DIRECT EXAMINATION

BY MR. ECKERT:

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Q Dr. Eisler, first: does this document, marked "Statement of Ronald Eisler" represent your testimony?

A Yes, with a few minor corrections.

Q Would you please give us those corrections?

JUDGE SWEENEY: Let's identify Dr. Eisler's statement as Exhibit 89.

(The document referred to was marked Exhibit No. 89, for identification.)

MR. OWEN: I take it he's swearing to it?

BY MR. ECKERT:

Q Do you swear that this testimony is true?

A Yes.

Q Now, would you please identify the corrections?

A Very well.

On the fourth page of the affidavit, iline 3, please delete the second "i" from the word "poisoning". It is a misspelling.

And on the twelfth line, the next to the last line, is another typographical error. It should be "were" instead of "wire".

And then Part E should read as follows:

"For Fundulus, the ratio LC-50 (96-hour)

[equal 55 milligrams per liter to the lowest concentration tested, which produced no reasonable whole-body accumulation over controls in 264 hours (equal 100 microgram per liter) was 550.

However, higher concentrations of cadmium tested (400 micrograms per liter and greater) were associated with increasing cadmium residues over the controls."

Then, going on to number 5, the second line. The second word should be "on" instead of "an".

Then, on the next page, the third line, the fourth word should be "guide" instead of "guise".

And the last correction is: "Cadmium levels in bottom waters at/or near some dump sites" -- add the word "at" between the words "waters" and "or".

MR. ECKERT: Gentlemen, your witness.

CROSS-EXAMINATION

BY MR. MILLER:

Q Dr. Eisler, just to get a little bit of background on your participation in these matters:

I understand you were not a member of the EPA task force that put together the proposed standards that are the subject of this hearing.

Is that correct?

A That's correct.

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Q Well, I also understand that you were not retained by them to act as a consultant to them in their labors.

Is that correct?

A That's correct.

Q Did you have any role in the preparation of the proposed standards?

A My affidavit: but do you mean so far as what appeard in the Federal Register?

Q As far as appeared in the Federal Register on December 27, 1973?

A No, I didn't.

Q Have you read the proposed standards which were published in the Federal Register?

A Yes, I have.

Q Did you have any role in the preparation of EPA's Statement of Basis and Purpose for any of the substances covered by the proposed standards?

A No, I didn't.

Q Have you had occasion to read any of those statements of basis and purpose?

A Yes, I have.

Q Which ones have you read?

A You mean as to the rationale behind the selection of the nine toxicants?

Q No.

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I'm talking about the Statement of Basis and Purpose which, the toxicants having been selected, describes the basis and purpose of the standard that is proposed.

And my question is as to what substances did you read the statement of basis and purpose?

A. Cadmium, for one. Mercury, for another.

Q. Any others?

A. I glanced at the others.

Q. But you had no role in the proparation of those documents?

A. No, for a very good reason.

Q. Who asked you to prepare written testimony for use in these proceedings?

A. My laboratory director, Dr. Eric Schneider, S-c-h-n-e-i-d-e-r.

Q. When did Dr. Schneider ask you to prepare written testimony for use in this proceeding?

A. Oh, I think it was late fall or early winter of 1973.

Q. Was that before the standards were published as a proposal in the Federal Register on December the 27th?

A. It was about that time. I don't know if it was shortly before or shortly after.

Q. At that time were you given a copy of the proposed standards?

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A Yes.

Q And are the proposed standards that were published in the Federal Register the same as the copy that you were given?

A Yes.

Q Do you know who requested Dr. Schneider to arrange for your preparation of written testimony?

A Not exactly, but probably -- not exactly. Not by name, anyway.

Q Would I be correct in assuming that your impression is that either Mr. Rogers or Mr. Eckert or one of the members of their office had made this request?

A I don't know. I didn't know those people at that time.

Q What did Dr. Schneider tell you was to be covered in your written testimony?

A Well, he indicated that EPA was promulgating some effluent standard guidelines for various substances, and since I was the team leader of the metals toxicity unit, to write up a review of the literature plus what I knew from other work going on in the laboratory, as to what we felt were the most rational basis, the most defensible limits, for the environment, as it represents a threat to public health and damage to marine ecosystems. These are the guidelines that I took.

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Q. Those guidelines you got from Dr. Schneider?

A. Yes.

Q. Did you have conversations with anyone else as to the subjects to be covered in your written testimony or the purpose for which your written testimony was to be written, Doctor?

A. I had many conversations with members of the laboratory staff, to find out what sort of work they had done; and we wanted to see if the body of observations would corrobo rate each other and tie it all together in a package.

Q. When did you start your work on preparing your written testimony?

A. Probably November, perhaps.

Q. When did you finish it up?

A. The first draft was finished shortly thereafter. It was a series of drafts, as I became aware of more information or, perhaps, some of my findings were not considered supportive enough. In other words, there wasn't enough hard data to support some of the speculation.

But this represents a series of, perhaps, four or five drafts, and I believe the last one was completed shortly before they were distributed, which was last month sometime.

Q. When was the first time that you submitted a draft to a superior of yours?

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A Probably November.

Q November?

A Yes.

Perhaps December. Sometime in 1973.

Q When did you reach the stage when you had a draft that was to your satisfaction?

A There wasn't that much change between the first draft and successive drafts. It was just a question of logic and English. I was more or less satisfied with the second or third draft.

Q And that was completed sometime in November or December of '73?

A No.

The first draft was completed in November and, possibly, the second draft in January. You know, it gets refined as more information becomes available.

Q Well, I guess what I'm looking for is the rather difficult distinction between major substantive changes and the polishing up.

A There were no major substantive changes after January, I would say.

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Q After January of 1974?

A Yes. I would say so.

Q At any time in the preparation of the final drafts of your written testimony were you provided with copies of

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written testimony that had been filed by others in these proceedings?

A. Oh, yes. Yes, I was.

Q. Did you read any of that testimony?

A. Yes.

Q. What testimony did you read?

A. I read the testimony of Mr. Heaton of the National Water Quality Laboratory.

Q. Let me narrow my question a little bit -- and confine yourself, if you would, to the written testimony of Objectors.

A. Oh.

Yes, I had copies of the Objectors' comments. The names George Capestany and Max Katz spring to mind.

Q. Did you read the statement of Capestany and Katz, Doctor?

A. Yes, I did.

Q. All right.

What other written statement did you read, relevant to the subjects that were called by Objectors?

A. I think that was the most relevant one. There was a package of, perhaps, six or eight that I thought were more important than the others, but I don't recall the actual names of the Objectors.

And these were given to me, essentially, after my

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affidavit was completed.

Q So would I be correct, then, in inferring that while you were given these statements to read for your own information, that you did not undertake in your written testimony to deal with the testimony of others?

A Absolutely not.

Q And your statement and your affidavit are not intended to reply to any of the written testimony of others?

A No, sir.

Q Or rebut it?

A No, sir.

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Q I'd like to turn, now, to page three of your written testimony.

Do you have a copy of it?

A Yes, I do.

Q In paragraph number one, you refer to certain data in a publication by yourself and others as to the bioaccumulation of cadmium, under the circumstances described.

A Yes.

Q Do you understand that bioaccumulation is considered in the basis for the proposed standards that are being considered in these proceedings?

A I thought it was not.

Q You thought it was not?

A Yes.

Q All right.

A As I say, my affidavit was prepared before I was aware, fully aware, of what the effluent standard guidelines consisted of, or whether the affidavits were filing either for the EPA, or objectors. I sort of prepared my affidavit more or less in a vacuum, on the basis of what I knew had been done, and what others in our laboratory knew had been done.

Q Since the time you started working on your statement, you have learned of the proposed standards and of the statements of others, and of the basis and purpose for the proposed standards as set forth in the statement of basis and

purpose?

A Yes.

Q Well, is it your understanding that the phenomenon of bioaccumulation is not one of the bases for the standards with respect to cadmium?

A It's my understanding that any information that I can prepare that might shed some light on establishing a meaningful standard would be welcome.

Q My question concerns the basis of the standards as they have been proposed by the Environmental Protection Agency, and it's really a rather simple point. I thought you had agreed with me that in the standards as proposed and as described in the statement of basis and purpose that has been published, bioaccumulation is not now included in the basis of those proposed standards.

A That's correct, yes.

Q All right.

Now, we find in the last paragraph on the page, the one that is unnumbered, it appears to be a continuation of paragraph number two --

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A Yes, it is.

Q You refer there to conditions under which cadmium-stressed oysters failed to develop.

Now, again, my question is the same: is your understanding the same as mine, that developmental problems such as

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described here were not included in the statement of basis and purpose as one of the bases for the proposed standards as we have them now?

A. Well, I would think that if an organism fails to develop properly, that quite possibly and probably it would fit in to what I would consider a toxic effect.

Q. I think you are missing the point of my question. My question is not what ought the standards to protect against, or how would you write the standard; my question concerns the standards as they have been proposed, and the statement of basis and purpose that has been published.

The question is, do you agree with me that the basis and purpose of the standards as proposed does not include data concerning developmental problems?

A. I'd have to take issue with that. I saw it rather differently. I thought -- this goes back to the bioaccumulation also, in the sense that, if an organism accumulates something to the extent where it represents a hazard either to the next trophic level or to man, or if it fails to develop properly and not have a chance for survival, I would certainly consider this within the realm of what the standards intended to be; although this was prepared, as I say, before I was cognizant of the standards.

Q. Maybe I'm speaking too generally, Doctor, because I am referring to that portion of the cadmium standard that

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deals with salt water bodies, and if I was speaking too generally, forgive me. I was referring to the subject matter which appears to be that of your affidavit.

A Yes, I was, too.

Q Okay.

And can you identify anywhere in the statement of basis and purpose where that standard -- that data concerning developmental abnormalities were considered in the basis for the proposed standards?

A I don't think they're spelled out.

Q Okay.

MR. MILLER: Your Honor, if I may, at this point I would like to make a procedural request of you which is in the way of a motion, but I hope would save time in these proceedings.

At the conclusion of Dr. Eisler's cross examination, you would admit his statement in evidence unless it is objected to. And I would like to inform you in advance that I will object to the admission of Paragraphs 1 and 2 of Dr. Eisler's statement, and if your Honor were in a position to rule at this time it would preclude the necessity of substantive cross examination about Paragraphs 1 and 2.

So that I move, your Honor, for a ruling that those paragraphs will not be admitted, and the basis for my motion is as follows:

Those paragraphs, as part of the general instructions and the general purpose that Dr. Eisler had when he started writing his affidavit, are not and were not intended to be rebuttal at any portion of the industries' or any of the objectors' written testimony in this case. My understanding has been that this witness is here as a rebuttal witness. And this testimony is not proper rebuttal testimony.

If I am mistaken in my understanding, if he is here presenting evidence in chief in support of the proposed standards, I think that leads to two additional difficulties.

First of all, it's out of time. My understanding has been that EPA's evidence in chief in support of the standards was in the statement of basis and purpose and that any witnesses which had called at the outset of which Dr. Thompson was the only one, if your Honor should be asked to accept this as evidence in chief out of time, I submit that your Honor should exercise his discretion not to accept it as evidence in chief out of time. It's clear, from what Dr. Eisler has said, that his draft of his statement was substantially complete by January, and there's no reason for it to be accepted out of time.

Furthermore, if it is accepted out of time as evidence in chief, we clearly have a right to rebuttal evidence to Dr. Eisler's evidence, and I think that could lead to a terrible snarl in delaying the hearing.

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You have in your rules, and in your own statement, a clear mission to get these hearings done promptly, and I think it would be contrary to that purpose, of the rules of this proceedings, and of your Honor's rulings, to permit the reception of this out of time, which would generate a right on us to file rebuttal testimony to this portion of Dr. Eisler's statement.

Finally, I think this evidence is not relevant to these proceedings. The proposed standards are supposed, under Part 104, to be accompanied by a statement of their basis and purpose, giving the facts upon which they are based. And as Dr. Eisler has testified, the proposed standards are not based upon data concerning bioaccumulation and developmental defects, at least insofar as the salt water standard for cadmium is concerned.

So, for all those reasons it seems to me it would be a waste of time to go any further and cross-examine Dr. Eisler on the substance of this, when it's clearly inadmissable. And I ask your Honor to rule that we can obviate that by not admitting the testimony.

I might say, your Honor, that I understand that other objectors will join in this motion, and if they wish to conduct additional voire dire examination of this witness on the point, I assume they will speak for themselves and make additional arguments.

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MR. OWEN: May I just add one comment, which I think Mr. Miller may have covered, but it does seem to me that the statute we're operating under and the procedural regulations and your Honor's concept of how the hearings would proceed, I contemplate that if EPA wants to put forward a fact or a factual allegation, the objectors should have a chance to respond to it.

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Now to the extent that an affidavit contains new factual allegations which were not submitted before, under the procedures your Honor has in mind we will never have an opportunity to respond to those factual allegations, so I think Mr. Miller's point is very well taken, that in order to avoid that injustice, this material should not be received in evidence.

JUDGE SWEENEY: May I make a suggestion, Mr. Miller, before a rule?

MR. MILLER: Yes, sir.

JUDGE SWEENEY: Could you make the motion in the form of a motion to strike?

MR. MILLER: I'd be glad to make it in that form. My technical mind suggested that nothing could be stricken if it weren't admitted, but I think that form--

JUDGE SWEENEY: Well, when we have written testimony it is just as though Dr. Eisler had sat here and read all of this.

MR. MILLER: Very well. On the grounds that I have stated I move to strike Paragraphs No. 1 and 2 of the Eisler affidavit.

MR. ECKERT: Before you rule on that motion, you Honor, I would like to briefly respond, and I think I can make my point best by reading from the affidavit, one sentence from the affidavit of Dr. Rolf Hartung, who was a witness

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on behalf of one of the objectors in this proceeding. He states:

> "EPA did not make use of all the pertinent scientific information in its standard-setting process even though a great deal of it is readily available."

Not only Dr. Hartung, but Dr. Katz and a number of other witnesses made this same point, that EPA ignored pertinent available evidence.

It seems to us that the affidavits here have attempted to respond to this by bringing forward some of the pertinent evidence for consideration of the Administrator. Industry Counsel have ample opportunity to cross-examine on this evidence.

It seems to me that their opportunity to cross-examine is adequate in this case. In their briefs filed at the conclusion of this proceeding they can make whatever arguments they wish with respect to the consideration by the Administrator of this material.

Finally, the rules of practice of the hearing state that if a party objects to the admission or rejection of any evidence -- and I'm paraphrasing here -- it's Section 104.10(c):

> "Whever evidence is excluded from the record, the party offering such evidence may make

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an offer of proof which may be included in the transcript. The offer of proof shall consist of a brief statement describing the evidence to be offered. If evidence consists of a brief statement or affidavit or an exhibit, it shall be inserted into the transcript in toto. In such event, it shall be considered a part of the transcript if the Administrator decides that the Presiding Officer's ruling excluding the evidence was erroneous."

It seems to me that that's the situation here. Regardless of whether or not you rule that this evidence is admissible, it must be marked in evidence and admitted into the record of the proceeding for the Administrator to decide, when he comes to make his decision, whether or not the ruling was proper in that case.

MR. MILLER: Are you through, Mr. Eckert?

MR. ECKERT: Yes, I am.

MR. MILLER: May I be heard briefly on these two points that were made?

JUDGE SWEENEY: The motion can be changed, Mr. Miller, as you originally propounded it, so that if I do agree with you then Mr. Eckert would have the right to make an offer of proof.

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MR. MILLER: I quite agree with that, and we shouldn't obliterate anything, but the purpose is as to a ruling on admissibility in whatever form.

JUDGE SWEENEY: Before we get back to you, Mr. Miller,--

Have you finished?

MR. ECKERT: Yes, I have, your Honor.

JUDGE SWEENEY: You didn't cover the point that Mr. Miller brought up and I believe Mr. Owen, that the objectors would have no opportunity to rebut any new evidence of this sort.

MR. ECKERT: I think that it might be appropriate to afford the objectors an opportunity to submit affidavits in rebuttal even though we would not have an opportunity to cross-examine on that, given the time deadlines that are facing us here, but before I commit myself, I would like to discuss that with my colleagues.

JUDGE SWEENEY: But that wouldn't be good enough because then, under your own rules of practice, the Administrator would not be required to give that any weight whatsoever. It's a subjective judgment as to any evidence that comes in not subject to cross-examination.

MR. ECKERT: Well, it's true that he would have to weigh the availability of cross-examination in assigning weight to the evidence, but I don't think that means that

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he would be entitled to exclude it from consideration.

And given the time limitations that we're operating under here, it seems to me that that's the only possible way to solve the problem.

JUDGE SWEENEY: Well, given the time limitations, I don't see how they can offer a proper rebuttal. The hearing will end at the end of May, May 31st. They will be very fortunate if they can get any kind of a brief in before the 25th of June, when the decision is due, much less gather new evidence together.

MR. ECKERT: That's the only suggestion I have.

JUDGE SWEENEY: Mr. Miller?

MR. MILLER: I think your Honor's colloquy with Mr. Eckert adequately covers the point that I wanted to make in addition about the practical possibility of our supplying rebuttal.

We have just in the recess now been able to turn, in a substantive way, to looking at these affidavits and upon looking at them, we have discovered what I have brought out upon cross-examination.

So far as Mr. Eckert's point that these are rebuttal, he refers to Dr. Hartung's affidavit specifically and to others where the statements are made that the standards are not based on the latest data.

However, this affidavit doesn't rebut the facts

stated there, that the proposed standards are not based on the latest data. This purports to be later data, but this does not rebut the objection that is made that the proposed standards were not based on later data.

And this isn't just an argumentative point. As we have read Section 307 and the rules of procedure, the Administrator should be considering the latest data and should come up with what are close to final standards when he proposes the standards, and he should describe the data on which they are based comprehensively.

And as Dr. Thompson testified, the purpose of the hearing and of the consideration of the final standards should be for fine tuning.

But here we have what I think is the original standard-setting process trying to be carried on through the medium of these hearings. Well, that is not the purpose of these hearings. What Mr. Rogers says doesn't change the fact that the proposed standards weren't based on the latest data.

If EPA wishes to consider the latest data in the proposed standards it may do so, but this hearing is not the proper medium for doing it.

MR. ECKERT: I think our difference on this point is adequately on the record. It seems to me, from the point of view of the agency staff, I can scarcely countenance any procedure for this hearing which would preclude vital and

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significant scientific evidence necessary for an adequate illumination of the standard-setting problems we are facing here from being placed before the Administrator.

MR. OWEN: The response to that can be very brief. He should have done his homework before the standards were promulgated.

JUDGE SWEENEY: This information was available to EPA before the standards were published.

MR.ECKERT: As you know, EPA produced these standards under court order and what can only be called a crash program, and it seems to me that if this hearing is not to be a farce, it has to be a forum for the production and the consideration of additional material.

Characteristically, rulemaking is done by hearings in which arguments are presented and the agency may, behind the scenes, develop such additional information as it pleases.

JUDGE SWEENEY: That's only when rulemaking is under a statute which does not require the decision to be on the record.

MR. ECKERT: It's true in this case we've gone the last mile, it seems to me, by producing the evidence, producing the witnesses, by making the witnesses available for cross-examination.

MR. MILLER: You have produced the witnesses and the evidence on which the Administrator might propose standards

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or might have proposed standards.

I wouldn't be surprised, if we asked Dr. Thompson about his 2200 articles of literature that they started out with, if that included a lot of late data. But we have the policy decisions having been taken to base the proposed standards on the Water Quality criteria. So we know where the standards were based, and our objection has been that the standards were not based on the latest data.

The difference between this and a formal rule-making is not only the hearing requirement but that those standards carry, under the statute, a rather heavy presumption of validity, and thus our procedural posture in the hearing is perhaps less advantageous than it would otherwise be.

But if they are going to carry such a heavy presumption of validity, the latest data, or whatever data the standards that are proposed are based on, ought to be disclosed to us at the outset.

Dr. Eisler had his draft in January. But the standards weren't based on it. And so, quite properly, his statement was not included in the Statement of Basis and Purpose. This just isn't relevant, your Honor.

JUDGE SWEENEY: Well, in order to save you time cross-examining on this, I will agree that you're correct and your motion should be granted. And at the time the statement is offered in evidence it will be received, except for

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the paragraphs you have pointed out. They're the only ones you have in mind; is that correct?

MR. MILLER: No, your Honor, they are not. My objection applies to the entire affidavit. And I would now like to make a motion as to the rest of it.

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JUDGE SWEENEY: What are the grounds?

MR. MILLER: Well, again, he has testified in a general way that none of this was intended as rebuttal. Now, I went through specifically on paragraphs 1 and 2, so that we could have a focal point for your Honor's ruling, but he did testify that he had completed his draft substantially by January; and that while he received objectors' written testimony which, as your Honor knows, was not filed until March, it was not his purpose to reply to anything in the testimony of the objectors.

And while Mr. Eckert says that this might be considered a reply to Dr. Hartung, the witness has testified that it was not intended as a reply to anyone. That was his general testimony.

And on that ground -- and I take it that testimony unless he wishes to qualify it applies to everything in the statement.

JUDGE SWEENEY: But it could, nevertheless, be proper rebuttal whether he intended it to be that or not.

MR. MILLER: Well, if Mr. Eckert wishes to argue that any is or the witness wishes to testify that any is, so be it. I might just clear that up by asking him a couple of questions, if I may, your Honor?

JUDGE SWEENEY: Go ahead.

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BY MR. MILLER:

Q Dr. Eisler, did I describe your testimony or summarize your testimony correctly as to the intent of this affidavit in its entirety? Was it intended to reply to anything that the objectors had said in their written testimony?

A No.

Q Is there anything in here that's intended as a reply or rebuttal?

A It could be construed as such.

Q No, I am asking for your intent?

A My intent? No.

JUDGE SWEENEY: His intent is not important to me, Mr. Miller.

The question is: Does it rebut anything?

BY MR. MILLER:

Q Now, Doctor, you have testified that you have reviewed the testimony of some of the objectors?

A Yes.

Q Can you identify any portions of your affidavit whether originally intended so or not do in your opinion stand as rebuttal or reply to any of the objectors' testimony?

A I would consider the entire affidavit as such.

Q Well, what about paragraphs 1 and 2? On that we already have a ruling.

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A Do you want me to comment on paragraphs 1 and 2?

Q No, I don't think so.

Doctor, let's take paragraph 3. To what written testimony by the objectors might that be considered to be a response?

A Well, there was one -- did you have something to say, Mr. Eckert?

(Laughter.)

I recall one portion of Dr. Kadz' testimony which indicated that the limit for cadmium in hard water should be at 300 micrograms per liter. That was his conclusion.

Q Well, now, Dr. Kadz' testimony as I recall it concerned fresh water standards; did it not?

A He specifically said 300 micrograms per liter of cadmium in hard water, and he used fresh water as his fulcrum.

Q And your testimony concerns salt water, does it not?

A Exclusively, yes, sir.

Q Do you think that data as to salt water toxicity can just be transposed to fresh water environments?

A I'm referring to Dr. Kadz' statment of 300 micrograms per liter; in some cases it can and in most cases it cannot.

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Q Is there any other written testimony of the objectors to which paragraph 3 is a reply?

A As I say I'm not familiar -- I don't have that much familiarity with the content of the objectors' affidavits; but I'm sure they would not have had those objections if they had read my affidavit, which is, of course, impossible.

(Laughter.)

MR. MILLER: Your Honor, I would like to renew my motion with respect now to paragraph 3. The witness has identified one statement by Dr. Kadz as to which he said the fulcrum was fresh water. His purported rebuttal to that concerns salt water standards which generally he says cannot be simply transferred from salt to fresh.

I don't think by any stretch of the imagination this can be called rebuttal of that.

MR. ECKERT: Before you rule on such a motion I would like to make two points:

First, we have not had time to go through the affidavits and to identify all the points which are made by objectors to which Dr. Eisler's testimony is responsive. Now, we can do that over the weekend, if necessary, and come in Monday morning with our position on that.

In the meantime it seems to me that Dr. Eisler's state of mind, as you correctly point out, is not what is at

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issue here; but, rather, what Dr. Eisler says is responsive to material, his rebuttal to material raised by objectors.

I would like to suggest that the hearing proceed with cross-examination of Dr. Eisler on his affidavit, and that any ruling on the admissibility of specific portions be withheld until we have had an opportunity to compare these two documents.

JUDGE SWEENEY: Well, you're going to have the same problem with your other EPA witnesses, are you not?

MR. ECKERT: We're going to have to make this comparison for all the affidavits; that's right.

MR. MILLER: As to that I might say, your Honor, there are some of the affidavits that clearly in part were intended as rebuttal under proper rebuttal. Dr. Mount's affidavit makes specific reference to the substance of the testimony by the objectors. Those portions of Dr. Mount's affidavit are not subject to this objection.

I believe there is a portion of the Steffen affidavit that makes specific reference to the testimony of Mr. Wyatt; so I don't find any difficulty at all in picking out those portions that are rebuttal, because they are specifically referred to the written testimony of the industry that they are rebuttal of.

JUDGE SWEENEY: How about Dr. Fisher?

MR. MILLER: I can't comment on that at this

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point, your Honor; I haven't read it.

JUDGE SWEENEY: I think he rebuts EPA witnesses, doesn't he?

(Laughter.)

MR. MILLER: So I am surprised, if this is truly being brought in as rebuttal -- which I don't think it was -- I'm surprised that neither the witness nor counsel can conveniently say in what respects it is rebuttal, and what it is rebuttal to.

I think it is perfectly clear that it is not rebuttal and was not intended as rebuttal. It's just a bunch ofnew data, and that's not the function of this hearing.

JUDGE SWEENEY: Well, Dr. Eisler made an attempt as to paragraph 3; why don't you continue?

BY MR. MILLER:

Q Dr. Eisler, as to paragraph 4 of your affidavit, can you identify what portion of the written testimony of any witness for an objector this might be considered to be rebuttal to?

A It's my feeling after going through the affidavits of the objectors that very little of their objections or even data were addressed to the marine environment -- perhaps less than two percent; but, nevertheless, whenever a comparison could be made -- and I specifically referred to the one by Dr. Kadz -- he indicated that level of cadmium should be

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300 parts per billion in hard water as oppossed to a much lower value for what he calls a softer water. And in this respect the information presented in paragraph 4 certainly invalidates the level of 300 parts per billion, which under these types of conditions would certainly wipe out entire populations of marine copepods which are extremely important in the marine food chains.

Q Again you recognize that Dr. Kadz was addressing himself to the fresh water standards, do you not?

A Primarily, except for that one statement.

There seemed to be a general view of all the objectors that the standards seem to be too stringent, and should be higher.

Q Well, let's take up paragraph 5. I ask you the same question; what's your answer on paragraph 5?

A Again the values there are substantially below the 300 parts per billion, in almost every instance.

Q Well, if I went through this paragraph-by-paragraph would I get the same answer, that this is rebuttal of Dr. Kadz' testimony that the standards should be set at 300 parts per billion in hard water?

A As I said before, this was meant to be rebuttal to any witness. It was supposed to present my opinion of relevant information most of it published in the open literature for some years, which could have some bearing

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on establishing a meaningful cadmium standard. These were teh guidelines that I was given in the preparation of this affidavit.

JUDGE SWEENEY: So, then, Doctor, it would be happenstance if anything you say in here is in direct rebuttal of anything said by anyone else?

THE WITNESS: That is correct.

MR. KANE: Your Honor, if I may add a word on the same motion that Mr. Miller made, I think that demonstrates beyond any argument that the affidavit is not admissible at all. I think it obviously is designed to be the same type of evidence that would have been produced as direct evidence in support of EPA's case had it been introduced at the right time, and then we could have rebutted it in the direct testimony that we presented in March.

Now to go back over our direct evidence or our rebuttal evidence and try to find cases in which he deals with the same subject matter and then characterize this after the fact as rebuttal to that, I think just distorts entirely the notion of what rebuttal evidence is.

MR. MILLER: I might say, your Honor, I am trying to seek an analogy where the rules of evidence, which I think are properly being applied here as far as the order of proof and the characterization of evidence is concerned are applied in their simplistic form. And I have in mind

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a trial wherein the issue is "Who hit John?" One would not be permitted to call as a rebuttal witness a person who was a witness generally to the entire transaction who would then testify at large and then be allowed to go through and say, "Oh, yes, that testimony does turn out to be in rebuttal to Witness X".

The point of rebuttal testimony is to be pointed to take up the matters that are new in the case that is being rebutted and to supply the evidence in contradiction of that. This, clearly, is not that sort of evidence. It is as the witness said "happensatnce" if any of it might have been intended as rebuttal, which clearly it was not.

MR. ECKERT: It equally clearly is not that sort of trial.

JUDGE SWEENEY: Mr. Eckert, just because things have been rather loose up to this time doesn't mean that we should abandon the Administrative Procedure Act completely.

The objectors' counsel have permitted you and Mr. Rogers to range far afield of some of the statements made by their witnesses without objecting to it. I think they have not tried to have a strict trial here.

MR. ECKERT: Well, even in some jurisdictions --

JUDGE SWEENEY: But this would be unfair to put in the guise of rebuttal something that is new; and they would have no chance to reply to it under the rules of

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procedure of the Administrative Procedure Act, in addition to not having time to do it, even if it was proper.

MR. OWEN: May I just add one note which is not intended to be unfriendly to the EPA lawyers, but we did raise this problem early in the hearing, and pointed out that in our judgment there was a distinction within these affidavits between rebuttal material and new information. We did forewarn that this problem was going to come up as soon as these materials were offered.

JUDGE SWEENEY: Well, I don't Mr. Eckert said he was surprised.

MR. ECKERT: No.

MR. MILLER: If your Honor would like, I could go through these point-by-point, but I think the witness has testified that his testimony would be the same as to each of these paragraphs; and for my part, I'm satisfied to stand on his testimony and on my motion as to each of these paragraphs. And I so do.

JUDGE SWEENEY: May we consider that Exhibit 89 has now been offered in evidence?

MR. ECKERT: Yes.

JUDGE SWEENEY: The motion of Mr. Miller and Mr. Owens is granted, and Exhibit 89 will not be received in evidence.

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(The document referred to, previously marked Exhibit 89 for identification, was rejected.)

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MR. MILLER: I have no further questions for the witness.

MR. ECKERT: Your Honor, at this point we call Dr. Dwight Ballanger.

(Witness excused.)

MR. MILLER: Your Honor, could we have about a five or ten-minute recess at this point for a discussion amongst counsel?

JUDGE SWEENEY: All right.

We'll take the afternoon recess now.

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(Recess.)

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