

ILLINOIS POLLUTION CONTROL BOARD

June 21, 2001

IN THE MATTER OF:)	
)	
REVISION TO ANTIDegradation)	R01-13
RULES: 35 ILL. ADM. CODE 302.105,)	(Rulemaking - Water)
303.205, 303.206, and 102.800-102.830)	

Proposed Rule. First Notice.

OPINION AND ORDER OF THE BOARD (by G.T. Girard, R.C. Flemal, N.J. Melas):

On August 30, 2000, the Illinois Environmental Protection Agency (Agency) filed a proposal for rulemaking (Prop.) to amend the Board’s water “nondegradation” rules at 35 Ill. Adm. Code 302.105, 303.205 and 303.206. The proposed rules would implement the required federal concepts of antidegradation and outstanding resource waters for the State of Illinois. The Agency also proposed amendments to the Board’s procedural rules at 35 Ill. Adm. Code 106.990-106.995 to include provisions for designating outstanding resource waters in Illinois. On September 7, 2000, the Board accepted the proposal for hearing.

The Board has held three hearings in this matter before Board Hearing Officer Marie Tipsord. The first and third hearings (November 17, 2000 and February 6, 2001), were held in Chicago, Illinois. The second hearing (December 6, 2000), was held in Springfield, Illinois. Testimony was heard from the Agency, the Department of Natural Resources (Department), Illinois Environmental Regulatory Group (IERG), American Bottoms Regional Wastewater Treatment Facility, Village of Sauget, Illinois (American Bottoms), Prairie Rivers Network, the Environmental Law & Policy Center, Friends of the Fox River, McHenry County Defenders and the Sierra Club.¹ In addition, all of these participants except the Department filed post-hearing public comments. The Board has received a total of 47 comments in this proceeding, which include 42 comments from groups and individuals not named in this paragraph.

The Board today proposes for first notice amendments to the Board’s antidegradation water rules and the Board will propose a procedure for designating waters of the State of Illinois as Outstanding Resource Waters. The Board will first discuss the proposal as filed by the Agency and then discuss the remaining issues before the Board. The testimony and comments will be included where appropriate.

BACKGROUND

Historical Preface

¹ The Prairie Rivers Network, the Environmental Law & Policy Center, Friends of the Fox River, McHenry County Defenders and the Sierra Club all participated both individually and as a group. Therefore when referring to their joint comments and testimony they will be collectively called “Environmental Groups”.

States are required to revise and update their water quality standards pursuant to the Federal Water Pollution Control Act (33 U.S.C. §§ 1251-1387 (1987)) (Clean Water Act). Prop. at 1. The update is necessary to ensure that the water quality standards protect public health and welfare, enhance the quality of water, and promote the purposes of the Clean Water Act. *Id.* This process is called a triennial water quality standards review. *Id.* citing 33 U.S.C. §1313(c)(1). One element in the triennial water quality standards review is the antidegradation policy and procedures found in the Board's regulations under the subheading titled, "Nondegradation," at 35 Ill. Adm. Code 302.105. Prop. at 1.

Antidegradation is one tool used in Illinois to meet the objective of the Clean Water Act enunciated at Section 101(a); "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C §1251(a). Each state must develop, adopt, and retain a statewide antidegradation policy. Prop. at 2.

The Board's current rules on antidegradation were adopted in 1972 and the goal was to preserve ". . . the present prohibition of unnecessary degradation of waters presently of better quality than that required by the standard, recognizing that the standards represent not optimum water quality but the worst we are prepared to tolerate if economic considerations require." Prop. at 2 citing, Effluent Criteria R70-8; Water Quality Standards Revisions, R71-14; Water Quality Standards Revisions for Intrastate Waters (SWB-14), R71-20 (March 7, 1972). Thus, Section 302.105 applies when existing water quality is better than established standards. However, it is not clear that waters outside the category of "better than established standards" are explicitly protected. Prop. at 2.

In 1998, under the potential threat of a lawsuit by environmental groups (Tr. 11/17/00 at 27), the Agency established a workgroup to clarify antidegradation issues. Prop. at 5. Participants included IERG, the Attorney General's Office, United States Environmental Protection Agency (USEPA), the Department, the Environmental Law and Policy Center, the Chemical Industry Council of Illinois (CICI), the Northeastern Illinois Planning Commission, the Sierra Club, and individuals representing various municipalities, industries and law firms. *Id.* Seven meetings were held over the next 18 months during which numerous drafts of the antidegradation policy were reviewed and critiqued. Prop. at 5-6. A representative from Ohio shared information on Ohio's experience implementing an antidegradation policy. Prop. at 6. The Agency submitted this proposal to the Board even though the workgroup did not agree on some issues. Prop at 6.

Federal Antidegradation Requirements

As the Agency explained in the proposal, the State of Illinois' antidegradation policy and implementation procedures must be consistent with the components detailed in 40 C.F.R. 131.12. Prop. at 2. The components of the federal plan included a three-tiered approach. 40 C.F.R. 131.12. The actual antidegradation procedure will be undertaken as a part of the National Pollutant Discharge Elimination System (NPDES) permit process. Prop. at Exh. B; Tr. 11/17/00 at 30-33.

Tier 1 in the federal scheme is based on achieving and maintaining existing stream uses. Prop. at 3. Tier 1 sets the minimum level of protection and is intended to be the absolute floor of water quality protection for all waters of the United States. *Id.*

Tier 2 of the federal program addresses waters whose quality exceeds the levels necessary to support the propagation of fish, shellfish, and wildlife and recreation in and on the water. Water quality cannot be lowered below the level necessary to protect the “fishable/swimmable” uses and other existing uses. Prop. at 3. However, maintaining a level of water quality above the “fishable/swimmable” level is not always required and water quality may be lowered if necessary to accomplish important economic or social development in the area in which the waters are located. *Id.* and 40 C.F.R. 131.12(a)(2).

Tier 3 of the federal regulations requires that high quality water, which constitutes outstanding resource waters, must be maintained and protected. Prop. at 4. Examples of outstanding resource waters could include waters of national and state parks, wildlife refuges or water of exceptional recreational or ecological significance. *Id.*

Currently, the Agency reviews applications for NPDES permits to determine if the discharges to be permitted will degrade the waters of the State. Tr. 11/17/00 at 30-32. The Agency will continue to review antidegradation as a part of the NPDES permit application process. Prop. at Exh. B; Tr. 11/17/00 at 34-36.

AGENCY PROPOSAL

The Agency, as a result of its ongoing triennial water quality standards review, proposes amendments to the Board’s current rules found at 35 Ill. Adm. Code 302.105 which concern antidegradation of waters in the State. The proposal is specific and limited, dealing with the issue of antidegradation while tracking the federal guidance. Tr. 11/17/00 at 17. The Agency proposes that the state’s water resources be viewed in the three tiers of the federal program. *Id.* In addition, the Agency proposes adding language to the Board’s rules at 35 Ill. Adm. Code 303 creating the category of waters classified as “outstanding resource waters” or ORWs. Finally, the Agency proposes the addition of a new Subpart to the Board’s procedural rules on the process for classification of Outstanding Resource Waters. Following is a discussion of each of the Agency proposed changes.

Antidegradation and Section 302.105

First, the Agency proposes to shift from using the term “nondegradation” to using the term “antidegradation” in order to parallel the federal regulations. Prop. at 3. Next, to coincide with the federal regulations’ Tier 1 approach, the Agency proposes language to insure the protection of existing uses as well as Illinois’ compliance with the Clean Water Act in Section 302.105(a) of the Agency’s proposal. Prop. at 3. More specifically, the Agency’s proposal provides that existing uses actually attained in the water body must be maintained and protected. Tr. 11/17/00 at 17. This proposed rule coincides with the federal regulation at 40 C.F.R. 131.12(a)(1).

The Agency proposes Section 302.105(c) to protect Tier 2 waters. This proposed rule corresponds to the federal regulations at 40 C.F.R. 131.12(a)(2). Collectively, the three

subsections in Section 302.105 establish the substantive requirements of an antidegradation standard. Tr. 11/17/00 at 18. The requirements are a combination of prohibitions on uses and less sharply-defined policy to avoid or minimize effects of activities on a water resource. *Id.* The prohibitions are no loss of existing use and no lowering of water quality in exceptionally high quality or outstanding resource waters. *Id.* The remaining requirements are not prohibitions *per se* but allow some degree of degradation when necessary to accomplish other public goals in the realm of social and economic needs of the community. *Id.*

The Agency indicated that it will evaluate requests for the degradation of waters as a part of the NPDES permit process. The Agency will use rules it intends to propose at 35 Ill. Adm. Code 354 to review the requests. Tr. 11/17/00 at 20.

Section 302.105(b) is proposed to protect Tier 3 waters or outstanding resource waters and corresponds with 40 C.F.R. 131.12(a)(3). Tr. 11/17/00 at 17. Specifically, the proposal prohibits the lowering of water quality in outstanding resource waters except for short-term lowering of water quality or stormwater discharges that comply with federal and state stormwater management regulations.

The Agency has also proposed a new Section 302.105(d) to specify activities that are not subject to an antidegradation review. Among the activities not subject to an antidegradation review are short-term lowering of water quality, bypasses that are not prohibited at 40 C.F.R. 122.41(m), and a thermal discharge that has been approved under a Clean Water Act Section 316(a) demonstration.

Section 302.105(e) is proposed to clarify that waters in the Lake Michigan Basin are also subject to the requirements applicable to bioaccumulative chemicals of concern (BCCs). These requirements are found at 35 Ill. Adm. Code 302.521.

The Agency proposed a definition of outstanding resource waters in Section 303.205. The Agency also proposed the creation of a new designated use category titled “Outstanding Resource Waters” in Section 303.206.

Designation of ORW’s at 35 Ill. Adm. Code 106.990-106.995

The Agency proposes new procedural rules to the Board for the nomination and classification of Outstanding Resource Waters (ORW). Those rules were proposed at 35 Ill. Adm. Code 106.Subpart L of the Board’s procedural rules.² The Agency proposes that the Board use its regulatory and informational hearing procedures to decide if a water should be considered an ORW. The Agency has proposed specific requirements to be used when requesting an ORW and for the Board to determine that an ORW should be named.

The Agency proposes that any person may submit a petition for adoption, amendment or repeal of an ORW. The Agency proposes that the petition be served on the:

² The Board adopted new procedural rules effective January 1, 2001. The adopted amendments reorganized the Board’s prior rules.

Agency, Illinois Department of Natural Resources (IDNR), the Attorney General, the States Attorney of each county in which the waters or water segment runs, the Chairman of the County Board of each county in which the waters or water segment runs, to each member of the General Assembly from the legislative district in which the waters or water segment runs, to current NPDES permit holders and NPDES permit applicants, applicants for federally permitted activities that require a certification from the Agency pursuant to Section 401 of the Clean Water Act, and to other persons as required by law. Prop. at 106.992.

Further, the Agency's proposal would require the petitioner to publish notice of the petition in a newspaper of general circulation in the county or counties through which the effected water body flows.

The Agency proposal also discussed specific informational requirements for the petition. In particular, the Agency proposes that the petitioner identify the water or water segment, describe the specific surface waters, and include a statement describing the area in which the specific surface water exists. Prop. at 106.994(a)-(c). The Agency also would have the petition contain a statement supporting the designation, describing the impact on economic or social development, existing or anticipated uses of the waters, and describing the existing or anticipated uses warranting the ORW designation. Prop. at 106.994(d)-(g). The Agency proposal would also require a synopsis of all testimony, copies of material to be incorporated by reference, and a petition signed by 200 persons, unless the Agency or the Department is the petitioner or unless waived by the Board. Prop. at 106.994(h)-(k). The Agency proposal also includes the reasons why the Board would dismiss a petition and under what circumstances a designation would be made. Prop. at 106.995.

Economic Reasonableness and Technical Feasibility of the Proposal

The Agency's proposal also addressed the economic reasonableness and technical feasibility of the proposal. The Agency indicated that this "regulatory requirement" within the State's water quality standards is a revision of the existing standard. Prop. at 6. The Agency maintains that the revision updates and clarifies existing policy and is expected to lessen the economic burden on the regulated community by listing activities that are already considered in compliance with the requirements without the need for an individual antidegradation review. *Id.* The Agency also asserts that the standard establishes criteria, which will provide better guidance for determining compliance with the antidegradation standard. *Id.*

PUBLIC COMMENTS

At this time the Board has received 47 public comments in this proceeding. The following is a table of public comments.

<u>PUBLIC COMMENT</u>	<u>DESCRIPTION</u>
1	President, Illinois Paddling Council and State Representative, American Canoe Association, MW Division
2	A group of eight citizens, submitted by A.G. Pilgrim
3	Jodie Randell, Naperville, Illinois

4	The Wetlands Initiative submitted by Albert E. Pyott, President
5	DeAnna Belz, Co-Director, LIVING upstream
6	Rhea Edge, President, John Wesley Powell Audubon Chapter of the National Audubon Society
7	Illinois Public Interest Research Group submitted Diane E. Brown, Executive Director,
8	Russell A. Dietrich-Rybicki, Urbana, Illinois
9	Patricia C. Riggins, Secretary, Madison County Conservation Alliance
10	Rebecca A. Hefter, Oregon, Illinois
11	Sally Paxton, Urbana, Illinois
12	Lake Michigan Federation submitted by Laurel O'Sullivan, Counsel and Toxics Coordinator
13	Gretchen Grant
14	Richard H. Acker, Regional Land Use Coordinator, Openlands Project
15	Karen Crum
16	Dominic C. Camona
17	John W. Massman, Woods & Wetlands Group-Sierra Club
18	Brett M. Schmidt, Naperville, Illinois
19	Illinois Coal Association's Prefiled Testimony submitted by Taylor Pensoneau, President
20	Cynthia L. Skrukrud, President, Friends of the Fox River
21	Public Comments of The Prairie-Woods Environmental Coalition (PWEC), Illinois Schools and the Families Against Rural Messes (F.A.R.M)
22	Richard Worthen
23	Linda Zamberletti, Georgetown, Illinois
24	Fran Lowman, Cherry Valley, Illinois
25	Debi Sieg, Carlock, Illinois
26	Stanna S. Breen, Bloomington, Illinois
27	Steve Ward, Bloomington, Illinois
28	Paar Caywood, Bloomington, Illinois
29	Dennis Hartung, Bloomington, Illinois
30	Phillip M. Caywood, Bloomington, Illinois
31	Phyllis Moore, Bloomington, Illinois
32	Marvin E. Nevmister, Bloomington, Illinois
33	Tom Ellis, Bloomington, Illinois
34	Nancy A. Dietrich-Rybicki, Urbana, Illinois
35	Prairie Rivers Network, Champaign, Illinois
36	William Freiwald, Westchester, Illinois
37	Duane R. Kimme, Champaign, Illinois
38	Prefiled Testimony of Brett J. Marshall submitted by Brett J. Marshall
39	Cynthia L. Quinby, Bettendorf, Iowa
40	Illinois Environmental Protection Agency Answers to Prefiled Questions
41	Chemical Industry Council of Illinois submitted by Christie M. Bianco
42	Prairie Rivers Network submitted by Robert J. Moore
43	Post Hearing Comments of the Environmental Groups submitted by Robert

	Moore and Albert F. Ettinger
44	Post Hearing Comments of the Illinois Environmental Regulatory Group submitted by Katherine D. Hodge
45	American Bottoms Regional Wastewater Treatment Facility submitted by Susan M. Franzetti
46	Closing Comments of the Illinois Environmental Protection Agency submitted by Connie L. Tonsor
47	Citizens Committee to Save Cache River submitted by Phyllis Oliver, President

Several of the comments, such as PCs 40-46, included lengthy discussion of the issues before the Board. Rather than summarize those comments individually, we will include reference to those comments, where appropriate, when discussing specific issues below. Each of the remaining comments, such as PCs 1-39, and PC 47, made at least one of the following points:

1. Antidegradation rules should be “strong” and not allow an increase of pollutants in waterways, nor should the rules include the ability to add new pollutants. If any business or company should petition the Board for relief, these petitions should be handled on a case-by-case basis.
2. Citizens and/or citizens groups should be allowed to petition to have certain waterways deemed an ORW and therefore protected from any harmful pollutants.

There were also other points mentioned in many of the public comments. Two comments indicated that water is one of the most essential resources to our physical well being and that the Board should seek to protect water values by strengthening the protection laws. PC 11 and PC 34. Lastly, a few of the public comments stated that the Clean Water Act does not say the only objective is to maintain, but to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” PC 10; PC 19.

PROCEDURAL BACKGROUND

On January 19, 2001, the Department prefiled testimony with the Board proposing that four water bodies in Illinois be designated as ORWs in the instant rulemaking. On January 29, 2001, the Board received motions filed by IERG and Illinois Steel Group asking the Board to strike the Department’s testimony.³ On February 1, 2001, the Board entered an order denying motions to strike the testimony of the Department. The Board agreed with IERG’s position that one of the purposes of this rulemaking is to develop and establish a procedure by which waters of the State of Illinois can be designated as ORWS. The Board also agreed that the procedural regulations for designating ORWs were not in place, so, therefore, the Board will not designate any specific water bodies as ORWS in this rulemaking. However, because in a rulemaking all

³ Dynegy Midwest Generation filed a comment (PC 38) in response to the prefiled testimony of the Department prior to the Board ruling on the motions to strike. On the issue of designation of ORWs, Dynegy indicated that the Board should adopt formal procedures for the designation of ORWs before an attempt is made to name an ORW. PC 38 at 3.

information that is relevant and not repetitious or privileged may be admitted (see 35 Ill. Adm. Code 102.426), the Board did not strike the Department's testimony.

ISSUES

After three hearings and 47 public comments, the record in this rulemaking clearly reflects that all the participants support some part of the rulemaking. However the participants do not agree on several issues. First, IERG, CICI and American Bottoms proposed that the Agency conduct a significance test prior to an antidegradation review. Second, those same groups support a *de minimis* exception to the antidegradation requirements. Third, the participants do not agree on the procedure the Board should use to determine that a water is an ORW.

Significance Determination

The Agency's proposal for high quality waters requires an antidegradation assessment or review for any proposed increase in pollutant loading that necessitates a new, renewed or modified NPDES permit or any activity that requires a CWA Section 401 certification. The Agency testified that while all potential increases in pollutant loading would be subject to antidegradation review on a case-by-case basis, the level of review would depend upon the relative significance of the pollutant loadings. Tr. 11/17/00 at 73-74, PC. 46 at 10. In this regard, the IERG and a number of other participants believe that the proposed regulations do not allow the Agency to conduct anything other than a comprehensive antidegradation review⁴ for every increase in pollutant loading. PC 44 at 4. IERG has suggested changes to the Agency's proposal that provide for a "significance determination" to determine whether a proposed increase in pollutant loading warrants a comprehensive antidegradation review.

IERG's recommendations are supported by CICI and American Bottoms. PC 41 at 3 and PC 45 at 11. IERG's and Agency's proposals concerning the issue of significance determination is summarized in this section. This summary is followed by the Board's discussion and findings concerning significance determination.

IERG's Proposal

IERG testified that the Board should adopt antidegradation implementation procedures that parallel the tiered approach recommended by the USEPA Region 8's Guidance on Antidegradation Implementation. Tr. 12/6/00 at 80. IERG states that the first step of the antidegradation review should involve the determination of whether an increased loading has a significant impact on the receiving stream quality and uses. If an increased loading is determined to have a significant impact, then the Agency should perform a comprehensive review. In this regard, IERG notes that the states of Wisconsin, Minnesota and Massachusetts have also provided for a significance review option. PC 44 at 7.

⁴ IERG and other participants refer to the Agency's proposed antidegradation review requirements at Section 302.105(c)(2) as "comprehensive" antidegradation review.

IERG has proposed amendments to the Agency's proposal that add a significance determination provision. This provision allows an applicant to request the Agency to determine whether a comprehensive antidegradation review is necessary. The amendments require the Agency, upon a request from an applicant, to determine whether the proposed increase in pollutant loading will have a significant impact on the overall water quality, and existing uses of the receiving stream. If the Agency determines that the increased loading will not have a significant impact, such loading is considered to be in compliance with the Agency's proposed comprehensive antidegradation review provisions at Section 302.105(c)(2). On the other hand, if the loading is determined to have a significant impact, the Agency is required to perform a comprehensive antidegradation review. PC 44 at 4-5.

IERG's proposal requires the Agency to perform a significance determination based on information pertaining to the nature and characteristics of the discharge, and the receiving stream. The proposal at Section 302.105(c)(2)(A)(iii) allows the Agency to make its determination based on the following factors:

- a) The volume, constituents, and concentrations of parameters in the proposed increase in pollutant loading;
- b) The nature of the proposed increase in pollutant loading, including location of the discharge, and timing and physical characteristics of the discharge; and
- c) The nature and condition of the receiving water, including characteristics of the water and of the water body, and any relevant biological, chemical, or physical characteristics of the water which will affect the impact of the proposed increase in pollutant loading upon the waterway.

Or, alternatively the Agency may consider whether the applicable numeric or narrative water quality standard will not be exceeded as a result of the proposed activity and whether all existing uses will be fully protected.

IERG's proposal requires the applicant to provide the necessary information pertaining to the discharge, and allows the Agency to utilize other information sources specified in the proposed regulations. IERG states that in performing the significance review, the Agency would simply be conducting part of the analysis that the Agency would normally perform when conducting a comprehensive antidegradation review under the proposed Section 302.105 (c)(2). PC 44 at 5-6.

In this regard, IERG notes that the significance determination entails the review of the same factors that must be considered by the Agency to evaluate the "fate and effect" of a proposed increase in pollutant loading. Further, IERG's proposed significance determination allows the Agency to ensure that the applicable water quality standard would not be exceeded and all existing uses would be fully protected. IERG states that if a proposed increase in pollutant loading is determined to be not significant, then the Agency is not required to perform the last two requirements of the proposed comprehensive antidegradation review. PC 44 at 6.

These requirements involve the evaluation of the alternatives to the proposed increase, and the consideration of anticipated benefits to the community at large due to the activity that results in the increased loading.

IERG states that the evaluation of alternatives and benefits analyses have the greatest potential to adversely impact the timing relative to issuing an NPDES permit. *Id.* In this regard, IERG notes that many of its industrial members experience a two to three-year lag time in the Agency's ability to act on NPDES renewal permit applications. IERG asserts that the Agency's inability to process current NPDES permit applications would worsen if comprehensive antidegradation reviews are required for all increased loadings. IERG states that the inclusion of the significance determination provides a tiered approach that promotes the Agency's ability to focus its time and resources on loadings that are truly significant. Tr. 2/6/01 at 10 and PC 44 at 6.

In addition, IERG testified that the proposed rules are very generally phrased and do not provide any guidance for determining when to perform a comprehensive antidegradation review. Tr. 2/6/01 at 34-35. IERG maintained that it is very important to clarify the proposed regulations since the very general review criteria would result in subjective and arbitrary decisions. Tr. 2/6/01 at 38.

Agency's Proposal

The Agency's proposal does not provide for a separate significance determination. The Agency's position regarding the implementation of antidegradation standard for high quality waters is that all potential increases in pollutant loading should be subject to the proposed comprehensive review requirements at Section 302.105(c)(2). PC 46 at 10. However, the Agency clarifies that the complexity of the review would be highly dependent upon the nature of the activity, the pollutant and the character of the receiving stream. *Id.*

The Agency states that while all increases in pollutant loading do not require the same level of review, even small amounts of increased loading of certain pollutants should not occur if avoidable at no cost. The Agency explained that a review of a new loading of chloride would differ significantly from a review for an increased loading of dioxin even if the pollutants are being discharged into the same stream at the same time. Tr. 11/17/00 at 76-77. Although the level of review depends on individual discharges, the Agency testified that it will perform the reviews based on fate and effect, technology, and economic considerations. Tr. 11/17/00 at 77.

Regarding IERG's proposal based on the USEPA Region 8 guidance, the Agency stated that the Region 8 significance review is the same as the proposed antidegradation review. Tr. 11/17/00 at 75. The Agency testified that the issues suggested for consideration in the guidance including alternative analysis are the same issues that the Agency considers in its antidegradation review. Tr. 11/17/00 at 74. In this regard, the Agency argues that IERG's proposal deviates from the Region 8 guidance. The Agency notes that under IERG's proposal, if a determination is made that a discharge will not have a significant impact on the receiving stream, the Agency would not have the opportunity to require an applicant to consider alternatives to avoid or minimize the discharge even if no cost alternatives are available. PC 46 at 10. Thus, the Agency

asserts that IERG's proposal goes beyond the significance review proposed in the USEPA Region 8 Guidance. PC 46 at 12.

The Agency has expressed other concerns regarding IERG's proposal. The Agency notes that IERG's proposal requires an evaluation of the impact of the pollutant loading on the water body as a whole as opposed to an evaluation based on the impact of each parameter on the receiving stream. PC 46 at 11. The Agency contends that as long as the overall water quality of the stream is not significantly impacted, IERG's proposal would allow increased loading without an alternatives analysis even if a particular parameter has an impact on the receiving stream.

In addition, the Agency asserts that IERG's proposal to allow for an appeal of any Agency determination of significance is problematic since such a determination would not be the Agency's final permit decision. PC 46 at 12. The Agency states that it is not clear as to whether an appeal of the Agency's significance determination would allow third party participation. Hence, the Agency contends that the significance determination as proposed by IERG may not be federally approvable. *Id.*

The Agency testified that while it is not opposed to the concept of significance determination, it is concerned about adding an additional step just to determine whether a review should be done. Tr. 11/17/00 at 82. Further, the Agency maintained that if that additional step of determining significance is more burdensome than doing the actual antidegradation review, the determination would unnecessarily prolong the review process. Tr. 11/17/0082-83. In this regard, the Agency noted that it would be willing to accept a process that reaches the same significance decision without the burden of going through any additional time consuming analyses.

USEPA Region 8 Guidance on Antidegradation Implementation

As noted above, IERG submitted the USEPA Region 8 guidance entitled "EPA Region VIII Guidance: Antidegradation Implementation" to support its proposal to add a significance determination provision. Exh. 1. The Region 8 guidance provides a framework for developing antidegradation implementation procedures and addresses a number of critical antidegradation issues, including significance determination. The Region 8 guidance provides for a "significant degradation" determination to identify and eliminate from further review those activities that do not present significant threats to water quality. Exh. 1 at 16.

The Region 8 guidance recommends that the significance determination should be made on the basis of all water quality parameters that would be affected by the proposed activity. Exh. 1 at 16. Further, the guidance notes that such determination should be done on a parameter-by-parameter basis. In addition Region 8 states that since significance determination is case specific, it is not appropriate to specify rigid decision criterion. *Id.* Instead, the guidance sets forth a comprehensive set of factors that the permitting authority may consider in making its determination. These factors include the following:

- a) Percent change in ambient concentrations predicted at the appropriate critical conditions.

- b) The difference, if any, between existing ambient quality and ambient quality that would exist if all point sources were discharging at permitted loading rates.
- c) Percent change in loadings, i.e. the new or expanded loadings compared to total existing loadings to the segment or, for existing facilities only, the proposed permitted loadings compared to the existing permitted loadings.
- d) Percent reduction in available assimilative capacity.
- e) Nature, persistence, and potential effects of the parameter of concern.
- f) Potential for cumulative effects.
- g) Predicted impacts to aquatic biota.
- h) Degree of confidence in any modeling techniques utilized.
- i) The difference, if any, between permitted and existing effluent quality.

The guidance states that special consideration should be given to activities that result in increased loading of persistent toxics. *Id.* Further, the guidance recommends that the permitting authority should make the significance determination based on appropriate modeling techniques in conjunction with detailed characterization of the existing background water quality. Exh. 1 at 17.

In addition to the above factors, the guidance suggests different criteria for making the significance determination such as lowering ambient water quality by more than 5% or reducing assimilative capacity by more than 5%. However, the guidance states that the intent of a significance determination should be to eliminate from review of only those activities that will result in truly minor changes in water quality. In this regard, the guidance recommends that the permitting authority be allowed to by-pass the significance determination when available information clearly indicates that reasonable or less degrading alternatives to lowering existing water exist. Exh. 1 at 18.

Board Discussion

IERG's proposal to add a significance determination is intended to provide the regulated community some degree of certainty as to how the Agency implements the antidegradation provisions, and ensure that the Agency's resources are used effectively on "truly" significant loadings. While IERG's intent is reasonable given the broad criteria proposed by the Agency, the proposed significance determination procedure raises a number of concerns.

A major concern regarding IERG's proposal is the limitation placed on the Agency's ability to perform alternatives and/or benefits analyses for discharges determined to have no significant impact on receiving water quality. See IERG's proposal at Section 302.105(c)(2)(A).

IERG's proposal for adding a significance determination precludes the Agency from identifying and implementing alternatives that either eliminate or reduce the pollutant loading for discharges determined not to have a significant impact.

In this regard, the Agency testified that even small amounts of increased loading of certain pollutants should not occur if avoidable at no cost. Tr. 12/6/00 at 126. As noted above, the USEPA Region 8 guidance also recommends that the significance determination provision should allow the permitting agency to perform analyses of alternatives and benefits when available information clearly indicates that reasonable or less degrading alternatives to lowering existing water exist. Exh. 1 at 18.

In addition while IERG's significance determination is based upon the Region 8 guidance, it does not incorporate certain key concepts recommended by the guidance. First, as noted by the Agency, IERG's proposal requires the comparison of the impact of the pollutant loading on the quality of water body as a whole. In this regard, the Region 8 guidance clearly sets forth that significance determination should be made on a parameter-by-parameter basis for all water quality parameters that would be affected by the proposed activity. Exh. 1 at 16. By considering the impact of pollutant loading on overall water quality, IERG's proposal would allow increased loading without further review if the overall quality of the stream is not impacted even if the particular parameter has an impact on the receiving stream.

Finally, as noted by the Agency, IERG's proposal for significance determination does not appear to allow for public participation that is an essential aspect of the antidegradation review. It is not clear as to whether any opportunity for third party participation is available in an appeal of the Agency's significance determination that may not be its final determination on the NPDES permit. In this regard, the Region 8's guidance allows for public participation on the issue of significance determination. The guidance specifically states that when a significance determination is in dispute, the significance factors considered by the permitting agency should be the focal point of opposing views of the applicant or the public. Exh. 1 at 16.

Regarding the Agency's proposal, the Board notes that while the Agency's proposed antidegradation review does not include a significance determination step, any increased loading would be subject to the review. Thus, the proposal assures the Agency's ability to ensure compliance with the proposed antidegradation standard. Although the Agency stated, in response to IERG's concerns, that each increase in pollutant loading would be reviewed on a case specific basis and not all increases in loading would require the same level of review, the Agency's proposal does not require the review to be based upon a "sliding scale" or "tiered" approach. The proposal allows the Agency to decide on a case-specific basis what level of review is necessary.

Conclusion on Significance Determination

While the Board recognizes that all proposed increases in pollutant loadings should not require the same level of review to demonstrate compliance with the proposed antidegradation standard, the Board believes that implementation procedures should allow the Agency to decide on a case-specific basis what level of review is appropriate. Further, the Board strongly believes

that antidegradation implementation procedures should not limit the Agency's ability to ensure compliance with the antidegradation standard's main objective of identifying and implementing alternatives that reduce or eliminate the increased loadings. In this regard, the Board finds that IERG's proposed significance determination procedure precludes the Agency from performing analyses of alternatives and benefits unless the proposed increase is determined to have a significant impact on the receiving stream.

IERG's proposal requires the Agency to go through the "fate and effect" evaluation and stop short of giving any consideration to any alternatives to the proposed activity even if available information indicates that economically reasonable or no cost alternatives are available to reduce or eliminate the proposed increased loadings. While it can be argued that under IERG's proposal the Agency could consider alternatives and benefits of a proposed activity by determining that the activity would have a significant impact, the Agency would be unable to do so until the resolution of any appeals stemming from the Agency's significance determination. Thus, IERG's significance determination proposal may end up consuming more Agency resources than intended. In light of this, the Board declines to adopt the significance determination proposed by IERG.

Instead, the Board adopts for first notice the antidegradation provisions proposed by the Agency at Section 302.105(c)(2). The Board finds that the proposed antidegradation review criteria provides the Agency flexibility to perform on a case-by-case basis the appropriate level of review without placing any undue limitations on its ability to ensure compliance with the proposed antidegradation standard.

De minimis Exception

IERG recommends that the Board include an exception from antidegradation review for *de minimis* discharges that use less than 10% of a receiving water body's assimilative capacity. Tr. 2/6/01 at 11 and PC 44 at 14. Dierdre Hirner, Executive Director of IERG, testified that without a *de minimis* exception the Agency would be bogged down in an endless review of permits that have virtually no environmental impact. Tr. 2/6/01 at 11. Hirner asserted that the establishment of a *de minimis* exception would allow the Agency to more effectively use its limited resources.

Fredric P. Andes, an environmental attorney from Barnes and Thornburg, testified on behalf of IERG regarding the proposed *de minimis* exception. He stated that USEPA has provided guidance to the states that makes it clear that states have a substantial amount of flexibility in how to craft their antidegradation program. Tr. 2/6/01 at 29. In this regard, IERG states that USEPA has endorsed the use of a 10% *de minimis* exception from antidegradation review requirements in its proposed Water Quality Guidance for the Great Lakes System. PC 44 at 14. Further, IERG notes that USEPA has approved the use of a *de minimis* exception for every other state in Region 5. IERG states that USEPA has approved the use of *de minimis* levels of 10% for Indiana, Michigan and Ohio, and 33% for Wisconsin. PC 44 at 15 and Tr. 2/6/01 at 33. IERG also notes that a number of states in other parts of the country including New Hampshire and Texas have also received USEPA's approval for *de minimis* exception to antidegradation review. PC 44 at 15.

Regarding the Agency's proposal, Andes testified that proposed rules are very generally phrased and do not provide any guidance for determining when to perform a comprehensive antidegradation review. Tr. 2/6/01 at 34-35. He maintained that it is very important to clarify the proposed regulations since the very general review criteria would result in subjective and arbitrary decisions. Tr. 2/6/01 at 38.

The Agency states that even though a number of states have incorporated some type of *de minimis* exception in their implementation procedures, it has the same concerns regarding *de minimis* exception as those with the significance determination. PC 46 at 14-15. The Agency asserts that the assimilative capacity of a water body is not constant, and hence, it may take as much effort to determine 10% of the remaining assimilative capacity as completing the antidegradation review. Further, the Agency argues that IERG's proposal to include a *de minimis* exception is unlike the other exceptions proposed at Section 302.105(d). The Agency notes that with the other exceptions it would have had the opportunity to review the proposed increase in pollutant loading and to determine that the intent of Section 302.105 had been met. PC 46 at 15. In contrast, the *de minimis* exception would require the Agency to determine if a review is necessary.

Board Discussion

The Board notes that the *de minimis* exception proposed by IERG is similar to the significance determination in that the exception defines what constitutes lowering of water quality. While significance determinations may be viewed as a narrative standard, the *de minimis* exception defines the lowering of water quality on a quantitative basis. As noted by IERG, a number of other states have adopted different types of quantitative significance tests or combination of quantitative or qualitative tests. Although *de minimis* exception may be helpful in focusing Agency's resources on only those increased loadings that pose a significant threat to water quality, the proposed *de minimis* exception raises a number of concerns.

The Board notes that since the proposed exception does not make any distinctions based on the nature and characteristics of the discharge, IERG's proposal would allow discharge of bioaccumulative and persistent chemicals without an Agency review as long as the increased level is below the *de minimis* level. Discharge of even small amounts of such chemicals may not be advisable in certain water bodies. Further, the Board agrees with the Agency that the actual determination of the assimilative capacity of receiving water body may take as much effort as performing the antidegradation review.

Conclusion on *De Minimis*

Based on the above discussion, the Board declines to adopt the *de minimis* exception proposed by IERG. The Board believes that the Agency should have the opportunity to review any proposed increase in pollutant loading. In this regard, the Board notes that the Agency would have had an opportunity to review the proposed increase in pollutant loading with respect to all the exceptions proposed under Section 302.105(d).

Designation of Outstanding Resource Waters

The participants do not agree on the issue of how an ORW should be designated. The Environmental Groups believe that the process proposed by the Agency is cumbersome and will make it nearly impossible for them to propose waters for designation as an ORW. The Department agrees that the designation process proposed is too cumbersome, particularly in the area of economic information required. On the other hand, business and industry argue for an adjudicatory process to be used to determine if a water should be designated as an ORW. Further, business and industry support the extensive notice requirements suggested by the Agency and ask for even more information.

In the following discussion, the Board will summarize the positions of the Environmental Groups, the Department, business and industry, and the Agency. Finally, the Board will discuss the rationale for the ORW designation rules which appear in this first-notice order.

Environmental Groups

The Environmental Groups testified and presented public comments indicating that they believe the Agency proposed requirements for petitioning for an ORW designation are too onerous. The representatives of the McHenry County Defenders ask that groups be given a reasonable opportunity to petition for ORW designation. Tr. 11/17/00 at Exh. 3, p. 3. McHenry County Defenders assert that organizations such as theirs and even private citizens do not have access to “current and verifiable information” on the impacts of an ORW that are required by the Agency’s proposal. *Id.*

The representative from Prairie Rivers Network also testified that the requested economic information is excessive and petitioners should only be required to provide what they know. Tr. 12/6/00 at Exh. 13, p. 3. Prairie Rivers Network maintains that the State and other participants in the process could fill in any additional information, and that designation of an ORW is not a prohibition of future economic development. *Id.* Prairie Rivers Network believes new development could occur in the form of canoe liveries, fishing equipment stores and other recreational and tourist based business. *Id.*

The Environmental Groups all assert that the proposed notice requirements are too extensive on the one hand. However, the notice requirements do not include the original petitioner for ORW designation in the case of a repeal of an ORW designation. Tr. 11/17/00 at Exh. 6, p. 2-3; Tr. 2/6/01 at Exh. 30, p. 35. They maintain that the extensive list of entities to be notified is wasteful and could have a chilling effect on requests for ORWs. Tr. 11/17/00 at Exh. 4, p. 2; Exh. 6, p. 3. The Environmental Groups argue that there is no need for notification more extensive than the notification requirements of a variance, site-specific rule, or NPDES permit proceeding. Tr. 12/6/00 at Exh. 13, p. 3.

Department of Natural Resources

The Department testified that the Agency proposal requires information on “various benefits and economic impacts” that take “extensive analysis and access to data not readily available to the public” in order for the requirements to have any meaning. Tr. 2/6/01 at Exh. 32, p. 1. The Department further testified that an examination of benefits of an ORW designation

would involve site specific studies and surveys on difficult to calculate concepts such as aesthetic, environmental, recreational, and health benefits. Tr. 2/6/01 at Exh. 32, p. 2. The Department maintained that these types of studies would take extensive resources to complete and there could be strong disagreement on the validity of the analysis. *Id.* The Department stated:

Consequently, this can be a burdensome process for individuals and organizations that want to petition for ORW designation, requiring extensive technical and legal support for each ORW designation petition. Designation of an ORW should be based on water quality, biological criteria and significant recreational resources; adding an economic analysis requirement may make it impossible to designate an ORW. *Id.*

The Department testified that the process outlined in the Agency's proposal is so burdensome that the Department is "not sure . . . we could have the resources even within DNR to actually meet" the requirements to designate an ORW. Tr. 2/6/01 at 181-82.

Chemical Industry Council of Illinois (CICI)

CICI indicated that it is important to recognize the "tremendous social, environmental and economic impacts ORW designation would have on a given water body's existing and future uses." PC 41 at 5. CICI commented that an ORW designation not only affects the water body but it has major implications for property owners adjacent to the water body. *Id.* CICI maintains that it is imperative that the final rule specifies what information must be submitted in support of an ORW designation and to make the petitioner assure that property owners are not compromised. PC 41 at 6.

Illinois Environmental Regulatory Group (IERG)

IERG maintains that designation of a water body as an ORW could have "profound economic impact" and broad ramifications for surrounding property owners. Tr. 12/6/00 at Exh. 17, p. 7. Because of this, IERG believes that ORW designations should only occur after "a very rigorous process" using definitive criteria with input from "all affected parties". *Id.* IERG further commented that designation of an ORW should only be made when the person petitioning for an ORW "is fully prepared to articulate and prove the justification for the designation. The burden of proof must be on the petitioner." *Id.*

IERG believes that designating a stream segment as an ORW "is well beyond protecting biological and recreational values of unique waters; it is land use regulation." Tr. 2/6/01 at Exh. 24, p. 7. IERG therefore proposes amending the Agency's proposal in two significant areas. First, IERG is proposing changes at Section 303.205 to clarify that the process used to petition the Board for an ORW designation is the adjusted standard procedures contained in Section 28.1 of the Act (415 ILCS 5/28.1 (2000)). Tr. 2/6/01 at Exh. 24, p. 8. IERG feels that the adjusted standard process is appropriate for ORW designation because of "the analogy between ORWs and Class III Groundwater, the designation of which takes place through the adjusted standard procedure." *Id.* Second, IERG is also proposing changes to clarify that the burden of proof will be on the person seeking the designation and to clarify what information must be submitted. *Id.*

Bill Compton testified on behalf of Caterpillar and IERG regarding the suggested changes to the Agency's proposal. Compton cited testimony by Toby Frevert of the Agency to bolster the position of IERG. In response to questions by IERG, Frevert suggested that the ramifications of a decision to designate an ORW are more significant than a typical adjusted standard or a statewide rulemaking, as some activities will be prohibited. Tr. 11/17/00 at 88. Frevert also opined that ORW designations and special resource groundwater designations would impose significant restrictions on property owners. Tr. 11/17/00 at 94. Compton testified that Caterpillar and IERG agree with Frevert's testimony and submit that the adjusted standard procedure should be the procedure used for designation of ORWs. Tr. 2/6/01 at Exh. 27, p. 4.

IERG believes that the adjusted standard procedure would provide more clarity on how the proceedings will take place, thereby promoting a "smoother" proceeding. Tr. 2/6/01 at Exh. 27, p. 4-5. IERG maintains that given the impact of an ORW designation on the "rights of owners adjacent" to the ORW, an adjudicatory process such as an adjusted standard "is the only fair way to consider and weigh the rights and positions of all interested parties" when making a decision. Tr. 2/6/01 at Exh. 27, p. 5. Compton testified that "[u]nlike a regulatory process an adjudicatory process provides a formal mechanism by which the Board can consider and weigh the rights and positions of all interested parties while making its decision." *Id.* Compton opined that an adjudicatory process would provide all affected property owners and other interested parties with an opportunity to participate in a "fair and open process." *Id.*

Compton suggested that "the Board has acknowledged that the adjusted standard procedure is appropriate for ORW designation." Tr. 2/6/01 Exh. 27, p. 5. According to Compton, the Board's acknowledgement is implied by similar regulations which allow the adjusted standard procedure to be used to determine if a groundwater is a "special resource groundwater" at 35 Ill. Adm. Code 620. *Id.* Also, IERG notes that the definition of special resource groundwater found at 35 Ill. Adm. Code 620.230 is similar to the definition of ORW proposed by the Agency. *Id.* Because of these similarities and because of the "greater burdens" an ORW designation will place on property owners, IERG proposed revising to the Agency proposal to require that ORWs be designated through adjusted standard procedures. Tr. 2/6/01 at Exh. 27, p. 7.

IERG also suggested amendments to the Agency proposal to "clarify what information" a petitioner for an ORW must include in the petition. Tr. 2/6/01 at Exh. 27, p. 7. IERG believes that the information should include:

a description of the surface water body at issue, including whether any wetlands are connected to the surface water body and whether any endangered or threatened plant or animal life is present; information on the reasons for the proposed designation (e.g., the health, environmental, recreational, aesthetic or economic benefits of the designation); a statement of the impact of the designation on economic and social development; information on the present and anticipated uses of the surface water body; and information on the present and anticipated quality of the surface water body. *Id.*

IERG testified that all of this information is necessary for a complete review of a request and a subsequent determination by the Board. *Id.*

IERG suggested clarifying the proposal with three additional changes. First, IERG suggests that the rule be clarified to indicate that the Board will only declare a water is an ORW “when the benefits of that designation will ‘substantially’ outweigh the benefits of economic or social opportunities that will be lost as a result of the designation.” Tr. 2/6/01 at Exh. 27, p. 8. Second, IERG’s suggested that the petitioner be required to provide proof of service of the petition for designation on specified parties including NPDES permittees who discharge to the surface water at issue and owners of real property located adjacent to the surface water. *Id.* Finally, IERG suggests adding a definition of the term “surface water body” to the rule. Tr. 2/6/01 at Exh. 27, p. 9.

In its public comment, IERG reiterated its position on the ORW process. IERG urges the Board to utilize the adjudicatory process of an adjusted standard for the determination of ORWs. PC 44 at 18. IERG has proposed the use of adjusted standard because the burden of proof for a proponent in an adjusted standard proceeding is well established. *Id.* IERG assert that the issue of burden of proof is crucial for several reasons. First, IERG opines that because of the “severe impact that an ORW designation would have” the burden of proof must be clear. *Id.* Second, IERG argues that a clear burden of proof gives interested parties a clear direction on what they must show to either support or oppose a designation. PC 44 at 19. Third, IERG states that the burden of proof in an adjusted standard gives the Board a framework to utilize when considering a petition to designate an ORW. *Id.* Fourth, and finally, IERG believes the use of an adjusted standard proceeding “makes it much easier for a reviewing court to evaluate the Board’s decision.” PC 44 at 20.

Finally, IERG reiterated the similarities between the ORW designation and special resource groundwater. IERG points out that both are unique bodies of water and the designation of either category would place “burdens on the owners of real property at which the waters are located.” PC 44 at 21. For these reasons, IERG, though “not wedded” to the use of the adjusted standard proceeding, believes that the process for determining if a water body is an ORW should be an adjudicatory process.

Illinois Environmental Protection Agency (Agency)

The Agency’s final comment indicates that the Agency “believes” that the process to designate an ORW “should be an open one in which interested groups could petition” the Board for designation of an ORW. PC 46 at 16. The Agency compared the special resource groundwater designation process to the ORW process and believes that ORW designation has “greater impacts than” special resource groundwater designations and the ORW designation “would impose prohibitions upon many types of activities.” *Id.* The Agency indicates that the special resource groundwater designation “simply allows for the setting of a more protective standard.” PC 46 at 17.

Board Discussion

The Board has carefully reviewed the testimony and comments presented on the issue of what process the Board should use in making the ORW designation. For the reasons discussed below, the Board is convinced that the proper avenue for ORW designation is rulemaking under Title VII of the Act (415 ILCS 5/Title VII (2000)) and 35 Ill. Adm. Code 102 of the Board’s

procedural rules. Many of the concepts advocated by the commentators will be included in the ORW designation rulemaking process. Additionally, by virtue of the rulemaking process, many informational and service requirements sought by the Agency and IERG will be unnecessary. Therefore the Board will propose amendments to the Board's procedural rules found at 35 Ill. Adm. Code 102, to set forth the process for designation of an ORW.

The rulemaking process is the best method for designating ORWs in Illinois for several reasons. First, the many requirements of Title VII of the Act and the Administrative Procedure Act (5 ILCS 100/1-1 *et seq.* (2000)) will provide the Board with the tools to develop the most comprehensive and complete record for ORW designation decisions possible. Second, the open nature of a rulemaking process in Illinois will allow for more ample opportunities for all individuals to testify or comment in support or opposition to an ORW designation proposal. Finally, the ability to appeal a Board rule is more broad than the opportunity to appeal a Board decision in an adjusted standard proceeding.

Many of the requirements of Title VII of the Act and the Administrative Procedure Act (5 ILCS 100/1-1 *et. seq.*) will assist the Board in developing a complete record for its decision. For example, a proposed rulemaking must be published in the *Illinois Register* for a minimum 45-day public comment period. Then a proposed rule must be submitted to the legislative Joint Committee on Administrative Rules (JCAR) for review. If JCAR does not object to the rule, the rule may be proposed for final adoption and publication in the *Illinois Register*. The adopted rule is then a part of the Illinois Administrative Code. This process will allow for statewide publication and notice of a proposal as well as an opportunity for substantial comment prior to the final designation of an ORW. Then once an ORW has been designated, the designation is published as a part of the Illinois Administrative Code allowing anyone interested to readily identify such designated waters.

Furthermore, Section 27 of the Act states, in part:

In promulgating regulations under this Act, the Board shall take into account the existing physical conditions, the character of the area involved, including the character of surrounding land uses, zoning classifications, the nature of the existing air quality, or receiving body of water, as the case may be, and the technical feasibility and economic reasonableness of measuring or reducing the particular type of pollution. 415 ILCS 5/27(a) (2000).

This provision would require the Board to examine land use, including zoning, the body of water, existing physical conditions of the body of water, technical feasibility, and economics as a part of any rulemaking requesting an ORW designation. Thus, the Board would be required by statute to examine many of the areas that the comments requested the Board review in an adjudicatory process.

The Board does not agree with IERG's position that a "burden of proof" must be established in the ORW designation process. The Board's rulemaking proceedings allow for testimony, cross-questioning of testifiers, and comments from any person or group as long as the testimony is relevant and not repetitious. 35 Ill. Adm. Code 102.426 and 102.430. The proponent of a rule must present testimony in support of that rule. 35 Ill. Adm. Code 102.428.

Thus, the rulemaking process will allow for development of the most complete record possible, allowing ample opportunities for those in support or opposition to present opinions to the Board on the designation of an ORW. The Board can then weigh all the information and evidence in the record and determine if the designation of an ORW is warranted. Furthermore, this same rulemaking process will be available to repeal an ORW designation should circumstances change concerning that body of water.

Finally, the Board believes that a rulemaking is the more appropriate forum for determining if a body of water should be designated an ORW because of the greater ability to appeal a Board rule. Section 29(a) of the Act provides:

Any person adversely affected by any rule or regulation of the Board may obtain a determination of the validity or application of such a rule or regulation by petition for review under Section 41 of the Act. 415 ILCS 5/29(a) (2000).

The Board believes that an adjusted standard proceeding or other types of adjudicatory proceeding would have several problems that are not associated with a rulemaking. First, Section 28.1 of the Act provides:

After adopting a regulation of general applicability, the Board may grant, in a subsequent adjudicatory determination, an adjusted standard for person who can justify such an adjustment 415 ILCS 5/28.1(a).

Thus, Section 28.1 of the Act allows for an adjustment from a rule of general applicability. There is no general designation rule for water or water segments in the State of Illinois, but instead water or water segments are subject to the water quality standards. Therefore, requesting that a water or water segment be designated an ORW is not an adjustment from a rule of general applicability and such a proceeding would be inappropriate.⁵

The other types of adjudicatory proceedings are variances and permit appeals. A variance is of limited duration and is also a variance from a rule of general applicability. See 415 ILCS 5/35-38. A permit appeal would be an appeal from a decision of the Agency. See 415 ILCS 5/40. Clearly, either of these suggestions would be problematic.

The Board also notes that the appeal of an adjusted standard is provided for in Section 28.1(g), which merely provides that “[a] final Board determination under this Section may be appealed pursuant to Section 41 of the Act.” 415 ILCS 5/28.1(g). Clearly the language of the Act provides more extensive rights to appeal a rulemaking decision of the Board than an adjusted standard determination by the Board.

⁵ Special use groundwater designations are an adjustment from a rule of general applicability at 35 Ill. Adm. Code 620.201 that classifies all groundwater of the State of Illinois. And in fact, the opinion which accompanied the adoption of special resource groundwater classification rule (35 Ill. Adm. Code 620.260) states in part: “Section 620.260 specifies that reclassification of any groundwater can occur as a result of an adjusted standard proceeding.” R89-14(B) slip. op. 15.

Proposed Rule on ORW designation

Having determined that the Board will propose the rulemaking process be used for the designation of ORWs, the Board will explain the specifics of the proposal on ORW designation. First will be a discussion of the requirements for notice of an ORW designation petition. This will be followed by an explanation of the informational requirements. Finally, the Board will specify the procedures the Board will follow when receiving an ORW designation petition. The Board notes that the caption in this proceeding will be amended to reflect that the Board is proposing amendments to 35 Ill. Adm. Code 102.800-102.830.

As indicated above, the Agency's proposal requires service of a petition for ORW designation on a host of individuals, groups and even legislators. In addition to those the Agency has listed, IERG's proposal would serve the petition for ORW designation on "all owners of real property" located "adjacent or contiguous" to the water or water segment at issue. Tr. 2/6/01 Exh. 24 at Appendix B, p. 3. The Board does not believe such extensive service of the petition is necessary for several reasons. First, as discussed above, publication of the proposal in the *Illinois Register*, which contains all proposed and adopted Illinois rules, will notify the public of the proposal. Second, the Board lists all new proceedings in the Board's *Environmental Register* that has statewide distribution and is also found on the Board's website. Third, the Board's website has already included the complete text of proposals for rulemaking among the information that is readily available to the general public. Therefore, public notice will be in the *Illinois Register* and the *Environmental Register* and the proposal can be made available on the Board's web page. Once a proposal has been accepted, the Board will hold at least two public hearings on the proposal and those hearings will also be publicly noticed as required by the Act (415 ILCS 5/28 (2000)). The Board generally holds at least one public hearing in the area of the State to be affected by the rulemaking and publishes notice in local newspapers of the hearings. Thus, property owners and other affected individuals will have an opportunity to be aware of the ORW proposal and meaningfully participate in a local hearing.

For all these reasons, the Board believes that an extensive service requirement proposed by IERG and the Agency is not appropriate. The Board's proposed rules will require service on the Agency, the Department and the Attorney General, as it does in all rulemakings. Further, the Board will not proceed with the Agency's proposal requiring notice of the proposal be published in a newspaper of general applicability. The Board's general rulemaking provisions (35 Ill. Adm. Code 102.202) do not include a requirement for publication by the proponent and the Board sees no need to add one here. The APA requires that all state rule proposals be published in the *Illinois Register*, and various interest groups already regularly scan that publication for notices that may impact their constituents.

As to the information which must be included in the petition for an ORW designation, the Board will propose for first notice the information requirements offered by the Agency's proposal with some slight changes. The Board understands the concerns of the Department and the Environmental Groups. However a careful review of the Board's rulemaking requirements at 35 Ill. Adm. Code 102.202 and 208 demonstrates that the informational requirements offered by the Agency are not dissimilar to those required in a regular or site-specific rulemaking. The Board will amend the language proposed by the Agency to insure consistency between the proposed rule and the existing Board regulations.

Inclusion of Agency Rules in Board Proposal

IERG noted in its final comment that it believes it is necessary to incorporate certain of the Agency's proposed procedures at Part 354 in the Board's rulemaking. PC 44 at 9. IERG stated that it believes that the manner in which the Agency requests information from an applicant, revises that information and makes the results of its assessment known to the public is inextricably linked to achieving the antidegradation standard. PC 44 at 10.

Discussion

The Part 354 amendments received many comments during this rulemaking, even though not technically a part of the rulemaking. See Tr. 11/17/00 at Exh. 5; Tr. 11/17/00 at 33-35, 59-63, 132-36; and Tr. 12/6/00 at Exh. 13. Thus, the Agency's procedures for implementing the antidegradation policy adopted by the Board appear to be linked to the actual policy. For this reason, the Board will go forward with the change suggested by IERG in this first-notice proposal. The Board will place in 35 Ill. Adm. Code 302(f), the Agency's procedures for implementing the antidegradation policy. The Board invites comment from all the participants on this proposal.

Streams With Zero 7Q10 Flow

At the Board's first hearing in this matter Edward L. Michael, testifying on behalf of the Illinois Council of Trout Unlimited, indicated a concern that streams with a zero 7Q10 flow were being excluded from consideration as an ORW in the Agency's proposal. Tr. 11/17/00 at Exh. 4, p. 2. Michael testified that some water bodies are by nature intermittent and have a specially adapted flora and fauna. *Id.* In other instances intermittent flow is only one component of a stream or the flow may disappear during low flow periods below the surface into underground channels and reappear miles away. *Id.* Michael maintains that all of these instances of zero 7Q10 flow streams should be eligible for consideration as an ORW.

Dave Thomas, testifying on behalf of the Department, also believes that streams with zero 7Q10 flow should be eligible for consideration. Thomas indicated that some of these streams might be "biologically productive ones." Tr. 2/6/01 at 179-180. In fact three of the four streams the Department would consider for immediate ORW designation are zero 7Q10 flow streams. Tr. 2/6/01 at 180.

Discussion

The language of the Agency's proposal states that: "Stream segments that have a 7Q10 low flow of zero will generally not be considered a candidate for this designation." Based on the testimony, the Board finds that a stream or stream segment with a zero 7Q10 flow may be eligible for ORW designation. The biology of a stream will speak for itself during an ORW designation process.

Other Suggested Changes

In addition to the specific changes discussed throughout this opinion, the Board also made several changes suggested by the Agency in PC 46. Many of those changes clarified the

language as originally proposed. The Agency also suggested accepting certain suggestions made by the Environmental Groups and IERG. The Board also made changes to the proposal to insure consistency administrative code rules and for clarity.

CONCLUSION

The Board today proposes for first notice amendments to the Board's antidegradation water rules and the Board will propose a procedure for designating waters of the State of Illinois as Outstanding Resource Waters. The Board is proposing the antidegradation rules without an exception for *de minimis* changes in discharges to waters of the State. Further, the Board has determined at this time that it will not proceed with a significance determination included in the rule. Finally, with regard to the designation of ORWs, the Board will propose a rulemaking process for ORW designation in Illinois. The Board will schedule additional hearings by hearing officer order at a later date.

ORDER

The Board directs the Clerk to cause the publication of the following rule for first notice in the *Illinois Register*.

SUBPART H: OUTSTANDING RESOURCE WATER DESIGNATION

Section 102.800 Applicability

This Subpart applies to any person seeking an Outstanding Resource Water (ORW) designation for a surface water or any water segment as provided by 35 Ill. Adm. Code 303.205.

Section 102.810 Petition

Any person may submit a petition for the adoption, amendment or repeal of an ORW designation. The original and nine (9) copies of each petition must be filed with the Clerk and one (1) copy each served upon the Agency, Illinois Department of Natural Resources, and the Attorney General.

Section 102.820 Petition Contents

Each proponent must set forth the following information in its proposal:

- a) The language of the proposed rule, amendment, or repealer identifying the waters or water segment being proposed for designation as a ORW. Language being added must be indicated by underscoring, and language being deleted must be indicated by strike-outs. The proposed rule must be drafted in accordance with 1 Ill. Adm. Code 100.Subpart C;
- b) A statement describing the specific surface water or water segment for which the ORW designation is requested and the present designation of the surface water or water segment;

- c) A statement describing the area in which the specific surface water or segment exists including:
 - 1) The existence of wetlands or natural areas;
 - 2) The living organisms in that area including endangered or threatened species of plants, aquatic life or wildlife listed pursuant to the Endangered Species Act, 16 USC 1531 et seq. or the Illinois Endangered Species Protection Act, 41 ILCS 10.
- d) A statement supporting the designation including the health, environmental, recreational, aesthetic or economic benefits of the designation;
- e) A statement identifying the ORW designation's anticipated impact on economic and social development. This statement should include:
 - 1) Impacts on the regional economy;
 - 2) Impacts on regional employment;
 - 3) Impacts on the community;
 - 4) A comparison of the health and environmental impacts to the economic impact of an ORW designation.
- f) A statement describing the existing and anticipated uses of the specific surface water or water segment for which the ORW designation is requested;
- g) A statement describing the existing quality of the specific surface water or water segment warranting the ORW designation;
- h) A synopsis of all testimony to be presented by the proponent at hearing;
- i) Copies of any material to be incorporated by reference within the proposed designation pursuant to Section 5-75 of the Administrative Procedures Act;
- j) Proof of service upon all persons required to be served pursuant to Section 102.810 of this Part;
- k) Unless the proponent is the Agency, Illinois Department of Natural Resources or receives a waiver by the Board, a petition signed by at least 200 persons, pursuant to Section 28 of the Act and Section 102.160(a); and
- l) Where any information required by this Section is inapplicable or unavailable, a complete justification for such inapplicability or unavailability.

Section 102.830 Board Action

a) Dismissal

- 1) Failure of the proponent to satisfy the content requirements for proposals under this Subpart or failure to respond to Board requests for additional information will render a proposal subject to dismissal for inadequacy.
- 2) Failure of the proponent to pursue disposition of the petition in a timely manner will render a petition subject to dismissal. In making this determination, the Board may consider factors including the history of the proceeding and the proponent’s compliance with any Board or hearing officer orders.
- 3) Any person may file a motion challenging the sufficiency of the petition pursuant to 35 Ill. Adm. Code 101.Subpart E.

b) Designation of ORW. The Board must designate a water body or water body segment as an ORW and list it in 35 Ill. Adm. Code 303.206 if it finds:

- 1) The water body or water body segment is of uniquely high biological or recreational quality; and
- 2) The benefits of protection of the water from future degradation outweigh the benefits of economic or social opportunities that will be lost if the water is designated as an ORW.

(Added at _____ Ill. Reg. _____, effective _____.)

TITLE 35: ENVIRONMENTAL PROTECTION
 SUBTITLE C: WATER POLLUTION
 CHAPTER I: POLLUTION CONTROL BOARD
 PART 302
 WATER QUALITY STANDARDS
 SUBPART A: GENERAL WATER QUALITY PROVISIONS

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302.505	Fecal Coliform
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302.507	Thermal Standards for Existing Sources on January 1, 1971
302.508	Thermal Standards for Sources under Construction But Not in Operation on January 1, 1971
302.509	Other Sources
302.510	Incorporations by Reference
302.515	Offensive Conditions
302.520	Regulation and Designation of Bioaccumulative Chemicals of Concern (BCCs)
302.521	Supplemental Antidegradation Provisions for BCCs
302.525	Radioactivity
302.530	Supplemental Mixing Provisions for BCCs
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302.545	Data Requirements
302.550	Analytical Testing
302.553	Determining the Lake Michigan Aquatic Toxicity Criteria or Values - General Procedures
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302.580	Procedures for Deriving Water Quality Criteria and Values in the Lake Michigan Basin to Protect Human Health – General
302.585	Procedures for Determining the Lake Michigan Basin Human Health Threshold Criterion (LMHHTC) and the Lake Michigan Basin Human Health Threshold Value (LMHHTV)
302.590	Procedures for Determining the Lake Michigan Basin Human Health Nonthreshold Criterion (LMHHNC) or the Lake Michigan Basin Human Health Nonthreshold Value (LMHHNV)
302.595	Listing of Bioaccumulative Chemicals of Concern, Derived Criteria and Values

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302.601	Scope and Applicability
302.603	Definitions
302.604	Mathematical Abbreviations
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302.612	Determining the Acute Aquatic Toxicity Criterion for an Individual Substance – General Procedures
302.615	Determining the Acute Aquatic Toxicity Criterion - Toxicity Independent of Water Chemistry
302.618	Determining the Acute Aquatic Toxicity Criterion - Toxicity Dependent on Water Chemistry
302.621	Determining the Acute Aquatic Toxicity Criterion - Procedures for Combinations of Substances
302.627	Determining the Chronic Aquatic Toxicity Criterion for an Individual Substance - General Procedures
302.630	Determining the Chronic Aquatic Toxicity Criterion - Procedure for Combination of Substances
302.633	The Wild and Domestic Animal Protection Criterion
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302.645	Determining the Acceptable Daily Intake
302.648	Determining the Human Threshold Criterion
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302.654	Determining the Risk Associated Intake
302.657	Determining the Human Nonthreshold Criterion
302.658	Stream Flow for Application of Human Nonthreshold Criterion
302.660	Bioconcentration Factor
302.663	Determination of Bioconcentration Factor
302.666	Utilizing the Bioconcentration Factor
302.669	Listing of Derived Criteria
APPENDIX A	References to Previous Rules
APPENDIX B	Sources of Codified Sections

AUTHORITY: Implementing Section 13 and authorized by Sections 11(b) and 27 of the Environmental Protection Act [415 ILCS 5/13 11(b), and 27]

SOURCE: Filed with the Secretary of State January 1, 1978; amended at 2 Ill. Reg. 44, p. 151, effective November 2, 1978; amended at 3 Ill. Reg. 20, p. 95, effective May 17, 1979; amended at 3 Ill. Reg. 25, p. 190, effective June 21, 1979; codified at 6 Ill. Reg. 7818; amended at 6 Ill. Reg. 11161, effective September 7, 1982; amended at 6 Ill. Reg. 13750, effective October 26, 1982; amended at 8 Ill. Reg. 1629, effective January 18, 1984; peremptory amendments at 10 Ill. Reg. 461, effective December 23, 1985; amended at R87-27 at 12 Ill. Reg. 9911, effective May 27, 1988; amended at R85-29 at 12 Ill. Reg. 12082, effective July 11, 1988; amended in R88-1 at 13 Ill. Reg. 5998, effective April 18, 1989; amended in R88-21(A) at 14 Ill. Reg. 2899, effective

February 13, 1990; amended in R88-21(B) at 14 Ill. Reg. 11974, effective July 9, 1990; amended in R94-1(A) at 20 Ill. Reg. 7682, effective May 24, 1996; amended in R94-1(B) at 21 Ill. Reg. 370, effective December 23, 1996; expedited correction at 21 Ill. Reg. 6273, effective December 23, 1996; amended in R97-25 at 21 Ill. Reg. 1356, effective December 24, 1997; amended in R01-13 at _____ Ill. Reg. _____, effective _____.

Section 302.105 Antidegradation

The purpose of this Section is to protect existing uses of all waters of the State of Illinois, maintain the quality of waters with quality that is better than water quality standards, and prevent unnecessary deterioration of waters of the State.

a) Existing Uses

Uses actually attained in the water body or water body segment on or after November 28, 1975, whether or not they are included in the water quality standards, must be maintained and protected. Examples of degradation of existing uses of the waters of the State include:

- 1) an action that would result in the deterioration of the existing aquatic community, such as a shift from a community of predominantly pollutant-sensitive species to pollutant-tolerant species or a loss of species diversity;
- 2) an action that would result in a loss of a resident or indigenous species whose presence is necessary to sustain commercial or recreational activities; or
- 3) an action that would preclude continued use of a water body or water body segment for a public water supply or for recreational or commercial fishing, swimming, paddling or boating.

b) Outstanding Resource Waters

- 1) Waters that are designated as Outstanding Resource Waters (ORWs) pursuant to 35 Ill. Adm. Code 303.205 and listed in 35 Ill. Adm. Code 303.206 must not be lowered in quality except as provided below:
 - A) Activities that result in short-term, temporary (i.e., weeks or months) lowering of water quality in an ORW; or
 - B) Existing site stormwater discharges that comply with applicable federal and state stormwater management regulations and do not result in a violation of any water quality standards.
- 2) Any activity in subsections (b)(1)(A) or (b)(1)(B) that requires a National Pollutant Discharge Elimination System (NPDES) or a Clean Water Act (CWA) Section 401 certification must also comply with (c)(2).

- 3) Any activity listed in subsection (b)(1) or proposed increase in pollutant loading must also meet the following requirements:
 - A) All existing uses of the water will be fully protected;
 - B) The proposed increase in pollutant loading is necessary for an activity that will improve water quality in the ORW; and
 - C) The improvement could not be practicably achieved without the proposed increase in pollutant loading.
- 4) Any proposed increase in pollutant loading requiring an NPDES permit or a CWA 401 certification for an ORW must be assessed pursuant to subsection (f) to determine compliance with this Section.

c) High Quality Waters

- 1) Except as otherwise provided in subsection (d) of this Section, waters of the State whose existing quality is better than any of the established standards of this Part must be maintained in their present high quality, unless the lowering of water quality is necessary to accommodate important economic or social development.
- 2) The Agency must assess any proposed increase in pollutant loading that necessitates a new, renewed or modified NPDES permit or any activity requiring a CWA Section 401 certification to determine compliance with this Section 302.105. In making this assessment, the Agency must:
 - A) Consider the fate and effect of any parameters proposed for an increased pollutant loading; and
 - B) Assure the following:
 - i) The applicable numeric or narrative water quality standard will not be exceeded as a result of the proposed activity;
 - ii) All existing uses will be fully protected;
 - iii) All technically and economically reasonable measures to avoid or minimize the extent of the proposed increase in pollutant loading have been incorporated into the proposed activity; and
 - iv) The activity that results in an increased pollutant loading will benefit the community at large.

C) Utilize the following information sources, when available:

- i) Information, data or reports available to the Agency from its own sources;
- ii) Information, data or reports supplied by the applicant;
- iii) Agency experience with factually similar permitting scenarios; or
- iv) Any other valid information available to the Agency.

d) Activities Not Subject to a Further Antidegradation Assessment

The following activities will not be subject to a further antidegradation assessment pursuant to subsection (c) of this Section.

- 1) Short-term, temporary (i.e., weeks or months) lowering of water quality;
- 2) Bypasses that are not prohibited at 40 C.F.R. 122.41(m);
- 3) Response actions pursuant to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), as amended, corrective actions pursuant to the Resource Conservation and Recovery Act (RCRA), as amended or similar federal or State authority, taken to alleviate a release into the environment of hazardous substances, pollutants or contaminants which may pose a danger to public health or welfare;
- 4) Thermal discharges that have been approved through a CWA Section 316(a) demonstration;
- 5) New or increased discharges of a non-contact cooling water, without additives, returned to the same body of water from which it was taken as defined by 35 Ill. Adm. Code 352.104, provided that the discharge complies with applicable Illinois thermal standards;
- 6) Discharges permitted under a current general NPDES permit as provided by 415 ILCS 5/39(b) or a general CWA, Section 401 certification are not subject to facility-specific antidegradation review; however, the Agency must assure that individual permits or certification are required prior to all new pollutant loadings or hydrological modifications that necessitate a new, renewed or modified NPDES permit or CWA, Section 401 certification that affect waters of particular biological significance; or

- 7) Changes to or inclusion of a new permit limitation that does not result in an actual increase of a pollutant loading, such as those stemming from improved monitoring data, new analytical testing methods, new or revised technology or water quality based effluent limits.

e) Lake Michigan Basin

Waters in the Lake Michigan basin as identified in 35 Ill. Adm. Code 303.443 are also subject to the requirements applicable to bioaccumulative chemicals of concern found at Section 302.521 of this Part.

f) Antidegradation Assessments

In conducting an antidegradation assessment pursuant to this Section, the Agency must comply with the following procedures.

- 1) A permit application for any proposed increase in pollutant loading that necessitates a new, renewed, or modified NPDES permit, with a new or increased permit limit, or a CWA Section 401 certification, must include, to the extent necessary for the Agency to determine that the permit application meets the requirements of Section 302.105, the following information:
- A) Identification and characterization of the waters affected by the proposed load increase or proposed activity and their existing uses. Characterization must address physical, biological and chemical conditions of the waters;
 - B) Identification and quantification of the proposed load increases for the applicable parameters and of the potential impacts of the proposed activity on the affected waters;
 - C) The purpose and anticipated benefits of the proposed activity. Such benefits may include:
 - i) Providing a centralized wastewater collection and treatment system for a previously unsewered community;
 - ii) Expansion to provide service for anticipated residential or industrial growth consistent with a community's long range urban planning;
 - iii) Addition of a new product line or production increase or modification at an industrial facility; or,

- iv) An increase or the retention of current employment levels at a facility.
- D) Assessments of alternatives to proposed increases in pollutant loading or activities subject to Agency certification pursuant to Section 401 of the CWA that result in less of a load increase, no load increase or minimal environmental degradation. Such alternatives may include:
- i) Additional treatment levels including no discharge alternatives;
 - ii) Discharge of waste to alternate locations including publicly-owned treatment works and streams with greater assimilative capacity; or
 - iii) Manufacturing practices that incorporate pollution prevention techniques.
- E) Any additional information the Agency may request.
- F) Any of the information sources identified in subsection 302.105(d)(3).
- 2) The Agency must complete an antidegradation demonstration review in accordance with the provisions of this Section.
- A) The antidegradation assessment pursuant to this Section is a part of the NPDES permitting process or the CWA Section 401 certification process. However, applicants may initiate communication with the Agency, preferably during the planning stage for any load increase. Communication will help assure the adequacy of information necessary to constitute an antidegradation demonstration and avoid or minimize delays and requests for supplemental information during the permitting stage. The Agency review process must be initiated by:
- i) an informal or preliminary request of a proponent of a project prior to filing of a permit application; or
 - ii) receipt of application for an NPDES permit issuance, renewal or modification, or a CWA Section 401 certification.
- B) A proponent seeking an immediate review of the results of the Agency's review pursuant to subsection (f)(2)(A)(ii) must do so

within the NPDES permit process or the CWA Section 401 certification process.

C) After a review pursuant to subsection (f)(2)(A)(i), the Agency must consult with the proponent and respond:

i) in writing to written requests. The written response will include a statement by the Agency indicating whether the demonstration, based upon the information provided or information acquired by the Agency during the review process, meets the criteria of this Section;

ii) verbally to verbal requests; or

iii) in a manner otherwise agreed upon.

D) After its review, the Agency must produce a written analysis addressing the requirements of this Section and provide a decision yielding one of the following results:

i) If the demonstration meets the requirements of this Section, then the Agency must proceed with public notice of the NPDES permit or CWA Section 401 certification and include the written analysis as a part of the fact sheet accompanying the public notice;

ii) If the demonstration does not meet the requirements of this Section, then the Agency must provide a written analysis to the applicant and must be available to discuss the deficiencies that led to the disapproval. The Agency may suggest methods to remedy the conflicts with the requirements of this Section;

iii) If the demonstration does not meet the requirements of this Section, but some lowering of water quality is allowable, then the Agency will contact the applicant with the results of the review. If the reduced loading increase is acceptable to the applicant, upon the receipt of an amended demonstration, the Agency will proceed to public notice; or if the reduced loading increase is not acceptable to the applicant, the Agency will transmit its written review to the applicant in the context of a NPDES permit denial or a CWA Section 401 certification denial.

3) The Agency will conduct public notice and public participation through the public notice procedures found in 35 Ill. Adm. Code 309.109 or CWA Section 401 certifications. The Agency must incorporate the following

information into a fact sheet accompanying the public notice:

- A) A description of the activity, including identification of water quality parameters which will experience the increased pollutant loading;
- B) Identification of the affected water segment, any downstream water segment also expected to experience a lowering of water quality, characterization of the designated and current uses of the affected segments and identification of which uses are most sensitive to the proposed load increase;
- C) A summary of any review comments and recommendations provided by Illinois Department of Natural Resources, local or regional planning commissions, zoning boards and any other entities the Agency consults regarding the proposal;
- D) An overview of alternatives considered by the applicant and identification of any provisions or alternatives imposed to lessen the load increase associated with the proposed activity; and
- E) The name and telephone number of a contact person at the Agency who can provide additional information.

(Amended at _____ Ill. Reg. _____, effective _____.)

Section 302.105 Nondegradation

~~Except as otherwise provided in Section 302.520, waters whose existing quality is better than the established standards at their date of their adoption will be maintained in their present high quality. Such waters will not be lowered in quality unless and until it is affirmatively demonstrated that such change will not interfere with or become injurious to any appropriate beneficial uses made of, or presently possible in, such waters and that such change is justifiable as a result of necessary economic or social development.~~

TITLE 35: ENVIRONMENTAL PROTECTION
 SUBTITLE C: WATER POLLUTION
 CHAPTER I: POLLUTION CONTROL BOARD

PART 303
 WATER USE DESIGNATIONS AND SITE SPECIFIC WATER QUALITY
 STANDARDS

SUBPART A: GENERAL PROVISIONS

Section	
303.100	Scope and Applicability
303.101	Multiple Designations
303.102	Rulemaking Required

SUBPART B: NONSPECIFIC WATER USE DESIGNATIONS

Section	
303.200	Scope and Applicability
303.201	General Use Waters
303.202	Public and Food Processing Water Supplies
303.203	Underground Waters
303.204	Secondary Contact and Indigenous Aquatic Life Waters
303.205	<u>Outstanding Resource Waters</u>
303.206	<u>List of Outstanding Resource Waters</u>

SUBPART C: SPECIFIC USE DESIGNATIONS AND SITE SPECIFIC WATER QUALITY STANDARDS

Section	
303.300	Scope and Applicability
303.301	Organization
303.311	Ohio River Temperature
303.312	Waters Receiving Fluorspar Mine Drainage
303.321	Wabash River Temperature
303.322	Unnamed Tributary of the Vermilion River
303.323	Sugar Creek and Its Unnamed Tributary
303.331	Mississippi River North Temperature
303.341	Mississippi River North Central Temperature
303.351	Mississippi River South Central Temperature
303.352	Unnamed Tributary of Wood River Creek
303.353	Schoenberger Creek; Unnamed Tributary of Cahokia Canal
303.361	Mississippi River South Temperature
303.400	Bankline Disposal Along the Illinois Waterway/River
303.430	Unnamed Tributary to Dutch Creek
303.431	Long Point Slough and Its Unnamed Tributary
303.441	Secondary Contact Waters
303.442	Waters Not Designated for Public Water Supply
303.443	Lake Michigan Basin
303.444	Salt Creek, Higgins Creek, West Branch of the DuPage River, Des Plaines River

SUBPART D: THERMAL DISCHARGES

Section	
303.500	Scope and Applicability
303.502	Lake Sangchris Thermal Discharges

APPENDIX A	References to Previous Rules
APPENDIX B	Sources of Codified Sections

AUTHORITY: Implementing Section 13 and authorized by Sections 11(b) and 27 of the Environmental Protection Act [415 ILCS 5/13, 11(b), and 27].

SOURCE: Filed with the Secretary of State January 1, 1978; amended at 2 Ill. Reg. 27, p. 221, effective July 5, 1978; amended at 3 Ill. Reg. 20, p. 95, effective May 17, 1979; amended at 5 Ill. Reg. 11592, effective October 19, 1981; codified at 6 Ill. Reg. 7818; amended at 6 Ill. Reg. 11161 effective September 7, 1982; amended at 7 Ill. Reg. 8111, effective June 23, 1983; amended in R87-27 at 12 Ill. Reg. 9917, effective May 27, 1988; amended in R87-2 at 13 Ill. Reg. 15649, effective September 22, 1989; amended in R87-36 at 14 Ill. Reg. 9460, effective May 31, 1990; amended in R86-14 at 14 Ill. Reg. 20724, effective December 18, 1990; amended in R89-14(C) at 16 Ill. Reg. 14684, effective September 10, 1992; amended in R92-17 at 18 Ill. Reg. 2981, effective February 14, 1994; amended in R91-23 at 18 Ill. Reg. 13457, effective August 19, 1994; amended in R93-13 at 19 Ill. Reg. 1310, effective January 30, 1995; amended in R95-14 at 20 Ill. Reg. 3534, effective February 8, 1996; amended in R97-25 at 22 Ill. Reg. 1403, effective December 24, 1997; amended in R01-13 at _____ Ill. Reg. _____, effective _____.

Section 303.205 Outstanding Resource Waters

An Outstanding Resource Water (ORW) is a water body or water body segment that is of uniquely high biological or recreational quality and must be designated by the Board pursuant to 35 Ill. Adm. Code 102.Subpart H.

- a) Outstanding Resource Waters (“ORW”) shall be listed in Section 303.206 of this Part. In addition to all other applicable use designations and water quality standards contained in this Subtitle, an ORW is subject to the antidegradation provision of Section 302.105(b).
- b) A petition to designate a water or water segment as an ORW must be submitted to the Illinois Pollution Control Board pursuant to the procedural rules found in 35 Ill. Adm. Code 102.Subpart H.

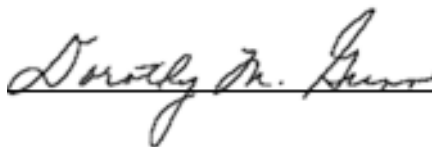
(Added at _____ Ill. Reg. _____, effective _____.)

Section 303.206 List of Outstanding Resource Waters

The Board has not designated any Outstanding Resource Waters pursuant to 35 Ill. Adm. Code 102.Subpart H.

(Added at _____ Ill. Reg. _____, effective _____.)

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 21st day of June 2001 by a vote of 7-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", is written over a horizontal line.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board

Appendix A

EXHIBITS FROM NOVEMBER 17, 2000 HEARING:

- No. 1 EPA Region VIII Guidance: Antidegradation Implementation
- No. 2 Prefiled testimony of Jeffrey S. Swano
- No. 3 Prefiled testimony of Lenore Beyer-Clow and Jerry Paulson
- No. 4 Prefiled testimony of Edward L. Michael
- No. 5 Prefiled testimony of Cynthia L. Skrukud
- No. 6 Prefiled testimony of Jack Darrin

EXHIBITS FROM DECEMBER 6, 2000 HEARING:

- No. 7 Answers of Agency Questions
- No. 8 General NPDES Permit No. ILR00
- No. 9 NPDES Permit No. ILR10
- No. 10 NPDES Permit No. ILG84
- No. 11 NPDES Permit No. ILG551
- No. 12 General Permits List
- No. 13 Prefiled testimony of Robert J. Moore
- No. 14 Supplemental Prefiled testimony of Robert J. Moore
- No. 15 Biological Stream Characterization a 1989 IEPA publication
- No. 16 The Kishwaukee River Basin a 1997 IDNR publication
- No. 17 Prefiled testimony of Diedre K. Hirner
- No. 18 Prefiled testimony of Robin L. Garibay
- No. 19 Prefiled testimony of Gregory D. Cargill
- No. 20 Wisconsin Administrative Code Chapter NR 102, Water Quality Standards for Wisconsin Surface Waters

- No. 21 Indiana Environmental, Health and Safety Regulations Section 327 IAC 2-1.5-4 Antidegradation Standard
- No. 22 West Virginia Environmental, Health and Safety Regulations Section 46-1-4 Antidegradation Standard
- No. 23 Pennsylvania Environmental, Health and Safety Regulations Section 93.4a Antidegradation Standard

EXHIBITS FROM FEBRUARY 6, 2001 HEARING:

- No. 24 Prefiled testimony of Deirdre K. Hirner
- No. 25 Prefiled testimony of Jeffrey P. Smith
- No. 26 Prefiled testimony of Fredric P. Andes
- No. 27 Prefiled testimony of Bill Compton
- No. 28 Federal Register dated Tuesday July 7, 1998, Water Quality Standards Regulation Proposed Rule
- No. 29 EPA Water Quality Guidance for the Great Lakes System: Supplementary Information Document March 1995
- No. 30 Memorandum of Law and Supplemental Testimony of the Environmental Law & Policy Center, Friends of the Fox River, Prairie Rivers Network, and Sierra Club
- No. 31 Answers to Prefiled Questions for the Environmental Groups
- No. 32 Prefiled testimony of David L. Thomas, Chief, Illinois Natural History Survey, Illinois Department of Natural Resources