

1 BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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4 IN THE MATTER OF:

5

6 PROVISIONAL VARIANCES FROM

7 WATER TEMPERATURE STANDARDS: R01-31

8 PROPOSED NEW 35 ILL. (Rulemaking-Water)

9 ADM. CODE 301.109

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14 Proceedings held on June 7, 2001 at 2:00 p.m., at the
15 Illinois Pollution Control Board, 600 South Second Street, Suite
16 403, Springfield, Illinois, before Hearing Officer Andrew Boron.

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A P P E A R A N C E S

Claire A. Manning, Chairman
G. Tanner Girard, Ph.D., Board Member
Elena Kezelis, Board Member
Nicholas J. Melas, Board Member
Anand Rao, Senior Environmental Scientist

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I N D E X

WITNESS	PAGE NUMBER
KENNETH R. ROGERS	8

E X H I B I T S

NUMBER	MARKED FOR I.D.	ENTERED
Hearing Exhibit 1	19	19

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

2 (June 7, 2001; 2:00 p.m.)

3 HEARING OFFICER BORON: Good morning. My name is Andrew
4 Boron, and I am the Attorney Assistant for Chairman Claire
5 Manning with the Illinois Pollution Control Board. The Board has
6 appointed me to serve as Hearing Officer in this rulemaking
7 proceeding entitled, In the Matter of: Provisional Variances
8 From Water Temperature Standards: Proposed New 35 Illinois
9 Administrative Code 301.109. The Docket Number for this
10 rulemaking is R01-31, and today is the first hearing.

11 Also present today on behalf of the Board are Chairman
12 Claire Manning to my right.

13 CHAIRMAN MANNING: Good afternoon.

14 HEARING OFFICER BORON: Anand Rao with the Board's
15 technical unit. Board Member Elena Kezelis.

16 BOARD MEMBER KEZELIS: Hello.

17 HEARING OFFICER BORON: On my left is Tanner Girard.

18 BOARD MEMBER GIRARD: Good afternoon.

19 HEARING OFFICER BORON: On April the 13th of 2001, the
20 Illinois Environmental Protection Agency filed a proposal to
21 amend the Board's Water Pollution Regulations at 35 Illinois
22 Administrative Code 301. The new rules would set forth the
23 factors that the Agency must address when it recommends that the
24 Board grant provisional variances for water temperature

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1 standards.

2 The Agency explains that based on its 20 years of
3 experience in considering provisional variance requests, the
4 proposed rules will help to both clarify what the Agency
5 considers when it recommends the granting of a thermal
6 provisional variance, and ensure that when it is granted the
7 environment will be protected.

8 Again, please note that the sign up sheets for the
9 proceeding service and notice lists are also located at the table
10 on the side. Those on the notice list will receive only Board
11 Opinions and Orders and Hearing Officer Orders. Those on the
12 service list will receive these documents plus certain other
13 filings, such as public comments. Also at the side of the room
14 are copies of the current notice and service lists. These lists
15 are updated periodically.

16 Besides witnesses for the Agency, if you wish to testify
17 today you must sign in on the appropriate sign up sheet at the
18 side of the room. Time permitting, after the Agency's testimony
19 we will proceed with the testimony of persons who sign up in the
20 order their names appear on the sign up sheet.

21 The Board's procedural rules for regulatory proceedings
22 govern this hearing. All information that is relevant and not
23 repetitious or privileged will be admitted. All witnesses will
24 be sworn and subject to cross-questioning. If you do not wish to

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1 give testimony you may file written public comments.

2 As for the order for today's proceeding, we will begin with
3 the Agency's testimony. Time permitting, after that we will
4 proceed with the testimony of persons who sign up in the order
5 their names appear on the sign up sheet. Anyone may ask a
6 question of any witness. I ask that during question periods if
7 you have a question please raise your hand and wait for me to
8 acknowledge you. When I acknowledge you, please state your name
9 and any organization you are representing here today.

10 Please speak one at a time. If you are speaking over each
11 other the court reporter will not be able to accurately
12 transcribe your statements for the record. For the same reason,
13 please speak loudly and clearly and not too rapidly. Please note
14 that any questions asked by anyone with the Board are intended to
15 help build a complete record for the Board's decision and not to
16 express any preconceived notion or bias.

17 Are there any questions about the procedure that we will
18 follow today?

19 Seeing none, Chairman Manning, would you like to make any
20 remarks at this time?

21 CHAIRMAN MANNING: Just to welcome everyone to this sort of
22 important issue on provisional variances from the thermal
23 temperature standards. We look forward to an effective hearing.

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HEARING OFFICER BORON: The purpose of this portion of the

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1 hearing is to receive testimony from the Agency on its proposed
2 amendments.

3 Ms. Williams, I just want to remind you that if you want
4 any of your comments to be considered substantive evidence, you
5 must first be sworn in. Do you want to be sworn in?

6 MS. WILLIAMS: Probably that won't be necessary, but if you
7 want to swear me in just to be safe maybe at the beginning that
8 would be fine.

9 HEARING OFFICER BORON: Okay. Why don't we do that. That
10 would be great. Also you have one witness, I gather?

11 MS. WILLIAMS: Yes. Today -- I am Deborah Williams from
12 the Illinois EPA. Is that okay to first --

13 HEARING OFFICER BORON: Okay. So actually it is you and
14 this gentleman here that are going to be sworn in?

15 MR. FREVERT: Ken and I will both be witnesses.

16 MS. WILLIAMS: We will have two who will be --

17 HEARING OFFICER BORON: Okay. All three of you. Okay. So
18 if we could please swear in the witnesses at this time.

19 (Whereupon, Kenneth Rogers, Toby Frevert, and
20 Attorney Deborah Williams were sworn by the Notary
21 Public.)

22 HEARING OFFICER BORON: Okay. Thank you. You may begin.

23 MS. WILLIAMS: Thank you. Good afternoon. My name is

24 Deborah Williams, and I am Assistant Counsel at the Illinois EPA,

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1 and I am representing the Agency in this docket that we are
2 discussing today, Provisional Variances From Water Temperature
3 Standards: Proposed New 35 Illinois Administrative Code 301.109.

4 Today the Agency will present formal testimony from one
5 witness, who will be Ken Rogers, who is seated to my right. Ken
6 will present testimony from his prefiled testimony.

7 We also have another witness to Ken's right, Toby Frevert.
8 Toby is the manager of the Division of Water Pollution Control at
9 the Illinois EPA. And they will both be available to answer any
10 questions that the Board or the public may have following the
11 testimony.

12 Before Ken gets started I just wanted to point out for the
13 record that we did find a typographical error in one of the
14 exhibits that were submitted. I believe it was Exhibit A,
15 submitted with the Agency's Statement of Reasons. We had a real
16 small typographical error in the last line. In the column that
17 says date of PCB order, we have 02-23-99, and that should read
18 09-23-99. I have corrected versions if you would like them
19 entered into the record or --

20 HEARING OFFICER BORON: You could do that afterwards.

21 MS. WILLIAMS: Okay. That's fine. All right, Ken.

22 HEARING OFFICER BORON: You may proceed, yes.

23 MR. ROGERS: My name is Ken Rogers. I am currently manager
24 of the Compliance Assurance Section in the Bureau of Water at the

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1 Illinois Environmental Protection Agency. I have held my current
2 position at the Illinois EPA since 1984. Prior to that time, I
3 served in the Division of Water Pollution Control as the Manager
4 of the Water Quality Monitoring Unit from 1979 to --

5 CHAIRMAN MANNING: Excuse me. Could you speak in the
6 microphone a little better. Just pull it up. Thank you.

7 MR. ROGERS: As manager of the Water Quality Monitoring
8 Unit from 1979 to 1984, and the manager of the Preconstruction
9 Grant Unit from 1974 to 1978. I have been employed at the
10 Illinois EPA since 1970. I received a Bachelor of Arts in
11 Biological Science with a Chemistry Minor from Minot State
12 University in North Dakota and a Master of Arts in Administration
13 from the University of Illinois at Springfield.

14 My duties as manager of the Compliance Assurance Section
15 include supervision of the development of the technical component
16 of the Illinois EPA recommendations to the Illinois Pollution
17 Control Board for the grant of provisional variances from water
18 pollution control regulations or permit requirements, including
19 provisional variances from thermal standards. I have also
20 participated in the development of the proposed amendment to the
21 Board's regulations which is the subject of this proceeding. My
22 testimony will address the Illinois EPA experience with

23 provisional variances from the thermal limits, the need for the
24 amendments the Agency has proposed, and the purpose and content

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1 of the proposed amendments.

2 In 1980 the Illinois General Assembly amended Title 9 of
3 the Environmental Protection Act to establish provisional
4 variances as an additional form of short term regulatory relief.
5 Provisional variances are appropriate where it can be shown that
6 compliance on a short term basis with any rule or regulation,
7 requirement, or order of the Board, or with any permit
8 requirement would impose an arbitrary or unreasonable hardship.

9 Section 35(b) of the Act also requires that the Board grant
10 a provisional variance within two working days from the date of
11 notification from the Illinois EPA that a provisional variance is
12 appropriate. In order to facilitate this process, the Illinois
13 EPA typically times the filing of its provisional variance
14 recommendation to coincide with scheduled Board meetings.

15 Provisional variances are intended to cover short term
16 hardship situations. Section 36(c) of the Act provides that a
17 provisional variance can only be granted for a maximum of 45
18 days, and no single facility can be granted provisional variances
19 which exceed a duration of 90 days in any calendar year. This
20 mechanism differs from the regular variance, which may be granted
21 for up to five years, and the adjusted standard or site specific

22 regulation, which typically grant permanent regulatory relief.
23 Because of the relief granted by provisional variances is of such
24 a short duration, no prior public notice or opportunity for

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1 comment or hearing is provided. However, provisional variances
2 are only granted by the State of Illinois and do not protect
3 facilities from U.S. EPA or citizen enforcement actions.

4 In 35 Illinois Administrative Code Part 180, the Illinois
5 EPA has established procedural regulations for the provisional
6 variance application and recommendation process. The pending
7 regulatory proposal should be read with these regulations in
8 mind. Section 180.202(b) of the existing procedural regulations
9 establishes the informational requirements currently applicable
10 to all provisional variance applications.

11 The relevant informational requirements for thermal
12 provisional variance applications are: A statement identifying
13 the requirement from which the variance is requested; a
14 description of the business or activity for which the variance is
15 requested; the quantity and types of materials used in that
16 process or activity; the quantity, types and nature of the
17 materials to be discharged and the identification of the
18 receiving waterway; an assessment of any adverse environmental
19 impacts which the variance may produce; an explanation of why
20 compliance with the requirement imposes arbitrary and
21 unreasonable hardship; a description of the proposed methods and

22 a timetable for achieving compliance; a discussion of alternative
23 methods of compliance and the factors influencing the choice to
24 apply for a provisional variance; a statement of the period for

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1 which the variance is requested; a statement of whether the
2 applicant has been granted any provisional variances within the
3 calendar year, and the terms and duration of such variances; a
4 statement regarding the applicant's current permit status; and
5 any Board orders in effect regarding the applicant's activities
6 and any matters currently before the Board in which the applicant
7 is a party.

8 Most provisional variance applications are received by the
9 Illinois EPA in the form of a letter from the environmental staff
10 at the given facility. The Bureau of Water receives
11 approximately 25 provisional variance applications per year.
12 Part 180 gives the Illinois EPA five days to accept or reject a
13 provisional variance application and 30 days to make a final
14 determination.

15 In general, the Part 180 rules have worked well in
16 clarifying for provisional variance applicants the documentation
17 required for a complete application and the Illinois EPA's
18 application review process. However, after 20 years of
19 considering variance requests for provisional variances, the
20 Illinois EPA believes that additional criteria in regard to

21 provisional variances from water temperature standards is
22 warranted. In the past, a combination of severe drought and
23 extremely hot weather, low river flows, elevated ambient river
24 temperatures and decreased heat dissipation have created

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1 emergency situations where power companies have been unable to
2 meet their National Pollutant Discharge Elimination System permit
3 conditions for the thermal component of their discharges and also
4 meet their obligations to supply reliable power to their
5 consumers.

6 (Board Member Nicholas Melas entered the hearing
7 room.)

8 MR. ROGERS: Since 1988, the Illinois EPA has received 23
9 formal requests for provisional variances from water temperature
10 standards. The Illinois EPA recommended the granting of
11 provisional variances, subject to certain conditions, for 20 of
12 these requests. Five of the approved requests were for
13 extensions of the previously granted variances. One thermal
14 provisional variance request was denied by the Agency and
15 applicants withdrew two others. In addition, numerous informal
16 inquiries have been made to the Illinois EPA regarding the merits
17 of a thermal provisional variance under consideration prior to
18 formal -- under consideration prior to formal submission. While
19 this proposal could potentially impact any facility subject to a
20 water quality temperature limitation for whom compliance with

21 that limit on a short term basis would impose an arbitrary and
22 unreasonable hardship, it is likely that this proposal will only
23 impact electric utilities that face the confluence of increased
24 demand for power production, low flow rates, and extreme warm

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1 weather conditions in the summer months.

2 The most recent emergency conditions which resulted in
3 provisional variance requests from thermal standards occurred in
4 the summer of 1999, when four provisional variances and one
5 extension were granted for the relief from thermal requirements.
6 Two of these provisional variances and the extension were
7 actually utilized by the petitioners. Commonwealth Edison
8 Company, Dresden Station, used one 45-day provisional variance
9 plus an extension for an additional 45 days and the other was
10 used by CIPS, Newton Station.

11 The Dresden Station permit provides for a maximum allowable
12 discharge temperature and a specified number of hours when the
13 discharge could exceed a long-term average discharge temperature.
14 The provisional variance increased the number of hours when the
15 long-term average temperature could be exceeded. No relief from
16 the maximum temperature was provided. The Dresden Station
17 submitted thermal provisional variance requests in 1988, 1992,
18 1994, 1996, 1997, and 1998. This history was evidence of an
19 apparent need for additional cooling capacity at the Dresden

20 Station. The Newton Station provisional variance was similar to
21 Dresden Station in that relief was provided for increased
22 excursions above long-term thermal limits but no relief from
23 maximum allowable thermal discharge limits. The Newton facility
24 also suffered major operational problems because of a prolonged

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1 period of hot weather and apparently exceeded maximum discharge
2 levels causing an extensive fish kill in the cooling lake. This
3 incident further supported the apparent need for additional
4 cooling capacity at Newton station.

5 Following the summer of 1999, the Illinois EPA notified
6 these power companies, Commonwealth Edison and Ameren-CIPS, of
7 the need to develop more proactive plans to avoid the
8 reoccurrence of violations and the need for variances. Both of
9 these companies have subsequently installed additional cooling
10 systems to reduce the possibility of permit violations.

11 Ameren-CIPS installed supplemental cooling ponds at the Coffeen
12 Station and Newton Station, and Commonwealth Edison installed
13 cooling towers in the discharge canal at Dresden Station. It is
14 expected that these cooling systems will sustain full compliance
15 under extreme weather conditions; however, it is possible that
16 unusual combinations of heat and drought may still create a
17 situation where relief from current permit conditions may be
18 needed in order to prevent a serious failure of the power grid.
19 Therefore, this regulatory proposal has been developed in an

20 effort to further clarify and provide up-front documentation to
21 any future applicant on the requirements for a provisional
22 variance from any water temperature standard.

23 The Illinois EPA has proposed the addition of a new Section
24 301.109 to the Board's water pollution regulations that sets

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1 forth how the Illinois EPA will exercise its provisional variance
2 authority consistent with the Act and the Illinois EPA's
3 procedural regulations when evaluating requests for provisional
4 variances from water temperature standards. The proposal also
5 provides guidance for the regulated community regarding the
6 minimum appropriate conditions to be included in thermal
7 provisional variances to ensure that no environmental harm will
8 result.

9 This proposed new Section places several requirements upon
10 the contents of any Illinois EPA recommendation to the Board for
11 the grant of a provisional variance from any water temperature
12 requirement. The Illinois EPA recommendation must specifically
13 address each of the informational contents required of a
14 provisional variance application under Part 180.202(b) of the
15 Illinois EPA's procedural regulations. The Illinois EPA is also
16 required to specifically address the foreseeability of weather
17 and operational conditions that led to the provisional variance
18 request and identify any provisional variances from any water

19 temperature standard that the Board has issued to the applicant
20 for the past five years. Typically, an Illinois EPA provisional
21 variance recommendation would only address whether the applicant
22 had been issued any provisional variances during the current
23 calendar year. The Illinois EPA recommendation must also address
24 its rationale for recommending any specific conditions that have

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1 been imposed upon the water temperature provisional variance.

2 Subsection (b)(2) of proposed Section 301.109 lists five
3 specific conditions that the Illinois EPA will impose upon most
4 provisional variances granted from a water temperature
5 requirement. These conditions are the retirement to:

6 One, continuously monitor intake, discharge, and receiving
7 water temperature and visually inspect intake and discharge areas
8 three times daily to assess any mortalities to aquatic life.

9 Two, document environmental conditions during the term of
10 the provisional variance and submit the documentation to the
11 Illinois EPA and the Department of the Natural Resources, DNR,
12 within 30 days after the provisional variance expires.

13 Three, immediately implement biological activities to
14 characterize how aquatic life respond to the thermal conditions
15 resulting from the provisional variance; document these
16 activities, and submit the documentation to the Illinois EPA and
17 DNR within 30 days after the provisional variance expires.

18 Four, notify the Illinois EPA and DNR of any unusual

19 conditions, including mortalities to aquatic life; immediately
20 take action to remedy the problem; investigate and document the
21 cause and seriousness of the unusual conditions while providing
22 updates to the Illinois EPA and DNR as changes occur until normal
23 conditions return; notify the Illinois EPA and DNR when normal
24 conditions return; and submit the documentation to the Illinois

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1 EPA and DNR within 30 days after normal conditions return.

2 Five, develop and implement a response and recovery plan to
3 address any adverse environmental impact due to thermal
4 conditions resulting from the provisional variance, including
5 loss and damage to aquatic life.

6 In many cases, these conditions are currently being imposed
7 upon provisional variance applicants. However, in some cases,
8 additional temperature, environmental, and biological monitoring,
9 record-keeping, and reporting will be required for the term of
10 the provisional variance.

11 This proposal is not intended to place new substantive
12 regulatory requirements under Illinois' water pollution control
13 regulations on facilities; but merely to clarify the types of
14 information the Illinois EPA should consider when recommending
15 that the Board grant provisional variances from a water quality
16 temperature regulation or permit limitation. The proposal
17 clarifies the information provisional variance applicants should

18 expect to submit to the Illinois EPA in a provisional variance
19 application and the minimum conditions that would be imposed upon
20 grant of such a provisional variance.

21 This concludes my prefiled testimony.

22 HEARING OFFICER BORON: Thank you very much. At this point
23 I would like to introduce Board Member Nick Melas who just joined
24 us.

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1 BOARD MEMBER MELAS: Thank you.

2 HEARING OFFICER BORON: Ms. Williams, would you like to
3 have the amended prefiled testimony admitted as a hearing
4 exhibit?

5 MS. WILLIAMS: Did you say the amended?

6 HEARING OFFICER BORON: Yes, because you had made some
7 changes from the -- didn't you say --

8 MS. WILLIAMS: That was --

9 HEARING OFFICER BORON: Oh, right. This is already part of
10 the record.

11 MS. WILLIAMS: Sure.

12 HEARING OFFICER BORON: Okay. So you just want to admit
13 the other amended document?

14 MS. WILLIAMS: Yes.

15 HEARING OFFICER BORON: Okay. You can hand me a copy.

16 MS. WILLIAMS: Okay.

17 HEARING OFFICER BORON: All right. I have been handed a

18 document that says Thermal Provisional Variances at the top. It
19 says revised as of June 7th of 2001. I will -- I am marking this
20 document as Exhibit Number 1, and entering it into the record as
21 a hearing exhibit.

22 (Whereupon said document was duly marked for purposes
23 of identification as Hearing Exhibit 1 and admitted
24 into evidence as of this date.)

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1 HEARING OFFICER BORON: Okay. Ms. Williams, if you would
2 like to proceed.

3 MS. WILLIAMS: I think we are finished. We are available
4 for any questions.

5 HEARING OFFICER BORON: Okay. We will now proceed with
6 questions for the Agency's witnesses. As I mentioned earlier, if
7 you have a question, please raise your hand and wait for me to
8 acknowledge you. When I acknowledge you, please state your name
9 and any organization you are representing here today, and your
10 position with that organization.

11 Before the Board proceeds with questions it may have, does
12 anyone else have any questions?

13 MR. MESSINA: Yes.

14 HEARING OFFICER BORON: Yes, please proceed, Mr. Messina.

15 MR. MESSINA: Hello and good afternoon. My name is Al
16 Messina, and I represent the Illinois Environmental Regulatory

17 Group. I have several questions, but I would like to start off
18 by first asking some questions with regards to the general
19 philosophy or the purpose of this proposal.

20 If I could, Mr. Rogers, if I could direct you to page two
21 of your testimony. You state that Section 35(b) of the Act
22 requires the Board to grant the provisional variance within two
23 working days from the date of notification from the Agency that a
24 provisional variance is appropriate.

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1 My first question would be do you believe that the Board
2 has the authority to deny a provisional variance if the Agency
3 recommends that it be granted?

4 MR. FREVERT: Are you asking for Ken Rogers' legal
5 interpretation of the Environmental Protection Act?

6 MR. MESSINA: We are asking for the Agency's
7 interpretation.

8 MR. FREVERT: I would like to take a shot at responding to
9 that and then I --

10 CHAIRMAN MANNING: Toby, would you talk in the microphone,
11 please.

12 MR. FREVERT: I will take a shot at responding to that, and
13 I would be happy to consult with the legal staff at the Agency
14 and give you any corrections of what I say today in the future if
15 I am wrong.

16 We believe the legislature specifically assigned the Agency

17 to review these emergency type provisional variance requests and
18 formulate a technical recommendation and action to either grant
19 or deny those requests and then refer those particular
20 recommendations to the Board for their consideration and action.
21 I think historically there has been no desire or intent for the
22 Board to necessarily deny an action that we have specifically
23 said meets our interpretation of the substance and the intent of
24 the Environmental Protection Act. That is as close to an answer

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1 that I can give you today.

2 MR. MESSINA: I guess then the follow-up question would be
3 whether or not you are able to let us know if the Board can or
4 cannot?

5 MR. FREVERT: I understand. Your question has been
6 registered. I can say now it is our understanding that we
7 believe it is the legislative intent that in situations of
8 emergency conditions where prompt action was necessary that the
9 primary responsibility for the State of Illinois to weigh in on
10 that request lies with the Agency.

11 MR. MESSINA: May I continue?

12 HEARING OFFICER BORON: Yes, you may. Again, any motions,
13 if you want to wait until the end to make those motions.

14 MR. MESSINA: Yes. I would just throw this question out to
15 either Mr. Rogers or Mr. Frevert. Whether it is your belief that

16 under the current statute and rules the Agency can simply not
17 make a recommendation that a provisional variance be granted?

18 MR. FREVERT: I agree with that.

19 MR. MESSINA: Then the result of that would be that the
20 provisional variance would never reach the Board, much less be
21 granted a provisional variance?

22 MR. FREVERT: I think that's the practical result, yes.

23 MR. MESSINA: If the Agency were to make a recommendation
24 to the Board with conditions, can the Board grant that

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1 provisional variance without those conditions or with different
2 conditions, or is the Board bound by that recommendation?

3 MR. FREVERT: Again, I think the primary responsibility for
4 identifying the appropriateness of the provisional variances and
5 restrictions and limitations upon those provisional variances
6 lies with the Agency. In practice, I believe the Agency
7 conditions and recommendations of provisional variances that have
8 gone into effect have been honored. To the extent there may be a
9 legal argument made, the Board can deviate from that. I am not
10 sure I can give you a specific answer today.

11 MR. MESSINA: Thank you. Then with regard to the proposal,
12 then, what is the value of explaining the Agency's rationale and
13 the recommendation if the Board must accept that final analysis?

14 MR. FREVERT: From my perspective the primary value of this
15 proceeding and this specific proposal is to register with the

16 regulated community and the citizens of Illinois that based on
17 our experience as an Agency implementing the provisional variance
18 component of the Environmental Protection Act as it applies to
19 thermal discharges, we feel we have enough experience over the
20 years and enough occasions of dealing with these things that we
21 believe it is appropriate to identify more specifically the
22 process we go through and the types of criteria and information
23 that we believe are appropriate to make this particular component
24 of the law more meaningful and to give fair notice to the

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1 regulated community how we intend to operate in the future.

2 MR. MESSINA: Okay. Under the existing rules and
3 procedures, namely the Part 180 provisional variance procedures,
4 doesn't the Agency already have the discretion to consider all of
5 the factors mentioned, including -- or such as the weather and
6 operating conditions referenced in the proposal before the Board
7 today that the proposed rule would require the Agency to discuss
8 in its recommendation?

9 MR. FREVERT: I believe we have the authority to do that.
10 In reality I can assure you that is what we intend to do from
11 this date forward. One of the primary benefits of this
12 proceeding is to put everybody on public notice and allow public
13 entering of our intent to operate that way in the future.

14 MR. MESSINA: Well, if that is, indeed, the case, then why

15 has the Agency proposed these as revisions to the Board's rules
16 rather than the Agency's Part 180 provisional variance procedural
17 rules?

18 MR. FREVERT: We had considered a number of ways to proceed
19 with our particular objective of notifying the State of Illinois,
20 industries operating in it and the citizens living in it of this
21 particular change in administrative approach and provide clear
22 definition and characterization of what we think that is. There
23 were several other options that all had merit. As the dust
24 settled, we selected this option as the option to proceed with.

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1 MR. MESSINA: Okay. Does the Agency believe that proposing
2 a Board regulation is somehow better or more effective in this
3 way than revising its own regulations?

4 MR. FREVERT: I guess I would have to repeat the earlier
5 comment. All of the options had practicality applicability. As
6 we completed our analysis, the Agency concluded that this was the
7 option to pursue to move this issue into the public realm.

8 MR. MESSINA: Okay. If I could return briefly to the
9 question I had asked you before about the conditions -- well,
10 actually, let me strike that and ask you something different.

11 In your opinion, can the Agency currently impose any or all
12 of the conditions that are contained in the proposal in
13 309.109(b)(2)?

14 MR. FREVERT: Yes.

15 MR. MESSINA: Can the Agency impose conditions other than
16 those listed as it were to deem necessary?

17 MR. FREVERT: I believe we have that latitude under the
18 state law, yes.

19 MR. MESSINA: Could you provide some examples of what other
20 types of conditions the Agency has imposed as part of its
21 recommendation in the past?

22 MR. FREVERT: I am not sure I can, but I do want to remind
23 you that the statute sets out the provisional variance as a
24 mechanism to deal with short term situations where there is some

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1 complication in complying with the applicable regulations. It
2 certainly is not specifically focused on or restricted to thermal
3 discharges. I think virtually any discharge we would have
4 options to an application of that statute provision. So
5 conditions that go along with any provisional variance that we
6 would grant are going to be specific to the nature of the
7 circumstances of that request.

8 MR. MESSINA: Let me rephrase the question, then. Could
9 you provide any examples with regards to a thermal provisional
10 variance beyond those listed in the proposal?

11 MR. FREVERT: Perhaps Ken can. I know we have done it. I
12 don't have personal recollection of how many applications and
13 what specific permittee was involved.

14 Ken, would you have anything to supplement?

15 MR. ROGERS: Yes. At times we had I think added a
16 condition where the variance would only be utilized to provide
17 electric power to essential operations or essential services. We
18 have included that as a condition in the past regarding the
19 utilities.

20 MR. FREVERT: There is one example. There probably are
21 more.

22 MR. MESSINA: If you are aware of any other types of
23 conditions, if you could supply that or put that within the
24 record, that would be --

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1 MR. FREVERT: We will look into it.

2 MR. MESSINA: -- very helpful. I have a question and this,
3 again, has to do with the testimony, and there was something
4 within the testimony that I was not sure I understood. If you --
5 if I could ask you some questions about it. You stated on page
6 four at one point that the Part 180 rules have worked well.
7 However, that additional criteria is warranted. I was just
8 unsure as to what you meant by additional criteria. With regards
9 to what?

10 MR. FREVERT: I believe what we were referring to and what
11 Ken specifically referred to in his testimony were the
12 supplemental issues and material that we will be looking for in
13 evaluating requests for thermal provisional variances. I would

14 agree wholeheartedly with Ken that our operating procedures have
15 worked well. Quite frankly, we thought it would be beneficial
16 not only to us but to the regulated entities and the general
17 public for some additional clarification on the material we are
18 looking at specifically referring to thermal type discharges. So
19 we proposed to supplement something. We believe it is a good
20 document in this fashion to have even clearer and better
21 communication with potential users of this provision of the law.

22 MR. MESSINA: And then those criteria would be the ones
23 contained in the proposal 309.109(a)(1) through (3)?

24 MR. FREVERT: I believe so, yes.

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1 MR. MESSINA: Are these, then, new standards for the
2 granting of a recommendation?

3 MR. FREVERT: I would consider it more delivered
4 communication of the operating standards that we have been and
5 will continue to be adhering to. Quite honestly, some of these
6 issues are things that we have learned through the evolution of
7 our 18 or 19 years of administering this program. Some of
8 these -- most of these provisions I believe we have used in the
9 past. We are merely trying to clarify and communicate to the
10 public that we think that has worked well enough that you can
11 expect that as a routine way of operating from us in the future.

12 MR. MESSINA: I have some additional questions with regard

13 to those specific provisions, if I could continue. I believe in
14 one of your earlier answers you stated that the Agency
15 essentially has full discretion over the decision to grant or
16 deny a provisional variance, and that it cannot recommend to the
17 Board its issuance. And further you had stated that the current
18 procedures in Part 180 allowed the Agency to seek all information
19 that it needs to impose any conditions. My question is, what
20 benefit will the Agency derive from this proposal?

21 MR. FREVERT: I think a clear and more up-front
22 communication with potential users and advanced notification that
23 this is the type of material we are looking at. So if you truly
24 anticipate at any time in the future that you may need to take

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1 advantage of provisional variances, your environmental staff
2 should have thought through and anticipate these are the type of
3 things we want information on as you approach us.

4 MR. MESSINA: Beyond --

5 MR. FREVERT: I mean --

6 MR. MESSINA: I am sorry.

7 MR. FREVERT: -- if they never use them, that is fine. To
8 any circumstance this year, next year, ten years from now, we
9 feel like it would be an unfair circumstance for us to tell an
10 applicant what the ground rules are at the eleventh hour when
11 they need the provisional variance. We are trying to give them
12 some indication of what we are looking for, some additional

13 detail on what we are looking for far enough in advance so we
14 don't turn a crisis into a super crisis.

15 MR. MESSINA: Then those, in your mind, include all the
16 benefits to the regulated community as well that they would
17 derive from this proposal? Or can you foresee any other benefit
18 beyond that?

19 MR. FREVERT: Well, I am not sure that I have attempted to
20 perceive this in terms of myself being an employee of that
21 community. I have looked at it in terms of my being an employee
22 of an Agency that has to pass judgment on these requests and what
23 I think is fair and up-front communication on my part as to how I
24 think the program works, and if you want to heighten your chances

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1 of success in asking us for support, bring this information with
2 you when you come talk.

3 MR. MESSINA: Does the Agency believe that this proposal
4 will have an affect on the ability of an applicant to obtain a
5 provisional variance?

6 MR. FREVERT: To the extent that they will have a better
7 idea of what we are looking for when they approach us, it should
8 improve their chances of either success or more timely success.
9 And also give them some lead time so that some of the tracking
10 and monitoring and the additional planning information that we
11 think is a beneficial component of a provisional variance, they

12 have a chance to have thought it through and prepare their
13 response recommendations.

14 MR. MESSINA: Could you please explain how this proposal
15 relates to applications filed under the regular application
16 provisions of 180.202(b) and the provisions pertaining to
17 emergency applications contained in 180.204?

18 MR. FREVERT: I think in terms of -- correct me if I am
19 wrong, Ken or Deb -- in terms of provisional variances as they
20 apply to thermal discharges, this is supplemental information to
21 communicate to an applicant what we are looking for in addition
22 to the provisions that you have already stated.

23 BOARD MEMBER KEZELIS: Excuse me. Could you speak up a
24 little? It is hard to hear you.

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1 MR. FREVERT: I thought I was doing well.

2 CHAIRMAN MANNING: Just to clarify for the record, too,
3 when you are talking about 180, you are talking about the EPA's
4 procedural rules found at Section 180 of 35 Illinois
5 Administrative Code. Go ahead, Toby.

6 MR. FREVERT: We are not proposing anything that would
7 conflict or undermine with those. We are proposing some material
8 that we believe supplements that set of requirements.

9 MR. MESSINA: Okay. Thank you for the clarification. You
10 would agree, then, that the emergency application procedures
11 could be applicable to the need to obtain a provisional variance

12 from thermal requirements?

13 MR. FREVERT: I think maybe you lost me. I am not sure I
14 understood the question.

15 MR. MESSINA: You could foresee that those procedures for
16 emergency provisional variances are necessary for those
17 facilities that would be seeking a provisional variance from
18 thermal requirements?

19 MR. FREVERT: I think that's correct.

20 MR. MESSINA: As a practical matter, then, under the
21 existing process, where there is an immediate need for a
22 provisional variance to cover emergency situations, doesn't the
23 Agency often respond almost immediately or often within just a
24 few days?

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1 MR. FREVERT: We try to accommodate the program and make it
2 work as rapidly and responsively as possible, and in the sense of
3 true emergencies we try to recognize them as emergencies and we
4 deal with them. That means quick turnaround, communicating our
5 position back to the applicant as fast as we can.

6 MR. MESSINA: Isn't it also true that under these emergency
7 circumstances the Agency does not always request all of the
8 information required under Section 180.202(b)?

9 MR. FREVERT: I believe so. These are general operating
10 procedures. We certainly don't deviate from operating procedures

11 on a wholesale basis, but every now and then there is a unique
12 situation.

13 MR. MESSINA: Isn't it likely that if the new requirements
14 imposed on the Agency by these proposed rules are deemed to apply
15 even to emergency applications, the Agency likely would not be
16 able to respond in a sufficiently timely manner to provide the
17 type of immediate relief contemplated by those emergency
18 provisions?

19 MR. FREVERT: Well, I believe the way we attempted to word
20 this particular proposal, we identified what we thought were
21 fairly routine and prudent and logical requirements. The
22 language clearly indicates we have to address each of those
23 requirements and to the extent to which it may or may not have
24 been included in any particular application of the original

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1 variance proceeding. It certainly was our intent.

2 We have identified some substantive requirements that we
3 think routinely go on our recommendations and our support, but we
4 have not established those as absolute 100 percent application
5 requirements. As I remember, our language is something that to
6 the extent our material forwarded to the Board would address
7 these issues and the extent to which they were or were not
8 included in our recommendation.

9 MR. MESSINA: To the extent that that distinction is not
10 clear, would the Agency be amenable to looking at language that

11 could possibly clear up that distinction?

12 MR. FREVERT: Certainly. And maybe I will just sort of
13 clarify for everybody in the room that it is our intent to get
14 this issue out in the open and into the public discussion. We
15 filed our proposal relatively rapidly because we thought it was
16 valuable to communicate in advance of this summer season our
17 interest and concern regarding thermal provisional variances, and
18 more or less put the utilities on fair notice that we are looking
19 at them in a different light maybe than we did ten years ago, and
20 to that extent I think we have accomplished our purpose. Now
21 that that is accomplished, we certainly have the time and the
22 desire to work with anybody that wants to fine-tune the actual
23 language in the proposal.

24 MR. MESSINA: In nonemergency situations the Agency

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1 currently has 30 days from the receipt of an application to act
2 on that application. Is the Agency confident that it can fulfill
3 these new requirements within that 30-day time frame?

4 MR. FREVERT: Generally speaking, I think that is
5 achievable, yes.

6 MR. MESSINA: What level of new effort or how much effort,
7 rather, does the Agency foresee in carrying out these new
8 responsibilities?

9 MR. FREVERT: I am not sure we see a lot of additional

10 effort. We have worked through this process and, in fact, most,
11 if not all, of what we are suggesting in our language of this
12 proposal has almost become standard operating practice for us
13 anyway. It is a matter of we think the time is here and it is
14 important to communicate that these are, indeed, standard types
15 of issues and concepts and that we intend to do our own
16 evaluation and brainstorming over and soul searching in the
17 process of deciding how to react to a request for a provisional
18 variance. To the extent that everybody else knows and
19 understands that is our operating mode, I would think it would
20 improve the chances of earlier and better decisions and less need
21 for supplemental information requests.

22 MR. MESSINA: Mr. Hearing Officer, I realize that I have
23 taken up all of the time for questions thus far. I have other
24 questions, but those are all that I had dealing with that

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1 particular issue. I didn't know if you wanted to ask if anyone
2 else wanted to chime in, or I can continue.

3 CHAIRMAN MANNING: I actually wanted to ask a question just
4 quickly of Mr. Frevert. To clarify the record, basically, we
5 have received, as I think you know, a couple of different
6 comments in this proceeding already, one of them from Five Limit
7 Bassmasters, who refer to some federal regulations, Mr. Frevert.
8 If you would, just explain, for purposes of the record. I don't
9 know if you are familiar with that public comment, but we believe

10 they are referring to 40 CFR 125, Subpart H, Clean Water Act
11 regulations that deal with demonstrations.

12 I would also like -- if you could speak to that federal
13 regulation as well as speaking to the Board's regulations at the
14 heated effluent regulations and the artificial cooling lake
15 regulations, and just for purposes of the record, getting out in
16 the open on our transcript, those particular Board rules and the
17 Agency's programmatic implementation of those rules.

18 MR. FREVERT: I would be happy to do so. The Clean Water
19 Act has specific provisions dealing with thermal discharges at
20 Section 316 of the Clean Water Act. The Board has a comparable
21 mechanism for artificial cooling lakes in its regulations. I
22 believe it is Part 302. Those are essentially processes and
23 approaches to find or delineate thermal standards for a
24 particular water body. In other words, that's the process for

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1 establishing the water quality standard.

2 Typically, under the Clean Water Act for a conventional
3 parameter like copper, lead, or dissolved oxygen, the U.S. EPA
4 would publish a criteria document and that would identify the
5 chemical concentration of a contaminant that is presumed to be
6 applicable to protect water bodies pretty generally for a
7 particular use. And in most instances the driving use is aquatic
8 life protection.

9 In the case of thermal discharges, maybe there is not the
10 same continuity of impact and the same specific way to identify
11 one single protective level or concentration. Rather, they have
12 opted for a process to actually go through studies and identify
13 sort of site specifically or water body specifically those
14 concentrations, or in the case of -- I am sorry -- not
15 concentrations in the case of thermal discharges, but those
16 temperatures that are deemed to be protective for the beneficial
17 uses of the water body, and those beneficial uses are almost
18 driven by aquatic life as the most demanding use.

19 So Section 316 and the artificial cooling lake regulations
20 set up a process to define temperature standards for a lake,
21 river, reservoir, or whatever. That, indeed, is the process we
22 use in Illinois. I believe 316 and the artificial cooling lake
23 program are compatible with one another. It is more or less a
24 state and federal version of the same thing.

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1 We are not talking about that here. We are specifically
2 not talking about setting water quality standards. We are
3 talking about the state provisions to deal with an emergency
4 situation to create a provisional short term variance which would
5 allow some deviation from the NPDES permit restrictions on a
6 water body that perhaps was derived from those protective water
7 quality standards. Those standards are, indeed, the standards.
8 They drive the permits. The permits presumably are adequate to

9 protect for those standards, and the use of those standards are
10 intended to support, and they stay in place within that permit.
11 And once the provisional variance period is over, those are the
12 operating procedures that are reinstated.

13 A provisional variance, as we are talking about today, is,
14 indeed, a state provision to respond to a short term crisis or an
15 emergency situation where there is consideration of the issues at
16 stake and some temporary allowance to allow discharges slightly
17 out of kilter with the NPDES provisions. Again, there are some
18 conditions and supplemental criteria in those provisional
19 variances to assure or minimize any potential environmental harm
20 that may result from that short term deviation.

21 Clearly, in my mind, both the artificial cooling lake and
22 the 316 demonstrations and virtually any water quality standard
23 is set at a protective level which has some factor of safety in
24 it, and it is deemed to be protective over a long-term

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1 application. Where provisional variances, we are operating in a
2 realm where we are going to recognize some clashes in social
3 needs or just some operating problems, treatment plants break
4 down or whatever, and how we manage that crisis situation. To
5 minimize or eliminate environmental harm, you have to have some
6 short term excursions beyond the numbers and the safety factors
7 that go along with the water quality standards.

8 Is that an adequate clarification?

9 CHAIRMAN MANNING: It is for me. Does anybody have any
10 follow-up questions?

11 HEARING OFFICER BORON: All right. Do any members of the
12 Board have any questions at this point?

13 All right. Then if you want to proceed you may ask, sir.

14 MR. CROSS: My name is Joel Cross. I am with the Illinois
15 Department of Natural Resources. I am the Streams Program
16 Manager in the Division of Fisheries, and I would like to ask one
17 follow-up question to Claire's question on 316.

18 If I understand the Agency's response correctly, once the
19 water temperature standard in the state has been established, am
20 I to understand that there would no longer be a need for the
21 state to ever require a 316(a) demonstration; is that correct?

22 MR. FREVERT: I don't think it is correct. I don't think
23 that is what I said.

24 MR. CROSS: Okay.

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1 MR. FREVERT: A 316 demonstration is the process whereby
2 you study the water body you are dealing with, and you produce
3 information that deals with all the environmental attributes and
4 looks at the stress levels resulting from the thermal load. You
5 go through a rulemaking process or a review and approval process
6 which identifies what is believed to be a safe operating level to
7 protect those uses and allow that discharge to take place.

8 If in the future circumstances change to the extent that
9 the operation may be developed in a fashion that they can no
10 longer comply with those standards, or they no longer are --
11 well, they no longer are complying with those standards, I
12 suppose there are all sorts of options, including enforcement.

13 If they anticipate they won't be able to deal with them in
14 the future due to expansion or other complications, there is
15 certainly the opportunity and the wisdom to go back and do a new
16 316 demonstration to see what has changed, to what extent that
17 water body can tolerate a higher heat load or maybe can no longer
18 tolerate the heat load as identified as safe earlier. I believe
19 the option with the new 316 and the new artificial cooling lake
20 demonstrations is the alternate standards can go up or down
21 either way.

22 MR. CROSS: Thank you.

23 HEARING OFFICER BORON: Any other questions from the
24 audience? Sir, you may proceed.

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1 MR. MARDER: Thank you. My name is Sid Marder. I am also
2 with the Illinois Environmental Regulatory Group. Just for
3 clarification, to be clear, the Board's regulation at 302.211,
4 specifically Subpart F and G, that talk about thermal
5 demonstrations to the Board, are those essentially the state
6 counterpart of the 316 demonstration?

7 MR. FREVERT: I was afraid somebody was going to ask me
8 that. I don't remember the section numbers as well as I used to.
9 I believe that's it, Sid.

10 CHAIRMAN MANNING: The heated effluent is 302.211(f).

11 MR. FREVERT: Yes, that's what I was talking about.

12 CHAIRMAN MANNING: His question is, I think -- I thought I
13 heard you say that the EPA considers that as the federal
14 equivalent of the Section 316 demonstration.

15 MR. FREVERT: Well --

16 CHAIRMAN MANNING: There is also the artificial cooling
17 lake demonstration of 302.211(j).

18 MR. MARDER: That's correct.

19 MR. FREVERT: What I was referring to is the state program
20 has an equivalent program. I don't -- I don't believe the U.S.
21 EPA has ever formally recognized that regulation as equivalent to
22 the 316. They still make a 316 finding.

23 MR. MARDER: But basically the intent of that regulation is
24 essentially the same?

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1 MR. FREVERT: We would not require two separate studies to
2 address both the state and the federal regulation, is the point I
3 was trying to make.

4 MR. MARDER: Okay.

5 MR. FREVERT: The concept is you demonstrate an adequate
6 thermal condition. And if demonstration is valid for one

7 purpose, I would certainly hope it is valid for the other
8 purpose.

9 MR. MARDER: Just to put this in perspective, can you give
10 me a feel for the type of discharge or facility that would be
11 subject to Subsection F or Subsection J? Is it only classic
12 utility, or does it cover chemical plants, or what type of people
13 would fall under that provision?

14 MR. FREVERT: Historically it has been classically the
15 electric generating utilities. I believe the EPA is in the
16 process of reviewing the 316 regulations now and that may change
17 in the future.

18 MR. MARDER: But today --

19 MR. FREVERT: Historically it has been the electric
20 generating industry.

21 MR. MARDER: Thank you.

22 HEARING OFFICER BORON: Any other questions from the
23 audience? Yes, sir?

24 MR. CROSS: Joel Cross, Illinois DNR again. I have several

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1 questions that are directed to Mr. Rogers' testimony.

2 On page three of the Agency's testimony it is stated that
3 the provisional variances are only granted by the State of
4 Illinois and do not protect facilities from U.S. EPA or citizen
5 enforcement actions.

6 My question is, is there a comparable process for state
7 relief from thermal water quality standards in other states?

8 MR. ROGERS: I don't know.

9 MR. FREVERT: We talked about that earlier, and to date we
10 have not made an effort to do a telephone search and see what
11 other states are doing. However, we know that other states have
12 fundamentally different approaches to program administration,
13 including compliance related activities and emergency tolerances
14 or emergency allowances. I can assure you that in general most
15 states have some provisions to deal with emergency situations,
16 whether it be as simple as just enforcement discretion or more
17 elaborate administrative processes to go through.

18 We are not the only state that incurs emergencies in the
19 realm of operating in society. Weather problems and floods and
20 droughts are all sorts of things that interfere with the
21 operation of sewage treatment plants and explosions for open
22 sewers, things of that nature. Typically most states have
23 administrative mechanisms to manage those things without going
24 through the courts to do the enforcement.

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1 MR. CROSS: Okay. Also on page three of the Agency's
2 testimony you lay out the relevant informational requirements for
3 thermal provisional variance applications. One of those
4 requirements is an assessment of an adverse environmental impact
5 for which the variance may produce.

6 My question is, what, if any, reports of an adverse
7 biological impact would be sufficient for the Agency to not
8 recommend a provisional variance?

9 MR. FREVERT: To start with, I guess wholesale loss of life
10 and limb. Beyond that, we are looking for as much information we
11 can as to what the educated understanding of the relative -- what
12 is at risk, how significant is the risk, what are the
13 consequences of essentially not allowing the provisional variance
14 to go forward as requested.

15 The other thing to keep in mind is if we choose not to
16 grant a provisional variance, the operator still has the
17 responsibility of managing that emergency situation. They are
18 still going to have to do whatever they have to do. Whether
19 there is any level of legal protection as a provision in the
20 legislature in the provisional variance process or not.

21 There are going to be emergencies in the State of Illinois
22 that have to be managed. We believe the provisional variance
23 mechanism maybe helps us play a better role in helping manage
24 those emergencies rather than say just do whatever you have to do

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1 at your own risk and we will see you in court if you do it wrong.

2 MR. CROSS: Unlike cooling lake impoundments, streams and
3 rivers contain a more diverse assemblage of aquatic species,
4 including cool water species that are more vulnerable to thermal

5 loadings. What information from various applicants reflects this
6 biotic diversity, and how will the Agency take this into account
7 when making recommendations for thermal provisional variances to
8 the Board?

9 MR. FREVERT: That is a pretty specific question, and all I
10 can give you is a general answer. We have a compliance section
11 that has the responsibility of receiving and coordinating the
12 review and reaction of these requests. In reality, the way we
13 operate those people would consult with our field biologists, our
14 field engineers, and anybody else in the Agency and glean from
15 that collective history and knowledge of the situation what
16 resource we are talking about that potentially would be affecting
17 what facility. We are talking about causing that impact in a
18 relatively short term basis, coming up with our collective best
19 wisdom as to how to manage the situation when we have the
20 information we need and, again, what it tells us about relative
21 risks and what is at stake here.

22 MR. ROGERS: Toby, you may want to add that we --

23 MR. FREVERT: Go ahead.

24 MR. ROGERS: We also typically and regularly consult with

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1 the DNR on issues that come up on the fisheries impact as well on
2 these types of matters.

3 MR. FREVERT: And whatever other expertise exists within
4 the state government or maybe even the academic institutions that

5 help us make a more intelligent decision.

6 MR. CROSS: One of the other relevant informational
7 requirements is an explanation of why compliance with the
8 requirement imposes an arbitrary and unreasonable hardship. How
9 has the Agency defined arbitrary and unreasonable? And can the
10 Agency provide some examples of what constitutes an arbitrary and
11 an unreasonable hardship?

12 MR. FREVERT: To a certain extent arbitrary and
13 unreasonable is going to involve concepts like to what extent
14 this thing is foreseeable and preventable, to what extent it is
15 the result of nature or something else beyond the control of the
16 individual. I can't give you today nor probably can I ever give
17 you a good, crisp Webster type definition of arbitrary. We are
18 weighing things, balancing things here as best we can. We are
19 trying to manage a crisis or an emergency situation, and in that
20 regard we seek the most information that we can find available
21 and seek the best expertise to consult with and we decide to what
22 extent an action of ours to grant or deny is appropriate.

23 MR. CROSS: Okay.

24 MR. FREVERT: But I can also tell you I think in the area

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1 of thermal discharges there probably is some advancement and
2 development in technology that helps make foreseeable, in terms
3 of the context of could you anticipate this coming, easier to

4 deal with now than it was ten years ago.

5 MR. CROSS: Are there any additional risks that the Agency
6 has identified that would be imposed on Illinois aquatic
7 resources by the adoption of these proposed amendments?

8 MR. FREVERT: I don't think this particular proposal has
9 anything to do with that. We are giving additional clarification
10 and definition to the operating procedure we are using to carry
11 out an existing statutory responsibility. We are not changing
12 any fundamental statutes or regulations in terms of the
13 environmental substantive requirements. We are merely adding an
14 administrative procedural definition to how we carry out an
15 existing program and existing statutory responsibility.

16 MR. CROSS: So potential additional risks, such as an
17 increased rate of disease or synergistic affects from other
18 interaction with other sources or cessation of growth in fish,
19 are those potential impacts that might result from the adoption
20 of these proposed amendments?

21 MR. FREVERT: Those may be potential impacts we are going
22 to have to weigh in carrying out this responsibility. There is
23 nothing in these procedures that specifies or dictates
24 programmatically or substantively how those are considered. If

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1 anything, it is more or less a communication or an opportunity to
2 communicate to others types of additional information we think
3 are necessary to identify whether things of that nature might be

4 issues in a particular application or not.

5 MR. CROSS: In April of this year at a special session of
6 the Illinois Commerce Commission the Illinois generating
7 facilities indicated that they, quote, expect to have more than
8 enough electricity to meet even the worse case scenario of hot
9 weather that comes along once every 10 or 20 years, end quote.

10 Given this information, under what conditions would the
11 Agency anticipate the need for any thermal provisional variances
12 this year?

13 MR. FREVERT: Well, everything they said at the conference
14 sounds wonderful. You know, the reality is under those
15 circumstances and what we are seeing going into this summer,
16 which suggests it is not going to be a climatically demanding
17 season, I think gives everybody a sense of confidence that there
18 is no rush here in terms of anticipating a lot of requests for
19 provisional variances.

20 We hope we get none, but nobody can sit here and testify in
21 any kind of certainty that there won't be some accident that
22 takes power plants or a distribution line or something out of
23 service that would warrant a response from some other location in
24 the state.

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1 MR. CROSS: Will provisional variances assure the
2 protection and propagation of a balanced population of shell fish

3 and fish and wildlife as required by the Clean Water Act?

4 MR. FREVERT: I am not sure what you are getting at there.
5 I guess my response, the best response I can give you is this is
6 a provision that exists in our state law and the state
7 legislature thinks it is an important provision to have in there,
8 and they have given us the responsibility to provide some
9 regulatory oversight role in this fashion. We are trying to
10 identify an administrative program to carry out that
11 responsibility in a fashion that is compatible with and achieves
12 both our state and our federal water quality goals.

13 MR. CROSS: I have just a few more questions.

14 CHAIRMAN MANNING: If I could just interject on that line
15 of questioning, though, so that I have a complete understanding
16 of what we are talking about here.

17 My understanding of your testimony at the beginning of this
18 hearing, Mr. Frevert, was that one of the purposes of the Agency,
19 if not the main purpose of the Agency in proposing this
20 particular regulation, was to allow the regulated community
21 sufficient advance notice so that hopefully provisional variances
22 will be less necessary than they may have been in the past,
23 because it would allow for more sufficient planning and those
24 kinds of things. Am I correctly --

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1 MR. FREVERT: I would have hoped that they would have
2 gotten that message even without this particular rulemaking. I

3 think this particular rulemaking is focused on even with all your
4 advanced planning and your better preparation and understanding
5 of your needs, if, indeed, due to something unforeseeable there
6 is a need for a provisional variance, it is prudent planning for
7 you to have this information available.

8 I guess in my mind the major thing that maybe is not as
9 predictable is the extent to some other facility contributing to
10 the electric being destroyed through an explosion or taken out of
11 service putting other demands on other units, and whether there
12 is perhaps some risk of life and limb if the electricity is not
13 available. Hopefully that is not going to happen, but it would
14 be prudent to plan for that and sort of have your act together so
15 that you could march into the Agency with the proper information
16 should that ever happen.

17 To the extent that people don't do that and they maybe ask
18 for provisional variances too often, or there were things that
19 really were foreseeable and avoidable, I believe this could put
20 them on notice. That would be viewed as abuse of the intent of
21 this section and you may get a denial. You may have to produce
22 electricity anyway and operate, but you won't get the legal
23 shield from us that you would otherwise get.

24 HEARING OFFICER BORON: All right. Mr. Cross, you may

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1 continue.

2 MR. CROSS: Thank you. On page eight of the Agency's
3 testimony you identify the five specific conditions that the
4 Illinois EPA will impose on most provisional variances granted
5 from the water temperature requirement.

6 Can the Agency provide a set of circumstances in which
7 Section (b)(2)(a) would not be required?

8 MR. FREVERT: I don't know that we can or not, but I don't
9 know that that is the point. We identified these as what we
10 thought were typically and routinely applicable things. We
11 intend to address them in virtually every application of our
12 review. If there is some particular unique circumstance where
13 Paragraph B or one of the other paragraphs cannot be accommodated
14 or isn't appropriate to accommodate that, we believe the language
15 allows that.

16 It is not our intent to operate that way on a wholesale
17 basis. We specifically structured this language to apply. This
18 is the normal operation, and we expect it to be adhered to in a
19 normal application. There is an escape valve or a bit of a
20 safety port in our language that says we are not going to
21 universally require, that there is a circumstance where we can
22 still make an intelligent decision without it.

23 MR. CROSS: I have just one final question. How does the
24 response and recovery plan as required as part of Section

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1 301.109(b)(2)(e) differ from the requirements of the EMDL

2 implementation plan for thermally impacted waters?

3 MR. FREVERT: The EMDL provisions are a part of the Clean
4 Water Act which puts an impetus on the State to specifically
5 address and identify a response program to a known stream
6 impairment or lake impairment, water quality impairment, or use
7 impairment may be a better term to use. We believe that it is a
8 totally different program and a different application.

9 In this particular instance what we are saying is if a true
10 emergency arrives and we have to manage it and the provisional
11 variance aspects of the Illinois Environmental Protection Act
12 come into play, we are going to do everything we can to identify
13 operating conditions sufficient to allow that facility to
14 continue operation in a manner and with controls and restrictions
15 such that hopefully there will be no environmentally detrimental
16 result.

17 But in the off chance, no matter how low the probability
18 is, something unforeseen does happen and there is a response of a
19 negative fashion that we were not expecting but have it anyway,
20 understand that you should have thought of that ahead of time and
21 have some kind of a plan to respond and allow recovery of that
22 circumstance, even though going into it we hope that does not
23 happen.

24 MR. CROSS: Okay. Thank you. We have no further questions

1 at this time.

2 HEARING OFFICER BORON: Okay. Do any other members of the
3 audience have any questions at this point?

4 MR. MESSINA: Yes.

5 HEARING OFFICER BORON: All right. Mr. Messina, why don't
6 you wait.

7 Do any members of the Board have questions at this point?

8 Okay. Anand, why don't you proceed.

9 MR. RAO: Anand Rao with the Pollution Control Board. I
10 have a follow-up question concerning the response and recovery
11 plan.

12 MR. FREVERT: Yes.

13 MR. RAO: Could you explain the types of activities or
14 issues such a plan should address?

15 MR. FREVERT: I think that, again, is going to depend upon
16 the specifics of the application, but in a speculative fashion it
17 is probably safe to speculate that perhaps the first use that
18 would be at risk and maybe subject to some kind of detriment
19 would be the aquatic community existing in the water body, fish
20 or other aquatic organisms that are a component of the aquatic
21 ecosystem there.

22 MR. RAO: So do you expect the petitioner to submit the
23 plan along with an application for a provisional variance?

24 MR. FREVERT: Well, yes and no, I think would be the

1 answer. There should be some acknowledgment to what extent you
2 think you are even nearing the edge where this might happen, how
3 much of a probability is it that something is going to happen.
4 If it is a high probability, then you should have thought out
5 perhaps further ahead of time in more detail what you think is
6 the appropriate response. If it is a relatively low probability,
7 low time frames or very small incremental increases over normal
8 operating conditions, maybe there is a circumstance where an
9 acknowledgment of the need to do that and a commitment to have
10 resources available to do it will suffice.

11 In higher probability circumstances I think we want
12 information identifying what component of the aquatic ecosystem
13 is at highest risk and if there are any mitigating steps you can
14 take to give that component extra protection. If that particular
15 component does incur some damage, is it damage that will have a
16 result in a relatively quick recovery or a long term recovery or
17 no recovery. And if it is a longer term recovery or no recovery
18 you have to intercede with active management to overcome that
19 damage and get the system back to a healthy condition more
20 rapidly.

21 MR. RAO: So in most circumstances the Agency will have an
22 opportunity to review certain elements of this plan?

23 MR. FREVERT: I would think in every circumstance that is
24 our intent. We would like to see -- if somebody is asking for a

1 provisional variance, and there is some level of risk to
2 environmental detriment we would like to hear what the thinking
3 is on how they are going to approach it, and have the ability to
4 agree or disagree or even suggest some enhancements or
5 modifications as part of our review and our authority and
6 responsibility to determine whether or not to issue a supporting
7 position.

8 MR. RAO: Thank you.

9 HEARING OFFICER BORON: All right. If there are no other
10 questions from the Board and no other questions from the
11 audience, Mr. Messina, you may proceed. Seeing none, Mr.
12 Messina, please.

13 MR. MESSINA: Thank you. I have a few questions regarding
14 the scope of the proposal. I believe it was indicated somewhere
15 in the testimony, and I am not certain, I was wondering if you
16 could give us an idea of the approximate percentage of the
17 provisional variances that are recommended for issuance by the
18 Agency that pertain to relief from thermal water quality
19 standards?

20 MR. ROGERS: Probably somewhere around ten or fifteen
21 percent.

22 MR. MESSINA: And can you give me an idea of what other
23 kinds of provisional variances -- or what other requirements
24 these facilities are asking for provisional variances from

1 besides the thermal requirements?

2 MR. ROGERS: I guess often there may be a facility that is
3 under construction to upgrade their facilities and in the process
4 of doing that they maybe need to take a unit out or can't operate
5 a unit as efficiently as it was designed, and so there, you know,
6 may be some relaxation requests for BOD or total suspended
7 solids, you know, the various requirements that may be as part of
8 their NPDES permit. Or there may be a situation where there is a
9 mechanical failure and a facility, you know, comes in with a plan
10 on how to address and bring that mechanical failure back into
11 play. But it is really, I guess, addressing the requirements in
12 the NPDES permit that may be related to a particular operational
13 unit.

14 CHAIRMAN MANNING: To clarify, Mr. Rogers, the universe of
15 provisional variances you are talking about and you are asking
16 questions about, Mr. Messina, are water related, correct?

17 MR. ROGERS: Yes.

18 MR. MESSINA: Yes.

19 CHAIRMAN MANNING: And not the other provisional variances
20 that the Agency may grant in the air area or in the land area?
21 We are talking just water. So the ten percent -- the ten percent
22 figure was for all the ones that might be granted by the Bureau
23 of Water?

24 MR. ROGERS: That's correct.

1 CHAIRMAN MANNING: Thank you.

2 MR. MESSINA: Thank you very much. Does the Agency see any
3 need to or does it intend to propose regulations for any other
4 types of provisional variances?

5 MR. FREVERT: Not today.

6 MR. MESSINA: Why, then, is it necessary to adopt special
7 Board rules for this narrow class of provisional variances?

8 MR. FREVERT: Again, because we have had a fair number of
9 applications of the provisional variance requests from the
10 thermal industry, and we have had repeated applications to
11 individual units within that industry.

12 MR. MESSINA: If I could call your attention to page five
13 of the prefiled testimony. Mr. Rogers states that the proposal
14 could potentially impact any facility subject to a water
15 temperature limitation. However, it is likely that this proposal
16 will impact only electric utilities.

17 I was wondering if you could give us an idea of what other
18 types of facilities might be affected?

19 MR. FREVERT: There may be some heavy industry application
20 in the State of Illinois that would have a great thermal load.
21 The iron and steel industry, perhaps. I don't know. There are
22 probably others.

23 MR. MESSINA: Can you identify -- I am sorry. One moment,
24 please.

1 To your knowledge, have any of those types of facilities
2 ever approached the threshold in Section 302.211(f), which states
3 that the owner or operator of the source of heated effluent which
4 discharges 150 megawatts or more?

5 MR. FREVERT: I am not aware of any.

6 MR. MESSINA: Have any of those facilities that you were
7 referencing beyond the electric utilities, have any of them, to
8 your knowledge, ever applied for or ever been subject to a
9 provisional variance regarding thermal requirements?

10 MR. FREVERT: No, I don't believe they have.

11 MR. MESSINA: If other such facilities beyond these
12 electric utilities were subjected to this proposal, would the
13 burden of compliance and the burden of gathering information
14 differ from that burden upon an electric utility?

15 MR. FREVERT: No, I don't believe it would. That is also
16 perhaps some of the modification for us wording the language the
17 way we are proposing it, vis-a-vis what we believe are generally
18 prudent pieces of information that we need. Our language does
19 not say they are universally required. It says we will address
20 the extent to which and how we address them in our communication
21 to the Board.

22 We did that on purpose in case there was, you know, the
23 square peg and we are designing the program for a round hole.
24 And I am not saying we know of one, but that was just prudent

1 wording on our part, I believe, so that we have the ability to
2 deal with those and, indeed, come up with an intelligent decision
3 on a short term or crisis basis. That is what we thought makes
4 sense.

5 MR. MESSINA: So then is my understanding correct that it
6 is your belief, or rather, the Agency's belief, that this
7 proposal was necessary for or should be applicable to all thermal
8 discharges?

9 MR. FREVERT: We think the information we are trying to
10 communicate in this proposal is necessary information to
11 communicate to any applicant for a thermal provisional variance,
12 the types of information we feel is important for us to do our
13 job and make the right decision in acting on those applications.
14 To the extent that there are complicating factors for other
15 reasons why one particular component of what we are identifying
16 in this general information is inapplicable they, indeed, have
17 the opportunity to explain why it is unnecessary in a particular
18 situation. But we believe it is a fundamentally beneficial thing
19 to identify these as procedural components we are looking for in
20 administering this program.

21 MR. MARDER: Can I just follow-up a little bit on that,
22 Toby?

23 MR. FREVERT: Please do.

24 MR. MARDER: If a facility has a thermal discharge but is

1 not subject to the provisions of that citation that we gave of
2 Subpart F, would I be correct that they would not have gathered a
3 certain amount of information that the facility that is subject
4 to Subpart F would have gathered?

5 MR. FREVERT: I believe in Illinois we do have permits with
6 thermal limitations in them based on the generic water quality
7 standard versus a specific 316 or an alternate thermal
8 demonstration, yes. Those people would not have done thermal
9 studies. There is a standard that they are held accountable to
10 which is generally a good standard. And there may be a situation
11 where somebody in that circumstance that encounters some type of
12 crisis or emergency where they may need a thermal provisional
13 variance. I don't believe we have ever experienced that. But we
14 tried to identify the possibility of that and have a process in
15 place and as much communication as we think is capable on how we
16 would view and assess the merits of what they are asking for.

17 MR. MARDER: The types of conditions and information that
18 you would consider for a large thermal facility, and I will use a
19 Subpart F type facility, versus a small facility, would there be
20 differences? Would there be differences in the information that
21 you would request?

22 MR. FREVERT: It is possible, yes. I mean, I think we are
23 still -- we are still going to focus on what is the potential
24 environmental consequence, and regardless of the size we still

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1 need to have a sense of whether or not that facility is going to
2 affect that receiving body in any significantly detrimental way.

3 (Board Member Nicholas Melas exited the hearing
4 room.)

5 MR. MARDER: But if a facility has not done a thermal
6 demonstration up front, how would they possibly find that kind of
7 information in the anticipation of an emergency situation? How
8 can they even get this to you?

9 MR. FREVERT: Well, I think there are other sources of data
10 and information they can rely upon. But, again, I am going to
11 fall back on what I thought I stated earlier, as in circumstances
12 where none of that information exists, there is still a pressing
13 need to consider and work through a proposal or a request. We
14 will work with them. We have identified the issues that we think
15 are important issues. And we will take whatever information we
16 can collectively get and work through that circumstance with
17 them.

18 We are still going to want to identify our own opinion of
19 how important these factors are. And in some cases where there
20 is limited data, we will have to deal with it. And that is
21 probably going to weigh in, and in reality that is going to weigh
22 in at the end point to what extent did we come in on the
23 supporting or the opposing side.

24 MR. MARDER: Understanding and essentially agreeing with

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1 that, would the Agency be willing to work with the regulated
2 community to limit the scope of this proposal by either the type
3 of facility or the amount of thermal load or the amount of
4 information that is generally required by a facility?

5 MR. FREVERT: That is kind of a no-brainer. As I said
6 earlier, we believe that we have gotten an initial communication
7 and have gotten this issue on everyone's radar screen. We have
8 accomplished what we want to accomplish on a needed basis.
9 Beyond that, we would like to work with everybody who cares and
10 make this proposal wind up the best it can be for the State of
11 Illinois. So the answer is yes.

12 MR. MARDER: Okay.

13 HEARING OFFICER BORON: All right. For the record, Board
14 Member Melas has left.

15 Are there any other questions from the audience at this
16 point other than -- okay. Please proceed.

17 MR. BRANHAM: Mike Branham, Illinois DNR, the Division of
18 Resource Review and Coordination.

19 Mr. Rogers, you had stated that the Agency consults with
20 DNR. In reference to that consultation, does -- is that meant in
21 a generic sense or does the Agency engage in the consultation
22 process as required by the Illinois Endangered Species Act in the
23 Illinois Natural Areas Protection Act in order to consider
24 adverse impacts to threatened and endangered species when

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1 formulating a recommendation to the Board?

2 MR. FREVERT: A general response to that is we consult with
3 whoever we think have expertise and data to bring to the issues
4 that we need to address. To the extent through that inquiry or
5 consultation we identify additional issues, additional
6 information, additional opinions that we think would be
7 beneficial on us acting on this request we do follow-up.

8 But Ken was not referring to any formal process. As a
9 matter of routine, when we get a request that involves us
10 formulating an opinion on conditions or relative risk of a water
11 body, we are going to need to go to our own experts and we are
12 going to ask our own experts to collaborate with their peers in
13 the field and anybody else that they know of that helps us make
14 the most informed decision that we can make. That's kind of the
15 generic or standard way we go about business. We were not
16 talking about triggering any formal consultation under any
17 specific other state or federal statutes.

18 MR. BRANHAM: As a follow-up to that, if that information
19 was requested and it was determined by DNR that a thermal
20 provisional variance, if granted and acted upon, is likely to
21 result in a take of a threatened or endangered species, if that
22 was the Department's position or opinion, what would the
23 recommendation to the Board be?

24 MR. FREVERT: I would say if that was the department's

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1 opinion and we were aware of it, the applicant's chances
2 diminishes greatly. Those are the kinds of information we try to
3 seek out so that when we make a decision we make the most
4 informed decision that we can. It is to nobody's advantage for
5 us to make a knee-jerk reaction that puts us cross-wise with some
6 other body, particularly with other bodies such as a sister state
7 agency.

8 But in the same light, we do have a statutory mandate and
9 we are talking about now how we operate in a semi-crisis mode.
10 So we are going to get as much information from as many people as
11 fast as we can and make the most intelligent decision that we can
12 make, knowing what our exposure is and what the environment's
13 exposure is.

14 HEARING OFFICER BORON: All right. Any other questions
15 from the audience? Any other questions from the Board?

16 Seeing none, let's go off the record.

17 (Discussion off the record.)

18 HEARING OFFICER BORON: All right. Let's go back on the
19 record, please.

20 Okay. Seeing as there was nobody who signed up to testify
21 at today's hearing, we are going to close the proceedings.

22 MR. MESSINA: Wait.

23 HEARING OFFICER BORON: Oh, Mr. Messina. Okay. Yes, if

24 you would like to make your motion.

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1 MR. MESSINA: No. Actually, we have questions with regard
2 to the specific language of the proposal. The questions so far
3 have been limited to the purpose and the scope. We do have --

4 HEARING OFFICER BORON: Okay. I thought we asked
5 generally if you had --

6 CHAIRMAN MANNING: We do have another hearing in this
7 matter. I think it is scheduled for --

8 HEARING OFFICER BORON: It is scheduled for the 20th of
9 June.

10 MR. MESSINA: Well --

11 HEARING OFFICER BORON: Do you want to proceed now or do
12 you think you should wait, or what is your preference?

13 MR. MESSINA: I think in proceeding now so that we will be
14 able to prepare for the second hearing.

15 HEARING OFFICER BORON: Okay. Would anybody like to take a
16 break at this point?

17 Okay. Why don't we take a five minute break.

18 CHAIRMAN MANNING: We will be back at a quarter to 4:00.

19 (Whereupon a short recess was taken.)

20 HEARING OFFICER BORON: All right. We are back on record.

21 (Board Member G. Tanner Girard not present in the
22 hearing room after the recess.)

23 HEARING OFFICER BORON: Okay. At this point we are going

24 to postpone the June 20th hearing, and at some point within the

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1 next week the Hearing Officer Order will be issued. During that
2 time, as discussed, we would like any questions that members of
3 the audience would like the Agency to respond to, to file that as
4 soon as possible. In the Hearing Officer Order we will set a
5 date in which the Agency would have to respond to those
6 questions.

7 Is there anything else that anybody would like to mention
8 at this point before I proceed with closing the hearing?

9 Yes, Ms. Williams?

10 MS. WILLIAMS: So you want questions to be formally filed
11 with the Board and then --

12 HEARING OFFICER BORON: Yes, served on --

13 MS. WILLIAMS: -- served on all of the parties?

14 HEARING OFFICER BORON: -- the service list, correct.

15 MS. WILLIAMS: Okay. Thank you.

16 CHAIRMAN MANNING: And we will try to get those on the web
17 page. That has been really helpful, I think, to a lot of parties
18 in our other proceedings. So we will try to do the same with
19 this proceeding. So as soon as we get them, we will post them on
20 the web page.

21 HEARING OFFICER BORON: Okay. If there is nothing else, I
22 will proceed to close the hearing.

23 The deadline for filing of public comments will be
24 established at the conclusion of the next hearing. The Board is

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1 presently accepting public comments. Copies of the transcript of
2 today's hearing should be available at the Board by June 12th of
3 2001. Shortly after that the transcript should be available
4 through the Board's home page on the World Wide Web, which is
5 located at www.ipcb.state.il.us.

6 The Board's April 19th, 2001 order as well as my Hearing
7 Officer Order of April 25th, May 7th, and May 30th are also
8 available on the Board's web site. If anyone has any questions
9 about the procedural aspects of this rulemaking, I can be reached
10 by telephone at 312-814-6062 or e-mail at
11 borona@ipcb.state.il.us.

12 Are there any other matters that need to be addressed at
13 this time?

14 All right. Seeing none, I would like to thank everyone for
15 participating today. This hearing is adjourned.

16 CHAIRMAN MANNING: Thank you.

17 (Hearing Exhibit 1 was retained by Hearing Officer
18 Andrew Boron.)

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) SS
2 COUNTY OF MONTGOMERY)

3 C E R T I F I C A T E

4

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 66 pages comprise a true, complete and correct
8 transcript of the proceedings held on the 7th of June A.D., 2001,
9 at 600 South Second Street, Springfield, Illinois, in the matter
10 of: Provisional Variances from Water Temperature Standards:
11 Proposed New 35 Illinois Administrative Code 301.109, in
12 proceedings held before Hearing Officer Andrew Boron and recorded
13 in machine shorthand by me.

14 IN WITNESS WHEREOF I have hereunto set my hand and affixed
15 my Notarial Seal this 11th day of June A.D., 2001.

16

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Notary Public and
Certified Shorthand Reporter and
Registered Professional Reporter

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CSR License No. 084-003677

23 My Commission Expires: 03-02-2003

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