to Section 302.105(b)(2).

15 HEARING OFFICER TIPSORD: Okay. Proceed with number seven.

16 MR. FREVERT: This was suggested language modification to
17 Section 302.105(b)(2)(c). I believe this is a good point. There
18 will be an overall improvement in the language of this Section by
19 achieving consistency between Sections 302.105(b)(2)(B) and
20 (b)(2)(C). However, I don't think we want to restrict the issue
21 to water quality. Rather, it should also encompass activities
22 that would result in an overall improvement in the resource.

23 For instance, stabilization or restoration of habitat may
24 have no direct improvement to water quality but may be very

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1 beneficial to the attributes of the water quality. Therefore,
2 the Agency suggested that adding a phrase "or the overall
3 environmental attributes of" in Section 302.105(b)(2)(B) after
4 the word "quality" and deletion of the second usage of the word
5 "in" would probably result in better language and accomplish our
6 overall intent of that Section.

7 HEARING OFFICER TIPSORD: I would note for the record this
8 is an example of where the Board's question skipped a number. We
9 went from five to seven.

10 MR. FREVERT: Okay. Number eight. This is regarding the
11 use of the word "exceeded".

12 As used in this paragraph the word "exceeded" is intended

13 to convey the notion of noncompliance or exceedance or otherwise
14 a lesser quality. However, as used in Section 302.105(c) the
15 word is intended to imply superior quality. So the nature of the
16 word "exceed" can exceed in either direction. "Exceed" and
17 "exceeded" should both be changed to avoid confusion and convey
18 the proper intent.

19 I thought I dealt with this in a response and maybe I
20 didn't. We will go back and suggest a different word than
21 exceeded, I believe. I guess one of the complications there was
22 exceed is a word we inherited in the existing language in the
23 existing standard. We wanted to preserve the notion that we were
24 not deviating from the existing standard. But we may improve the

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1 overall clarity of that existing standard by deviating from the
2 word exceed to a better word.

3 I think question number nine refers to protection of water
4 quality and water quality standards at some point downstream of
5 the actual point of discharge.

6 My clarification is the standard applies equally to all
7 waters of the state. The principles apply whether your focus is
8 the point of the discharge, one foot downstream of that point,
9 one mile or more.

10 So in reality the standard applies to the water body
11 sources that have any potential affect on that water body. It

12 does not matter whether they are immediately there or some
13 distance away.

14 Question number ten refers to, I believe, the section
15 dealing with thermal discharges, cross reference to procedural
16 rules for alternate thermal standards. Yes, we think this may be
17 a beneficial clarification. I believe we will consider some
18 language to accomplish that.

19 A similar question in number seven, in reference to thermal
20 standards and some cross-referencing.

21 The difference between Section 302.105(d)(4) and (d)(5) is
22 that Section 302.105(d)(4) applies to thermal discharges that are
23 subject to and have complied with the special thermal studies
24 called for under Section 316(a) of the Clean Water Act.

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1 Subsection (d)(5) is intended to apply to sources that are not
2 subject to and would not be required to conduct such a thermal
3 impact study. The Agency's intent with respect to subsection
4 (d)(5) is that we would not require an antidegradation
5 determination for a proposed discharge that adds no parameters to
6 the receiving water except heat if that source complies with the
7 generally applicable thermal standards and is not otherwise
8 required or motivated to conduct a thermal study. Therefore, the
9 Agency does not believe such a cross reference is appropriate in
10 this section.

11 I assume there is no follow-up? Okay. I think we are on

12 to number 12.

13 The applicability to existing point sources. The
14 antidegradation standard is intended to assure conscious
15 assessment of new loadings that could produce some extent of
16 degradation. Existing point sources undergoing permit renewal
17 with a proposed increase in permitted loading would be subject to
18 an antidegradation determination; those renewals remaining at
19 existing authorized loading levels would not. In the specific
20 case of existing facilities covered by general permit, the Agency
21 contends that compliance has and will continue to be accomplished
22 through categorical or general antidegradation determination as
23 part of the general permit development and issuance. General
24 permits include conditions for site management, operational and

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1 discharge handling practices that we believe accomplishes the
2 intent of the antidegradation standard and the review and
3 analysis there for.

4 MS. LIU: Mr. Frevert, would this antidegradation
5 rulemaking be in any way retroactive for existing sources that
6 were not up for renewal on their permits?

7 MR. FREVERT: That's not my intent. I believe if we issue
8 that permit and authorize that loading, then we determine
9 compliance with the antidegradation standard at the time we
10 authorize that loading through whatever process was in place at

11 that time. I think I had testified earlier that our reviews have
12 actually evolved and improved over the last 15 years or so.

13 Nevertheless, we have addressed the antidegradation in one
14 fashion or another through that time. So our position is that
15 once we have authorized the load, we don't have to -- I am sorry
16 -- not once we have authorized the load. Once we have determined
17 that load is consistent with the intent of the antidegradation
18 standard through the issuance of that permit we are not going to
19 duplicate that effort when the permit is up for renewal unless
20 there are new loading issues to be dealt with.

21 MS. LIU: If someone were to document some sort of
22 degradation in a water body that occurred after the approved
23 pollutant loading was applied, would they have a recourse for
24 going back to the Agency to have them re-review that permit

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1 issuance?

2 MR. FREVERT: I don't know. From a practical matter, I
3 don't know why you would bother with that. If you have
4 documented significant deterioration or viable deterioration in
5 the community or the character of the stream and you have
6 documented that it is attributable to a particular source, it
7 seems to me that takes on more of an issue of compliance
8 follow-up or enforcement type of review and consideration rather
9 than trying to retrofit a permit review that perhaps may not be
10 viewed as the ideal permit review at some later date.

11 Antidegradation is -- it is a preventative and proactive
12 approach. Whereas, I think you are talking about a circumstance
13 where you are really dealing with a response and a reaction to
14 something that -- whether it should have happened or not,
15 something that you determined has happened after the fact.

16 BOARD MEMBER FLEMAL: But you can be enforced against for
17 failure to comply with antidegradation; is that not correct?
18 Could be?

19 MR. FREVERT: If someone -- I think the complicated issue
20 there is if you are talking about this being the result of a load
21 that the Agency has authorized and permitted through an NPDES
22 permit, that might be a little more complicated in debating or
23 litigating whether or not that antidegradation view and
24 determination either didn't take place or was flawed and resulted

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1 in the wrong decision.

2 BOARD MEMBER FLEMAL: Possession of a permit is no defense
3 against violation of a standard, is it?

4 MR. FREVERT: Well, to begin with, I have not conceded that
5 this scenario that you are talking about constitutes a violation.
6 Clearly, our antidegradation standard says there can't be
7 degradation. It says degradation must be justified based upon a
8 determination prior -- a determination prior to the authorization
9 for that action. If we have authorized that action, I think it

10 almost inherently applies that if we did our job right and
11 addressed the water quality standards in that authorization, we
12 determined that it was compliant and consistent with the intent
13 of the standard. We may have been wrong, but we still made that
14 determination.

15 BOARD MEMBER FLEMAL: What you have done, though, is to
16 authorize a discharge. You have not authorized a violation of a
17 provision in the regulations and antidegradation provisions, so
18 it is entirely possible that there could be an enforcement action
19 brought for a violation of antidegradation in spite of the
20 existence of the Agency's review and in spite of the existence of
21 an Agency permit, and in spite of the existence of an Agency
22 determination that a certain load was permissible; is that not
23 correct?

24 MR. FREVERT: Theoretically that be a pleasant exercise. I

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1 am not -- it is not clear in my own mind how you would prove
2 violation of that standard. It is clear to me how you would
3 prove violation of copper standards. But how you would prove
4 violation of a standard which sets up a review policy and a
5 determination process without dictating the outcome of that
6 determination, I believe that is a little different issue and
7 maybe you ought to be asking your question to a lawyer rather
8 than me (laughing).

9 BOARD MEMBER FLEMAL: We are not here to debate litigation

10 practice, I suppose. But it would certainly, I think, be my
11 understanding that there is more to the issue of violation of --
12 potential violation of an antidegradation standard than if the
13 Agency has signed off on it that there is no problem. There may
14 be problems.

15 So I think it is important that when we are looking at what
16 is before us that we bear in mind that this is a standard, that
17 we are reviewing a standard, and whatever Agency practices are
18 involved in your aspect of reviewing whether that standard is met
19 in a permit process, there are still issues that relate to
20 enforcement.

21 MR. FREVERT: Generally I agree with you. I guess the
22 point I am making is the responsibility of the discharger is to
23 comply with the standard. The standard is complied with through
24 some conscious determination and review process. If we have gone

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1 through that review and we deem that the permit can be issued
2 with those limitations in that permit, then that will meet our
3 quality standards unless they deviate from those conditions. It
4 is possible that you could argue or you could make the case that
5 they violated the standard by deviating from the conditions that
6 the permit placed upon them. I think that's a little more
7 clearly.

8 But if they comply with all of those conditions and there

9 was some increment of additional loading, that additional
10 loading, in and of itself, and even perhaps some slight
11 measurable degradation that resulted from that additional
12 loading, I don't -- in my own mind, that is not clearly a
13 violation of that standard. Obviously, it is a standard and you
14 can debate that point, but that is pretty theoretical.

15 MR. ETTINGER: I have one question to follow-up on those.
16 Most of your permits -- and there is a person from permitting
17 here -- I believe all of the permits have boilerplate language in
18 the back saying that you cannot cause a violation of state water
19 quality standards. So is my understanding correct that in using
20 this loose hypothetical, let's say, for example, you are granted
21 a permit and it turned out, however, that then the discharge
22 started to kill things below it, that would probably violate
23 either the narrative or the no toxics and toxics amounts water
24 quality standards, you could still proceed against that permittee

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1 based on the boilerplate language?

2 MR. FREVERT: I think that would be the logical thing to
3 do. I mean, if that result occurred, there are much clearer and
4 crisper standards or statutory citations that someone could
5 follow in pursuing a correction of that rather than debate
6 antidegradation, whether or not it was met. Certainly, if you
7 documented significant -- well, elimination of use through a fish
8 kill or something of that nature, you know, we are going to sue

9 them over a fish kill in violation of 12(a), we are not going to
10 sue them over whether or not that antidegradation determination
11 that we made constituted compliance with that standard. We have
12 remedies to that hypothetical that would not require such a
13 jeopardous approach. We have much greater certainty, I think,
14 siting other violations.

15 MR. SMITH: My name is Jeffrey Smith. I am with Abbott
16 Laboratories. Toby, I have a question for you, in terms of you
17 discussed general permits dealing with stormwater, for example.
18 If in the situation of an industrial facility that has an
19 individual permit that covers a number of outfalls one of which
20 would be say an outfall that consists of stormwater from an
21 industrial area site, what type of activity would occur -- would
22 need to occur that would require the permit holder to go and make
23 an antidegradation demonstration and go through the process? For
24 example, if the facility installs a tank, would that, in fact,

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1 require the permit holder to go to the Agency with an antideg
2 application?

3 MR. FREVERT: I am going to need a little more
4 clarification, Jeff. Are we talking about a stormwater outfall
5 now that is covered by your NPDES permit?

6 MR. SMITH: That's correct. Basically, the reason why I
7 asked the question, the permit requirements that apply to that

8 type of an outfall really mimic what is in the State's general
9 stormwater permit. Which in your answer to that question that we
10 have been discussing basically says if you follow the
11 requirements of the conditions in the general permit, you are
12 deemed to be in compliance with the antideg rules, as I read it.
13 If you -- how would that apply, then, to an industrial facility
14 that has an individual permit?

15 MR. FREVERT: Well, I think we would look at the
16 circumstances of that particular site to determine whether or not
17 there was anything over and above what we believe the
18 antidegradation would require for the normal majority of
19 stormwater that is covered by a general permit and simply would
20 not be efficient for an individual review. Nevertheless, if that
21 outfall is not covered by a general permit, we would have to make
22 an independent individual decision on that outfall, whether or
23 not the intent of antidegradation was met. You could take a lot
24 of confidence, unless there is something really unusual in that

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1 site, that type of operational practices and alternative control
2 and pollution prevention techniques that are generally required
3 through the general permit would be the same result. You would
4 be treated the same way, but we would make a conscious decision
5 for that outfall. Whereas, once we decide that one of the 4,000
6 outfalls that we think is eligible for the general permit is
7 appropriate, any additional requirements upon that facility for

8 antidegradation would be those housed in that general permit, the
9 operational and management practices.

10 MR. SMITH: So the Agency would advise permittees with that
11 kind of situation to consult the permit group to see if, in fact,
12 your expansion may, in fact, trigger an antidegradation issue for
13 an expansion?

14 MR. FREVERT: No, I don't think that is what I am saying.
15 I think what I am saying is it would trigger an antidegradation
16 examination and we can tell you what the outcome of that
17 determination is and the types of things that we believe are the
18 level of control and stormwater management that we would be
19 looking for. And you can, unless there is something unusual or
20 rare out there, purely stormwater within your facility and it is
21 not interconnected with the processed waste, the outcome is
22 probably going to be the same as the outcome for if you have that
23 outfall covered under a general permit.

24 HEARING OFFICER TIPSORD: Are there any questions? Any

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1 others?

2 MS. HODGE: I just want to clarify. What you are saying,
3 Mr. Frevert, is that the installation of a new storage tank could
4 trigger an antideg review?

5 MR. FREVERT: If -- well, if that storage tank is merely
6 another management practice of an existing permitted facility,

7 and it does not constitute a load increase, no, there would be no
8 review. I was interpreting Jeff's questions as if he installed a
9 new facility to handle additional stormwater from the expansion
10 of the site or something of that nature.

11 If he is merely implementing stormwater handling and
12 management practices from a stormwater source that is already
13 permitted, that determination was made at the time that the
14 permit was issued and we are not asking -- we are not saying that
15 it would trigger another one.

16 So perhaps I was a little confused in assuming that your
17 question was based on additional service area or increased
18 stormwater. If it wasn't, it would not trigger anything. That
19 is merely implementing the conditions that apply to that outfall
20 at the time it was permitted.

21 MS. HODGE: How would a permittee determine whether the
22 installation of the new tank or a new parking lot or something
23 would or could result in an increased loading to the discharge
24 through the stormwater outfall?

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1 MR. FREVERT: I might ask Steve to help me here a little.
2 But my understanding is that those stormwater permits,
3 essentially they cover a parcel of property, and those permits
4 require certain stormwater management handling practices to
5 maintain the best performance and the best quality of that
6 stormwater discharge into the waters of the State. What you do

7 in that active management within that piece of property that is
8 covered by a current, valid permit, you don't need a permit
9 modification to carry out practices in that permit.

10 If you are proposing to expand across the street or some
11 other parcel of land that is not covered by that, then you need
12 to get the new parcel of land covered by some form of permit,
13 either a new permit or a modification of that existing permit.
14 And if it triggers modification for expansion of coverage area
15 and expansion of volume of stormwater and stormwater load, that
16 is an additional load that would trigger antidegradation. If you
17 are doing management within property that is already permitted,
18 there is no need to address antidegradation beyond the point it
19 was addressed at the time the permit was issued.

20 MS. HODGE: Okay. Thank you.

21 MR. SMITH: Thank you.

22 HEARING OFFICER TIPSORD: I think we are ready, then, for
23 question number 13.

24 MR. FREVERT: Okay. This is an issue regarding quantity of

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1 load or other factors beyond chemical pollutant loading, I
2 believe.

3 Flow modifications that affect water quality. Yes, the
4 premise of the question that lowering of water quality can result
5 from effects other than an increase in pollutant loading is

6 correct. This issue should be adequately resolved by
7 modification of Section 302.105(c)(2) as follows: "Any proposed
8 increase in pollutant loading subject to an NPDES permit or an
9 activity requiring a Clean Water Act action, Section 401
10 certification...". This should adequately encompass all
11 potentially degrading actions that are within the reach of state
12 preauthorization authority through NPDES and Section 404 water
13 quality certification programs.

14 The issue here is there are activities that are regulated
15 under Section 401 of the Clean Water Act, such as dredging and
16 construction within waterways, and dam construction and
17 hydrologic modification. And in many instances the environmental
18 ramifications and concerns of those projects don't really focus
19 in on chemical disturbance so much as habitat destruction and
20 other changes. And that is, indeed, the -- that's the reason,
21 the main reason the Section 404 program is in the Clean Water Act
22 to address those types of changes. We routinely do those kinds
23 of reviews and place certain restrictions or criteria on 401
24 certifications to address potential environmental degradation

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1 that results from hydrologic modification.

2 HEARING OFFICER TIPSORD: Okay. Let's proceed with
3 question number 14.

4 MR. FREVERT: I think this deals with the definition or the
5 understanding of what outstanding waters are.

6 It is not the Agency's intent that the term "unique" or the
7 word "unique" carry such rigid definition as suggested by the
8 question. The dictionary also includes, "very rare or uncommon"
9 and "very unusual" as valid definitions. The importance of this
10 issue is to understand, regardless of how one describes the
11 classification; this classification is substantially more
12 restrictive than any other surface water classification in the
13 Board's rules.

14 And, therefore, I think it should be reserved to waters
15 that are significantly or truly above and beyond the normal type
16 of water resources that we have in Illinois. Albeit, our
17 resources are valuable and I am not suggesting they are of low
18 quality or inferior quality, but suggesting that this is a
19 category that rises much higher than the normal quality.

20 MR. ETTINGER: Reading the Board's question and then
21 hearing your answer, the first thing that came to my mind is that
22 I should have checked the dictionary, as the Board did. Would
23 you have any problem with using the term outstanding instead of
24 unique since we do call it outstanding, and outstanding seems to

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1 cover the same thing that we mean here as very unusual.

2 MR. FREVERT: If that would solve some problems or be more
3 commonly understood what the intent is, that may be a good
4 suggestion.

5 HEARING OFFICER TIPSORD: Okay. Question number 15.

6 MR. FREVERT: This deals with some earlier testimony I made
7 regarding the primary mode of operation usually looking at water
8 quality and water chemistry.

9 The primary criteria for identifying high quality waters
10 are based on the existing language of Section 302.105; namely,
11 "waters whose existing quality is better than the established
12 standards". The Agency is proposing retention of this approach.
13 The majority of existing water quality standards are chemical in
14 nature; therefore, a chemical assessment is the primary
15 identifier. However, there are other, nonchemical components to
16 our water quality standards, as well. For example, Section
17 302.203 and 302.211 are water quality standards that are not
18 focused on chemical parameters.

19 In terms of identifiers for Outstanding Resource Waters,
20 the Agency is recommending that this determination not be made
21 through a particular measurement or criteria but through a Board
22 rulemaking or a quasi-legislative policy setting forum.

23 Therefore, we feel there is the latitude to put a water
24 body in that classification for whatever attributes constitute

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1 worthiness of an outstanding designation, whether that be
2 chemistry or habitat or historical or whatever criteria you would
3 want to choose.

4 The proposal requesting whether or not the Agency intends

5 to nominate candidates for --

6 HEARING OFFICER TIPSORD: Just one moment. We do have a
7 follow-up.

8 MR. FREVERT: Okay.

9 MS. LIU: I guess when I read the description of
10 Outstanding Resource Waters I automatically thought that they
11 would have high water quality as well, until I read Region 8's
12 guidance that kind of pointed out that the high water quality is
13 not a prerequisite to becoming an Outstanding Resource Water.

14 I was wondering, for the sake of making this a useful
15 rulemaking and making it clear in the wording, if you could
16 include something along those lines so that people know that it
17 does not have to necessarily be a high quality water to be an
18 Outstanding Resource Water.

19 MR. FREVERT: I take that not as a question, but as a
20 request to go back and consider some alternate language to
21 accomplish the task. Yes, we would be happy to do that. I
22 can't, off the top of my head, tell you what magic word will do
23 that, but we will certainly try to accommodate that.

24 MS. LIU: Thank you.

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1 MR. FREVERT: I believe we are on number 16, does the
2 Agency intend to nominate waters for this outstanding category.
3 It is a pretty specific answer. I hope I presented it in the

4 last hearing. I wanted to reiterate it.

5 The Agency does not intend to propose any specific
6 nominations as Outstanding Resource Waters until the
7 classification and the process for consideration of such
8 proposals is established within Board regulations. You can take
9 that as saying that we don't intend and we don't recommend that
10 specific waters be considered for that in this proceeding.
11 Should other parties petition the Board to classify any water as
12 an Outstanding Resource Water, such proposals should be
13 considered separately from this docket.

14 I think there is some practicalities there because there
15 are -- hopefully there will be a lot of focus on the specific
16 benefits and attributes of the particular proposal, and I am
17 afraid that that level of effort on an individual application
18 will bog down the more general state-wide rulemaking.

19 HEARING OFFICER TIPSORD: I think I would like to follow-up
20 a little bit on that question. I do think you were clear that
21 the Agency does not intend to do anything until the procedures
22 are in place. But I think the question is after procedures are
23 in place, is this going to become a part of the Agency's review
24 such that we may see rulemakings or however the Board -- I think

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1 currently it is proposed as an adjusted standard in the adjusted
2 standard arena.

3 Does the Agency intend to come forward with or review

4 periodically streams in the State and say, you know, here is one
5 that we think may be an Outstanding Resource Water?

6 MR. FREVERT: That is certainly a possibility. We do
7 ongoing reviews and there is a significant amount of water
8 quality standard regulations on the books in Illinois. A number
9 of them need to be reviewed and updated. We try to do as much as
10 we can as fast as we can, and this certainly will be an issue
11 that we can deal with and intend to deal with as the
12 circumstances arise.

13 I am going to stop short of saying that I would predict
14 that you should expect a significant number of filings from us
15 within the next five to ten years. But I can tell you as a
16 matter of practice that we are looking at designated uses. As a
17 matter of fact, we are reviewing the use designation now. So use
18 classifications are part of our ongoing review process.

19 HEARING OFFICER TIPSORD: Okay. Thank you. I think we are
20 ready for question number 17.

21 MR. FREVERT: I believe this is another reference to the
22 Outstanding Resource Water classification. There was a reference
23 to federal criteria or federal guidance on the issue.

24 My understanding of the federal guidance at 40 CFR

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1 131.12(a)(3) and other federal documentation on this issue,
2 including the Region 8 guidance, specifies national and state

3 parks along with wildlife refuges are categories that may
4 logically be candidates to consider for outstanding resource
5 status. This is certainly far short of the presumption that they
6 should be Outstanding Resource Waters.

7 For some further clarification, one must remember that the
8 EPA's interpretation of such designation is "no new or increased
9 discharges to, their term, outstanding national resource waters
10 and no new or increased discharge to tributaries to outstanding
11 national resource waters that would result in lower quality".
12 Illinois is fortunate to have parks and wildlife refuges all up
13 and down its major rivers. Classifying all such locals as ORWs
14 would affect the majority of the state and their tributary
15 watersheds in adjoining states.

16 So the presumption that a state park along the Mississippi
17 or the Illinois River is an ideal candidate for outstanding
18 resource classification may have ramifications 500 miles away. I
19 want to make sure that everybody understands that. Any
20 follow-up?

21 HEARING OFFICER TIPSORD: Question number 18.

22 MR. FREVERT: Under what circumstances would wetlands be
23 able to receive outstanding resource classification. Then there
24 is some follow-up aspects to that question.

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1 My answer is, the Agency is proposing no prerequisites for
2 either flow amount or duration of standing water in the

3 classification of a wetland as an outstanding resource.

4 (A brief recess was taken when the phone rang in
5 the hearing room and Hearing Officer Tipsord
6 answered it.)

7 MR. FREVERT: Let me start over.

8 MR. ETTINGER: I was wondering if that was an objection
9 from the U.S. EPA.

10 (Laughter.)

11 MR. FREVERT: The Agency is proposing no prerequisites for
12 either flow or duration of standing water in the classification
13 of a wetland as an outstanding resource. Likewise, we are not
14 proposing any restrictions for lakes and reservoirs. We do,
15 however, recommend that free flowing streams with 7Q10 or seven
16 day tenure low flow of zero will generally not be deemed a top
17 candidate for classification. We intentionally stopped short of
18 an outright prohibition, opting for a statement of general
19 discouragement, believing intermittent streams in and of
20 themselves typically are not the caliber of resource warranting
21 Outstanding Resource Water classification. I believe such
22 classification may indeed be appropriate for intermittent streams
23 as part of a larger system that includes a perennial stream, lake
24 or reservoir where the overall system may constitute an

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1 outstanding resource.

2 In drafting our proposal, it was intentional to put the
3 word generally in there as precluding 7Q10 and stop short of
4 making it absolute. But we also thought there was enough
5 significance there that we needed to make a statement of some
6 level of discouragement. We don't want every little half mile
7 stream segment here and there that is not tied in to perhaps a
8 more logical and significant resource to have these designations.

9 BOARD MEMBER FLEMAL: In giving reference to a resource of
10 saying resource water, you use the term water body or water body
11 segment. We commonly use in our regulations when we are talking
12 about the waters to which our standards apply the term, water of
13 the State. Is there some significance in your choice of not
14 using water of the State here and instead using the terms water
15 body and water body segment?

16 MR. FREVERT: No. I don't think there is any intention.
17 You can probably use those terms interchangeably.

18 BOARD MEMBER FLEMAL: If we were to use water of the State
19 in replacement of those two terms, would that meet the Agency's
20 understanding of the intent with this rule?

21 MR. FREVERT: With one possible confusion, in that this
22 rule and this intent is focused in on surface waters, and waters
23 of the State may also include groundwaters, and we are not
24 proposing that this standard is to have any application to

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1 groundwaters.

2 BOARD MEMBER FLEMAL: I guess I would ask both the Agency
3 and as well as interested persons in this rulemaking as to
4 whether or not that scope, that intended scope is reflected here
5 in the choice of wording and whether that water of the State
6 terminology is or is not an appropriate change to put in.

7 MR. FREVERT: I can assure you that in drafting them that
8 there was no conscious intent to use those terms only.

9 BOARD MEMBER FLEMAL: From my own understanding of this, I
10 guess I am not terribly clear as to what the population of water
11 bodies other than surface water, which may, in fact, even be yet
12 another possible term to use, but what that population actually
13 is. And if we can find language that would not only clarify it
14 in my mind but clarify it for people who have to live under these
15 regulations I think that would be a useful bit of our time.

16 HEARING OFFICER TIPSORD: Okay. Any additional follow up?
17 Okay. Here is another example of where the Board's
18 questions skipped number 19 and went to number 20.

19 MR. FREVERT: This deals with specification of criteria
20 for the Outstanding Resource Water classification.

21 As stated earlier, an Outstanding Resource Water
22 classification is substantially more restrictive than any other
23 classification currently in place and those restrictions are more
24 policy oriented than technically derived decisions, such as

1 determining a safe concentration for a numeric chemical standard.
2 Determination of whether a water resource will be so classified
3 or not will ultimately rest with the judgment of the Board in
4 weighing the benefits of the classification against the
5 restrictions that come with the classification. The Agency has
6 chosen to focus its attention on the process and the types of
7 information necessary for the Board to make a fully informed
8 judgment rather than to specify criteria that would dictate what
9 that judgment must be.

10 I guess another way of putting it is I don't want to tell
11 you when you have to say no and when you have to say yes. I just
12 want to make sure you understand the ramifications of your
13 decision and you make the best decision that you can.

14 Region 8 guidance for Outstanding National Resource Water
15 nomination. There is another question regarding that document.
16 And I think it is regarding the process for nomination and
17 consideration of candidates.

18 The standards setting process is drastically different
19 among the various states and territories. I am not aware of any
20 state that has a process identical to Illinois. Some states
21 allocate the Outstanding Resource classification is delegated to
22 a body comparable to the Board; in others it is reserved for an
23 action of the state legislature. I think the Board should
24 exercise caution in giving too much credence to Region 8

1 guidance. The states within Region 8 have large expanses of land
2 within public ownership which should greatly simplify some of the
3 issues and ramifications that need to be considered when
4 entertaining such nominations. Just land use and property issues
5 are so much different out there, and also the hydraulics and the
6 nature of the water systems.

7 HEARING OFFICER TIPSORD: Could you just clarify what
8 states encompass Region 8? I think it is in the document.

9 MR. FREVERT: Colorado, Wyoming, Utah.

10 MS. TONSOR: Montana.

11 MR. FREVERT: Maybe New Mexico and Montana. The Seattle
12 region has Idaho and Oregon and Washington, and I don't remember
13 -- I think Region 8 also has the Dakotas, and the western side of
14 the Dakotas are pretty arid.

15 HEARING OFFICER TIPSORD: Thank you.

16 MS. TONSOR: I have a question to clarify on this, as well.
17 Is there any similar guidance document in Region 5?

18 MR. FREVERT: No. Region 5 does not have regional guidance
19 on this issue.

20 MS. TONSOR: Does the regional guidance from any region, in
21 fact, control in that region.

22 MR. FREVERT: It is a regional guidance document. It does
23 not carry any weight in terms of findings from headquarters or
24 any sort of official promulgation or adoption process. It is

1 probably a staff working paper. I think there is some good
2 notions and ideas in there that they have probably tried to
3 customize for the geography and the climate and the population
4 and the nature and activities in their states. But it is not
5 unusual -- well, that is why we have regions in the United
6 States, is because solutions that may work on the east coast may
7 not work on the west coast and so on.

8 Okay. Are we down to number 22?

9 HEARING OFFICER TIPSORD: We have another follow-up.

10 MR. FREVERT: Oh, I am sorry.

11 BOARD MEMBER GIRARD: Mr. Frevert, I have a follow-up to
12 the issue of guidance documents, and it is sort of a general
13 question because it brings me back to many of the things that
14 have come out in your responses here. I want to thank you. It
15 helps us see how the Agency interprets much of the proposal.

16 But, for example, I see some things that are not specified
17 or spelled out, and I just wonder if many of these things are
18 your personal interpretation that would leave the Agency when you
19 leave or if these things are put down in writing somewhere in an
20 internal Agency --

21 MR. FREVERT: You know something, I don't know.

22 (Laughter.)

23 BOARD MEMBER GIRARD: You know, I wish you a long and
24 healthy life.

1 (Laughter.)

2 BOARD MEMBER GIRARD: But someone may make you an offer
3 that you can't refuse some day. Well, for instance, you know,
4 back in one of the earlier questions you talked about an
5 interpretation of the terms resident and indigenous species to
6 include endangered, threatened and migratory. Now, some other
7 people may not consider that to include those terms.

8 For instance, you talked about how the U.S. EPA uses data
9 in deriving protective standards that will protect 95 percent of
10 a population as opposed to 100 percent. But if you were looking
11 at an endangered species in a nondegradation context, you would
12 consider protecting 100 percent of the population.

13 Now, are those standards set down anywhere in the Agency,
14 or is this the first time that they have appeared on paper?

15 MR. FREVERT: I think the last question is pretty easy to
16 answer and that is because there are, separate from the Clean
17 Water Act there is the Endangered Species Act, and there is a
18 requirement to address endangered species through a whole other
19 set of laws and requirements and whole other process that we are
20 obligated to adhere to. It is sort of regardless of what happens
21 with the standard. In reality, we are going to deal with them
22 whether there is an antidegradation standard or not. We are
23 probably going to deal with them in the same way whether there is
24 an antidegradation standard or not.

1 In terms of the definition of technical terms like
2 migratory and things of that nature, I am not aware that there is
3 a significant opportunity to misinterpret those. I think the
4 standards indicate that you have to protect all uses, and all
5 uses, existing uses, is more than -- as long as there is any form
6 of aquatic life, we are protecting aquatic life. To a great
7 extent that is why we offer that language to indicate the
8 definition of aquatic life and designated use is a whole lot
9 different. That is one use in the classification system. In the
10 reality of protecting existing use there is almost an infinite
11 number of uses. And those uses have to be protected under the
12 Clean Water Act if they exist. And if that use is a seasonal
13 use, it still needs to be protected on that seasonal basis.

14 Maybe to a more general issue behind your question, there
15 is obviously the need to identify and make available to the
16 public the actual permitting process and how it is going to work
17 and how we interpret things and when and how we ask for
18 information, how we make that decision. And there is a lot more
19 clarification and a lot more specific detail within the
20 permitting procedures to put the public on notice on how we think
21 we can accomplish the intent of the standard.

22 BOARD MEMBER GIRARD: So you would expect these to be
23 spelled out in more detail in your 354 rules?

24 MR. FREVERT: I think they will be spelled out in more

1 detail. I also want to make the point that there is no single
2 way to do an antidegradation determination. Probably every one
3 will be a little different. I have seen some testimony and some
4 other comments in terms of full-blown. To the best of my
5 knowledge, there is no such thing as a full-blown review. We are
6 trying to identify and provide as much clarity as we can as to
7 the intent and the requirement of the standard itself.

8 How we address that in a particular application depends on
9 so many variables. The size and nature of the discharge. The
10 size and nature of the receiving stream, the location, things of
11 that nature. That there is -- I can't sit down and tell you what
12 the, quote, full-blown review would be. There is no such thing.

13 BOARD MEMBER GIRARD: Okay. Thank you.

14 HEARING OFFICER TIPSORD: Anything further? All right.
15 Then the last question is question number 22.

16 MR. FREVERT: This is regarding the relative level of
17 burden for a proponent that wants to nominate a resource as an
18 Outstanding Resource Water. It will reiterate some of the
19 earlier issues.

20 The Agency believes it is critical that all parties
21 anticipated to be affected by such a classification be given
22 sufficient notice and adequate explanation of the proposed
23 classification to assess its impact upon their present and future
24 activities so they may participate in the regulatory process if

1 they so choose. To the extent that this can be accomplished
2 through a more abbreviated manner than the full petition, the
3 Agency would be receptive to other alternatives.

4 If the petition weighs ten pounds with all of the
5 documentation and there is 5,000 property owners that are deemed
6 to be potentially affected or businesses or permittees, I can
7 understand why we may not want to be required to mail ten pounds
8 5,000 times. But there needs to be some one or two page fax
9 sheet that would have enough detail that a discharge or a
10 property owner would know there is some pending proposals that
11 may preclude their future opportunities to use their property.

12 So we are open to consideration of something there. And I
13 think I had stated earlier in the prior hearing that we are
14 trying to emphasize the significance of the classification so
15 that you know what kind of information you need to make a good
16 decision. How much information is required to trigger that
17 process and open the docket and start holding hearings, I think
18 is perhaps what we are debating. We want to make sure that there
19 is enough information and enough reason to believe that this is
20 truly a likely candidate for that process before a lot of people
21 start investing a lot of staff time and attending a lot of
22 hearings. We are not trying to intentionally make the process
23 burdensome. But we are trying to make sure that we truly get
24 legitimate petitions and not a lot of petitions that -- where

1 there was not enough homework done to warrant Board
2 consideration.

3 And also to make sure that -- I guess the other important
4 thing here is that there are a lot of people that could
5 potentially be affected by such classification and probably does
6 not even know the Pollution Control Board and water quality
7 standards exist, because they are not currently operating a
8 business or an activity where they need a permit and they are
9 under the regulations. Every parcel of land out there may have
10 some future use that would require that, and until these people
11 pursue those ends, they may not even know that the water quality
12 standards classification has any ramification on their piece of
13 property.

14 HEARING OFFICER TIPSORD: Section 37(a) of the Act talks
15 about the requirements in a variance, what the Agency must
16 undertake, and just sort of very briefly paraphrasing, it
17 indicates that the Agency shall notify of any petition to any
18 person in an area that has said that they want to be notified and
19 also requires the chairman of the county board to get notice and
20 for the Agency to also publish notice of the variance, the
21 potential variance in a paper in that area. I am wondering if
22 those kinds of notice requirements would satisfy what you are
23 trying to achieve here, absent having a ten pound petition mailed
24 to 5,000 people.

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1 MR. FREVERT: We will be happy to go back and give that
2 some more thought and try to give you better guidance.

3 HEARING OFFICER TIPSORD: There are also some specific
4 provisions in the Act, I believe, on who has to be notified in
5 both landfill siting cases and enforcement procedures, and I just
6 toss those out as possibilities of general notifications that
7 might be helpful.

8 MR. FREVERT: Again, we would be happy to do that. And,
9 again, I would encourage other parties to weigh in with their
10 opinions of how it should actually be dealt with. It is an
11 important issue and there needs to be a balance. I don't want a
12 process that is so cumbersome that citizens can't use it, but I
13 don't want a process that is so inadequate that truly affected
14 people are not aware of their opportunity to weigh in and bring
15 you information on the ramifications that it may have on them.

16 HEARING OFFICER TIPSORD: Are there any other additional
17 questions at this time for the Agency?

18 BOARD MEMBER FLEMAL: I have a question that goes back to
19 your prefiled testimony as presented at the last hearing. In
20 your discussion of what constitutes usage, you made the statement
21 that it should be noted that the proposal protects existing uses
22 rather than designated uses in the water body. Could you
23 elaborate for us just a little bit on what significance you
24 attach to that distinction?

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1 MR. FREVERT: Certainly. I think I did it earlier, but I
2 will try again. Designated uses, if you look at the definition
3 or the Part 3 with the designated uses language, it is a pretty
4 broad umbrella type approach where aquatic life is designated
5 use. Within that designated use, the caliber and the quality of
6 that aquatic life varies from stream to stream.

7 For instance, some streams are perfectly capable of
8 sustaining an adult population, but they are not capable of
9 functioning as spawning and rearing grounds, while you can
10 maintain perhaps a migratory population, who do not fully
11 reproduce in year-round population. Those are different types of
12 uses, even within one species.

13 A water body can be used as a feeding ground for mature
14 fish, but it may not function as a spawning ground. There are a
15 lot of smaller streams that are, indeed, the breeding and rearing
16 and nesting grounds for the young immature organisms that
17 probably are not particularly functional for supporting an adult
18 population due to their seasonal flow.

19 Those are the kinds of environmental and biological details
20 and complexities that I was trying to focus on and make sure that
21 everybody understood, that there is a significant difference
22 between an aquatic life use classification and actual existing
23 uses and numbers and types of uses that occur in any particular
24 stream, lake, reservoir, wetland.

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1 BOARD MEMBER FLEMAL: Fishable and swimmable are designated
2 or are existing uses?

3 MR. FREVERT: Yes.

4 (Laughter.)

5 MR. FREVERT: Fishable and swimmable is the goal of the
6 Clean Water Act. We have streams and lakes that are swimmable,
7 and we have some streams and lakes that are not swimmable. I
8 believe our standards and our use classifications have wording in
9 there adequately that talk about protecting swimmable conditions
10 when the physical and bacterial and other attributes allow.

11 BOARD MEMBER FLEMAL: Okay.

12 MR. FREVERT: I would like to give you a straighter answer,
13 but I am not sure I know what you are going at, Ron.

14 BOARD MEMBER FLEMAL: I guess I was just struck by the fact
15 that you made that distinction and I was wondering what was
16 behind your --

17 MR. FREVERT: As a matter of fact, I think it probably was
18 more important for the work group in the communication of the
19 public knowledge than perhaps the absolute nature of the meaning
20 in the regulation. You can protect an aquatic use, but you can
21 protect a lower level aquatic use that existed yesterday, and
22 that's the type of distinction that I am trying to make.

23 HEARING OFFICER TIPSORD: Okay. Anything further? Okay.
24 Before we --

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1 MS. TONSOR: I wanted to ask some follow-up questions of
2 Toby from the questions from the last hearing, which we really
3 got short on time so I didn't have time to clarify with him.

4 HEARING OFFICER TIPSORD: Okay.

5 MS. TONSOR: And is now an appropriate time or do you want
6 to break or --

7 HEARING OFFICER TIPSORD: Actually, why don't we go ahead
8 and -- you had submitted to me four general permits and these
9 were ones requested from the previous hearing. I am going to
10 admit those as Exhibit Numbers 8, 9, 10 and 11. General permits
11 -- general NPDES permit number ILR00 is Number 8. NPDES permit
12 number ILR10 is Number 9.

13 (Whereupon said documents were duly marked for
14 purposes of identification as Hearing Exhibits 8
15 and 9 and admitted into evidence as of this date.)

16 HEARING OFFICER TIPSORD: Then NPDES permit number ILG84 is
17 Exhibit Number 10.

18 (Whereupon said document was duly marked for
19 purposes of identification as Hearing Exhibit 10
20 and admitted into evidence as of this date.)

21 HEARING OFFICER TIPSORD: NPDES permit number ILG551 is
22 Exhibit Number 11.

23 (Whereupon said document was duly marked for

24 purposes of identification as Hearing Exhibit 11

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1 and admitted into evidence as of this date.)

2 MS. TONSOR: Did we get ILG84?

3 HEARING OFFICER TIPSORD: Yes, that is Number 10.

4 MS. TONSOR: Okay. I am sorry.

5 HEARING OFFICER TIPSORD: That's okay.

6 MS. TONSOR: There should be as a last page of the packet a
7 one sheet, which gives the number of general permits outstanding.

8 HEARING OFFICER TIPSORD: Yes, that is attached to the back
9 of NPDES permit number ILG551. That was admitted as Exhibit
10 Number 11. Do you want me to detach that and give it its own
11 exhibit number?

12 MS. TONSOR: It needs to be detached and have its own
13 exhibit number.

14 HEARING OFFICER TIPSORD: All right. We will make that,
15 then, Exhibit Number 12.

16 (Whereupon said document was duly marked for
17 purposes of identification as Hearing Exhibit 12
18 and admitted into evidence as of this date.)

19 HEARING OFFICER TIPSORD: Do you have additional copies of
20 these?

21 MS. TONSOR: I brought approximately 30 copies of them.

22 HEARING OFFICER TIPSORD: Okay. Thank you. Why don't we
23 go off the record for a couple of seconds.

24 (Discussion off the record.)

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1 HEARING OFFICER TIPSORD: Okay. We will take a 15 minute
2 break and then try to go until 1:00 before we take a break.

3 (Whereupon a short recess was taken.)

4 HEARING OFFICER TIPSORD: I think what we are going to do
5 is leave it up to the testifier as to whether or not they want to
6 read their testimony into the record, or if they want to take it
7 as if read and do a summary. And so with that in mind, we will
8 start with Mr. Moore. Could we have him sworn in and then we
9 will discuss how you want to proceed with your testimony.

10 Excuse me. I just received a message that we need to wait
11 another couple of minutes. Okay. So we will go off the record.

12 (Discussion off the record.)

13 HEARING OFFICER TIPSORD: Okay. We are back on the record.

14 As we discussed before, I am going to leave it up to the
15 testifiers as to whether or not they want to read their testimony
16 or give us a brief summary and then admit it as an exhibit.

17 All right. Could we have Mr. Moore sworn, please.

18 (Whereupon the witness was sworn by the Notary
19 Public.)

20 HEARING OFFICER TIPSORD: All right. Go ahead, Mr. Moore.

21 MR. MOORE: My name is Robert Moore. I am the Executive
22 Director of the Prairie Rivers Network. It is a state-wide river

23 conservation group with offices in Champaign, Illinois. In the
24 interest of moving the proceeding along today and getting us to

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1 lunch sooner rather than later I guess I will opt for the
2 nonreading option and try to provide the Board and the audience
3 members with a summary of the testimony we prefiled previous to
4 the November 17th hearing and the supplemental testimony that we
5 prefiled in preparation for this hearing today.

6 I would like to thank the Board for the opportunity to come
7 before it and provide our input to this process. We think the
8 promulgation of the antidegradation rules and the forthcoming
9 implementation procedures are an essential part of the Illinois
10 Clean Water Program and one that we hope to see rapidly
11 implemented.

12 To summarize the comments which we have filed, we are
13 generally in favor of the concept of a strong antidegradation
14 policy. There were a few issues which we thought needed to be
15 clarified, some of which have already been addressed by the Board
16 and discussed in questions and with testimony by the Agency and
17 questions by other audience members and the Board itself.

18 Some of our concerns are simple and can be addressed rather
19 quickly just concerning minor language changes and the
20 clarification of language. And others deal with more substantive
21 issues, particularly some of our concerns focus on making sure
22 that the antidegradation rules, when adopted, indeed apply to all

23 new or increased discharges from point sources in the State of
24 Illinois. And we also have some concerns about the process for

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1 recognizing Outstanding Resource Waters.

2 In addition, we would like to touch on the issue
3 surrounding the de minimis exception, which has been brought up
4 by several parties in the prefiled testimony and was also the
5 subject of great discussion and debate at the work group
6 meetings, which the IEPA convened in the two years previous to
7 these hearings, which Prairie Rivers Network participated in.

8 With that said, I would be happy to entertain any questions
9 related to the testimony that we prefiled and the supplemental
10 testimony that we have prefiled.

11 HEARING OFFICER TIPSORD: Okay. Before we do that, let's
12 take care of some housekeeping. Do you have a clean copy of the
13 testimony and the supplemental testimony that we can mark as an
14 exhibit?

15 MR. MOORE: Yes.

16 HEARING OFFICER TIPSORD: Okay. We will mark the prefiled
17 testimony of Robert J. Moore as Exhibit Number 13, and then the
18 supplemental prefiled testimony as Exhibit Number 14.

19 (Whereupon said documents were duly marked for
20 purposes of identification as Hearing Exhibits 13
21 and 14 and admitted into evidence as of this

22 date.)

23 HEARING OFFICER TIPSORD: With that, are there any
24 questions for Mr. Moore?

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1 Yes, Mr. Harrington?

2 MR. HARRINGTON: Some of these relate directly to your
3 testimony and some, I think, more to the thrust of your
4 testimony.

5 I believe that at the first hearing there was testimony and
6 today about thermal discharges. Mr. Frevert testified that the
7 Agency did not think a review -- a full-blown nondegradation
8 review would be necessary for increasing the thermal loading,
9 which did not include additional pollutants other than water
10 treatment chemicals already approved in the NPDES permit.

11 In one of the prefiled questions I asked the Agency, which
12 we will get to later, is would he object to including this as the
13 list of things presumptively not considering nondegradation. Do
14 you have any opinion on that?

15 MR. MOORE: The subject of thermal discharges was brought
16 up at the work group meetings and, again, as Mr. Harrington
17 brought up, was brought up at the first hearing. We agreed at
18 the work group and we continue to agree with the Agency's
19 determination that it does not -- it is not a wise allocation of
20 the Agency's resources to do an antidegradation analysis of a
21 thermal discharge if, indeed, a demonstration has already been

22 made under Section 316 of the Clean Water Act showing that no
23 deterioration of the State's waters would occur from the thermal
24 discharges. With the subject of additives, if additives are part

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1 of the thermal discharge, those additives need to be examined to
2 determine their potential to the waters of the State.

3 MR. HARRINGTON: Just to follow-up on that, in my question
4 and in my questions to Mr. Frevert at the first hearing I dealt
5 with additives that had already been approved as part of an NPDES
6 permit where the volume might increase with increased thermal
7 discharge. Would that be a problem as far as you are concerned
8 if that was not covered by -- if that was considered one of the
9 presumptively nondegradating discharges?

10 MR. MOORE: Inclusion of a pollutant in an NPDES permit --
11 by increasing the loading of a pollutant already included in a
12 NPDES permit, I don't think that their inclusion in the prior
13 permit is a presumptive finding that increased levels would not
14 cause degradation.

15 MR. HARRINGTON: Did you -- at the first hearing, again,
16 when I asked some questions, as did other people, about
17 pretreatment, did you agree with the Agency's testimony at that
18 time that a new increased discharge of a POTW that did not
19 require the POTW to modify its NPDES permit is not covered by
20 these rules or should not be covered?

21 MR. MOORE: Are you asking my opinion?

22 MR. HARRINGTON: Yes.

23 MR. MOORE: You are asking on my opinion on if the Agency
24 should do an antidegradation review?

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1 MR. HARRINGTON: Yes, on a new or increased discharge to a
2 POTW which does not require a modification of the POTW's permit.

3 MR. MOORE: That is a decision that is up to the Agency.
4 My understanding of the pretreatment program is increases in
5 discharges from pretreaters, as long as they have -- as long as
6 that increase in discharge results in no change to a POTW's NPDES
7 permit, any increase in the discharge of the pretreater is
8 between the POTW and the pretreater.

9 MR. HARRINGTON: Okay. Thank you. Your testimony opposes
10 any de minimis exemption of the rules; is that correct?

11 MR. MOORE: I am not certain what you mean by closes.

12 MR. ETTINGER: Opposes.

13 MR. HARRINGTON: Opposes. Excuse me.

14 MR. MOORE: Oh, opposes. No, I don't believe that is
15 correct. In fact, in our prefiled testimony we make reference to
16 the fact that in a proposal that was drafted by Prairie Rivers
17 Network and the --

18 HEARING OFFICER TIPSORD: I am sorry. The court reporter
19 is having trouble hearing you.

20 MR. MOORE: I am sorry about that. In our prefiled

21 testimony, I make mention of the fact that the Prairie Rivers
22 Network, the Sierra Club, the Environmental Law & Policy Center
23 and the McHenry County Defenders actually proposed a limited de
24 minimis language. In the course of discussions over that de

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1 minimis language, it was decided that the Agency's -- that the
2 approach that the Agency had decided to take in this proposal
3 makes more sense than the approaches that were -- the many
4 approaches that were discussed regarding de minimis in the work
5 group meetings.

6 Simply because, and we would agree with Mr. Frevert's
7 earlier testimony from November 17th on this matter, it seemed
8 that the burden of proof to show a de minimis increase in
9 loadings far exceeded the burden of proof for demonstrating
10 nondegradation.

11 MR. HARRINGTON: Okay. I have no further questions. Thank
12 you.

13 BOARD MEMBER FLEMAL: In your prefiled testimony you
14 recommend that this Board delete the provision in the proposal
15 that deals with streams of zero 7Q10 flows; am I correct in my
16 understanding of that?

17 MR. MOORE: Yes. We don't agree that 7Q10 -- that streams
18 with the 7Q10 flow of zero should be dismissed from ORW
19 designation.

20 BOARD MEMBER FLEMAL: As I read the language as proposed to
21 us, it is more advisory than an absolute outright prohibition of
22 allowing those sorts of streams to be --

23 MR. MOORE: That's correct.

24 BOARD MEMBER FLEMAL: Do you think that there should be

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1 some higher test put to low flow streams than might be to other
2 --

3 MR. MOORE: No, I think simply because a stream has a 7Q10
4 flow of zero, it should not be treated any differently than any
5 other water body. Just because the stream might have a flow of
6 zero does not mean it is a completely dry stream bed. There
7 could be significant pools, which still survive despite the fact
8 that there is no continuous flow in the stream.

9 In fact, a quick survey of the Agency's current
10 classification system for waters conducted under the Illinois EPA
11 and the Illinois Department of Natural Resources biological
12 stream characterization methodology, shows that a large
13 percentage of the very highest quality streams, also known as
14 Class A streams, are, indeed, streams that have a 7Q10 flow of
15 zero. There are streams such as the Jordan Creek in the North
16 Fork Vermillion watershed, Jordan Creek in the Salt Fork
17 Vermillion watershed and Walnut Creek, the Mackinaw.

18 There is numerous streams that have a 7Q10 flow of zero,
19 yet exhibit very, very exceptional levels of water quality, and

20 because of the presence of water year round, albeit not always
21 flowing water, there are pools that still harbor populations,
22 thriving populations of mussels, crustaceans, and fish and even
23 aquatic plants which may be rare and/or of protected status.

24 BOARD MEMBER FLEMAL: You also make a recommendation, and I

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1 will read this. It says, Prairie Rivers would also like to
2 request that the Pollution Control Board consider the
3 identification of some initial ORW waters for inclusion under
4 303.206 as part of this rulemaking. Am I to take it that you
5 would suggest that in the current rulemaking right now that we
6 identify some ORWs?

7 MR. MOORE: I think as part of the proceeding it might be
8 advantageous to consider naming some Outstanding Resource Waters,
9 which are of clear exceptional quality, are clearly of
10 significant biological interest, or recreational interest. And I
11 think there are agencies within the state government that
12 possibly could even identify those waters for the Board, if the
13 Board so desired.

14 BOARD MEMBER FLEMAL: Do you have some candidates that you
15 would include on such a list right off the top of your head?

16 MR. MOORE: Right off the top of my head? I think I would
17 be reluctant to toss out names randomly without considering that
18 very carefully. But I think there are several streams throughout

19 the state, particularly in Southern Illinois, that largely reside
20 within the boundaries of the Shawnee National Forest, for
21 instance, and I think there are several other streams, such as
22 the Middle Fork in the Vermillion, which is the State's only
23 national scenic river which would be a pretty easy candidate to
24 recognize as an ORW. And I think there is probably a good many

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1 other streams that could be so recognized as well.

2 BOARD MEMBER FLEMAL: Your examples, again, are all
3 streams. We have been led to understand, however, that there may
4 be waters to which this designation might apply that are not, in
5 fact, streams. Do you have thoughts or candidates for water
6 bodies that would fall under this nonstream grouping?

7 MR. MOORE: Well, again, I am a little apprehensive to name
8 water bodies right off the top of my head. However, I know one
9 that does spring to mind, the Voter Bog in McHenry County. I am
10 sure that there are many other wetlands, sloughs, bogs, that
11 would be very excellent candidates for an ORW designation.

12 BOARD MEMBER FLEMAL: Okay.

13 HEARING OFFICER TIPSORD: Okay. Anything additional?
14 Okay. Seeing none, thank you very much.

15 MR. MOORE: Thank you.

16 HEARING OFFICER TIPSORD: Just a couple of housekeeping
17 matters. At break, Mr. Ettinger, you had handed me some material
18 that we had requested from a previous testifier in the Chicago

19 hearing. Biological stream characterization, a biological
20 assessment of Illinois stream quality, date stamped September 25,
21 1996, that was actually printed by the Environmental Protection
22 Agency in September of 1989. We will admit that as Exhibit
23 Number 15.

24 (Whereupon said document was duly marked for

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1 purposes of identification as Hearing Exhibit 15
2 and admitted into evidence as of this date.)

3 HEARING OFFICER TIPSORD: And Kishwaukee River Basin. Is
4 that correct? Am I saying that correctly?

5 MR. MOORE: Yes.

6 HEARING OFFICER TIPSORD: An inventory of the region's
7 resources by the Illinois Department of Natural Resources. We
8 will admit that as Exhibit Number 16.

9 (Whereupon said document was duly marked for
10 purposes of identification as Hearing Exhibit 16
11 and admitted into evidence as of this date.)

12 HEARING OFFICER TIPSORD: And Mr. Ettinger informs me that
13 these are available from the Department of Natural Resources, and
14 they are quite nice.

15 MR. ETTINGER: You want the color version. You don't want
16 a black and white copy. They are very pretty pictures.

17 BOARD MEMBER FLEMAL: Can we let the record show that

18 DeKalb is located on the banks of the beautiful Kishwaukee River?

19 HEARING OFFICER TIPSORD: We certainly can.

20 BOARD MEMBER FLEMAL: Thank you.

21 HEARING OFFICER TIPSORD: Okay. Did you have anything
22 further today?

23 MR. ETTINGER: Actually, I had one question or a
24 clarification that I just wanted to ask regarding the additives

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1 on treated water.

2 Did you have occasion to look at Mr. Frevert's testimony
3 that Mr. Harrington referred to in his question?

4 MR. MOORE: Yes, I did.

5 MR. ETTINGER: And what was your understanding of reviewing
6 that regarding additives?

7 MR. MOORE: My understanding of the conversation that took
8 place between Mr. Harrington and Mr. Frevert at the last hearing
9 seemed to be consistent with the idea that thermal discharges
10 alone would not have to undergo an antideg analysis if they were
11 in compliance with Section 316 of the Clean Water Act.

12 If there were additives in the cooling water to be
13 discharged, those cooling additives would have to be evaluated
14 from an antidegradation perspective. And if increased loading of
15 those additives was proposed, that those would also have to be
16 examined in the course of an antidegradation analysis, albeit,
17 probably much more of an abbreviated analysis than the original

18 one.

19 MR. ETTINGER: Do you agree with Mr. Frevert's position on
20 that?

21 MR. MOORE: I do, indeed, agree with Mr. Frevert's position
22 on that issue.

23 HEARING OFFICER TIPSORD: Okay. Anything further? Thank
24 you very much.

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1 I would also like to note for the record that Cynthia
2 Skrukruud had notified me by e-mail that some of the documents
3 that we had asked her to provide as part of her testimony at the
4 last hearing are quite lengthy. So she will be submitting the
5 relevant portions of those in a later filing along with an
6 explanation to that effect. I forgot to mention that at the
7 beginning. Thank you.

8 All right. I think we can go ahead and proceed, then, with
9 IERG.

10 MS. HODGE: My name is Katherine Hodge. I am with the law
11 firm of Hodge and Dwyer in Springfield. And today with me is Ms.
12 Deirdre K. Hirner, who is the Executive Director of IERG. We did
13 file prefiled testimony for Ms. Hirner. I do have extra copies
14 of that here if anyone else would like it. I have copies for the
15 Hearing Officer, as well.

16 We would ask that this prefiled be admitted into the

17 record, but Ms. Hirner would also like to offer just a summary of
18 this testimony today.

19 HEARING OFFICER TIPSORD: Okay. We will admit this, then,
20 as Exhibit Number 17.

21 (Whereupon said document was duly marked for
22 purposes of identification as Hearing Exhibit 17
23 and admitted into evidence as of this date.)

24 HEARING OFFICER TIPSORD: Ms. Hirner, we will have you

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1 sworn in.

2 (Whereupon the witness was sworn by the Notary
3 Public.)

4 MS. HIRNER: Thank you very much. On behalf of IERG and
5 our member companies, I would like to thank the Board for the
6 opportunity to present testimony today. As Ms. Hodge said, it is
7 perhaps not a summary of our prefiled testimony, but it will be
8 an abbreviated version of what we have presented.

9 As Ms. Tipsord has noted and has been discussed earlier,
10 IERG does hope that the Board will look favorably on a request
11 for a third hearing to allow us to present additional testimony.

12 Today, I will offer information about IERG's general areas
13 of concern, again, with our intent to offer specific proposed
14 revisions to the Agency's proposal and supporting documentation
15 at a next hearing, if you should decide to grant that.

16 IERG has been an active participant in the Agency's

17 antidegradation work group process, and although we did not
18 concur that a regulatory initiative and requisite rulemaking were
19 necessary for the Agency to continue to conduct its
20 antidegradation reviews, but rather, it was done as a means to
21 avoid threatened litigation, as attested to by Mr. Frevert at the
22 first hearing, IERG did participate in the spirit of moving the
23 process forward.

24 However, throughout the process, we have maintained that

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1 the current antidegradation review procedures used by the Agency
2 are technically sound, legally sufficient, and are conducted in a
3 manner that is consistent with the intent of federal law and
4 regulations. If Illinois' implementation procedures are not up
5 to par in any respect, they are in those areas involving
6 designating Outstanding Resource Waters and in public
7 participation.

8 While we understand the Agency references antidegradation
9 reviews in the public notice fact sheets that are prepared for
10 all NPDES permits, we do believe a lack of detail in the fact
11 sheets may lead the public to question the adequacy of the
12 Agency's antidegradation review.

13 Noting the two potential deficiencies early on in the
14 process, IERG had suggested a limited revision to the procedures
15 on which the Agency relied, involving first an expansion of the

16 information regarding the antidegradation reviews to be included
17 on the fact sheets and, second, a process for designating ORWs,
18 or Outstanding Resource Waters, in accordance with the procedures
19 for adjusted standards. Primarily we had looked at those for the
20 class three groundwater classification.

21 Now, IERG does not dispute the principle that the Clean
22 Water Act requires an antidegradation review in certain cases.
23 Rather, our concerns are with the procedures the Agency and the
24 regulated community must undertake in certain specific cases. We

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1 are pleased that Mr. Frevert's previous testimony indicated a
2 willingness to consider changes to clarify the intent of the
3 Agency's proposal. And with that in mind, I will highlight
4 IERG's general areas of concern. Again, hopefully we will have
5 the opportunity to offer some very specific recommendations and
6 some greater detail at a future hearing.

7 First, the proposal does not contain a significance test to
8 determine the need for a comprehensive antidegradation review.

9 Second, the proposal contains only a limited number of
10 exceptions to an individual antidegradation demonstration.

11 Third, the proposal requires extensive up-front submissions
12 from an NPDES permit or 401 certification applicant.

13 Fourth, the proposal does not contain sufficient
14 requirements for demonstrating ORW designation.

15 Fifth, the proposal lacks clarity in certain areas. And I

16 will discuss each of these in a little greater detail.

17 First, I would turn to the significance determination. The
18 business community believes that if procedures are adopted they
19 should be similar to the tiered approach suggested in Region 8's
20 guidance document, a copy of which we provided to the Board at
21 the first hearing.

22 The first step should be to determine whether an increased
23 load is of such significance that a comprehensive antidegradation
24 assessment is required or whether such load, by it's nature,

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1 warrants an insignificance determination. In such an instance,
2 the finding of insignificance, in and of itself, would be, we
3 believe, an appropriate antidegradation review.

4 Secondly, regarding exceptions, if the antidegradation
5 review process is to effectively function in the real world and
6 not to cause the Agency to bog down in an endless review of
7 permits that have virtually no environmental impact, certain
8 activities, such as those in proposed Section 302.105(d) that are
9 not subject to individual demonstration pursuant to the Board's
10 standard, are both necessary and appropriate.

11 During the work group process, IERG had proposed additional
12 exceptions which we believed adhered to the standards requirement
13 to maintain and protect existing uses and to avoid unnecessary
14 deterioration of the water. The Agency did not include these,

15 our recommendations of exceptions, in its proposals. We assume
16 that is because the Agency did not believe them to be workable or
17 federally approvable.

18 However, in reviewing the antidegradation procedures of
19 other Region 5 states, IERG has found similar exceptions included
20 in their antidegradation procedures and, apparently, those have
21 been approved by the U.S. EPA. Based on this review, we do
22 intend to offer additional exceptions in the future and we will
23 provide justification for those exceptions.

24 Regarding the third area, up-front data submissions, IERG

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1 agrees the Agency should have the information it needs to wholly
2 fulfill its obligation to conduct antidegradation determinations
3 on proposed increased loadings. Section 302.105(c)(2) requires
4 an applicant to demonstrate the standard is not exceeded, that
5 existing uses are protected, that all technically and
6 economically reasonable measures are incorporated and that
7 community-wide benefits accrue.

8 The Agency's proposed implementation procedures, and that
9 was proposed Part 354, specify that a permit applicant must, and
10 I emphasize the word must, identify and characterize the waters,
11 identify and quantify the proposed load increase and its
12 potential impacts, determine the social and economic benefits of
13 the activity, and provide a comprehensive alternatives
14 assessment.

15 In both instances, as we read the language, this
16 information must be provided by the applicant up-front for each
17 loading, regardless of whether the loading is significant, or
18 whether any lowering of water quality is determined, or whether
19 the IEPA has access to the information from other sources or,
20 indeed, has the information in its possession.

21 IERG is not opposed to providing such information when it
22 is truly deemed necessary to conduct a thorough antidegradation
23 review. And Mr. Frevert has testified that the Agency will use
24 its discretion requesting this information. However, IERG

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1 believes that neither the language of proposed Part 302.105 nor
2 Part 354 allows the Agency this discretion.

3 Regarding ORW demonstration, IERG recognizes that an
4 outstanding resource water designation carries with it the
5 potential for profound economic impact and environmental
6 restrictions on surrounding lands and on the owners of those
7 properties. Such designation requires a rigorous process based
8 on definitive criteria with the full input of all affected
9 parties through public hearings and through notification of all
10 surrounding landowners. The burden must be on the petitioner to
11 fully articulate and to prove the justification for the
12 designation.

13 The business community could support a Board rule for

14 designating ORWs which contained sufficient requirements for the
15 demonstration of the designation. IERG intends to submit
16 specific language and supporting testimony in this regard.

17 Regarding lack of clarity on parts of the proposal, the
18 regulated community has identified three primary areas of
19 concern. First, what is the trigger for an antidegradation
20 review? Is it allowing the lowering of water quality, as noted
21 in 302.105(c)(1), and that is the lowering of the water quality
22 of a high quality water. Is it any increase in pollutant loading
23 subject to an NPDES permit?

24 The regulated community holds that the trigger should be an

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1 increase in pollutant loading for which a new or increased permit
2 limit would be required. We believe the Agency concurs with this
3 based upon Mr. Frevert's previous testimony, but we do believe
4 this needs to be clarified.

5 Secondly, the proposed Board rule references loading
6 subject to an NPDES permit. The proposed Agency's implementation
7 procedures reference any permit application for a new, renewed,
8 or modified NPDES permit.

9 When do the requirements for an antidegradation review
10 apply? The two references in the Board rule and in the Agency's
11 proposed Part 354 lack consistency, and we believe this should be
12 clarified.

13 Third, what is the relationship between increased loading

14 and the lowering of water quality? And this distinguishing
15 between the two has raised some questions in our mind. Do all
16 increases in pollutant loadings require an antidegradation
17 demonstration? Do proposed increased loading trigger conscious
18 thought on the part of the Agency to review and determine whether
19 instream concentration is going to be better than worse? And is
20 this an antidegradation demonstration?

21 Are new, renewed, or modified permits for operation having
22 no proposed increase in any pollutant parameter activity or
23 loading exempt from any type of antidegradation review? Is the
24 trigger for an antidegradation review, in fact, a two-step

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1 process with the first step being that a proposed actual increase
2 in loading will occur, and the second step being that that
3 loading must lower water quality? Our question is what standard
4 applies and when does it apply?

5 In conclusion, I would like to note that substantive
6 changes to federal policy, rules, and guidance in the
7 antidegradation arena are underway. They will not be forthcoming
8 for at least another year. The proposed changes to Illinois'
9 antidegradation standard and procedures currently before us may
10 or may not comply with the federal provisions, which are yet to
11 come. The scope of an antidegradation review must be with the
12 intent of the Clean Water Act. We agree.

13 However, realistically, effective use of the resources of
14 the regulators and the regulated necessitates a reasonable cut
15 regarding applicability for purposes of review. The decision as
16 to whether a discharge constitutes unacceptable degradation rests
17 with the Illinois EPA, and we believe it must be made on the
18 basis of a blend of solid information, experience, and
19 professional judgment. Alternative options must be based in
20 reality and on clearly stated rationale decision-making criteria.
21 To do otherwise, would simply hold each and every permit decision
22 open for appeal.

23 We believe the business community is rightly concerned that
24 an open-ended review will, rather than yield a final decision,

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1 avoiding third-party permit appeals, provide additional impetuous
2 for filing such appeals.

3 And, finally, in any petition to change a rule or make a
4 regulatory designation, the burden of proof rests with the
5 petitioner. Such premise must hold true for the designation of
6 ORWs.

7 Again, I thank you for the opportunity to testify before
8 you today, and I would be pleased to answer any questions.

9 HEARING OFFICER TIPSORD: Are there any questions?

10 MR. ETTINGER: Yes.

11 HEARING OFFICER TIPSORD: Go ahead.

12 MR. ETTINGER: I can't find the reference in your

13 testimony, but you talked about the federal rules on this being
14 under consideration and you make reference, and I forgot the guys
15 name. Is it Bob Shippen?

16 THE WITNESS: Bob Shippen.

17 MR. ETTINGER: Yes, Shippen. He came and spoke to the
18 group. Have you heard anything about this since Mr. Shippen
19 spoke to the group a year or two ago?

20 MS. HIRNER: He spoke -- it was in 1999, and I have not
21 heard anything since that time.

22 MR. ETTINGER: So you don't know anything about any changes
23 to the antidegradation rules since 1999?

24 MS. HIRNER: Since he spoke at our hearing. Mr. Frevert

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1 spoke today and said today that the headquarters had briefed us
2 at that particular meeting.

3 MR. ETTINGER: Yes, Mr. Shippen was from headquarters.

4 MR. MOORE: You stated in your testimony that the Agency
5 currently summarizes the antideg analysis in the NPDES permit
6 fact sheets?

7 MS. HIRNER: They put some information -- our understanding
8 is, based on testimony at the first hearing, that they do outline
9 some of that information in the fact sheets, that they reference
10 it in their fact sheets. I believe at the first hearing Mr.
11 Frevert said that when they put the NPDES permit applications out

12 for public review, that the information is included.

13 MR. MOORE: I guess I would not say this as a question, but
14 as a -- as possibly a question for the Agency. I think what Mr.
15 Frevert's testimony was, was that they would provide the
16 antidegradation analysis if a member of the public requested it.

17 HEARING OFFICER TIPSORD: Mr. Frevert, do you have any
18 comment on that since they are discussing your testimony?

19 MR. FREVERT: I was in the back of the room and the
20 acoustics aren't so good.

21 MR. MOORE: I just wanted to clarify, does the Agency -- I
22 think I know the answer already, but does the Agency routinely
23 summarize antideg findings in the permit fact sheets?

24 MR. FREVERT: Yes. In cases where we don't, it is an

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1 oversight and we should.

2 MR. MOORE: Okay. I guess we will submit some sample fact
3 sheets, because I have never seen one.

4 HEARING OFFICER TIPSORD: Any other questions?

5 Yes, Connie at the back of the room.

6 MS. TONSOR: I did have a question referring back to your
7 testimony. You suggest that and you state that IERG's position
8 is that the current standard is sufficient. And in your
9 testimony reviewing the proposed standard, you indicate that one
10 of the deficiencies which you see is that there is not a
11 significance of the degradation caused by the increased activity

12 of the pollutant loading or the increased action.

13 You suggest that the Board needs to include in the new
14 standard a significance determination. The current
15 nondegradation standard, however, if you remember it, does it
16 contain a significance criteria? And I have that regulation with
17 me. It is up front if you want to look at it. It is 302.105.

18 MS. HIRNER: I think if you -- if our testimony does not
19 state it clearly, what the intent of our testimony is, is that
20 the review procedures currently used by the Agency to conduct its
21 antidegradation reviews are sufficient and compliant with the
22 intent of the federal language.

23 (Ms. Tonsor showing document to Ms. Hirner.)

24 MS. TONSOR: If I understood, however, the gist of what you

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1 were stating, was that you wanted somehow in the standard, that
2 the Board is considering, there to be an element where once there
3 is a decision that there is an increase in pollutant loading and
4 it is more than a de minimis increase, before an antidegradation
5 review would be required or a full review, it would have to be a
6 significant degradation.

7 MS. HIRNER: I have really made no mention of de minimis in
8 my testimony.

9 MS. TONSOR: Okay. Before -- but you did talk about the
10 significance as being an area of deficiency.

11 MS. HIRNER: What we stated was that the first step should
12 be to determine whether a permit action is of such significance
13 that a formal antidegradation review is necessary. And when we
14 refer to the formal antidegradation review, I believe that we
15 look at the characteristics of the water and the characteristics
16 of the loading and then we go on to social and economic
17 justification and description of all alternatives. That is, in
18 my mind, what a formal antidegradation review is.

19 MS. TONSOR: In --

20 MS. HIRNER: Now -- may I finish?

21 MS. TONSOR: Sorry. Go ahead.

22 MS. HIRNER: Thank you. Then we go on to say that if, if
23 the Agency reviews an activity or a proposed loading, and they
24 find that by the nature of that it is insignificant in that

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1 significant being causing an unacceptable lowering in water
2 quality, so if it is insignificant and does not do that, that
3 finding is an appropriate antidegradation review.

4 MS. TONSOR: Is the significant trigger currently a part of
5 the Board's standard under 302.105?

6 MS. HIRNER: I am not alluding to the current Board
7 standard. I am alluding to the review processes.

8 MS. TONSOR: Okay. And then your suggestion that the
9 Agency add a significance determination refers to the
10 administrative procedures for implementing the Board's standard?

11 MS. HIRNER: My understanding, as I look at the Board, and
12 this is my understanding, and correct me if I am wrong, as I look
13 what is before the Board today, there are two things described.
14 One thing being the standard, and the second thing being the
15 review necessary to determine whether or not an issue meets the
16 standard. My argument or my testimony does not relate to the
17 standard. It relates to the review processes and the information
18 required to conduct those reviews.

19 MS. TONSOR: And you indicate that a review should not be a
20 full nondegradation, antidegradation review, unless there is a
21 decision made that the increased loading is significant?

22 MS. HIRNER: The Agency last -- at first hearing, the
23 Agency itself stated that the degree of information required and
24 the type of review that is conducted for each and every

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1 particular proposed loading will be done on a case by case basis
2 and will vary. As we read the language that is before us, both
3 in the proposed Board -- in the Board proposal and in the
4 proposed Part 354, we see that that language does not give the
5 Agency any discretion in its ability to ask for certain types of
6 information or, indeed, to look at the activity on a case by case
7 basis.

8 MS. TONSOR: So you are -- I am sorry. Go ahead. Are you
9 done?

10 MS. HIRNER: Yes.

11 MS. TONSOR: So your concern is not so much with the water
12 quality standard, the 302.105, but is with the implementation
13 rules that are offered as a -- for informational purposes for the
14 Board as an exhibit in 354?

15 (Ms. Hodge and Ms. Hirner confer briefly.)

16 MS. HIRNER: My concern goes to both. And as I said --

17 MS. TONSOR: Okay.

18 MS. HIRNER: May I?

19 MS. TONSOR: Sure, sure.

20 MS. HIRNER: As I said, in the language of the Board, there
21 is the standard and then there are, in essence, review procedures
22 and --

23 MS. TONSOR: Criteria.

24 MS. HIRNER: There are criteria. My concern is not with

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1 the standard. We recognize that there is an antidegradation
2 standard. My concern is with --

3 MS. TONSOR: And then are you --

4 MS. HIRNER: -- the review procedures.

5 HEARING OFFICER TIPSORD: Ms. Tonsor, please let her
6 finish.

7 MS. TONSOR: Your concern is with the criteria that are
8 folded into 302.105?

9 MS. HIRNER: Yes.

10 MS. TONSOR: Okay. So that your concern -- and we need to
11 clarify language. I am reviewing the 302.105 as the water
12 quality standard, which includes criteria for the Agency's
13 review.

14 When you look at language of 302.105 and compare it with
15 the existing 302.105, is there a significance test for
16 nondegradation in existing 302.105?

17 MS. HIRNER: My concern is not with the existing standard
18 stated in 302.105. My primary area of concern is with the
19 proposed 302.105(c)(2) in the proposal currently before the
20 Board.

21 MS. TONSOR: Okay.

22 MS. HIRNER: Those, I think, are the review procedures or
23 review criteria.

24 MS. TONSOR: So the point that I would want to ask you is,

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1 it is not IERG's position that the Board should do or in the
2 proposed rulemaking, make an antidegradation rule which is less
3 protective than its current rule? That is not what IERG is
4 proposing?

5 MS. HIRNER: No.

6 MS. TONSOR: I am sorry. I didn't hear you.

7 MS. HIRNER: We are asking -- what IERG is asking is that
8 -- and I believe the Agency has said this, and I think Mr.

9 Frevert made the point. That each and every activity is subject
10 to the standard. But the degree of review, and I believe -- I
11 believe in his testimony at the first hearing he said that there
12 is a great deal of difference between being subject to the
13 standard and being subject to an individual review or being
14 subject to an individual demonstration. And that the Agency
15 could not concur with any activity or any type of process that
16 would say something was not subject to the standard. But could,
17 indeed, entertain recommendations regarding the degree of review
18 that each and every activity must comply with or must have. I
19 have no argument with what Mr. Frevert said.

20 MS. TONSOR: Good. Did Mr. Frevert use the word in your
21 memory, that we would make a significance decision?

22 MS. HIRNER: Actually, Mr. Frevert used the term
23 significant on a number of occasions. If you --

24 MS. TONSOR: In?

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1 MS. HIRNER: In his testimony. If you would give me a
2 moment, I can look through and find those.

3 MS. TONSOR: That is fine.

4 MR. ETTINGER: Well, may I -- could I object? Mr.
5 Frevert's testimony says what Mr. Frevert's testimony says. I
6 don't think it serves any purpose for Ms. Hirner to go through
7 his testimony and try and interpret what Mr. Frevert said here.

8 MS. TONSOR: Nor do I want to unduly utilize the time that

9 we have today. The question that I had asked, which Ms. Hirner
10 answered, was whether it was their intent that the standard be
11 less protective and she said no. So I think that's the point I
12 wanted to get to. That's all I had.

13 HEARING OFFICER TIPSORD: Okay. Thank you.

14 BOARD MEMBER GIRARD: Can I ask a related question?

15 HEARING OFFICER TIPSORD: Sure.

16 BOARD MEMBER GIRARD: Ms. Hirner, going back to your
17 proposal for an original significance test, what criteria would
18 you suggest should be used in that original significance test?

19 MS. HIRNER: I think right now that is why we had asked for
20 a third hearing, to be quite honest with you, because we are in
21 the process of reviewing both the Region 8 document, which based
22 upon our investigation is the only regional document that has
23 been available, made available to any of the states to guide it
24 in its activities. We are also in the process of reviewing the

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1 significance determinations that have been included in the other
2 Region 5 state standards. And so had we been able to clearly
3 define what IERG members believe should be that criteria, we
4 would have offered that today. Unfortunately, we are still in
5 the process of looking through those various criteria.

6 BOARD MEMBER GIRARD: Thank you. We look forward to seeing
7 it.

8 HEARING OFFICER TIPSORD: Okay. Is there anything further?
9 Okay. Thank you very much.
10 MS. HIRNER: Thank you.
11 MS. HODGE: Thank you.
12 HEARING OFFICER TIPSORD: At this time we will take an hour
13 lunch break. We will reconvene around 2:00.
14 (Whereupon a lunch recess was taken from 1:05 p.m.
15 to 2:15 p.m.)
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1 A F T E R N O O N S E S S I O N
2 (December 6, 2000; 2:15 p.m.)
3 HEARING OFFICER TIPSORD: We are back on the record.
4 MS. FRANZETTI: My name is Susan Franzetti. I am here on
5 behalf of the American Bottoms Regional Wastewater Treatment
6 Facility, owned by the Village of Sauget, Illinois.
7 As I think is reflected in the prefiled testimony of Ms.

8 Robin Garibay, who is sitting to my right, many aspects of the
9 Agency's proposal both deserve support and we do support them.
10 Our concerns relate only to a limited number of issues in the
11 proposal and in certain respects what the Agency's testimony has
12 been in this proceeding is consistent with our views, but we
13 don't believe that the substance of the testimony has been
14 reflected in the language of the proposed Board rules.

15 So in order to underscore the importance of addressing
16 these issues and the language of the Board rules, we are offering
17 the testimony of Robin Garibay. She is a principal of the Advent
18 Group. She has a significant amount of experience in this area
19 based on her participation in other state antidegradation
20 rulemaking proceedings, as well as her involvement in preparing
21 antidegradation demonstrations on behalf of dischargers. So with
22 that, I will turn it over to Ms. Garibay.

23 HEARING OFFICER TIPSORD: Just as a point of clarification,
24 are you going to enter her testimony as an exhibit?

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1 MS. FRANZETTI: As an exhibit, yes.

2 HEARING OFFICER TIPSORD: Okay.

3 (Whereupon the witness was sworn by the Notary
4 Public.)

5 MS. GARIBAY: As Susan indicated, my name is Robin Garibay.

6 I am a principal with the Advent Group. On behalf of American

7 Bottoms Regional Wastewater Treatment Facility, I reviewed the
8 Illinois Agency proposed antidegradation rules and the
9 implementation procedures, and there are many provisions that are
10 reasonable and appropriate.

11 There are certain areas, though, that could and should be
12 revised. These revisions include inclusion of a proper standard
13 of when the antidegradation rules apply to high quality waters,
14 the inclusion of a provision that the antidegradation rules do
15 not apply to a de minimis increase in loading to a receiving
16 water, and an addition of an assessment of the significance of
17 the lowering of water quality, prior to the final two provisions
18 of the antidegradation demonstration review, a reasonable
19 alternatives assessment, and a social and economic benefit
20 assessment. This assessment would occur early in the NPDES
21 permitting process.

22 By the way, I am not going to read in my testimony. I am
23 just going to summarize the highlights.

24 The first issue is on when the antidegradation standard

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1 applies to a discharger; there seems to be a conflict that has
2 been pointed out by other presenters about a conflict between the
3 Agency rule and the Board rule. Basically the Board language has
4 an "any increase" provision triggering the application of the
5 antidegradation standard. Whereas, the Board rule seems to imply
6 that -- I am sorry -- the Agency rule seems to imply that the

7 trigger is the request for a new or a modified permit limit.

8 So one of the questions may be why is the Agency rule
9 better than the Board language and why would the Board language
10 potentially need revisions. So I have a series of points on
11 that. And one of them is that the existing permit limits and
12 conditions developed for a discharger were based on the permit
13 renewal application data that would have shown the inherent
14 variability that occurs in a discharge. Therefore, the existing
15 permit limit and conditions reflect the fluctuations that occur,
16 particularly for a POTW. In other words, any increase is
17 captured in the establishment of the permit limits and
18 conditions.

19 Also, the existing permit limits and conditions would have
20 considered attainment of water quality standards by the
21 dischargers. Those water quality standard provisions in this
22 state have always included an antidegradation standard. For a
23 POTW in particular, there is an exhaustive review process of
24 making sure that the POTW does attain water quality standards.

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1 It starts off first with the approval of the design, then the
2 construction grant program, and the construction permitting
3 program.

4 Then the second review occurs when they get the NPDES
5 permit to operate the POTW. And, finally, when they take over

6 their pretreatment program, and their pretreatment program is
7 approved, once again, an assessment that that pretreatment
8 program will assure attainment of the water quality standards
9 occurs.

10 One of the needs for having a nice, clear benchmark for
11 understanding when the antidegradation standard applies, is so
12 the discharger knows when they are in compliance and when they
13 are not. If the antidegradation standard is any increase, there
14 would not be a clear benchmark for them understanding when I have
15 triggered the need to review my compliance with the
16 antidegradation standard. If the trigger is a request for a new
17 or increased permit limit, they know exactly when the
18 antidegradation standard applies. That also applies for any
19 stakeholders who are interested in what is going on with the
20 permitted facility.

21 Finally, one of the things that we have seen in other
22 states, it is basically a penalty for a good performer. Without
23 having a clear benchmark of being a new permit limit or a
24 modified permit limit and you basically are telling somebody if

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1 you make any increase over your existing effluent quality, you
2 are treating the whole requirements of the antideg review
3 process. Whereas, if it is the new or increased permit limit,
4 they may sit there and continue looking for opportunities to
5 improve their effluent quality.

6 If you have a permit limit as a clear trigger, they are
7 going to continue to look for ways to improve their effluent
8 quality. And I guess as people have mentioned, the whole process
9 of trying to decide whether a fluctuation or, for instance, for a
10 POTW that does have inherent invariability in their discharge due
11 to the way their industrial users operate, the demands their
12 commercial users may have on their products, and then any
13 fluctuations because of wet weather event, if any increase is a
14 trigger, both the Agency and the POTW are going to be in this
15 sort of almost never-ending process of applying for any
16 degradation demonstrations and will be quite burdensome on the
17 resources for both the POTW and for the Agency.

18 The second suggested revision was the inclusion of de
19 minimis. In other words, basically having it set out a clear
20 benchmark for what is a small, a minuscule, an insignificant de
21 minimis increase. Based on the Agency testimony, they do not
22 appear to be opposed to a de minimis approach, with the caveat
23 that if it is not burdensome. There are approaches to defining
24 de minimis, as I have included in the prefiled testimony, that

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1 show that this is not a burdensome process to either the Agency
2 or to the district, as it uses the same data that is needed for
3 determining whether a discharger should have a water quality
4 based effluent limit. The de minimis approach ends up

5 establishing an objective way for understanding how to implement
6 the antidegradation standard. All of the stakeholders will know
7 what the definition is of minuscule, small, or insignificant. It
8 would be a nice, clear, bright line definition of an activity
9 that triggers antidegradation review.

10 It also allows for consistency. There would be consistent
11 interpretation of what would be defined as a small increase, not
12 warranting full antidegradation review. Most importantly, in
13 some ways, it would not delay projects unnecessarily. It would
14 allow the resources, once again, of the Agency and the discharger
15 to be focused on those projects that do have significant impact
16 and warrant full antidegradation review.

17 Sort of by way of example, I was going to discuss one of
18 the projects that we have been recently involved in as a way the
19 de minimis approach worked in the NPDES process. This was a
20 facility that was adding a better engineered production process
21 that also had the benefit for the facility of increasing their
22 production. They were required to have a permit modification
23 because the increased production was going to revise their
24 categorical best available technology limits, which were

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1 production based.

2 Knowing that the antidegradation demonstration process can
3 be cumbersome, time-consuming, and more importantly for them,
4 unpredictable in outcome, part of the overall project was to

5 manage the wastewater to assure that the effluent quality would
6 be at levels below the well-defined de minimis concept in this
7 state. An assessment of the proposed loading increased to show
8 that the impact of the receiving stream would be below ten
9 percent of the unused loading capacity was presented to the State
10 Environmental Agency, and it was presented as part of the permit
11 modification application.

12 In this case, and by way of example, we knew that the water
13 quality based effluent limit for lead would have been 12 parts
14 per billion as a monthly average. But in order to keep the
15 discharge level of lead below the ten percent of unused loading
16 capacity, which was this State's bright line threshold for
17 defining de minimis, the facility needed to limit its lead and
18 its effluent to a level of six parts per billion as a monthly
19 average.

20 So the project was engineered to assure that the discharge
21 level would be less than six parts per billion lead. This was
22 not the most cost effective way for the facility to manage their
23 wastewater, but in managing their wastewater this way they knew
24 that they were going to have a de minimis -- they would fit the

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1 definition of de minimis and the project could move forward in a
2 timely fashion.

3 This information is all being submitted to the state agency

4 and at this time it is being well received and the permit is in
5 the process of being modified. Basically what happened in having
6 a bright line definition of de minimis, it has encouraged
7 facilities to actually look at opportunities to engineer their
8 activities and their expansions to go beyond best available
9 technology, and in this case to go beyond water quality based
10 effluent limits.

11 So I see a well-defined de minimis threshold as an
12 extremely useful mechanism to allow efficient and effective
13 implementation of the antidegradation standard. As in my
14 prefiled testimony and attachments to it, the use of an allowable
15 and acceptable small increase and de minimis approach has been
16 used in other Region 5 states with U.S. EPA approval of those
17 regulations.

18 The information and data required to conduct a de minimis
19 assessment of whether the increase is below a bright line
20 threshold is essentially the same information that is needed to
21 develop a water quality based effluent limit. Basically a bright
22 line threshold allows projects that have minimal adverse impacts
23 to move forward without creating burdens on the Agency or the
24 stakeholders. And more importantly, it can encourage wastewater

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1 management beyond best available technology levels and in some
2 cases beyond water quality based effluent levels.

3 The third opportunity for improvement of the Board language

4 is the discussion of significance and significance assessment.
5 Basically this would be for those proposed increases that may not
6 warrant all three provisions of the antidegradation review to
7 apply. What the request is, is that the three provisions of the
8 antidegradation -- the Board antidegradation review, are showing
9 that designated and existing uses are fully protected, a
10 demonstration that all technical and economically reasonable
11 measures to control the increase have been taken, what we have
12 been calling the reasonable alternatives analysis, and a showing
13 of social and economic benefit.

14 The latter two requirements can be and are burdensome to
15 satisfy, and in many cases unnecessary where the proposed
16 increase will not significantly impact water quality. So
17 basically what the request is, is to have a specific analysis of
18 whether the proposed increase in loading will have an
19 insignificant or a significant affect on the water quality as a
20 first step in the NPDES permitting process before requiring the
21 latter two requirements to be -- for the information to be
22 submitted and then decisions made on that information.

23 One of the questions that has come up and is being talked
24 about is, well, what is burdensome about those latter two

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1 requirements. I am not going to discuss the burden of doing a
2 social and economic impact analysis. I am not a sociologist and

3 I am not an economist. But on a reasonable alternatives analysis
4 I thought it would be good to sort of talk through a theoretical
5 example and then an actual example that, once again, occurred in
6 the state as part of an antidegradation review.

7 Sort of a theoretical example for a POTW would be an
8 industrial user coming in, and once again, the permit -- the
9 discharger, the POTW, would need to modify their permit limit for
10 some parameter. An example I gave in the prefiled testimony was
11 looking at a semi-conductor facility coming in and needing to
12 change the discharge level for fluoride.

13 Well, one of the things in doing a reasonable alternatives
14 analysis for a POTW is how far do you go, when does it end, and
15 how many iterations do you look at, and who makes the
16 determination of what is reasonable? Well, let's assume the POTW
17 makes the determination of what is reasonable and not the
18 industrial user. Well, that would be asking the semi-conductor
19 to look at different pretreatment options for fluoride,
20 potentially even looking at changing manufacturing specs, which
21 for a semi-conductor, they have to meet such tight quality
22 assurance for their consumers that changing manufacturing specs
23 is not always a good idea.

24 Potentially it would be asking whether you could do

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1 pollutant trading within your pretreatment program, within your
2 industrial users. And then the POTW would also have to look at

3 end of pipe control measures itself for fluoride in this case.

4 That process takes a long time to conduct and many
5 engineering hours. Part of it is because -- part of the time
6 consumed in that is because you will never have just one
7 technology. You will never have just one source reduction,
8 pollution prevention measure, and in the case that we have talked
9 through on the fluoride, the increase in fluoride was less than
10 ten percent of the unused loading capacity. So the question is,
11 why spend all of that engineering time and effort going into the
12 final two provisions of the antidegradation demonstration review
13 if at the first step there would have been a showing that there
14 was not a significant lowering of water quality.

15 These materials did become a major stumbling block to a
16 recent project that still is not completed, and that had to do in
17 support of a dredging project. For this particular dredging
18 project we both needed, obviously, a 401 certification as well as
19 an NPDES permit for the dewatered water from the sediments.

20 When you are looking at what are the reasonable
21 alternatives for a dredging project, you are not only looking at
22 the actual technique for dredging and the management of those
23 sediments, but more importantly what are the treatment
24 technologies to remove any constituents in the dewatered water.

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1 One of the things that you have to remember in a reasonable

2 alternatives analysis is that you have to consider multi-media
3 impacts.

4 So for instance, yes, reverse osmosis will pretty much
5 remove most chemicals from water, but you generate a huge amount
6 of solid waste. Another example is, yes, you can remove metals
7 using classical precipitation techniques, but you are going to
8 generate salts in return. So at what point does your reasonable
9 alternatives analysis end. Okay. I got rid of the metals, but I
10 have added salt. Now I need to go manage the salt. Once again,
11 this is having to do with an alternatives analysis that occurred
12 before we went to see whether salt or the metals would even have
13 a significant impact on our water quality.

14 In this case we ended up looking at four different
15 wastewater treatment options and the discussion of the evaluation
16 of just four different wastewater treatment options consumed two
17 years and \$100,000.00 worth of engineering fees. This project
18 has been and is still being delayed by the NPDES permitting
19 process. Yet, this is a project that everybody acknowledges is
20 going to have a major impact on water quality in the ecosystems
21 because of its removal of contaminated sediments.

22 MS. FRANZETTI: A beneficial impact.

23 MS. GARIBAY: Yes, it is beneficial, yes. One solution to
24 this dilemma would have been to have had the assessment of

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1 whether the discharge would have had a significant water quality

2 impact. That assessment was already conducted as part of the 401
3 certification. So we knew up-front that this discharge was not
4 going to have a significant impact on water quality. But because
5 there was not, at that point, the ability to say, hey, this is
6 not going -- this is going to have an insignificant impact on
7 water quality. We should proceed with this project, proceed with
8 the rest of the NPDES permitting, we were still stuck in this two
9 year cycle of having to look at all of the reasonable
10 alternatives analysis.

11 One of the questions has been, well, what does it take to
12 look at significance. How do you assess whether an increase
13 results in an insignificant lowering of water quality. One of
14 the discussions has been what information does it take. Well,
15 fortunately, it pretty much takes the same information that is
16 needed to assess if you are complying with water quality
17 standards. The discharger supplies information on the effluent
18 concentration and the effluent flow. Where IEPA does not have
19 toxicity data on a parameter, the discharger might provide that
20 toxicity data. Where the IEPA does not have receiving water
21 information with respect to physical, chemical, biological
22 characteristics, the discharger may provide that information.

23 Then the Agency could then determine whether the resulting
24 increase in the receiving water concentration is chemically,

1 biologically, or physically significant. This is not an
2 assessment that is new to the Agency or new to, you know,
3 consultants like myself. This is an assessment that we routinely
4 make. What does it entail? Well, maybe for the chemical
5 assessment we look at whether it is analytically detectable. Is
6 the change analytically detectable and is it statistically
7 significant.

8 If we are looking at biological significance, there are
9 many tools available, such as bio assessments, bio criterias, eco
10 risk assessments, looking at whether there is any documentation
11 that organisms responds to that change in instream concentration.
12 But this -- these are assessments that are conducted in Clean
13 Water Act programs.

14 What the requested revision is, is to provide a discharger
15 with the opportunity and right under the Board's rules to make a
16 showing that its proposed increase in pollutant loading will not
17 significantly lower water quality before it must spend the
18 resources to generate the information concerning reasonable
19 alternatives and the social and economic benefits of the proposed
20 activity.

21 The Board rules should allow that the impact of the water
22 quality assessment contemplated in the Agency rules. If you look
23 at the Agency rules, there seems to be this contemplation of
24 determining the significance in lowering. And as other people

1 have indicated, Toby, the IEPA, the Agency, has indicated that
2 that is something that they look at, as a first cut in reviewing
3 a request for an increase. But have this occur, this
4 determination of whether the lowering of water quality is
5 significant, have this occur prior to going into the final two
6 provisions of an antidegradation demonstration.

7 I think this would be much more effective and efficient
8 management of the State's resources as well as making sure that
9 when there are proposed loading increases that warrant the full
10 antidegradation demonstration requirements, that those have the
11 proper attention they need. Thank you very much.

12 HEARING OFFICER TIPSORD: Thank you. Are there any
13 questions?

14 Yes, Mr. Ettinger?

15 MR. ETTINGER: Yes, I have a couple.

16 HEARING OFFICER TIPSORD: Excuse me. Could you speak up?
17 They are having trouble hearing you in the back of the room. Or
18 if you want, there is a microphone right here.

19 MR. ETTINGER: Well, they may be better off not hearing me,
20 but I will speak up anyway.

21 (Laughter.)

22 MR. ETTINGER: I have a witness here who says he is better
23 off not hearing me.

24 (Laughter.)

1 MR. ETTINGER: The first question was with regard to the
2 first -- the first fault you find in the proposal, that has to do
3 with this any increase problem and that is in, I guess,
4 302.105(c)(2); is that correct?

5 MS. GARIBAY: Uh-huh.

6 MR. ETTINGER: Okay. Now, I just want to be clear on what
7 your problem is here, because I think that there may not be a
8 problem. If I have an NPDES permit now which allows me to
9 discharge four million gallons per day, and I want a new permit
10 that would allow me to discharge 4.5 million gallons a day, you
11 would admit that that would require an antidegradation analysis
12 independent of one of these other exceptions that you are
13 proposing?

14 MS. GARIBAY: Okay. You have an NPDES permit that limits
15 your discharge to four million gallons per day?

16 MR. ETTINGER: Yes. You now have a permit at four million
17 gallons per day. You want to discharge 4.5 million gallons per
18 day. Assuming that that didn't fall within one of the other
19 exceptions that you are proposing, you would agree that that
20 would need an antidegradation analysis?

21 MS. GARIBAY: What we have seen that worked well in other
22 states is to have the trigger being that if you are going from
23 four to 4.5 million gallons per day, that that is going to
24 require you to need to modify your existing permit limits and

1 conditions.

2 MR. ETTINGER: Okay. So as long as it is a modification
3 contemplated for the permit --

4 MS. GARIBAY: Right.

5 MR. ETTINGER: -- then that would meet your first objection
6 here?

7 MS. GARIBAY: Right.

8 MR. ETTINGER: Okay. My other questions were with regard
9 to your ten parts per billion of lead to six parts per billion of
10 lead examples that resulted in various obstacles. I was
11 wondering what state that occurred in.

12 MS. GARIBAY: Indiana.

13 MR. ETTINGER: And then as to the significance issue with
14 the delayed project, what state was that in?

15 MS. GARIBAY: Indiana.

16 MR. ETTINGER: Okay. I have no other questions.

17 HEARING OFFICER TIPSORD: Okay. Anyone else?

18 MS. TONSOR: I just want to clarify the examples that you
19 had attached to your testimony of regulations from other states.
20 One was I believe from Wisconsin.

21 MS. GARIBAY: Right.

22 MS. TONSOR: And the other was Indiana, the Great Lakes?

23 MS. GARIBAY: Right.

24 MS. TONSOR: Those were the examples of the implementation

1 processes for those states?

2 MS. GARIBAY: Right.

3 MS. TONSOR: And you did not mean to offer those as
4 examples of what we would call the water quality standard in
5 those states, did you? I am using the word water quality
6 standard to mean the actual non-antidegradation prohibitions or
7 statement in the regulatory --

8 MS. GARIBAY: Well --

9 MS. FRANZETTI: I am not sure I understand in terms of not
10 part of the standard meaning part of --

11 MS. TONSOR: What would be equivalent to our Board
12 rulemaking, the water quality standard.

13 MS. FRANZETTI: Okay. I am not sure you were even
14 commenting on that.

15 MS. GARIBAY: No. I mean, where I saw the revision
16 occurring is within the Board language where it says activities
17 not subject to antidegradation review. I mean, as far as I
18 understand, that is part of the Board language.

19 MS. TONSOR: Here?

20 MS. GARIBAY: Right. There is activities not subject to
21 antidegradation review and this would be added to that, i.e., one
22 of the activities not subject to the antidegradation review would
23 be a request for an increase that triggers the need for a new
24 permit limit or a permit modification that was less than de

1 minimis or something like that. I am not a lawyer. I don't know
2 how you word that. That is where I would see it fitting in.

3 MS. TONSOR: Okay. Then the examples that you provided
4 were examples of the workings of the permitting process in --

5 MS. GARIBAY: Right. Because one of the concerns that I
6 had understood in the Agency testimony is that they didn't want
7 the de minimis, and I think it was referred to by others, that
8 you don't want it have a de minimis process that is more
9 burdensome than the antideg review process. I mean, that would
10 make no sense at all. In providing those examples states that
11 basically -- I mean, the information that is used by those states
12 to generate a determination of whether it is de minimis or
13 insignificant is the same data and the same assessment that is
14 used for developing the water quality standards.

15 MS. TONSOR: Okay.

16 MS. GARIBAY: Thank you.

17 HEARING OFFICER TIPSORD: Is there anything further from
18 anyone else? Thank you very much.

19 MS. FRANZETTI: I would like to provide you with a clean
20 copy to mark as an exhibit.

21 HEARING OFFICER TIPSORD: Thank you very much. This will
22 be marked, then, as Exhibit Number 18.

23 (Whereupon said document was duly marked for
24 purposes of identification as Hearing Exhibit 18

1 and admitted into evidence as of this date.)

2 HEARING OFFICER TIPSORD: Then we have the prefiled
3 testimony of the Illinois Wastewater Agencies. We will have you
4 sworn in.

5 (Whereupon the witness was sworn by the Notary
6 Public.)

7 MR. CARGILL: As most of you know, my name is Greg Cargill.
8 I am a civil engineer by education, and I don't know if it is
9 important to note this, but I am the first person to sit up here
10 without legal counsel in the adjacent chair.

11 (Laughter.)

12 MR. CARGILL: But with two engineering degrees and an MBA,
13 I will just try to muddle my way through. It is sort of --
14 hopefully, that sets the tone of my testimony, a lot simpler.

15 First of all, I applaud the previous speakers and testimony
16 givers, Mr. Moore, Ms. Hirner, and Ms. Garibay. They probably
17 are much more eloquent than I am when it comes to public
18 speaking. Yet, I think they did an excellent job of putting some
19 of the issues in front of the Illinois Pollution Control Board.

20 One of the things that I do want to emphasize -- actually
21 two things, flexibility and reasonableness. We have offered
22 written testimony and I will summarize our comments here with
23 this testimony and leave an exhibit for you to read in its
24 entirety. But, first of all, I think the final rule needs to be

1 extremely flexible.

2 From a technical standpoint, I really feel bound to point
3 out that an antideg review is a prediction. It is a prediction
4 or a model that says with this added loading that there should
5 not be any added degradation to the receiving stream, lake, body
6 of water, whatever. We don't really know for sure. We would
7 like to know. We would like to have a database that was so vast
8 and so expansive that we could tell that using this previous
9 example of adding 0.5 MGD flow from a wastewater treatment plant,
10 it would or would not cause degradation to the receiving stream.
11 But we really don't know.

12 Unfortunately, with the real world constraints of sampling
13 and preparation of this antidegradation submittal, is that we may
14 never know. What we will know is that if the proposed expansion
15 is not blocked, we will have real world data with the discharge
16 and using the same example of being expanded from four MGD to 4.5
17 MGD, and over a period of time we will have the ability to
18 finally and truly assess the impact of that added discharge to
19 the stream.

20 Now, let me back up half a step. I am not saying to go
21 into this blindly. The Illinois Association of Wastewater
22 Agencies represent more than eight million people in the State of
23 Illinois, and they treat the wastewater of those eight million
24 plus people each and every day. We have to have some

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1 constraints, and I think we already have a lot of them. We have,
2 first of all, water quality based effluent limits. And the key
3 there is if done properly, you are allowed to discharge a
4 parameter that meets that water quality based effluent limit.
5 Take whatever heavy metal or any other substance that falls into
6 that category, and your new discharge, if you will, should be
7 held responsible to meeting that water quality based effluent
8 limit. That is what we are all about, is good water quality.

9 We took a comment towards Mr. Frevert's testimony in one of
10 the previous things about whether or not something is good or
11 practically good or not good at all. But if you are in
12 compliance with water quality based effluent limits and your
13 stream is in compliance with stream quality, I think we have done
14 a great job. We have not done a good job. We have done a great
15 job. I think we need some recognition of that, because that is
16 our first level goal, is that all of the waters of the State of
17 Illinois meets the minimum requirements of water quality. But if
18 we do that, I think we have done a great job. That is not to say
19 that we couldn't go higher, but that is really an important step.

20 Reasonableness. I think the last two speakers really
21 addressed that. As much as we would like Mr. Frevert to be
22 around for a long, long time some day he will not be here, but we
23 are really talking about a program. We are talking about a
24 process, and we need -- from the POTW point of view, we need for

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1 it to be reasonable. Not only can not the formalization or the
2 preparation of an antideg process be so expensive that the POTW
3 community can't afford it, I think we have to look at the other
4 side of the coin at the same time.

5 There was a statement made, once again, that there may be
6 little or no financial impact. That is not true, ladies and
7 gentlemen. The Illinois EPA, in my opinion, does a very good
8 job. But if you ask them to review another 50, 100, or 200
9 antideg packages, they will be further behind. We know what that
10 means. We know that if you cannot process that antideg review,
11 nothing happens. We really can't allow that to happen. We need
12 to process them not only in the normal scheme of your course of
13 business, but we may need to acknowledge in this process that
14 they may need to hire more people. We are all for it. If we get
15 a quick turnaround time from the Agency, it helps us.

16 One of the points that was made, but I really want to
17 emphasize this, when we do a planned expansion it is not, oh, we
18 submit it, and it is the first time anybody has heard about it.
19 No, the municipality, the village, the city, whoever, they
20 probably had to go to the town council, they had to float bonds,
21 they had to, you know, make public notice, if you will. They are
22 not trying to hide anything. It is a process. It involves
23 politics. It involves economics. It involves funding. It
24 involves environmental adherence. So we are not trying to hide

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1 anything.

2 But we are also saying that once you get to the stage of,
3 for example, take this half a million gallon per day expansion,
4 and let's just say it was domestic wastewater. We know how to
5 treat domestic wastewater. There are a couple extra wrinkles to
6 treating industrial wastewater, but domestic wastewater is a
7 pretty known proven fact in this country. We can meet not only
8 water quality based effluent limits, but we can make technology
9 based limits. We know we can do that. To go from four million
10 to four and a half million MGD, we don't think there should be
11 much of an antideg review. Back to my point on flexibility. Why
12 should we spend a lot of money? And we are talking tens if not
13 hundreds of thousands of dollars to prepare these packages, and
14 then the lag time if it is a full-blown deg review on the
15 obligation and responsibility of the Agency to review it and go
16 through it. We have all had to go through 200 page documents.
17 It does not happen overnight.

18 In my example of my expansion of a domestic wastewater,
19 engineering school taught me one thing. You are going to
20 increase the loading on that receiving stream if the numerical
21 effluent limits are the same. Take suspended solids, if you can
22 put out ten parts per million, and you go from four to four and a
23 half and you still have ten parts per million effluent limit, in
24 theory you have expanded the loading on that stream. We can't

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1 change the math. But it does not necessarily require, you know,
2 much of an antideg review.

3 Back to my point about flexibility. The Agency must retain
4 that flexibility to be able to say, gee, this is pretty
5 straightforward, boom, boom, it is done. On our side of the same
6 topic is, we didn't have to invest \$100,000.00 to convince the
7 Agency that is it was not that critical. Once again, please
8 remember this, the hundreds of thousands of dollars spent on the
9 preparation of an antideg package did not improve water quality.

10 In deference to my consulting friends, it might have
11 improved their bottom line, but that is not really my goal here
12 today. They can improve their own bottom line. But we have to
13 look at that. What are we trying to do here? We are trying to
14 pass a rule that protects water quality. I think we can get
15 there with somewhat of a more simplified approach and a more
16 simplified final rule.

17 I guess my final point is about de minimis. I think we
18 have to look at that in the same concept. In de minimis we are
19 not saying that they get a free pass. No. They have to meet
20 good, well thought out, and many, many times water quality based
21 effluent limits. But what goal is there to be gained if you take
22 a large stream, and if you take a half million gallons and you
23 discharge it into the Chicago Sanitary and Ship Canal, I want to

24 meet the biologist, and I know a very good one, that can prove

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1 that if you meet effluent limits that you are going to change
2 that receiving stream. Are you going to spend all your money
3 sampling and then trying to analyze the results? You really get
4 to a point of diminishing returns.

5 I believe that's all I have to say. Thank you.

6 HEARING OFFICER TIPSORD: All right. Thank you very much.
7 Are there any questions? Yes, Mr. Flemal.

8 BOARD MEMBER FLEMAL: Thank you, Mr. Cargill. I appreciate
9 your plea for flexibility in the rule. Could you provide us with
10 your ideas of specifically how the rule, as proposed to us by the
11 Agency, might be modified to include that flexibility that you
12 desire?

13 MR. CARGILL: We can provide some follow-up information. I
14 think it gets back down to where we started, you know, not only
15 in the work group but in the process in the Agency's ability to
16 retain their ability to review each case on a case by case basis.
17 You know, if you set a lot of tiers on what is necessary, and
18 they are forced to do these things, whether it be a full-blown or
19 a three-quarters or a half or a quarter, we may defeat the
20 purpose. But, once again, IAWA would be willing to, you know,
21 provide some suggestions, if you will.

22 BOARD MEMBER FLEMAL: Do you believe that the rule as
23 proposed to us by the Agency does require some modifications to

24 ensure that flexibility? That's the first question.

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1 MR. CARGILL: Well, first of all, we think that without any
2 reference to de minimis is that actually it takes away some of
3 the flexibility, not of the Agency but of the system. In other
4 words, is it a possibility to say that this is so small that it
5 could not possibly have an impact on the receiving stream. You
6 know, if the Agency was able to make that comment, we may not
7 have to write it into the rule. But the IAWA believes that there
8 should be some de minimis. Because I have to look at both sides.
9 If there is no such section, then someone could say, well, gee,
10 we are going to force the Agency to always give some kind of
11 minimal or cursory review of each antideg situation. And if the
12 final rule does not protect the Agency, then they are forced to,
13 you know. If it is not specifically allowed or conversely, if
14 something says you must do something, somebody in this world in
15 this decade, as opposed to 30 years ago, is definitely going to
16 force their hand, and call it what you want. They are going to
17 sue them or whatever. But once somebody sues the Agency, they
18 don't have a choice anymore. We have seen this in the last ten
19 years.

20 As an engineer, once again, I don't think we make progress
21 in the courts other than we get finally a resolution of that
22 thing. But it takes us literally, you know, half a dozen years,

23 ten years, whatever. I am saying that we have the opportunity
24 here to write a better rule that leaves them the flexibility to

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1 say, okay, this thing really does not require much, if any,
2 review whatsoever on the topic of antideg and you move on. But
3 the IAWA would be willing to submit some comments, if you will.

4 BOARD MEMBER FLEMAL: That would be useful for us if you
5 could do so.

6 MR. CARGILL: Okay.

7 BOARD MEMBER FLEMAL: As a second issue, I think you used
8 the figures that an antideg study might entail costs as much as
9 tens to even hundreds of thousands dollars. Am I correct on
10 that?

11 MR. CARGILL: That is correct.

12 BOARD MEMBER FLEMAL: Is this sort of actual experience
13 numbers that you folks have encountered.

14 MR. CARGILL: Yes, it is.

15 BOARD MEMBER FLEMAL: What is it that produces that kind of
16 range?

17 MR. CARGILL: Two things. One is that you normally hire a
18 consultant for professional work, and they need to be compensated
19 at the professional level. But more importantly, if, indeed,
20 there is any water quality studies that need to be done, you
21 know, they are very expensive.

22 BOARD MEMBER FLEMAL: Data collection.

23 MR. CARGILL: Data collection, right.
24 BOARD MEMBER FLEMAL: Okay. Thanks.

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1 HEARING OFFICER TIPSORD: Okay. Anything further?
2 Okay. Thank you very much, Mr. Cargill. We will mark your
3 testimony as Exhibit Number 19.
4 (Whereupon said document was duly marked for
5 purposes of identification as Hearing Exhibit 19
6 and admitted into evidence as of this date.)
7 HEARING OFFICER TIPSORD: Thank you very much.
8 MR. CARGILL: Thank you.
9 HEARING OFFICER TIPSORD: I believe the Agency had some --
10 wanted to do some clarifying questions?
11 MS. TONSOR: Yes. I wanted to give Toby an opportunity to
12 clarify what the Agency's position was on the de minimis
13 exception. I have been told that in the back they can't hear me
14 when I speak. So I am trying to make that adjustment.
15 So I want Toby to clarify for the Board the process.
16 First, how long or how many times was the de minimis process
17 reviewed, if you will, during the work group sessions.
18 MR. FREVERT: One time from start to finish, a continual
19 discussion on that.
20 MS. TONSOR: Were you able ever to come up with a
21 determination of what would be de minimis which would work in

22 each situation?

23 MR. FREVERT: In my mind it is even more complicated than
24 that. The issue of de minimis is a gray concept. How do you

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1 define de minimis. I don't believe we can even reach a consensus
2 on what the criteria is to define de minimis. For instance, the
3 cost and alternative effect defining something significant. I
4 would say one molecule of dioxin in the Mississippi River is
5 significant if it is avoidable at no cost. That being said, that
6 doesn't mean that I envision any kind of a review to meet this
7 regulation as being particularly costly.

8 I don't think -- for instance, some things you can go
9 through and you know there may be an infinite number of
10 alternatives, but you know through the social and the cost
11 factors in terms of making this consistent with the State's
12 overall goal for the population in the community, there is some
13 rational way to look at what alternatives are close enough for in
14 the ballpark and reasonable to warrant assessment and other
15 alternatives that may be technically or theoretically available
16 don't warrant inclusion in an evaluation. I think we are still
17 amenable to any clarity we can provide on this issue to the
18 extent that it can be provided. But my personal feeling is the
19 more we talk about this thing, maybe the more it digresses rather
20 than the more it narrows.

21 MS. TONSOR: In reviewing -- you had an opportunity to

22 review Ms. Garibay's testimony didn't, you?

23 MR. FREVERT: That's correct.

24 MS. TONSOR: One item that I wanted to clarify with you and

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1 for the Board and the persons here is to review the -- some of
2 the standards that are the water quality standards from the
3 states that were mentioned in Ms. Garibay's testimony. And I am
4 going to offer those as exhibits for the Board and they will
5 basically speak for themselves. Additional copies are available.
6 In looking at, let's say, the Wisconsin standard -- I think I
7 have it in here.

8 MR. FREVERT: The actual language in the Wisconsin standard
9 is even less specific than our standards in terms of information
10 on how to proceed after the statement of the basic policy. I
11 believe there are some implementation guidance and procedures in
12 the Wisconsin regulations on the permitting process. I don't
13 think they are fundamentally that different than the way we do
14 business. But they are not part of the standard themselves.
15 They are part of the implementation program.

16 BOARD MEMBER FLEMAL: May I jump in here. Are you
17 referring to the attachment one to Ms. Garibay's testimony, the
18 water quality antidegradation regulations from the Department of
19 Natural Resources of Wisconsin?

20 MR. FREVERT: I don't know whether I am or not, Ron.

21 BOARD MEMBER FLEMAL: I was just wondering if you are,
22 could you point us to the actual portion of that language that
23 you characterize as being less specific?

24 MS. TONSOR: Let me give you those copies.

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1 MR. FREVERT: Okay. I think that's correct. I am talking
2 about the Wisconsin administrative code chapter NR 102. The
3 antidegradation standard, as I understand it, is NR 102.05(a).

4 HEARING OFFICER TIPSORD: What you are specifically
5 referring to, Mr. Frevert, is that what we were just handed that
6 we are going to mark as an exhibit?

7 Is that correct, Connie?

8 MS. TONSOR: Yes.

9 HEARING OFFICER TIPSORD: Okay. Then we will mark this
10 as Exhibit Number 20, which is Wisconsin Administrative Code,
11 Department of Natural Resources, Chapter NR 102.

12 (Whereupon said document was duly marked for
13 purposes of identification as Hearing Exhibit 20
14 and admitted into evidence as of this date.)

15 BOARD MEMBER FLEMAL: Before we leave that, again, just to
16 keep me clear on this, Ms. Garibay gave us the Chapter NR 207,
17 called water quality antidegradation, which is something
18 different than that which we just received which is Chapter 102?

19 MR. FREVERT: I believe that is the permitting procedures
20 that they utilized to implement that standard.

21 MS. TONSOR: If I might, to clarify any confusion that
22 might arise that those are, in fact, the water quality standards,
23 we offer for the Board's review the water quality standard which
24 those procedures that Ms. Garibay talked about implement.

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1 MEMBER OF THE AUDIENCE: I am sorry. We can't hear.

2 MS. TONSOR: I am sorry. The point is just to clarify any
3 confusion that might result. What we are talking about now is
4 the water quality standard that -- Ms. Garibay indicated that she
5 had provided the implementation procedures for the water quality
6 standard.

7 MR. FREVERT: Maybe to help the situation, it is possible
8 that she was recommending that the Board incorporate some of the
9 permitting procedures within the Board regulations. But in the
10 case of the State of Wisconsin, they have an antidegradation
11 standard on the books in one location, and they have a permitting
12 procedure on the books in another location. I suppose if we were
13 try to parallel that in Illinois, there would be two approaches.

14 One is what we would recommend and we would identify and
15 promulgate a permitting process whereby we would operate our
16 permit program, if and when this regulation is adopted, to
17 demonstrate adherence to that within our permitting programs. If
18 the Board wanted to add some additional clarification on their
19 own, I would presume that sort of thing, to maintain consistency

20 with the Wisconsin approach would probably be housed in Part 9 of
21 Subtitle C and not the water quality standards themselves. It is
22 really an approach to permitting issuance rather than a statement
23 of the policy of the standard.

24 HEARING OFFICER TIPSORD: Any additional questions?

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1 BOARD MEMBER FLEMAL: Without beating that one to death,
2 just for the record's sake, then the entire antidegradation
3 standard of the State of Wisconsin is what we see in Exhibit
4 Number 20, chapter NR 102.05(1), just that first part, one; is
5 that correct?

6 MR. FREVERT: That's my understanding, yes.

7 HEARING OFFICER TIPSORD: Okay. Go ahead.

8 MR. FREVERT: I believe there is a similar pattern from
9 other states. And I think that's what my attorney is trying to
10 establish in her next question to me. Is that correct?

11 MS. TONSOR: Essentially I wanted to ask whether you had
12 also had an opportunity to look at the water quality standards in
13 the other states that had been referenced in Ms. Garibay's
14 testimony and then have your comments on those and we will admit
15 those as an exhibit.

16 HEARING OFFICER TIPSORD: Could we have those before?

17 MS. TONSOR: Sure.

18 MR. FREVERT: It is a similar approach in all states. The
19 water quality standards are relatively crisp and straightforward

20 and they promulgate the implementation procedures to demonstrate
21 the mechanics of how one implements that in the NPDES program in
22 some other document or some other section of their state program.

23 HEARING OFFICER TIPSORD: Okay. I have Pennsylvania, West
24 Virginia, and Indiana. Do you have additional copies of West

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1 Virginia?

2 MS. TONSOR: Sure.

3 HEARING OFFICER TIPSORD: I need two more, please.

4 MS. TONSOR: Okay.

5 HEARING OFFICER TIPSORD: For the record, I have been
6 handed Indiana Environmental Health and Safety Regulations, West
7 Virginia Environmental Health and Safety Regulations and
8 Pennsylvania Environmental Health and Safety Regulations.

9 I will mark Indiana as Exhibit Number 21, West Virginia as
10 Exhibit Number 22, and Pennsylvania as Exhibit Number 23.

11 (Whereupon said documents were duly marked for
12 purposes of identification as Hearing Exhibit 21,
13 22, 23 and admitted into evidence as of this date.)

14 MS. TONSOR: How would you characterize the Illinois
15 proposal vis-a-vis the other state's proposals?

16 MR. HARRINGTON: Excuse me. We can't hear you.

17 MS. TONSOR: Excuse me. Toby, how would you characterize
18 Illinois' proposal vis-a-vis the other state's proposals?

19 MR. FREVERT: I think the approach we are following in the
20 relative distinction between the standard itself and the process
21 to go through and in conducting a permit review or a 401 review
22 to determine adherence to that standard is essentially the same
23 approach.

24 One point of clarification is I don't think these are

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1 proposals. I think the other three states have actually adopted
2 these and are standing regulations in those states. Another
3 point of clarification, maybe just to put everything in proper
4 perspective, we are essentially on notice that the Illinois
5 program is deficient in that we don't have a fully promulgated
6 federally improved NPDES implementation procedure to deal with
7 the antidegradation standard.

8 The standard itself probably does not absolutely need to be
9 changed or updated. Nevertheless, we have an obligation to
10 review the standard and together with the implementation
11 procedures make a submittal to the U.S. EPA for federal review
12 and approval.

13 As part of the work group, I believe, some of the early
14 discussion were the adequacy of the standard and whether or not
15 it was warranted for updating. The purpose of this proposal
16 today is to honor, I think, the general consensus of people that
17 the standard would benefit from updating, although it does not
18 absolutely have to be updated. What has to happen is have an

19 NPDES permitting program that is approvable to implement either
20 the standard that we are proposing or the standard that exists.

21 HEARING OFFICER TIPSORD: Okay. Go ahead, Dr. Flemal.

22 BOARD MEMBER FLEMAL: I have some more questions on these.
23 You note that the State of Illinois' antidegradation policy is
24 under review. How about the four states that you given us?

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1 Where do they stand on the same process.

2 MR. FREVERT: The State of Indiana is under a notice of
3 intent to sue by some environmental groups. They, apparently,
4 have a developmental program underway. They are fairly actively
5 working through the process. My understanding is that so long as
6 that process moves forward and is not abandoned or stalled both
7 the U.S. EPA and the environmental groups that have filed their
8 notice of threat to sue are willing to allow the process to move
9 forward. That is what my understanding is.

10 BOARD MEMBER FLEMAL: So would you hold Indiana up, then,
11 as any particular good example for us based on that
12 characterization?

13 MR. FREVERT: In general or with regard to antidegradation?

14 BOARD MEMBER FLEMAL: Antidegradation.

15 MR. FREVERT: I don't believe -- my communication with
16 federal employees and my communication with some of the Indiana
17 staff are that they are a long way from having solved the

18 antidegradation issue in the State of Indiana.

19 In the State of Wisconsin they have a standard and an
20 implementation procedure that was approved early on, probably in
21 excess of ten years ago. It probably would not be approvable
22 under the current criteria the U.S. EPA is applying. It is the
23 U.S. EPA's priority at this point to get implementation
24 procedures and programs together for the states that don't have

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1 them. Once they have accomplished that, they intend to go back
2 and probably with training and the review process ask the states
3 with older more historic programs to review and consider updating
4 them. So at some point in the future Wisconsin may benefit from
5 some brush-ups as well.

6 A few of years ago I was involved in some national
7 conferences and workshops where I had some exposure to the West
8 Virginia people and their program, and I know they were actively
9 working on some antideg issues there. I can't honestly tell you
10 that I kept up to speed with where the status of their program is
11 right now.

12 Other than a little involvement with the State of
13 Pennsylvania, regarding Great Lakes regulations, I am not that up
14 to speed on the Pennsylvania programs.

15 BOARD MEMBER FLEMAL: Are there any of these four that you
16 look on as a model that might be able to give us some perspective
17 on an appropriate way to go?

18 MR. FREVERT: I think the language in the standards of all
19 four states is pretty close to federally approvable if not
20 federally approvable. I think the big focus is what is the
21 administrative permit issuing process and how adequate and up to
22 speed it is.

23 BOARD MEMBER FLEMAL: So they do stand as example as the
24 definition of the standard, and not necessarily the associated

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1 implementation procedures.

2 MR. FREVERT: That's correct. They would probably all be
3 reasonable approvable language for a standard. The U.S. EPA will
4 probably not review that standard in the isolation without access
5 to their permitting procedures. They would have ten years ago,
6 but not today.

7 BOARD MEMBER FLEMAL: Somewhere way in the back corners of
8 my mind I have a recollection that the State of Pennsylvania has
9 been one particular battleground in the issue of antidegradation.
10 Am I correct in that there has been a history of litigation
11 focused on the Pennsylvania rule?

12 MR. FREVERT: The water program in the State of
13 Pennsylvania has had a history of some debates and arguments. I
14 don't -- I can't recall Pennsylvania being held up as an example
15 of how to do anything with the water --

16 (Laughter.)

17 MR. FREVERT: I am not trying to be --

18 BOARD MEMBER FLEMAL: Have they been held up as a state not
19 to model yourself after if you are trying to do an
20 antidegradation rule?

21 MR. FREVERT: I am sorry, but I just don't have the
22 personal knowledge to answer that question.

23 BOARD MEMBER FLEMAL: As I said, it is only a vague
24 recollection on my part. Again, if there is anybody anywhere

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1 along the line that could enlighten us on that --

2 MR. ANDES: I could. I am a member of the --

3 HEARING OFFICER TIPSORD: Could you identify yourself, for
4 the record, please?

5 MR. ANDES: I would be glad to. I am Fred Andes from
6 Barnes & Thornburg. I am sorry to interrupt, but if you want me
7 to help clarify a few things, I can.

8 First, on Indiana, the notice of intent to sue that has
9 been filed has nothing to do with the current Indiana
10 antidegradation rules which, in fact, the EPA is fine with under
11 the Great Lake Initiative. The notice of intent to sue has to do
12 with a new law that has been passed by the Indiana legislature on
13 antidegradation. And the contentions are that, in fact, the new
14 law made some changes in standards that have to be approved by
15 the EPA. It has nothing to do with the current antidegradation
16 rules in Indiana, whatsoever, which will have to change under the

17 new law. It is two separate issues.

18 HEARING OFFICER TIPSORD: Excuse me.

19 MR. ANDES: Yes.

20 HEARING OFFICER TIPSORD: Could I have you sworn in?

21 MR. ANDES: Absolutely.

22 HEARING OFFICER TIPSORD: Thank you.

23 (Whereupon the witness was sworn by the Notary

24 Public.)

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1 MR. ANDES: So as to Indiana, the notice of intent has
2 nothing to do with the current antidegradation rules. A lot of
3 the reason why Indiana is cited as an example here is because
4 through the Great Lakes Initiative, Indiana had to put in
5 antidegradation rules and a lot of these issues -- and Ms.
6 Garibay and I were very involved in this -- a lot of these issues
7 were debated and dealt with in the Indiana rulemaking, and are
8 continuing to be discussed in Indiana. There are some good, some
9 bad, but a lot of these debates have taken place there and that
10 is why a lot of the examples tend to refer to what is going on in
11 Indiana.

12 In Wisconsin my understanding is that the EPA, in approving
13 the Great Lakes program for Wisconsin, did not disapprove any
14 element of their antidegradation rule. So I don't see -- I see
15 nothing saying the EPA has any problem with the Wisconsin

16 antidegradation rule.

17 Your recollection is correct on Pennsylvania that there was
18 litigation. The specific issue in Pennsylvania was they refused
19 to fill a gap that the Illinois EPA is now proposing to fill.
20 Pennsylvania refused to put in an ONRW classification in their
21 rules. They pretty much said to the EPA, no, we don't feel like
22 doing that and the EPA said, well, then, we will do it for you.
23 It didn't have anything to do with the other tiers of the
24 antidegradation, simply a very clear issue where they had to do

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1 something under the federal rules and said that they were not
2 going to do it.

3 MR. FREVERT: You know, the only clarification I could add
4 is that my comments regarding Wisconsin and Indiana really were
5 not germane to the Great Lakes issue on the antidegradation regs
6 in the Great Lakes. It was a broader state-wide program. In the
7 case of Wisconsin a significant part of the state is not in the
8 Great Lakes system. If this is an important issue to you, I will
9 be happy to try to get you some specific statements from members
10 of those two states or the U.S. EPA if you so choose. The EPA
11 would like to help in the process, but the EPA is not going to
12 want to go to one state to make news about another state.

13 MR. ANDES: The only other clarification I would offer, in
14 terms of the whole standard versus implementation procedures, is
15 that Toby is correct that every state, every state that I know of

16 has the same water antidegradation standard. It is in the
17 federal reg and the EPA has told the states this is the standard
18 you have to have. Each state that I can think of has, in
19 essence, then said, all right, then we will have that in one part
20 of our standard -- one part of our rules, the official Board
21 approved rules. And then in another part our official Board
22 approved rules we will have how we deal with that in specifics.
23 Do we have exemptions? Do we have de minimis levels? How do we
24 do demonstrations? All of those issues get dealt with in

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1 official Board approved rules. So when I think the regulated
2 community is talking in terms of the need for de minimis levels,
3 exemptions, etcetera, we are looking at the other states and
4 saying wherever they have it in their rules, it is in them
5 officially and our feeling is that needs to happen here as well.
6 Thank you.

7 HEARING OFFICER TIPSORD: Go ahead.

8 MR. ETTINGER: I am not a witness here and I am going to
9 file a brief or whatever it is in a few weeks if that is what we
10 work out that I think will set forth the history of some of the
11 consideration here and the problems with the U.S. EPA. But I do
12 want to point out a few things just because I am the person who
13 signed the nasty 60 day notice letter in November of 1997.

14 You know, what our thinking was, just to give us a little

15 bit of background here, as Toby said in the first -- in the first
16 day of testimony, for a long period Illinois just was not paying
17 much attention to the antidegradation. In more recent years it
18 has -- they have been paying more attention to it, particularly
19 after we filed the 60 day notice letter. They seemed to pay a
20 lot more attention to it. But the problem is that we are writing
21 these permits and they are playing the game without the rules
22 being established, and that is what we are trying to do here.
23 And that is what is necessary because there are all of these
24 permits under consideration now and they don't have either the

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1 Board rule written up or the Agency rules considering how exactly
2 to do this. And that's what we are trying to do here, and that
3 is sort of the urgency of getting this through.

4 HEARING OFFICER TIPSORD: Are there any other questions?
5 Mr. Harrington?

6 MR. HARRINGTON: I have two groups of questions, follow-up
7 on some of this testimony and the earlier testimony and the
8 prefiled questions, which if we are going to have another
9 hearing, I would just as soon postpone, because although they
10 were mailed to the Agency they, apparently, were not received.

11 HEARING OFFICER TIPSORD: Again, I don't know what the
12 Board is going to do tomorrow. Is it possible that if the Agency
13 does not feel comfortable answering those questions today if we
14 do not have another hearing could they answer them in writing as

15 a part of their comments?

16 MR. HARRINGTON: Yes. Why don't I go through both sets of
17 questions in case there is a not a hearing because there may be
18 some follow-up.

19 HEARING OFFICER TIPSORD: Okay.

20 MR. HARRINGTON: What standard will the Agency use in
21 determining whether an increased pollutant or whether the
22 activity benefits the community at large?

23 HEARING OFFICER TIPSORD: This is question number one of
24 the prefiled questions.

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1 MR. HARRINGTON: Yes, part of question number one of the
2 prefiled questions, referring to section 302.105(c)(2)(B)(iv).

3 MR. FREVERT: I don't believe there will be a single
4 standard. I believe there are a number of hopefully obvious
5 social and community goals for the citizens of Illinois, such as
6 economic prosperity, and clean healthy and environment, economic
7 competitiveness with the rest of the world, things of that
8 nature. So to say there is one yardstick, like a job or a dollar
9 revenue or something like that, I don't believe it will be
10 defined that simple.

11 MR. HARRINGTON: So, in essence, there will not be a
12 standard in the rules or the Agency rules for determining what is
13 -- what activities benefit the community at large; is that

14 correct?

15 MR. FREVERT: A standard meaning a yardstick or a
16 measurement?

17 MR. HARRINGTON: Yes.

18 MR. FREVERT: If you are saying that something is not going
19 to benefit the community unless there are X numbers of jobs or X
20 number of people you are correct, there is no intention of
21 setting a standard of that nature.

22 MR. HARRINGTON: If someone appeals the Agency denial of a
23 permit on this basis, that they failed to demonstrate the
24 activity would benefit the community at large, what standard is

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1 the Board supposed to apply in determining whether the Agency's
2 decision was correct or not? Or can the Board make its own
3 decision on whatever basis it wants?

4 MR. FREVERT: I believe the intent and even in the
5 specifics of our implementation procedures indicate the need to
6 identify social or economic benefits expected to arise so that it
7 will be a decision or a criteria or a measurement available. I
8 can't give you a yardstick of what that will be in each instance.
9 There will be a statement of what the benefit is.

10 MR. HARRINGTON: If the statement of the benefit is this
11 will keep X, Y, Z factory running, employing ten people, but we
12 find that that benefit is insufficient for the community at large
13 and, therefore, deny the permit, what is the Board supposed to do

14 on an appeal?

15 MR. FREVERT: In an example like that, there are all sorts
16 of specifics you could think of in the example, but sort of a
17 blatant and cold-hearted denial like that, I would hope that the
18 Board would over turn us.

19 (Laughter.)

20 MR. HARRINGTON: Well, they may. But what basis would they
21 have for overturning it?

22 MR. FREVERT: They can interpret that standard, the intent
23 of the standard, and whether or not the process adhered to that.
24 I can tell you right now that many, many states and the U.S. EPA

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1 have specifically struggled with the need and the desire to come
2 up with a yardstick to address that. And my latest discussion
3 with the headquarters standard people were if, indeed, they did
4 anything in terms of studying and developing supplemental future
5 guidance for the antidegradation policies, it would be focused on
6 producing some additional guidance that would help the states put
7 in perspective how to deal with the social and economic terms in
8 the standards, and to date they have not produced much.

9 MR. HARRINGTON: Would you see a problem if the Board rules
10 included a list of things that they could consider such as
11 creation of new jobs, preserving of existing jobs, adding to the
12 tax rolls?

13 MR. FREVERT: Solving other environmental problems and
14 solving public health problems. I don't think that would be a
15 problem at all as long as it was not perceived as an exclusive
16 list, because I am sure there are social and community benefits
17 that you won't think of when you are putting the list together.

18 I might, just to help everybody else, when Bob Shippen from
19 headquarters came out to discuss these things with us, their
20 indication of perhaps the biggest and the most significant aspect
21 of the social and economic issue was making sure that those
22 benefits were identified and there was opportunity for public
23 participation and public understanding of what those benefits
24 were. Not so much as it is a hard yes or no criteria, but an

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1 open public process. Currently that is what they are looking for
2 and until and unless they find the magic target and produce some
3 supplemental guidance, it boils down to formula. That is all
4 they are going to be looking for.

5 MR. HARRINGTON: So the feds would accept the process if it
6 is open and public, and you think putting in the examples of
7 types of benefits to be considered into the rule itself, as long
8 as it was not exclusive, would be acceptable?

9 MR. FREVERT: Yes, I think so. I think it may add more
10 wording and language, but if it is deemed that that helps clarify
11 the intent and the understanding of the types of things that are
12 meant by those terms, you would certainly have no opposition to

13 it.

14 MR. HARRINGTON: Will community opposition to an activity
15 unrelated to impacts on water quality be considered in
16 determining whether that activity benefits the community at
17 large?

18 MR. FREVERT: I guess that I didn't comprehend your
19 question.

20 MR. HARRINGTON: Well, let me give you an example, one that
21 has caused a lot of consternation in the Chicago area that had no
22 water quality impact, the Robins Waste Energy project. There was
23 a great deal of public opposition in some communities to that
24 project and there was community support in other communities.

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1 Now, if you took that project and it came under antidegradation
2 review, would the Agency be considering that community opposition
3 or support as part of determining whether it benefited the
4 community at large?

5 MR. FREVERT: It doesn't help any time the Agency takes
6 action or something of that nature if we fail to consider any
7 public comments from either side. If somebody filed a comment
8 suggesting that there was a particular negative or positive to
9 it, that has to be considered and factored into our decision. I
10 think the critical thing to making this program work is for us to
11 anticipate and identify those issues as best we can so that the

12 best information is out there whenever a decision we make goes to
13 public notice so that we can solicit proper and adequate input to
14 finish up the process.

15 MR. HARRINGTON: Well, in determining public benefit will
16 you take into account other environmental impacts such as air or
17 land.

18 MR. FREVERT: If the new discharge is necessary to solve a
19 public health problem like failing septic tanks, I would view
20 that as a social and community benefit. If some increment of
21 additional loading had to go to a stream for a larger improvement
22 in overall air quality or in other environmental media, I would
23 certainly view that as a legitimate benefit, perhaps even more
24 than a legitimate benefit, and one of the types of benefits

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1 envisioned by the rule.

2 MR. HARRINGTON: What if there was opposition because of
3 its impact on the air, but it met all the air standards, new
4 source review, air toxics, anything else that came about, but
5 there was still opposition because people didn't like its air
6 impact? Would that be something to be considered in a water
7 nondegradation review?

8 MR. FREVERT: Certainly it would be something to be
9 considered. The level of weight it was given and to what extent
10 it did or did not affect a decision, I cannot comment on this
11 theoretical type of issues. But, you know, the world is evolving

12 and changing and we are more focused on multimedia issues than we
13 ever have been before. Personally, I think there is better
14 coordination and communication across the media now. So things
15 are moving that way, Jim.

16 MR. HARRINGTON: This is one you may wish to answer -- this
17 is from the prefiled questions. Question two, based on the first
18 hearing, would you agree to a provision that said that included
19 among the activities not subject to an antidegradation
20 demonstration language, which included new or increased
21 discharges of noncontact cooling water return to the same body of
22 water from which it was taken, provided that the discharge
23 complies with applicable Illinois thermal limits and further
24 provided that the additives contained in such cooling water are

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1 or have been approved the IEPA in the NPDES permit?

2 MR. FREVERT: I think what you are saying is that at one
3 time in history a cooling water source received authorization
4 through the NPDES process to use cooling water additives for
5 whatever purpose and those additives would need to be acceptable
6 under the antidegradation standard, and would I subject a request
7 for an expansion of those additives to also be subject to an
8 antidegradation determination?

9 MR. HARRINGTON: Expansion of the volume of the cooling
10 water discharge, which would probably contain with it a

11 proportionate increase in the additives.

12 MR. FREVERT: I would think in most instances, all of the
13 other details not being known, that I would yield the same result
14 on that request that I did on the initial request and find that
15 that additive, that additional additive was acceptable and
16 consistent with the intent of antidegradation. But I would call
17 that a conscious decision if it is compliant with the standard
18 rather than exempt from demonstration.

19 MR. HARRINGTON: You would not --

20 MR. FREVERT: I would anticipate that me making that
21 decision would not require more than ten minutes. I am not going
22 to take it through a full-blown review.

23 MR. HARRINGTON: One other from the prefiled questions.
24 Well, actually, two others. Would you be willing to include in

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1 the list of activities on that subject to an antidegradation
2 demonstration new or increased discharges to a publicly owned
3 treatment works subject to a local pretreatment program?

4 MR. FREVERT: You are talking about a circumstance where
5 there is a new industrial discharge to an existing collection
6 system that has an approved pretreatment program and nothing in
7 that proposal warrants a change in the loading at the POTW's
8 outfall. In other words, it does not require any additional
9 modification of that NPDES permit. And my view is that
10 additional loading is deemed acceptable and compliant with the

11 standard at the time the permit was issued. We have already done
12 that review and made that determination. The fact that the
13 actual loading comes six months or a year or five years later is
14 immaterial. That loading was authorized and deemed in our
15 opinion to be compatible with the antidegradation standard and
16 not exempt from it.

17 MR. HARRINGTON: So assuming that there was agreement on
18 the language, you would not mind the rule specifying that just
19 for clarity, would you?

20 MR. FREVERT: I would prefer a system where it was clear
21 that if the loading is already anticipated and authorized by the
22 permit, they have gone through that demonstration, so that there
23 is no need and no intent and no likelihood and there is no
24 requirement to make that determination the second time.

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1 MR. HARRINGTON: All right.

2 MR. FREVERT: No action is required on our part unless you
3 need a construction permit. You don't even need to tell the
4 Agency that that new source is in town.

5 MR. HARRINGTON: If there is a new industrial discharge to
6 a POTW, which does require a nondegradation -- a new NPDES permit
7 or a modified permit and, therefore, an antidegradation review,
8 does that review extend to determining whether the new industrial
9 activity has a beneficial affect on the community at the large or

10 whether there are alternatives or do you merely look at the POTW?

11 MR. FREVERT: I believe the correct answer to that is if we
12 have established the permit and we found that the permit
13 acceptable and we found the pretreatment process and the process
14 for local permitting and local allowance of annexation of the new
15 source is acceptable, there is no action for us to take.

16 MR. HARRINGTON: If the permit had to be modified to
17 accommodate the new industry, you would have to take action on
18 the modification, right?

19 MR. FREVERT: Yes. If you are saying we have to modify a
20 permit to allow that to happen, we have to modify a permit to
21 allow that to happen.

22 MR. HARRINGTON: And then you would do a nondegradation
23 review?

24 MR. FREVERT: It depends on what the purpose for the

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1 modification is. If it is a load increase that you discharge
2 outfall, quite frankly, it does not matter whether the load
3 increase is attributable to new industry or new subdivision or
4 something else.

5 MR. HARRINGTON: The question is do you then go back behind
6 the POTW to look at the source of that increase when you consider
7 alternatives or benefit to the community? Do you look at whether
8 the new subdivision is desirable or not or the new industry is
9 desirable or whether there are alternatives for the discharge or

10 alternatives to these being built?

11 MR. FREVERT: As a routine matter, those issues are dealt
12 with in facility planning and pretreatment ordinances and things
13 of that nature. Once the programs to address those things are in
14 place, we are not going to revisit them. So I think the answer
15 to your question is, no, we would not feel that antidegradation
16 applied to that example. But there -- I mean, we could sit
17 around and concoct a scenario where maybe there is something
18 peculiar where you would do it one out of a million times. So I
19 --

20 MR. HARRINGTON: So we -- excuse me. Go ahead.

21 MR. FREVERT: I think the way you have to set up your
22 theoretical, the answer is we are going to rely on those other
23 programs, the pretreatment programs and facility planning
24 programs, those things that, indeed, look at the alternatives and

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1 technologies and the cost effectiveness and things of that nature
2 and also the desire to serve community growth and all the social
3 benefits that come along with the municipal wastewater collection
4 and treatment. And we don't have any intention to use
5 antidegradation to revisit all of the other program decisions.

6 MR. HARRINGTON: Would you consider -- and you may not wish
7 to answer this today, but maybe in your comments -- agreeing to a
8 provision in the rule that made it clear that those activities

9 are not going to be re-reviewed as part of nondegradation?

10 MR. FREVERT: We would be happy to review and advise the
11 Board of our reactions to any language that anybody proposes on
12 modification of this proposal.

13 MR. HARRINGTON: I think you will see I have proposed some
14 language in my questions when you have had more of a chance to
15 review them. I would ask you to take a look at our alternatives.

16 I think there is one area that we have sort of missed in
17 the testimony, and as we went on today it bothered me. I would
18 like to touch on it. If somebody is going to, for example, build
19 a new factory and have a wastewater discharge, a steel mill or a
20 chemical plant, and they have to do -- and they are going to have
21 a discharge. They are going to come in and apply for a new
22 permit and it is clearly subject to nondegradation review. How
23 long do you think it would take them to put together the
24 demonstration you would want? Do you have any idea how much that

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1 demonstration would cost, and how long would it take you to
2 review it?

3 MR. FREVERT: I will do the best I can on that one,
4 carrying on with the theme that antidegradation is a standard
5 that requires some decision making in the permitting process and
6 that it varies from source to source and areas of the state to
7 other areas of the state and different circumstances. There is
8 no single answer. But I think what you are getting at is what we

9 would view as perhaps on the high end of complexity and
10 controversy.

11 If the ultimate case example that this rule was intending
12 to do deal with came before you, how much time and effort would
13 it take to address that. And I am going to assume in answering
14 that that there may indeed be some chemical and biological data
15 collection and perhaps other types of information on the
16 environmental conditions and proposed environmental
17 ramifications. There would need to be some consideration of if
18 we are going to build this factory and produce this product, show
19 me that you have looked at the various technologies to do that
20 and made the right selection of what technology will do that. I
21 assume that is being done anyway and we are not doing that only
22 for a permit.

23 If an individual came in and opened that dialogue and said
24 we are proposing to build facility "A" and we want to know what

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1 the environmental requirements are, and here is the copper
2 standard and here is another standard. When the antidegradation
3 came into that dialogue, and I would hope in most instances the
4 data collection and analysis and the development of what I think
5 we would need to address the standard the way it is intended, at
6 both the state and federal levels, could stay on the time frame
7 as the overall permitting.

8 Needless to say, that is one more issue when you get to
9 public participation. It is available to the public to weigh in
10 on it. The public has ten issues they are commenting on and this
11 becomes the eleventh and there is one more issue in and of
12 itself. It may not take any longer than the normal permitting
13 process. A new industry, a new factory in the State of Illinois,
14 perhaps anywhere in America, as industry recognizes, you can't
15 get your NPDES in less than a year anyway, even in a
16 noncontroversy circumstance. So, yes, I can see a year.

17 MR. HARRINGTON: A year for the Agency from --

18 MR. FREVERT: A year for the entire process for those
19 complex -- potentially controversial issues.

20 MR. HARRINGTON: Would you envision ever seeing a four
21 season aquatic study of a stream?

22 MR. FREVERT: Even without antidegradation, if there is an
23 issue involving an endangered species or something that has
24 critical needs, critical life stages at critical times of the

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1 year, yes. Routinely there are requirements to look at aquatic
2 communities in different life stages and different seasonal and
3 climatic patterns. We do that and address issues other than
4 antidegradation. Sure, that is potentially some information that
5 we need to make the right decision on the cases.

6 MR. HARRINGTON: Or season chemical studies?

7 MR. FREVERT: Yes, as a matter of fact with the -- the

8 ammonia water quality standard, we are looking at seasonal
9 impacts already, sure.

10 MR. HARRINGTON: In fact, dissolved oxygen and other things
11 all relate to that; is that correct?

12 MR. FREVERT: Yes. Although I -- well, we would really
13 have a bad time if we had DO problems in the winter. It is
14 usually -- it is maybe seasonal, but only half the season.

15 MR. HARRINGTON: What about computer modeling stream
16 impacts? Would you envision that as part of nondegradation?

17 MR. FREVERT: Well, again, probably the need to assess
18 impact of predicted concentrations and things at certain
19 locations, whether or not those assessments are so complicated
20 that the model would have to be computerized or not, I don't
21 know. I don't know. I think a lot of times we use computer
22 models when we don't need to.

23 MR. HARRINGTON: One last -- I hope one last question. Am
24 I correct that you would not see antidegradation being applied to

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1 man-made basins that are used for wastewater treatment?

2 MR. ETTINGER: Are you including the Sanitary and Ship
3 Canal?

4 (Laughter.)

5 MR. HARRINGTON: No, not the Sanitary and Ship Canal.

6 MR. FREVERT: Are you talking about wastewater lagoons.

7 MR. HARRINGTON: Yes, among others.

8 MR. FREVERT: They are treatment devices. They are not
9 waters of the State.

10 MR. HARRINGTON: Okay. Thank you very much.

11 MR. ETTINGER: I have a couple of follow-up questions
12 following up on Mr. Harrington's questions.

13 Is this concept of having to show that a new discharge
14 serves some social or economic goals a new requirement that is
15 coming in first with this proposal?

16 MR. FREVERT: I believe that is an existing component of
17 our existing standard.

18 MR. ETTINGER: So if one of these extremist environmental
19 groups were to appeal one of Mr. Harrington's permits now, would
20 the Board be faced with potentially having to decide the meaning
21 of as a result of necessary economic or social development
22 currently?

23 MR. FREVERT: Yes, I think we intentionally retained the
24 standard on the books now in those terms. There is some

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1 clarification and additional language regarding 401 activities
2 but for the court standard, we use the exact words that are on
3 the books today in that part of it.

4 MR. ETTINGER: I would like to ask two more. Now, this is
5 as to the additives, the treatment water problem again. Just to
6 give a hypothetical. We like hypotheticals here. Let's say, for

7 example, that a factory now has got noncontact cooling water with
8 additives, say chlorine or bromine now and they are discharging
9 10,000 gallons per day and that has been approved in the past,
10 but in a new permit they want to discharge 500,000 gallons per
11 day of water with the same concentration of bromine or chlorine
12 in it. Would you then consider antidegradation in that instance?

13 MR. FREVERT: In a general sense I believe I would consider
14 antidegradation -- if all the circumstances were the same, the
15 presumption is likely the outcome would be the same. But this
16 additional heat load may come from different operating conditions
17 such that the chemical additive may be chemically modified or
18 something else happen to it. This is all theoretical.

19 MR. ETTINGER: In my example the chemical loading would be
20 increased 50 times, would it not, if you had the same
21 concentration?

22 MR. FREVERT: A 50-fold increase?

23 MR. ETTINGER: Yes.

24 MR. FREVERT: Well, that's a big increase.

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1 MR. ETTINGER: You would have to look at the antideg for
2 that increase of the chemical?

3 MR. FREVERT: I believe my answer was the same even if it
4 was less than 50-fold. I think there needs to be some conscious
5 decision that that allowance still makes sense, even at the

6 higher level. I am assuming in most real world instances it is
7 not going to be a burden on the Agency or the discharger. But
8 you can concoct an example with increases of some other factor
9 that would make it otherwise.

10 MR. ETTINGER: The last thing, this had to do with the
11 relationship between a pretreater and the POTW, and an instance
12 in which a change that somebody discharging to a POTW has made
13 that necessitates the POTW to go for a new permit. That was
14 another one of Mr. Harrington's examples. Let's imagine that as
15 to a particular POTW that was seeing to modify its permit to
16 increase loading, and that loading could be avoided if the POTW
17 went back to the pretreater and asked them to change their
18 discharge in some way or otherwise they had alternatives for
19 having to increase the discharger from the POTW. Would that be
20 potentially an issue under an antidegradation?

21 MR. FREVERT: From a practical sense I could tell you that
22 with that issue the driving force of that would be revealing the
23 pretreatment regulations what those requirements are, and I
24 believe some of the same concepts are contained within those

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1 reviews. But I certainly would not have the desire to do an
2 entire separate review only for antidegradation for that request
3 when there are other review processes to entertain that.

4 MR. ETTINGER: Does the IEPA oversee the pretreatment
5 permits?

6 MR. FREVERT: I don't believe we are delegated. The U.S.
7 EPA still administers that program.

8 MR. ETTINGER: Okay. Thanks.

9 HEARING OFFICER TIPSORD: Is there anything further at this
10 time?

11 MS. FRANZETTI: I just have a couple. I would like to
12 clarify. I am concerned, Toby, that we may be creating a bit of
13 a misconception on the task force efforts on de minimis and just
14 what those were, with regard to your testimony that we couldn't
15 get a consensus. In the task force certainly the de minimis
16 concept was discussed. Do you agree with that?

17 MR. FREVERT: Sure.

18 MS. FRANZETTI: We discussed the fact that an approach
19 could be the use of a bright line type of approach of a
20 percentage cutoff. Do you agree with that?

21 MR. FREVERT: There was discussion on that.

22 MS. FRANZETTI: We also discussed what some of the other
23 relevant factors might be that you would look at like stream
24 characteristics and the nature of the proposed increase in

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1 loading. Would you agree with that?

2 MR. FREVERT: Certainly.

3 MS. FRANZETTI: Okay. And then at a certain point everyone
4 was asked to submit their ideas and their proposed language in

5 comments, and they did. And people submitted including Mr.
6 Ettinger, Mr. Moore, myself, IERG, and sorry if I left anybody
7 else out. But everyone submitted comments to you. And I believe
8 it would be accurate to say that everyone included a de minimis
9 exemption in those comments. Do you agree with that?

10 MR. FREVERT: There are a number of people that did. I
11 can't say everybody.

12 MS. FRANZETTI: Okay. I will accept that, too. I don't
13 know if everyone did. In those, some people proposed percentage
14 bright line cut offs as part of the proposal, albeit the
15 percentage numbers were different; isn't that correct?

16 MR. FREVERT: I think that's correct.

17 MS. FRANZETTI: Okay. Then did the Agency -- in response
18 to those comments, didn't the agency say, and I believe your
19 response was that you did not feel that you had identified one
20 way that was not burdensome and not arbitrary; is that correct?

21 MR. FREVERT: Probably.

22 MS. FRANZETTI: Okay. But we never came back together
23 again after that to try and negotiate or to try work to a
24 consensus position on the de minimis exemption?

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1 MR. FREVERT: There were some follow-up meetings with the
2 individual members of the work group, yourself included. There
3 were some -- I believe there were some additional comments filed
4 after, say, the termination of the active working sessions. In

5 fact, I think we still have open dialogue with some people and
6 continue to discuss this issue even today. And sitting here
7 today, I have not heard of an approach to this de minimis
8 exception yet that I think is really workable and would not
9 result in a more burdensome load both on the permit applicant and
10 my Agency.

11 MS. FRANZETTI: I understand that, Toby. I just wanted it
12 clarified, what the process was.

13 MR. FREVERT: Okay.

14 MS. FRANZETTI: And that in my view we never came together
15 after everyone taking their first shot to try to come to a
16 consensus. So I am not sure if we could or couldn't have. I do
17 understand that it is your view that you feel it is unworkable
18 because it may be equally or more burdensome. I don't want to
19 beat it to death. I just did think it was worthy of some
20 clarification.

21 MR. FREVERT: I want to reiterate and make sure that the
22 Board understands that we did identify this as a significant
23 issue and we tried to forewarn the Board that this would be a
24 matter of some further discussion. We didn't want to undermine

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1 peoples' ability to come forward with their recommendations. But
2 after two years we felt the need to move on to the next stage and
3 get a petition filed and try to resolve these things because we

4 really do have a requirement under the Clean Water Act to do
5 something and we haven't done it yet.

6 MS. FRANZETTI: Okay. Thank you. I have no further
7 questions.

8 MR. ANDES: In response to Mr. Harrington, in terms of the
9 social and economic test, you indicated that it was a list of
10 factors in there, in terms of increasing employment and other
11 types of benefits. I guess I would just point out and ask the
12 Agency to review -- there is a list exactly like that in the
13 Wisconsin rules. I would ask if the Agency would review that and
14 see if that fits the bill.

15 MR. FREVERT: I believe we identified within our own
16 proposed permitting procedures things that we would consider
17 example benefits as well. It is not an exhausting list, but we
18 attempted to show some indication that there are certain types of
19 things that ought to be recognized.

20 MR. ANDES: I guess one question would be whether there
21 would be some benefit to putting that into the Board's
22 regulations to make it clear and get more approval that those are
23 the factors that you would consider.

24 MR. FREVERT: I thought I had already stated in answer to

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1 Jim's questions that I was amenable to that as long as it is
2 worded in a fashion that it isn't exclusive and there may be some
3 benefit that we can't envision that would warrant an action.

4 MR. ANDES : So would --

5 MR. FREVERT: I mean, the clean up of a Super Fund site is
6 a justification for perhaps there is some incremental loading
7 somewhere else.

8 MR. ANDES: In fact, correcting an environmental or a
9 public health problem is one of the factors.

10 MR. FREVERT: Yes.

11 MR. ANDES: The other question relates to the question that
12 Ms. Franzetti asked. As I recall, one of the things that we
13 talked about at some point during the advisory process was a tier
14 review program, and as you have said, for some projects it would
15 get different levels of review than others.

16 I guess one question is, and I would like your thoughts on
17 this, is what some other states have done is that they have some
18 types of projects that sort of get the full bore of both parts of
19 the antideg analysis, look at alternatives and look at the social
20 and economic benefit. And there are some projects which get the
21 alternatives analysis to make sure that you are minimizing a
22 discharge, but you don't do the social and economic analysis
23 mainly because, in essence, you have already decided those types
24 of projects already have some benefit and you would not go

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1 through that.

2 MR. FREVERT: That may be the extent of my social and

3 economic analysis.

4 MR. ANDES: Okay. But it might be --

5 MR. FREVERT: You envision me doing more, perhaps, than I
6 intend to do.

7 MR. ANDES: No, I don't. The simple issue is whether that
8 could be embodied more clearly in the regulations.

9 MR. FREVERT: Hopefully our intent, our desire, and our
10 understanding of what would make the program in Illinois both
11 workable and federally approvable has been articulated as best I
12 can articulate it. If people want to bring in language that does
13 a better job than what my language did, that's fine. As long as
14 you understand what my intent is. If you meet my intent the odds
15 are I will say, yes, I like your language better than mine.

16 HEARING OFFICER TIPSORD: All right. Anything further?

17 MR. ETTINGER: If we are going to have this meeting, I just
18 want to make sure that the lawyers know before they run away.

19 HEARING OFFICER TIPSORD: Yes, I will address that in just
20 a second.

21 If there are no further questions for the Agency at this
22 time, thank you very much. I appreciate it.

23 We will go off the record for just a minute.

24 (Discussion off the record.)

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1 HEARING OFFICER TIPSORD: At this time I want to thank
2 everyone for your patience. It has been a second long day of

3 hearing. We have some wonderful information and some wonderful
4 testimony and great dialogue going. I thank you all for your
5 attention.

6 Do any of the Board Members have anything that they would
7 like to add at this time? Okay. Thank you very much, and we are
8 adjourned.

9 (Exhibits retained by
10 Hearing Officer Tipsord.)

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2 COUNTY OF MONTGOMERY)

3 C E R T I F I C A T E

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5 I, DARLENE M. NIEMEYER, a Notary Public in and for the
6 County of Montgomery, State of Illinois, DO HEREBY CERTIFY that
7 the foregoing 163 pages comprise a true, complete and correct
8 transcript of the proceedings held on the 6th of December A.D.,
9 2000, at 600 South Second Street, Suite 403, Springfield,
10 Illinois, In the matter of: Revisions to Antidegradation Rules:
11 35 Ill. Adm. Code 302.105, 303.205, 303.206, and 106.990-106.995,
12 in proceedings held before Marie Tipsord, Hearing Officer, and
13 recorded in machine shorthand by me.

14 IN WITNESS WHEREOF I have hereunto set my hand and affixed
15 my Notarial Seal this 12th day of December A.D., 2000.

16

17

18

19 Notary Public and
20 Certified Shorthand Reporter and
Registered Professional Reporter

21 CSR License No. 084-003677
My Commission Expires: 03-02-2003

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