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STATE OF ILLINOIS
Pollution Control Board

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
)
REVISIONS TO ANTIDegradation)
RULES: 35 ILL. ADM. CODE 302.105,)
303.205, 303.206, AND 106.990 - 106.995)

R01-13

(Rulemaking)

P.C. #44

NOTICE OF FILING

TO: Ms. Dorothy M. Gunn
Clerk of the Board
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(PERSONS ON ATTACHED SERVICE LIST)

PLEASE TAKE NOTICE that I have filed today with the Clerk of the Illinois Pollution Control Board an original and nine copies of **POST-HEARING COMMENTS OF THE ILLINOIS ENVIRONMENTAL REGULATORY GROUP**, copies of which are herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
REGULATORY GROUP,

By: *Kath D. Hodge*
One of Its Attorneys

Dated: March 19, 2001

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STATE OF ILLINOIS
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**POST-HEARING COMMENTS OF
THE ILLINOIS ENVIRONMENTAL REGULATORY GROUP**

NOW COMES the ILLINOIS ENVIRONMENTAL REGULATORY GROUP (“IERG”), by one of its attorneys, Katherine D. Hodge of HODGE & DWYER, and submits its Post-Hearing Comments in the above-captioned matter to the Illinois Pollution Control Board (“Board”), stating as follows:

I. INTRODUCTION

As the Board is aware, the regulations at issue in this rulemaking are the culmination of a two-year process of consideration by the Illinois Environmental Protection Agency (“Agency” or “Illinois EPA”), the regulated community, the “Environmental Groups,”¹ and other interested participants, regarding how best to protect the surface waters of Illinois from degradation. IERG appreciates the opportunity to participate in this process, and appreciates the efforts that all parties to this rulemaking have made.

Based on the testimony at hearing, and a review of the transcripts and written testimony, it is clear that all participants agree the Agency must have flexibility in conducting antidegradation reviews. Not every proposed increase in loading should be subjected to the same depth and degree of antidegradation review. IERG strongly

¹ The Environmental Law and Policy Center of the Midwest; Friends of the Fox River, Prairie Rivers Network; and the Illinois Chapter of the Sierra Club, (hereinafter collectively “Environmental Groups.”)

supports Agency flexibility in the process, and believes that the revisions IERG has proposed to the Agency's proposed Section 302.105 achieve this goal in the clearest, most workable manner.

IERG has consistently emphasized five specific areas of concern regarding the Agency's proposal during this proceeding. Two of these areas of concern specifically address the need for flexibility during the course of an antidegradation review:

1. the Agency's proposal does not contain a significance test to be used to determine the need for a comprehensive antidegradation review; and
2. the Agency's proposal requires extensive up-front data submissions from an applicant for a National Pollutant Discharge Elimination System ("NPDES") permit or Section 401 certification, which extensive submissions may not be necessary.

Related to the Agency's ability to be flexible in its antidegradation review procedures is the need for the Agency to target its efforts and resources so as to review those proposed loadings that have true potential to pose a threat to the quality of water in Illinois. Two issues raised by IERG during the course of this proceeding speak to this concern:

3. the Agency's proposal does not contain needed exceptions to the individual demonstration required by the proposed Board standard; and,
4. the Agency's proposal lacks clarity as it relates to definitions of some of the provisions and terms proposed.

Finally, also at issue during this proceeding has been the process by which the Board will designate surface water bodies as "outstanding surface waters," or "ORWs." While all participants agree that waters that meet certain criteria should be granted ORW status, IERG has been the primary participant in this rulemaking to recognize that designating a water body as an ORW will have severe, far-reaching consequences. Early

in the Illinois EPA's regulatory development process, IERG articulated its concerns regarding ORW designation. The final issue raised by IERG in the context of developing and implementing an antidegradation review process addresses this concern as follows:

5. the Agency's proposal does not contain sufficient requirements for ORW designations.

As stated in its December 6, 2000, testimony, IERG is fully aware that the Clean Water Act requires antidegradation reviews in certain cases. We do not seek to dispute that principle, but to comment on the procedures with which both the Agency and the regulated community must comply if the goal of the antidegradation standard is to be achieved. Therefore, IERG has proposed revisions to the Agency's proposed Sections 302.105 and 303.205 to ensure that all affected parties will have fair, clear and workable regulations to guide their efforts and actions. We respectfully ask the Board to favorably consider our recommendations.

II. THE AGENCY MUST BE ABLE TO EXERCISE FLEXIBILITY IN THE ANTIDEGRADATION REVIEW PROCESS BY INCORPORATING A SIGNIFICANCE DETERMINATION INTO ITS PROCEDURES AND BY ELIMINATING REQUIREMENTS FOR EXTENSIVE UP-FRONT DATA SUBMISSIONS.

A. Significance Determination

As noted above, all participants to this rulemaking agree that all increases in loading should not be subjected to the same depth and degree of antidegradation review. The Agency has indicated that it can be flexible in conducting antidegradation reviews by choosing whether to enforce the antidegradation regulations on a "case by case" basis. See, e.g., November 17, 2001, Hearing Transcript, at 72. The Environmental Groups have stated that they have "considerable misgivings" regarding this approach, but that

they are “willing to try [it] for now.” Environmental Groups’ Memorandum of Law, at 17.

As IERG has demonstrated to the Board previously in its filed testimony and presentation before the Board, however, the language that the Agency has proposed simply does not allow the Agency to conduct anything other than a comprehensive antidegradation review for every increase in loading. See, e.g., December 6, 2000, Hearing Transcript, at 90 (Testimony of Deirdre K. Hirner); January 18, 2001, Prefiled Testimony of Frederic P. Andes, at 4. In order to address this problem, IERG has proposed amending the Agency’s proposed Section 302.105 to provide for a significance review option in antidegradation reviews. A significance review would not take place in every case, but rather only when the permit applicant asked the Agency to conduct such a review. As noted in IERG’s February 6, 2001, testimony, implementing the antidegradation review process in this tiered fashion would first allow a determination of whether a proposed action is of such significance that all five components of the full antidegradation review proposed by the Agency would need to be addressed. If not, the finding of insignificance would, in and of itself, constitute an appropriate antidegradation review.

Under the Agency’s proposal, it would be required to assess every proposed increase in loading relative to the following issues:

1. “the fate and effect of any parameters proposed for an increased pollutant loading”;
2. whether “[t]he applicable numeric or narrative water quality standard [will] be exceeded as a result of the proposed activity”;
3. whether “[a]ll existing uses [will] be fully protected”;

4. whether “all technically and economically reasonable measures to avoid or minimize the extent of the proposed load increase have been incorporated into the proposed activity”; and,
5. whether “the activity that results in an increased pollutant loading [will] benefit the community at large.”

Agency’s proposed Section 302.105(c)(2).

IERG’s proposed significance review would, alternatively, provide that the Agency would first assure that all existing uses would be fully protected and that water quality standards would not be exceeded. Under IERG’s proposal, if necessary to complete a viable assessment, the Agency would be authorized, at its discretion, to consider the following factors as well:

- 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 existing water quality characteristics, the chemical and physical 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.

IERG’s Proposed Amended Section 302.105(c)(2)(A)(iii).

The Agency has noted that it does not wish to engage in a significance review process that is more burdensome than the antidegradation review that it has proposed in this proceeding. See November 17, 2000, Hearing Transcript, at 82 (Testimony of Mr. Toby Frevert). IERG does not believe that its proposed significance determination would impose any additional burden on the Agency. Rather, in making a significance determination, the Agency would simply be performing part of the analysis that it would

have to perform when conducting a full antidegradation review, as the above-mentioned factors are among those reviewed when considering “the fate and effect of any parameters proposed for an increased pollutant loading.” Further, permit applicants would be required to submit similar information under the Agency’s draft Sections 354.103(a) and (b).

If the Agency determined that the proposed increase in loading was not significant, the Agency would not conduct a further review of the proposed increase. If the Agency determined that the proposed increase was significant, the Agency would proceed to examine alternatives to the proposed increase, and the anticipated benefits of the increase that would accrue to the community at-large. It is the analyses of these two components of the antidegradation review process that the regulated community believes have the greatest potential to adversely impact the timing relative to issuing an NPDES permit. As we stated during the February 6, 2001, hearing, many of our industrial members experience a two to three-year lag time in the Agency’s ability to take action on NPDES renewal permit applications. February 6, 2001, Hearing Transcript, at 11-12 (Testimony of Deirdre K. Hirner). The Agency’s inability to process current permit applications due to a lack of sufficient staff resources can only worsen with the increased requirement of comprehensive antidegradation reviews. IERG strongly believes that the inclusion of a significance determination in the proposed rule will allow the proponents of proposed discharges and the Agency to protect water quality by focusing their time and resources on those increased loadings that truly are “significant.”

In the process of developing its significance determination proposal, IERG closely studied the “Antidegradation Implementation” practices suggested by USEPA’s

Region VIII 1993 Guidance Document, a copy of which has been provided previously to the Board. IERG also was able to determine that the states of Wisconsin (Wis. Admin. Code § NR 207.04) and Minnesota (Minn. R. 7050.0185) provide for a significance determination. Further, the state of Massachusetts has a significance review option similar to the one IERG has proposed. In Massachusetts, “[l]imited degradation may be allowed by the Department where it determines that a new or increased discharge is insignificant because it does not have the potential to impair any existing or designated water use and cause any significant lowering of water quality.” Mass. Regs. Code tit. 314, § 4.04(2) (emphasis added). IERG believes these examples provide solid evidence that a significance determination is not only a workable review option, but is an option that has been approved by USEPA.

The Agency has expressed that its intent is not to do what proposed Section 302.105(c) says it must do, that is, conduct a full antidegradation review in every case. Accordingly, proposed Section 302.105(c) (and draft Part 354) should be revised to express the Agency’s true intent – flexibility – through a significance determination option.

B. Up-Front Data Submissions

As proposed by the Agency, an applicant for an NPDES permit or 401 certification seeking an increase in loading would be required to submit all data stipulated in the rule to demonstrate the consequences of a proposed loading. It is the Agency, and not the applicant, however, that is charged with determining whether degradation will occur and, if so, whether it may be warranted to accommodate economic or social development. Throughout this process, IERG has continually maintained that the

Agency, indeed, must have the information it needs to thoroughly make its antidegradation determination. However, the regulated community is aware that much of the required information is currently in the possession of the Illinois EPA. Therefore, throughout the antidegradation regulatory development process, IERG has emphasized the necessity of providing flexibility in the regulation so as to allow the Illinois EPA to utilize data in its possession, or to which it has ready access, to conduct an antidegradation assessment rather than requiring extensive up-front submissions of data from a permit applicant. This, we believe, will avoid wasteful efforts that place an undue burden on an applicant to acquire and provide what could constitute voluminous information to the Illinois EPA that, in many instances, duplicates information in the possession of, or readily available, to the Agency.

It is generally acknowledged that the Illinois EPA has extensive data for potential receiving waters that have been the subject of numerous studies, and for the larger waterways. IERG believes that the proposed regulation should specifically stipulate that the Agency may rely on such data and need not require an applicant to replicate existing information. Similarly, IERG believes that the Agency should be allowed to rely on the collective knowledge and expertise of its staff when making its determinations.

IERG has continually emphasized the Illinois EPA's proposal does not provide for this flexibility. Therefore, IERG's proposal adds the following language that would delineate the information sources the Illinois EPA can utilize in making an antidegradation assessment:

- iii) In making its assessment, the Agency may utilize the following information sources:

- a) Information, data or reports available to the Agency from its own sources;
- b) Information, data or reports supplied by the applicant;
- c) Agency experience with factually similar permitting scenarios; and/or
- d) Any other valid information available to the Agency.

IERG's proposed Amended Section 302.105 (c)(2)(b)(iii).

Again, it is IERG's belief that inclusion of this language will allow the Illinois EPA to achieve its expressed intent when conducting antidegradation reviews – that is, to look at proposed increased loadings on a case-by-case basis, requiring the submittal of only that information necessary to conduct a thorough review. As stated in the February 6, 2001, testimony by Mr. Jeff Smith, on behalf of IERG, requiring a permittee to provide information without consideration of whether the Agency already possess it will, at minimum, delay the application process. At worst, the expense of collecting unneeded data and associated delays could undermine a project's viability.

Further in this regard, and as noted by Deirdre K. Hirner during her testimony at the February 6, 2001, public hearing, IERG believes that revisions to the Agency's proposed Part 354 are necessary. IERG understands that proposed Part 354 was not intended to be part of this proceeding. However, after further consideration, and for the reasons stated below, IERG believes it is necessary to incorporate the procedures in proposed Part 354 into the proposed Section 302.105. Accordingly, we have amended our proposed revision to the Agency's proposed Section 302.105 to incorporate these procedures, and have attached our amended proposed revision hereto as Exhibit A. Please note that IERG has, for the most part, merely inserted the Agency's proposed

language as a “placeholder” into a new subsection 302.105(c)(3); further revisions may well be necessary to fully incorporate these procedures into a Board rule.

We believe that the manner in which the Agency requests information from an applicant, reviews that information, and makes the results of its assessment known to the public is inextricably linked to achieving the antidegradation standard. IERG’s most significant revision to these procedures, as proposed by the Agency, would be to the “Required Information for Antidegradation Review,” which again we believe would require every proponent of an increase in loading to submittal of all the data listed therein. Under IERG’s proposal, the information to be provided by a permit applicant “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,” is only that information that is necessary for the Illinois EPA to determine whether any increase in pollutant loading or proposed activity would result in degradation of the receiving water. IERG supports providing the Agency the information it needs to do its job, and assuring that the public has access to the results of an antidegradation assessment in which it can have full confidence, and believes that this provision accomplishes that goal.

III. THE AGENCY MUST BE ABLE TO TARGET LIMITED RESOURCES BY RELYING ON FURTHER EXCEPTIONS TO THE ANTI-DEGRADATION REVIEW REQUIREMENT AND ENSURING THAT THE TERMS OF THE REGULATION ARE CLEARLY DEFINED.

A. Further Exceptions Needed

By including six exceptions to the antidegradation review requirements in its proposal, the Agency has recognized that activities that are in compliance with other applicable laws or which improve water quality need not be subject to an antidegradation

review. IERG believes additional exceptions warrant inclusion in the proposal. As stated in our previous testimony, IERG firmly believes that the inclusion of such exceptions allows the Agency to avoid the review of permits that have virtually no environmental impact and, thus, to expend its resources where truly needed.

First, the Board should revise the Agency's exception for non-contact cooling water discharges so that it applies to non-contact cooling water with additives where "the Agency has approved the use of any additives present in [the] specific discharge." IERG's Proposed Revised Section 302.105(d)(5). At the time the Agency approved the use of additives for such discharges, it would have made the assessment that the additive had no potential to adversely impact water quality. In essence, the antidegradation determination has been completed, and additional review under the provisions of Section 302.105 would be duplicative.

Second, the Board should include an exception for "[c]hanges to or inclusion of a new permit limitation that does not result in an actual increase of a pollutant loading." IERG's Proposed Revised Section 302.105(d)(7). Such a circumstance could arise due to the availability of improved monitoring data, new analytical testing methods, or the imposition of new or revised technology or water quality-based effluent limitations. In such a circumstance, however, there would be no physical change in the receiving water. The Agency did not include the exception in its proposal based on the rationale that it is not necessary, stating: "since the Agency believes there is not load increase, the matter is not subject to the anti-deg rule." See Agency Memorandum dated June 14, 2000, Attachment 5, paragraph 1 (a copy of which is attached hereto as Exhibit B). IERG,

however, believes it is better to explicitly state this exception in the regulation so there will be no uncertainty as to whether this situation triggers an anti-degradation review.

Third, the Board should also include an exception for “[s]ite stormwater discharges covered by a Stormwater Pollution Prevention Plan (SWPPP), as required in an individual NPDES permit, provided that the discharge will not cause or contribute to a violation of Illinois water quality standards.” IERG’s Proposed Revised Section 302.105(d)(8). Non-stormwater waste streams discharged together with stormwater subject to contamination from outdoor industrial activities are regulated in an industrial facility’s individual NPDES permit through the SWPPP and/or specific federal categorical limitations (for certain industries). The NPDES permit requires the facility to develop a SWPPP, which requires, among other things, the implementation of best management practices.

In instances where site development or construction could increase stormwater on site, it could be argued that an additional antidegradation review would be necessary for each outdoor plant modification or construction activity, although it has already been taken into consideration at the time the SWPPP was developed. IERG’s proposed exception seeks to avoid any confusion regarding the need for duplications. The exception also seeks to avoid the unintended dilemma of the potential for increased precipitation, an event over which an industrial facility has no control, to trigger the need for an antidegradation review at the time of NPDES permit renewal.

Fourth, the Board should also include an exception for “[n]ew or increased discharges of a pollutant where the permit applicant has made a contemporaneous and enforceable decrease in the actual loading of that pollutant at the source such that there is

no net increase in the loading of that pollutant into the same surface water body or surface water body segment.” IERG’s Proposed Revised Section 302.105(d)(9). As discussed at the Third Hearing, such discharges do not increase the quantity of a pollutant discharged into a water body, so they pose no additional threat to water quality. In choosing to exclude this exception from its proposal, the Agency’s rationale acknowledged that offsets, internal to an individual permittee, may require a permit modification to reflect the changed operating conditions, but stated that if the change would not constitute a load increase, antidegradation would not apply. See Agency Memorandum dated June 14, 2000, Attachment 5, paragraph 9. Again, IERG believes it is better to explicitly state the exception in the regulation so there will be no uncertainty as to whether this situation triggers an antidegradation review.

Fifth, the Board should also include exceptions for discharges “authorized by a site-specific regulation, adjusted standard, or variance issued by the Board,” or “by a Consent Order or Consent Decree entered by a court of competent jurisdiction.” IERG’s Proposed Revised Sections 302.105(d)(10), (11). The Agency has indicated that “[i]f the Board specifically authorizes a load increase through its own action[,] the Agency will not nullify any provision of that order through application of anti-degradation. The Board order itself will constitute either compliance with or exception from the action at hand.” Agency Memorandum dated June 14, 2000, Attachment 5, paragraph 6. Again, IERG recommends explicitly stating the exception to avoid unnecessary uncertainty. Further, we believe it is important to note, the Agency has no authority to review a Court Order authorizing a discharge.

Finally, the Board should include an exception for de minimis discharges that use less than ten percent (10%) of a receiving water body's assimilative capacity. IERG's Proposed Revised Section 302.105(d)(12). As IERG has noted to the Board, the United States Environmental Protection Agency ("USEPA") has endorsed the use of a ten percent (10%) de minimis exception from antidegradation review requirements, stating:

EPA and the Great Lakes States and Tribes believe that the 10 percent value chosen as the threshold represents a reasonable balance between the need to the regulatory agencies to limit the number of actions involving non-BCCS that are subjected to the detailed antidegradation demonstration requirements and the need to protect and maintain water quality. In particular, it is believed that any individual decision to lower water quality for non-BCCs that is limited to 10 percent of the unused assimilative capacity represents minimal risk to the receiving water and its ability to support all existing uses.

Proposed Water Quality Guidance for the Great Lakes System, 58 Fed. Reg. 20802, 20903 (April 16, 1992) (emphasis added)².

Further, the USEPA has approved the use of a de minimis exception for every other state in USEPA's Region V, as follows:

² Copies of all portions of the Federal Register, of statutes, or of regulations cited in these Comments are attached hereto as Exhibit C for the Board's convenience.

STATE	DE MINIMIS LEVEL	CITATION	USEPA APPROVAL
Indiana	10%	Ind. Admin. Code tit. 327, r. 5-2-11.3(b)(1)(B)(ii)	65 FR 47864-01
Michigan	10%	Mich. Admin. Code r. 323.1098(9)(c) ³	65 FR 47864-01
Ohio	10% ⁴	Ohio Admin. Code § 3745-1-05(D)(1)(b)(i)	65 FR 47864-01
Wisconsin	33% ⁵	Wis. Admin. Code § NR 207.05(4)(a)(1)	65 FR 66502-02
Minnesota	see footnote ⁶	Minn. R. 7050.0185(2)(G)	65 FR 48517-01

States in other parts of the country also provide for a de minimis exception to their antidegradation review requirements, including New Hampshire⁷ and Texas⁸.

³ It is IERG's understanding that amendments to Michigan's water quality standards will be proposed in the near future. A copy of the proposed amendments is not available at this time, but it is IERG's understanding, based on conversations with the Michigan Department of Environmental Quality, that the proposed amendments will not affect Michigan's 10% de minimis exception.

⁴ Ohio has several categories of "high quality waters." "General high quality waters" correspond to the high quality water designation proposed by the Agency in proposed Section 302.105(c); "superior high quality waters," are waters at a level somewhere between "high quality water" and ONRW. See Ohio Admin. Code § 3745-1-05(A)(9). The de minimis cutoff for "general high quality waters" is 10%. Ohio Admin. Code § 3745-1-05(D)(1)(b)(i). The de minimis cutoff for "superior high quality waters" is 5%. Ohio Admin. Code § 3745-1-05(D)(1)(b)(ii).

⁵ Wisconsin provides for a 33% de minimis cutoff for "indicator parameter[s] other than dissolved oxygen." Wis. Admin. Code § NR 207.05(4)(a)(1). Dissolved oxygen is subject to a different formula. See Wis. Admin. Code § NR 207.05(4)(a)(2).

⁶ Minnesota provides for a de minimis exception (which it refers to as "significance"), but rather than defining de minimis by the amount of assimilative capacity to be used by an increase in loading, it defines de minimis by the volume of the discharge increase or whether the increase contains "any toxic pollutant at a mass loading rate likely to increase the concentration of the toxicant in the receiving water by greater than one percent over the baseline quality." Minn. R. 7050.0185(2)(G)(3).

⁷ N.H. Code Admin. R. Env-Ws 430.34(b)(4) provides for an exception from antidegradation review procedures for increases in loading to "Class B Waters" that use less than 25% of the receiving water's assimilative capacity. "Class B Waters" are in part defined as waters "acceptable for fishing, swimming and other recreational purposes and, after adequate treatment, for use as water supplies." N.H. Rev. Stat. Ann. § 485-A:8(II).

⁸ 30 Tex. Admin. Code § 307.05(b)(2) (defining "degradation" as "a lowering of water quality by more than a de minimis extent, but not to the extent that an existing use is impaired" (emphasis added)).

As discussed above, all parties agree that the Agency needs flexibility in conducting antidegradation reviews, in order to allow it to focus its resources on those loading increases that pose a threat to water quality. The de minimis exception, as well as the other exceptions discussed above, are necessary to prevent the Agency from becoming bogged down in meaningless, resource-wasting reviews of loading increases that do not pose any threat to water quality.

B. Clarity of Terms and Provisions

Industry supports full compliance with environmental laws and regulations. Compliance is in the best interest of the regulated community and the public at-large. In order to comply with an environmental law, however, industry must have a definitive understanding of when the law applies, and the compliance threshold must be clearly articulated in the rules and regulations. On review of the Illinois EPA's proposed language, IERG believes this is not the case in the proceeding currently before the Board, particularly as it relates to the trigger for an antidegradation review.

To rectify this matter, IERG has proposed a revision to proposed Section 302.105(c)(2) to make clear that the requirements for an antidegradation review do not apply to all loadings "subject" to an NPDES permit. IERG offers language to provide that a minimum threshold to trigger an antidegradation review must be related to the need to obtain an NPDES permit and to the limit stated in the permit:

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 be assessed by the Agency to determine whether allowing the lowering of water quality is necessary to accommodate important economic or social development.

IERG's Proposed Revised Section 302.105(c)(2).

IERG believes this language meets the goal of the antidegradation standard, which requires that existing water uses be maintained and protected, and that waters whose existing quality exceeds established standards be maintained in their present high quality. IERG further believes our proposed revision reflects Mr. Frevert's testimony at the November 17, 2000, hearing when he indicated that the Agency's proposed rule would not apply "where there is no proposed increase in any pollutant parameter activity," and that the antidegradation review would not be required unless an applicant filed "for an increase over and above those levels that are already authorized in your permit." November 17, 2000, Hearing Transcript, at 44-46 (Testimony of Mr. Toby Frevert). Therefore, IERG would urge the Board to adopt its proposed revision.

IV. THE OUTSTANDING RESOURCE WATER DESIGNATION PROCEDURES MUST BE STRENGTHENED.

In addition to agreeing that all increases in loading should not be subject to the same level of antidegradation review, all participants in this rulemaking agree that the Board should establish procedures by which persons can seek designation of qualified surface water bodies as "Outstanding Resource Waters," or "ORWs." The Agency has proposed such procedures (see the Agency's proposed Section 303.205), and IERG has proposed some revisions to the Agency's proposed procedures. For the reasons discussed below, IERG submits that its proposed revisions are necessary to fashion an ORW designation procedure that protects the rights of, and is fair to, all affected parties.

The main issue that IERG has raised regarding ORW designation is what type of proceeding the Board should utilize when considering whether to designate a water body as an ORW. "Board proceedings can generally be divided into two categories: rulemaking proceedings and adjudicatory proceedings." 35 Ill. Admin. Code §

101.108(a). The Agency has proposed that the Board designate ORWs through a “hybrid” proceeding, that appears to be a combination of a regulatory and an adjudicatory proceeding. See the Agency’s proposed Section 106.990. IERG, on the other hand, has proposed amending the Agency’s proposal to provide that ORW designations shall take place through an adjudicatory proceeding, specifically an adjusted standard proceeding. See IERG’s Proposed Revised Section 303.205. IERG is not aware of any comment by the Environmental Groups or any other participant to this rulemaking other than the Agency and IERG on this issue.

IERG has proposed that the Board utilize an adjudicatory proceeding when considering whether to designate a water body as an ORW because the burden of proof on a proponent in an adjudicatory proceeding before the Board is well established, while the burden of proof on a proponent in a rulemaking proceeding is not. In an adjusted standard proceeding, for example, “[t]he burden of proof . . . is on the petitioner,” who “must justify an adjusted standard consistent with Section 27(a) of the Act.” 35 Ill. Admin. Code § 104.426. IERG is not aware of any decision by the Board establishing the burden of proof on the proponent in a rulemaking proceeding.

The issue of burden of proof is crucial in this context for several reasons. First, and most importantly, the burden of proof must be clear because of the severe impacts that an ORW designation would have. When IERG questioned the Agency’s witness Mr. Toby Frevert at the First Hearing in this matter regarding what type of proceeding the Board should use to designate ORWs, Mr. Frevert indicated that the Agency “want[ed] to adhere to a fairly open regulatory process.” November 17, 2000, Hearing Transcript, at p. 88, ll. 9-10. Mr. Frevert further testified, however, that:

the ramifications of [a] decision [to designate a surface water body as an ORW] are fundamentally more significant than the ramifications of a typical adjusted standard or even a statewide standard in that we are not setting a target to protect an environmental use here. We are setting an absolute prohibition on some activities. And that has greater ramifications on property owners and other citizens in the community than changing the water quality standard from No. A to No. B.

So our intent is to remain relatively flexible, recognizing those higher ramifications, making sure there is an obligation to disseminate adequate information to start the process and that potentially [a]ffected property owners and other citizens have adequate notice, which probably isn't accomplished in a typical adjusted standard set of procedure requirements.

You are not only talking about surface property rights, but even mineral rights[,] and [with] an outstanding resource water[,] other than a very few things[,] you are almost precluded in any development. And that is so much of a higher significance than merely adjusting an environmental effect standard that we thought there is a responsibility to even start the process to make sure that the people that have something at stake and are effected have a better chance of getting notice early on so they can participate.

November 17, 2000, Hearing Transcript at p. 88, ll. 11-19.

In a proceeding that will set “absolute prohibitions” on the use of land owned by a specific set of persons, a proponent of an ORW designation must have a burden to prove the facts in support of the designation and to prove that the designation is warranted. It is crucial that the State not take away property rights without at least that level of process.

Second, the clear burden of proof of an adjudicatory proceeding gives interested parties clear direction on what they must show to either support or oppose the designation. The proponent of the designation knows that it has the burden to establish certain things. The opponent of the designation knows what the proponent must establish, and is thus able to ascertain whether the proponent has met its burden.

Third, the clear burden of proof of an adjudicatory proceeding gives the Board a framework to utilize when considering a petition to designate a water body as an ORW.

The Board can examine whether the proponent has met its burden of proof on the specified issues. If the proponent has met its burden of proof, the designation can be granted; if the proponent has not met its burden of proof, the designation can be denied.

Fourth, use of an adjudicatory proceeding makes it much easier for a reviewing court to evaluate the Board's decision. "When an administrative agency such as the Board exercises its rulemaking powers, it is performing a quasi-legislative function and, therefore, has no burden to support its conclusions with a given quantum of evidence." Horsehead Resource Dev. Co., Inc. v. Illinois Pollution Control Bd., 684 N.E.2d 837, 840 (1st Dist. 1997) (citations omitted). Thus, when reviewing a rulemaking, a court "need not consider whether the manifest weight of the evidence reveals that the proposed regulations are technically feasible and economically reasonable. A regulation will be upheld if the record simply reflects that these factors were 'taken into account.'" Granite City Div. of Nat. Steel Co. v. Illinois Pollution Control Bd., 581 N.E.2d 703, 708 (5th Dist. 1991) (citations omitted).

So, if the Board denied a petition to designate a water body as an ORW in a rulemaking proceeding, a reviewing court would not be able to consider, for example, whether the evidence presented by the proponent of the designation demonstrated that denial of the designation would threaten endangered species or the essential character of the water body. Instead, the reviewing court would only be able to examine whether the Board had "taken those issues into account," with no regard as to the amount or the quality of the evidence presented to the Board on those issues.

On the other hand, if the Board denied a petition to designate an ORW in an "adjudicatory proceeding, a reviewing court may only set aside the agency decision if it

is clearly against the manifest weight of the evidence.” Shell Oil Co., et al v. Illinois Pollution Control Bd., 346 N.E.2d 212, 218 (5th Dist. 1976). Therefore, the reviewing court’s responsibility “is to evaluate all the evidence on the record . . . to determine whether the Board’s finding are contrary to the manifest weight of the evidence.” Wells Manufacturing Co. v. Illinois Pollution Control Bd., 383 N.E.2d 148, 151 (Ill. 1978). In this situation, the reviewing court would be able to review the amount and the quality of the evidence presented to the Board.

IERG has noted the similarities between the designation of ORWs and the designation of “special resource groundwaters.” See Prefiled Testimony of Bill Compton at 5-6. First, both are unique bodies of water. A “special resource groundwater” is “[g]roundwater that is determined by the Board . . . to be . . . [d]emonstrably unique[,] [v]ital for a particularly sensitive ecological system[,] or . . . that contributes to a dedicated nature preserve. 35 Ill. Admin. Code § 620.230. An “ORW” is “a water body or water body segment that is of uniquely high biological or recreational quality.” Agency’s proposed Section 303.205.

Second, the designation of both special resource groundwaters and ORWs places burdens on the owners of real property at which the waters are located. At the first hearing in this matter, the Agency’s witness Mr. Frevert acknowledged that both designations would both impose “significant . . . restrictions” on property owners. November 17, 2000, Hearing Transcript, at p. 94, ll. 2-8. In fact, Mr. Frevert testified that it was his understanding that the limitations associated with the designation of an ORW “may be even more restrictive for outstanding resource waters than the limitations placed on groundwaters.” November 17, 2000, Hearing Transcript, at p. 94, ll. 9-12.

IERG has proposed that the adjusted standard procedure be the adjudicatory proceeding that the Board uses to designate ORWs. At the Third Hearing, the Board raised some questions about the use of the adjusted standard procedure, including whom the parties to such proceedings would be, how interested persons would prove standing sufficiently to participate in such proceedings, and who could appeal in such proceedings. February 6, 2001, Hearing Transcript, at pp. 116 to 118.

IERG proposed the use of the adjusted standard procedure because of the parallels between ORWs and Special Resource Groundwaters, which are designated through an adjusted standard proceeding. IERG agrees that the Board's concerns about the use of the adjusted standard procedure are valid, however. After further consideration, IERG is not wedded to the use of the adjusted standard procedure to designate ORWs. Instead, IERG's goal is to have ORW designations take place through an adjudicatory proceeding, for the reasons stated above. This could either be a modified adjusted standard process, or some other adjudicatory type of proceeding, as the Board may see fit.

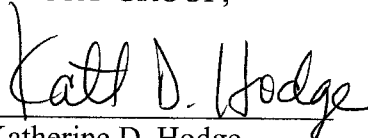
V. **CONCLUSION**

IERG would like to again thank the Board for holding the Third Hearing in this matter on February 6, 2001. IERG believes that the comments and proposals submitted in advance of that Third Hearing, and the testimony elicited at that Third Hearing, will be very helpful to the Board as it considers the Agency's antidegradation proposal. IERG urges the Board to favorably consider the revisions to the Agency's proposal put forth by

IERG and discussed at the Third Hearing and above in taking further action in this matter.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
REGULATORY GROUP,

By: 
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Dated: March 19, 2001

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IERG:001/R Dockets/Fil/R01-13/Post-Hearing Brief

EXHIBIT A (3/19/01)

IERG'S PROPOSED REVISIONS TO THE AGENCY'S PROPOSAL FOR PART 302

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

PART 302
WATER QUALITY STANDARDS

Section 302.105 Antidegradation

The purpose of this Section is to maintain high quality waters and to prevent unnecessary deterioration of waters of the State.

a) Existing Uses

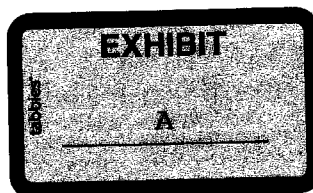
Uses actually attained in the surface water body or surface water body segment on or after November 28, 1975, whether or not they are included in the water quality standards, must be maintained and protected. Examples of degradation of existing uses of the waters of the State include but are not limited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

- 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; ~~or~~ and
- 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.

b) Outstanding Resource Waters

- 1) Waters ~~that are classified designated as an~~ Outstanding Resource Waters (ORWs) ~~pursuant to and listed in 35 Ill. Adm. Code 303.2056~~ must not be lowered in quality ~~except as provided below; provided, however, that the follow activities and discharges may be allowed if the Agency determines that the requirements for High Quality Waters, set forth in subsection (c) of this Section, have been met, and that all existing uses of the ORW water will be fully protected:~~

- A) ~~An activity~~ Activities that results in short-term, temporary (i.e., weeks or months) lowering of water quality in an ORW; ~~or~~



- B) Existing site stormwater discharges into an ORW that comply with applicable federal and state ~~storm water~~ stormwater management regulations and that do not result in a violation of any water quality standards; and
- C) Activities that result in an increase in pollutant loading into an ORW that necessitates the issuance of a new, renewed, or modified ~~The proponent of any activity requiring a~~ National Pollutant Discharge Elimination System (NPDES) permit, with a new or increased permit limit, or a Clean Water Act (CWA) Section 401 certification, is required, provided that the proposed increase in pollutant loading is necessary for an activity that will improve water quality in the ORW and that such water quality improvement could not be practicably achieved without the proposed increase in pollutant loading, must also submit a demonstration to the Agency meeting the requirements of subsections b(2) and c(2) of this Section.

~~2) The activities referenced in subsection (b)(1) or proposed increase in pollutant loading must also meet the following requirements:~~

~~A) All existing uses of the ORW 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.~~

~~3) Any proposed increase in pollutant loading requiring an NPDES permit or a CWA 401 certification for an ORW must be assessed pursuant to 35 Ill. Adm. Code Part 354 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 exceeds established standards of this Part must be maintained in their present high quality, unless the Agency determines, the proponent can demonstrate pursuant to subsection (c)(2) of this Section, that allowing the lowering of water quality, is necessary to accommodate important economic or social development.
- 2) Any proposed increase in pollutant loading that necessitates a new, renewed, or modified subject to a NPDES permit, with a new or increased permit limit, or a CWA Section 401 certification, must be assessed by the Agency pursuant to 35 Ill. Adm. Code Part 354 to determine compliance

with this Section, whether allowing the lowering of water quality is necessary to accommodate important economic or social development.

A) In making its assessment, the Agency shall determine, upon a request by an applicant pursuant to subsection (c)(2)(A)(i) of this Section, and in accordance with subsections (c)(2)(A)(i) through (vi) of this Section, whether the proposed increase in pollutant loading will have a significant impact upon the overall water quality, or the existing uses, of the receiving water. If the Agency determines that the proposed increase in pollutant loading will not have a significant impact upon the overall water quality or the existing uses of the receiving water, such increase in pollutant loading shall be deemed to comply with the provisions of subsection (c)(2)(B) of this Section.

i) Any applicant for a new, renewed, or modified NPDES permit or CWA Section 401 certification may file with the Agency, as part of its application, a request for a determination that the proposed increase in pollutant loading (or other activity or discharge) will not have a significant impact upon the overall water quality, or the existing uses, of the receiving water.

ii) Such request shall set forth, as necessary, information on the proposed increase in pollutant loading, the nature of the discharge in general, including timing, location and physical characteristics, and may include any other information which may assist the Agency in making its determination.

iii) In making its significance determination, the Agency may consider:

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 existing water quality characteristics, the chemical and physical 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.

iv) In making its significance determination, the Agency may utilize the information sources set forth in subsection (c)(2)(B)(iii) of this Section.

v) The Agency shall make significance determinations in accordance with ~~its antidegradation implementation procedures~~ subsection 302.105 (c) (3) of this Section.

vi) If the Agency determines that the proposed increase in pollutant loading is significant, it shall so inform the applicant, in which case, the applicant then may comply with the provisions of subsection (c)(2)(B) of this Section or may appeal the Agency's determination to the Board in accordance with 35 Ill. Adm. Code 105.Subpart B.

B) If the Agency determines that the proposed increase in pollutant loading will have a significant impact upon the overall water quality or the existing uses of the receiving water, such proposed increase in pollutant loading shall be assessed by the Agency in accordance with ~~its antidegradation implementation procedures~~ subsection 302.105 (c) (3) of this Section. In making its assessment:

i) The Agency shall consider the fate and effect of any parameters proposed for an increased pollutant loading;

ii) ~~The proponent of an increased pollutant loading shall demonstrate the following:~~ The Agency shall determine whether:

a) The applicable numeric or narrative water quality standard ~~must~~ will not be exceeded as a result of the proposed activity;

b) All existing uses ~~must~~ will be fully protected;

- c) All technically and economically reasonable measures to avoid or minimize the extent of the proposed increase in pollutant loading ~~load increase~~ have been incorporated into the proposed activity; and
- d) The activity that results in ~~an~~ the increased in pollutant loading ~~must~~ will benefit the community at large.

iii) In making its assessment, the Agency may utilize the following information sources:

- a) Information, data or reports available to the Agency from its own sources;
- b) Information, data or reports supplied by the applicant;
- c) Agency experience with factually similar permitting scenarios; and/or
- d) Any other valid information available to the Agency.

3) In conducting Antidegradation Assessments pursuant to this Section, the Agency shall comply with the following procedures.

A) 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:

- i) 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;
- ii) 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;

iii) The purpose and anticipated benefits of the proposed activity. Such benefits may include, but are not limited to:

a) Providing a centralized wastewater collection and treatment system for a previously unsewered community;

b) Expansion to provide service for anticipated residential or industrial growth consistent with a community's long range urban planning;

c) Addition of a new product line or production increase or modification at an industrial facility; or,

d) An increase or the retention of current employment levels at a facility.

iv) 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, but are not limited to:

a) Additional treatment levels including no discharge alternatives;

b) Discharge of waste to alternate locations including publicly-owned treatment works and streams with greater assimilative capacity; or

c) Manufacturing practices that incorporate pollution prevention techniques.

v) Any additional information the Agency may request.

vi) Any of the information sources identified in subsection 302.105(d) (3).

B) The Agency must complete an antidegradation demonstration review in accordance with the provisions of this Section.

i) The antidegradation assessment pursuant to this Section is a part of the NPDES permitting process or

the CWA Section 401 certification process. However, applicants should 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 shall be initiated by:

- a) an informal or preliminary request of a proponent of a project prior to filing of a permit application; or
 - b) receipt of an application for an NPDES permit issuance, renewal or modification, or a CWA Section 401 certification.
- ii) A proponent seeking an immediate review of the results of the Agency's review pursuant to subsection (b)(1) must do so within the NPDES permit process or the CWA Section 401 certification process.
- iii) After a review pursuant to subsection (a)(1), the Agency shall consult with the proponent and respond:
- a) in writing to written requests;
 - b) verbally to verbal requests; or
 - c) in a manner otherwise agreed upon.
- iv) 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.
- v) After its review, the Agency shall produce a written analysis addressing the requirements of this Section and provide a decision yielding one of the following results:
- a) If the demonstration meets the requirements of this Section, then the Agency shall 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;

b) If the demonstration does not meet the requirements of this Section, then the Agency shall provide a written analysis to the applicant and shall 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;

c) 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.

1. 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

2. 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.

C) When the Agency initially determines to authorize a load increase, public notice and public participation will be achieved through the public notice procedures found in 35 Ill. Adm. Code 309.109 or CWA Section 401 certifications. The Agency shall incorporate the following information into a fact sheet accompanying the public notice:

i) A description of the activity, including identification of water quality parameters which will experience the increased pollutant loading;

ii) 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;

iii) 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;

iv) 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

v) The name and telephone number of a contact person at the Agency who can provide additional information.

d) Activities Not Subject to a Further Antidegradation Demonstration Assessment

The following activities shall be deemed to comply with the provisions of this Section and shall not be subject to ~~an a further~~ antidegradation ~~demonstration~~ 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 CFR 122.41(m);
- 3) Response actions pursuant to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), as amended, or 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 ~~has~~ 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, and that the Agency has approved the use of any additives present in specific discharge;

- 6) Discharges permitted under a current general NPDES permit as provided by 415 ILCS 5/39(b), are not subject to facility-specific antidegradation review; 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 (WQBELs);
- 8) Site stormwater discharges covered by a Stormwater Pollution Prevention Plan, as required in an individual NPDES permit, provided that the discharge will not cause or contribute to a violation of Illinois water quality standards;
- 9) New or increased discharges of a pollutant where the permit applicant has made a contemporaneous and enforceable decrease in the actual loading of that pollutant at the source such that there is no net increase in the loading of that pollutant into the same surface water body or surface water body segment;
- 10) Discharges authorized by a site-specific regulation, adjusted standard, or variance issued by the Board;
- 11) Discharges authorized by a Consent Order or Consent Decree entered by a court of competent jurisdiction;
- 12) An increase in pollutant loading that results in a lowering of water quality that is less than a de minimis lowering of water quality. As used in this provision, a "de minimis lowering of water quality" occurs if all of the following are satisfied for the constituent under consideration and such a determination is consistent with any other applicable requirements and limitations in this Part:

A) The proposed increase in mass discharged is less than ten percent (10%) of the unused loading capacity. The proposed increase in mass discharged shall be determined as follows:

$$M_p - M_E = \text{Proposed increase in mass discharged}$$

Where M_p = Monthly average mass effluent limitation for the parameter in the proposed discharge.

M_E ≡ Monthly average mass effluent limitation for the parameter in the existing permit. If the existing permit does not contain a monthly average mass effluent limitation for the parameter, but does contain a weekly average or daily maximum mass limit, the existing weekly average or daily maximum permit limit shall be converted into a monthly average value to be used in this equation. If the existing permit does not contain a mass limit for the parameter, but does contain a concentration limit, this concentration limit shall be converted into a mass value, using the discharge flow rate, to be used in this equation. If the existing permit does not contain an effluent limit for the parameter, the actual monthly average mass discharged shall be used in this equation.

B) For the purposes of this subsection, "Total loading capacity" means the product of the applicable water quality criterion times the sum of the existing effluent flow and the stream design flow for the water body in the area where the water quality is proposed to be lowered, expressed as a mass loading rate; and "Unused loading capacity" means that amount of the total loading capacity not utilized by point source and nonpoint source discharges. The unused loading capacity is established at the time the request to lower water quality is considered.

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.




ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

1021 NORTH GRAND AVENUE EAST, P.O. BOX 19276, SPRINGFIELD, ILLINOIS 62794-9276

THOMAS V. SKINNER, DIRECTOR

MEMORANDUM

DATE: June 14, 2000
TO: Anti-Degradation Workgroup
FROM: Toby Frevert 
SUBJECT: Draft Rules and Implementation Procedures

We have completed our redraft of the Anti-degradation policies and procedures based on the written comments received and the discussions of our February 16 workgroup meeting. Enclosed are the following draft documents:

1. Revision to IPCB non-degradation Standard - 35 Il. Adm. Code 302.105
2. Agency procedures for application of the new anti-degradation standard within its NPDES and CWA Section 401 Certification programs
3. Proposed addition of an "Outstanding Resource Waters" category to the IPCB's designated uses regulations at 35 IL Adm. Code Subtitle C, Section 303.205
4. Proposed procedural rules governing the proposal and adoption of an "Outstanding Resource Water" classification.
5. A summary of the various exceptions suggested by the workgroup and the perspective of the Agency relative to their inclusion or exclusion from the proposal.

The Agency will proceed in the next few weeks to assemble these materials along with other appropriate supporting material into a petition for rulemaking that will be filed with the IPCB.

I appreciate time and effort each of you contributed to the workgroup. Undoubtedly there are still some areas where differing views persist, but I believe we have collectively made great progress in resolving many issues and focusing others such that the hearings before the IPCB will be much more efficient.

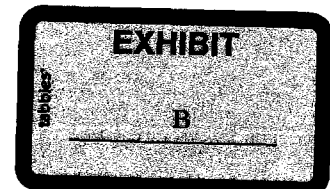
Once again I wish to thank you for your participation and encourage your continued involvement as this matter moves from our workgroup forum into the adoption stage.

Anti-degradation Workgroup List:

Deanna Glosser
Dick Reilly
Paul Pederson
Chris Bucko
Mark Biel

IDNR
Hey & Assoc.
Nalco Chemical
Il. Atty. Gen.
CICI

GEORGE H. RYAN, GOVERNOR



Attachment 5

Summary of exceptions presented by various workgroup participants

1. Various circumstances where the action does not constitute an increased load, rather it merely institutes a limit on a parameter that was already present in the permitted source. Source: American Bottoms(#1 & 10), IERG(#5), IAWA(#10-b-2,3,4,5&7)

Rationale- Since this is not a load increase it is not subject to the anti-deg rule, therefore no exception is either necessary or appropriate.

2. Exception for stormwater discharges. Sources: American Bottoms(#4), IERG(#7), IAWA(#10-b-4)

Rationale- An exception has been proposed for sources permitted and operating under a general permit, most stormwater discharges are covered by a general permit. Therefore the intent of this exception has been honored. Stormwater discharges significant enough to warrant an individual permit would receive some extent of anti-deg review.

3. Exceptions for POTW Routine Additional loadings. Source: American Bottoms(#5), IAWA(#10-b-2)

Rationale- The anti-deg provision is triggered by a proposed increase in NPDES permitted loading. Routine Incremental increases in service area or tributary loading to a POTW were determined to be compliant with anti-deg at the time the permit loadings were set. Unless the proposed increase is in conflict with the approved facility plan, anti-deg demonstration or other basis for setting the existing permit limits, no supplemental review would be required.

4. Domestic wastewater treatment exception. Source: American Bottoms(#6)

Rationale- This appears to be in direct conflict with the intent of the standard. Anti-degradation typically does not preclude any particular load increase, rather it subjects that proposed increase to a public review and balance between environmental and social/economic goals. Even when all parties agree that additional domestic wastewater service is appropriate, the alternatives analysis and public review provisions of the anti-deg standard should be addressed to assure the most balanced project.

5. Exception for Net Improvement (including water quality improvements and cross media improvements). Source: American Bottoms(#8) & IERG(#11), IAWA(#10-b-5,6,7)

Rationale- The anti-degradation standard does not prohibit load increases, it merely requires a balance of environmental considerations against social/economic considerations within a public forum. In cases where "net improvement" in water quality results, anti-degradation could easily be addressed by documenting the benefit in the public notice fact sheet. Compliance with the

standard should be no less burdensome than documenting eligibility for the exception and no more subject to challenge than an assertion of incorrectly applying an exception.

6. Exception for Variances and Adjusted Standards. Source: American Bottoms(#7) & IERG(#10)

Rationale- If the Board specifically authorizes a load increase through its own action the Agency will not nullify any provision of that order through application of anti-degradation. The Board order itself will constitute either compliance with or exception from the action at hand.

7. Exception for treating intake pipes for zebra mussel. Source: American Bottoms(#9), IAWA(#10-b-8)

Rationale- This is a specific application where the social/economic need is relatively obvious and easy to document. Nevertheless, anti-degradation review may be valuable since there are various methods and substances that can be utilized for zebra mussel control (some of which rely heavily on toxicants). The alternatives analysis provisions of anti-degradation would still be valid and appropriate; thus the Agency will not propose a blanket exception.

8. Exception for De Minimis Factors. Source: multiple participants

Rationale- The Agency supports the concept of abbreviating reviews consistent with the relative insignificance of small increases in loading but are not proposing a specific de minimis exception for several reasons. Firstly, arbitrary percentage increases don't relate well to either science or economics. An "X" percent increase in loading may impart some relevance to an existing source, but does not address the relative effect on the receiving water. This would also be problematic for a new source where the smallest of loading increase would be infinite. If the de minimis level is described relative to the stream such as a specified percentage of the remaining assimilative capacity, this presumes that there is one quantifiable and readily determinable mass that constitutes remaining assimilative capacity. In reality, assimilative capacity varies proportional to many factors (flow, temperature, hardness, pH, turbidity, timing and duration of exposure, etc.) and can be different every day. The other and more significant concern is that reserve assimilative capacity is usually unknown and in many cases would be more difficult to quantify sufficiently than to complete an abbreviated anti-degradation review. For instance if a de minimis exception was set at 5% it would probably be easier to make the judgement that a relatively small loading increase was compliant with the intent of the standard than to quantify with any certainty that it was 4.9% rather than 5.1%. This would be true even if assimilative capacity was simplistically defined under a standard set of worst case conditions.

Conceptually, the Agency supports de minimis provisions and intends to utilize the principle in carrying out its implementation duties. Furthermore the Agency

welcomes testimony on the issue and would support addition of a de minimis exception that was neither arbitrary nor more burdensome than performing the review.

9. Exceptions for offset provisions. Sources: American Bottoms(#3), Illinois Coal Association, IERG(#9)

Rationale- If the offset is internal to an individual permit there may be a need to modify the permit to reflect the changed operating conditions, but the change would not constitute a load increase therefore anti-degradation would not apply. CWA Section 401 water quality certifications have been issued under conditions requiring incorporation of mitigation features into a project design, but within the domain of the project proponent. Offsetting from an activity or source external to an NPDES permit or a Section 404 permitted activity is more complex. The Agency believes this concept has potential application to and does not rule out offsets or other mitigation steps, but believes this should be inherent to the alternatives analysis within an anti-degradation review rather than an exemption from anti-degradation. Regardless of whether authority exists to condition a permitted activity upon something external to the permitted activity, the Agency does not support offsetting as an exception.

Citation
 WI ADC S NR 207.04
 Wis. Adm. Code s NR 207.04
 Wis. Admin. Code s NR 207.04

Found Document

Rank 1 of 1

Database
 WI-ADC

TEXT

WISCONSIN ADMINISTRATIVE CODE
 DEPARTMENT OF NATURAL RESOURCES
 CHAPTER NR 207. WATER QUALITY ANTIDEGRADATION
 Current through Reg. No. 541 (Jan 2001)

NR 207.04 Fish and aquatic life waters.

(1) Application information. Persons proposing a new or increased discharge to fish and aquatic life waters shall provide documentation for the following:

(a) An assessment of existing treatment capability which demonstrates:

1. Any of the following:

a. The permittee's discharge equals or exceeds 85% of any mass permit limitation.

b. The permittee's monthly average discharge equals or exceeds 85% of a monthly average effluent limitation established in a permit for 3 consecutive months;

c. The permittee's weekly average discharge equals or exceeds 85% of a weekly average effluent limitation established in a permit for 4 consecutive weeks.

d. The permittee's daily discharge equals or exceeds 85% of a daily maximum effluent limitation established in a permit 5 or more times during a calendar year;

e. There are exceedances of any daily maximum, weekly average or monthly average effluent limitation for a parameter in a permit; or

f. A municipal permittee's compliance maintenance annual report point total, as required in ch. NR 208, is 70 or greater;

2.

3. The treatment facilities were operated and maintained as efficiently as possible; and

4. The conditions documented in subd. 1. were not due to temporary upsets.

(b) Effluent quality data and background water quality data for indicator parameters so a determination will be made on whether or not a significant lowering of water quality will occur under s. NR 207.05.

(c) If the proposed new or increased discharge is found to result in any lowering of water quality or if the person proposing the new or increased discharge has waived the procedure in s. NR 207.05 (2) (a) to (d), the permit applicant shall demonstrate the following:

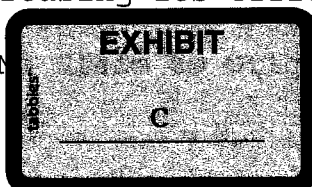
1. The proposed new or increased discharge will accommodate important economic or social development in any of the following ways:

a. The discharger will be increasing its employment.

b. The discharger will be increasing its production level.

c. The discharger will be avoiding a reduction in its employment level.

d. The discharger will be increasing its efficiency.



WI ADC S NR 207.04

TEXT

e. There will be industrial, commercial or residential growth in the community.

f. The discharger will be providing economic or social benefit to the community.

g. The discharger will be correcting an environmental or public health problem.

(d) If the new or increased discharge is found to result in a significant lowering of water quality or if the person proposing the new or increased discharge has waived the procedure in s. NR 207.05 (2) (a) to (d), the permit applicant shall demonstrate the following:

1. The proposed significant lowering of water quality cannot be prevented in a cost effective manner by the following types of pollution control alternatives:

a. Use of conservation measures.

b. Use of recycling measures.

c. Use of other applicable wastewater treatment process or operational changes.

d. Use of source reduction measures.

e. Use of other pollution minimization alternatives.

2. For proposals involving the expansion of a wastewater treatment plant, whether or not there are alternative wastewater treatment technologies which:

a. Have documented performance levels for similar wastewater composition,

b. Have capital costs less than 110% of the capital costs (or present worth less than 115% of the related total present worth value) for alternatives achieving the water quality based effluent limitations or the effluent limitations determined pursuant to chs. NR 200 to 297, as appropriate, and

c. Would prevent a significant lowering of water quality.

3. Whether or not there are other discharge locations or alternatives which would meet the conditions of subd. 2. b. and c.

4. Any other information required by the department or believed by the applicant to be necessary to complete review of the application.

Note: It is the intent of the department that, where possible, an applicant may use applicable information contained in a facility plan approved by the department to meet the requirements of s. NR 207.04 (1) (a) 1.a. to f..

(2) Department determinations. (a) If the department determines that the existing wastewater treatment facilities have treatment capability to treat any proposed new or increased discharge and maintain treatment levels sufficient to meet existing effluent limitations as documented under sub. (1) (a), effluent limitations will remain unchanged.

(b) If the department determines that the existing treatment facilities do not have treatment capability to treat any proposed new or increased discharge and maintain treatment levels sufficient to meet existing effluent limitations, effluent limitations will be developed using the following procedures:

WI ADC S NR 207.04

TEXT

1. If the proposed new or increased discharge will not significantly lower water quality as determined under s. NR 207.05 (4) and will accommodate important economic and social development as documented under sub. (1) (c), water quality based effluent limitations will be determined based on applicable procedures and criteria in chs. NR 102, 103, 105 and 106 or on categorical effluent limitation procedures pursuant to chs. NR 200 to 297 as appropriate.

2. If the proposed new or increased discharge will not significantly lower water quality as determined under s. NR 207.05 (4) and will not accommodate important economic and social development as documented under sub. (1) (c), water quality based effluent limitations for substances in the new or increased discharge will be set equal to the existing levels of these substances upstream of, or adjacent to, the discharge site.

3. If the proposed new or increased discharge will significantly lower water quality as determined under s. NR 207.05 (4), or the applicant has chosen to waive the procedure in s. NR 207.05 (2) (a) to (d), and the proposed discharge will not accommodate important economic and social development as documented under sub. (1) (c), water quality based effluent limitations for substances in the new or increased discharge will be set equal to the existing levels of these substances upstream of, or adjacent to, the discharge site.

4. If the proposed new or increased discharge will significantly lower water quality as determined under s. NR 207.05 (4), or the applicant has chosen to waive the procedure in s. NR 207.05 (2) (a) to (d), and the proposed discharge will accommodate important economic and social development as documented under sub. (1) (c), effluent limitations for the proposed new or increased discharge will be determined using the procedure in par (c).

Note: When assessing existing treatment capabilities, it is the intent of the department to consider projected increases in a permittee's discharge due to a planned water conservation project.

(c) The department shall use the following procedures to determine water quality based effluent limitations or effluent limitations determined pursuant to chs. NR 200 to 297 as appropriate, for each substance in the proposed new or increased discharge for which the existing levels upstream of, or adjacent to, the discharge site are of better quality than applicable water quality criteria or secondary values derived according to ch. NR 102, 103 or 105:

1. If there are no applicable pollution control alternatives or alternative discharge locations which meet the conditions of sub. (1) (d) 2. or 3., effluent limitations will be determined for the new or increased portion of the discharge based on applicable procedures and criteria or secondary values derived according to chs. NR 102, 103, 105 and 106 or based on effluent limitations pursuant to chs. NR 200 to 297, as appropriate.

2. If there are applicable pollution control alternatives or alternative discharge locations which meet the conditions of sub. (1) (d) 2. or 3., water

WI ADC S NR 207.04

TEXT

quality based effluent limitations will be determined for the new or increased portion of the discharge based on the applicable pollution control alternative or alternative discharge site which prevents the significant lowering of water quality.

3. For an increased discharge not involving expansion of a wastewater treatment plant:

a. If there are no demonstrated, cost effective pollution control alternatives which would prevent significant lowering of water quality as demonstrated under sub. (1) (d) 1., effluent limitations shall be determined pursuant to chs. NR 102 and 106 or chs. NR 200 to 297, as appropriate.

b. If there are demonstrated, cost effective pollution control alternatives which would prevent the significant lowering of water quality as demonstrated under sub. (1) (d) 1., water quality based effluent limitations will be determined for the new or increased portion of the discharge based on the cost effective pollution control alternative which prevents the significant lowering of water quality.

(d) The department shall determine water quality based effluent limitations using the water quality criteria or secondary values derived according to ch. NR 102, 103, 104 or 105 for substances in the proposed new or increased discharge whose levels in the receiving water are of lesser quality than the water quality criteria or secondary values for the receiving water upstream of, or adjacent to, the discharge site.

(e) In addition to the provisions of pars. (a) to (c), if the department determines that a proposed new or increased discharge will result in lowering of water quality in downstream outstanding resource waters or a proposed new discharge would result in lowering of water quality in exceptional resource waters, other than for the reasons specified in s. NR 207.03 (2) (a), water quality based effluent limitations for substances in the new or increased portion of the discharge will be set to prevent the lowering of water quality in the downstream outstanding or exceptional resource water. Whenever s. NR 207.03 (2) (a) applies, effluent limitations shall be established using the procedures in this section.

CREDIT

History: Cr. Register, February, 1989, No. 398, eff. 3-1-89; renum. (1) (a) 1. a. to d. to be (1) (a) 1. b. and d. to f., cr. (1) (a) 1. a., c. and (d) 1. e., am. (2) (c) (intro.), 1. and (d), Register, August, 1997, No. 500, eff. 9-1-97.

<General Materials (GM) - References, Annotations, or Tables>

WI ADC s NR 207.04
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Citation	Search Result	Rank 23 of 37	Database
MN ADC 7050.0185			MN-ADC
Minnesota Rules, part 7050.0185			
Minn. R. 7050.0185			

TEXT

MINNESOTA RULES
CHAPTER 7050
MINNESOTA POLLUTION CONTROL AGENCY
WATERS OF THE STATE
STANDARDS FOR PROTECTION OF QUALITY AND PURITY
Current with amendments adopted through 12-6-99

7050.0185 NONDEGRADATION FOR ALL WATERS.

Subpart 1. Policy. The potential capacity of the water to assimilate additional wastes and the beneficial uses inherent in water resources are valuable public resources. It is the policy of the state of Minnesota to protect all waters from significant **degradation** from point and nonpoint sources and wetland alterations, and to maintain existing water uses, aquatic and wetland habitats, and the level of water quality necessary to protect these uses.

Subp. 2. Definitions. For the purpose of this part, the following terms have the meanings given them:

A. "'New discharge'" means a discharge that was not in existence before January 1, 1988.

B. "'Expanded discharge'" means a discharge that changes in volume, quality, location, or any other manner after January 1, 1988, such that an increased loading of one or more pollutants results. In determining whether an increased loading of one or more pollutants would result from the proposed change in discharge, the agency shall compare the loading that would result from the proposed discharge with the loading allowed by the agency on January 1, 1988.

C. "'Baseline quality'" means the quality consistently attained by January 1, 1988.

D. "'Existing'" means in existence before January 1, 1988.

E. "'Economic or social development'" means the jobs, taxes, recreational opportunities, and other impacts on the public at large that will result from a new or expanded discharge.

F. "'Toxic pollutant'" means a pollutant listed as toxic under section 307(a)(1) of the Clean Water Act, United States Code, title 33, section 1317(a)(1), or as defined by Minnesota Statutes, section 115.01, subdivision 20.

G. "'Significant discharge'" means:

(1) a new discharge of sewage, industrial, or other wastes greater than 200,000 gallons per day to any water other than a class 7, limited resource value water; or

(2) an expanded discharge of sewage, industrial, or other wastes that expands by more than 200,000 gallons per day and that discharges to any water other than a class 7, limited resource value water; or

(3) a new or expanded discharge containing any toxic pollutant at a mass

TEXT

loading rate likely to increase the concentration of the toxicant in the receiving water by greater than one percent over the baseline quality. This determination shall be made using:

(a) data collected from the receiving water or from a water representative of the receiving water;

(b) the entire once in ten-year, seven-day low flow of the receiving water as defined in part 7050.0210, subpart 7; and

(c) a mass balance equation that treats all toxic pollutants as conservative substances.

Subp. 3. Minimum treatment. Any person authorized to maintain a new or expanded discharge of sewage, industrial waste, or other waste, whether or not the discharge is significant, shall comply with applicable effluent limitations and water quality standards of this chapter and shall maintain all existing, beneficial uses in the receiving waters.

Subp. 4. Additional requirements for significant discharges. If a person proposes a new or expanded significant discharge from either a point or nonpoint source, the agency shall determine whether additional control measures beyond those required by subpart 3 can reasonably be taken to minimize the impact of the discharge on the receiving water. In making the decision, the agency shall consider the importance of economic and social development impacts of the project, the impact of the discharge on the quality of the receiving water, the characteristics of the receiving water, the cumulative impacts of all new or expanded discharges on the receiving water, the costs of additional treatment beyond what is required of nonsignificant dischargers, and other matters as shall be brought to the agency's attention.

Subp. 5. Determination of significance. A person proposing a new or expanded discharge of sewage, industrial waste, or other wastes shall submit to the commissioner the information required to determine whether the discharge is significant under subpart 2. If the discharge is sewage or industrial waste, the flow rate used to determine significance under this part is the design average wet weather flow for the wettest 30-day period. For discharges of other wastes, the flow rate to be used is the design maximum daily flow rate. In determining the significance of a discharge to a lake or other nonflowing receiving water, a mixing zone may be established under the guidelines of part 7050.0210, subpart 5.

Subp. 6. Baseline quality. If an existing discharge to a water of the state is eliminated or significantly reduced, baseline quality for purposes of this part shall be adjusted to account for the water quality impact associated with that particular discharge.

If no data are available to determine baseline quality or the data collected after January 1, 1988, are of better quality, then the commissioner shall authorize the use of data collected after January 1, 1988. If no data are available, the person proposing the discharge may collect new data in accordance with agency protocols.

Subp. 7. Incremental expansions. If a new or expanded discharge is proposed in increments, the increments must be added together to determine whether the discharge is a significant discharge. Once the criteria for a significant

MN ADC 7050.0185

TEXT

discharge are satisfied by adding together the increments, the requirements of this part shall apply to the discharge.

Subp. 8. Determination of reasonable control measures for significant discharges. The person proposing a new or expanded significant discharge of sewage, industrial waste, or other wastes shall submit to the commissioner information pertinent to those factors specified in subpart 4 for determining whether and what additional control measures are reasonable.

The commissioner shall provide notice and an opportunity for a public hearing in accordance with the permit requirements in chapter 7001 before establishing reasonable control requirements for a new or expanded significant discharge.

Subp. 9. Physical alterations of wetlands. The permit or certification applicant shall comply with part 7050.0186 if there is a proposed physical alteration that has the potential for a significant adverse impact to a designated use of a wetland and that is associated with a project that requires a National Pollutant Discharge Elimination System (NPDES) permit, a 401 certification under parts 7001.1400 to 7001.1470, or a state disposal system permit.

CREDIT

Statutory Authority: MS s 115.03; 115.44

History: 12 SR 1810; 15 SR 1057; 18 SR 614; 18 SR 2195; 22 SR 1466

MN ADC 7050.0185
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Citation
314 MA ADC 4.04
314 CMR 4.04

Search Result

Rank 22 of 33

Database
MA-ADC

TEXT

CODE OF MASSACHUSETTS REGULATIONS
TITLE 314: DIVISION OF WATER POLLUTION CONTROL
CHAPTER 4.00: MASSACHUSETTS SURFACE WATER QUALITY STANDARDS
Current through January 5, 2001, Register #912

4.04: Antidegradation Provisions

(1) Protection of Existing Uses. In all cases existing uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.

(2) Protection of High Quality and Other Significant Resource Waters. Certain waters shall be designated for protection under this provision in 314 CMR 4.06(2) and 4.06(3). These include waters whose quality exceeds minimum levels necessary to support the national goal uses, low flow waters and other waters whose character cannot be adequately described or protected by traditional criteria. These waters shall be protected and maintained for their existing level of quality unless limited **degradation** by a new or increased discharge is authorized by the Department. Limited **degradation** may be allowed by the Department where it determines that a new or increased discharge is insignificant because it does not have the potential to impair any existing or designated water use and cause any significant lowering of water quality; also limited **degradation** may be allowed as provided in 314 CMR 4.04(4).

(3) Protection of Outstanding Resource Waters. Certain waters shall be designated for protection under this provision in 314 CMR 4.06(3) including Public Water Supplies (314 CMR 4.06(1)(d)1.). These waters constitute an outstanding resource as determined by their outstanding socio-economic, recreational, ecological and/or aesthetic values. The quality of these waters shall be protected and maintained.

(a) Any person having an existing discharge to these waters shall cease said discharge and connect to a publicly owned treatment works (POTW) unless it is shown by said person that such a connection is not reasonably available or feasible. Existing discharges not connected to a POTW shall be provided with the highest and best practical method of waste treatment determined by the Department as necessary to protect and maintain the outstanding resource.

(b) A new or increased discharge to an Outstanding Resource Water is prohibited unless:

1. the discharge is determined by the Department to be for the express purpose and intent of maintaining or enhancing the resource for its designated use and a

314 MA ADC 4.04

TEXT

variance from this regulation is granted as provided in 314 CMR 4.04(4). The Department's determination to allow a new or increased discharge shall be made in agreement with the federal, state, local or private entity recognized by the Department as having direct control of the water resource or governing water use; or

2. the discharge is dredged or fill material for qualifying activities in limited circumstances, after an alternatives analysis which considers the Outstanding Resource Water designation and further minimization of any adverse impacts. Specifically, a discharge of dredged or fill material is allowed only to the limited extent specified in 314 CMR 9.00 and 314 CMR 4.06(1)(d). The Department retains the authority to deny discharges which meet the criteria of 314 CMR 9.00 but will result in substantial adverse impacts to the physical, chemical, or biological integrity of surface waters of the Commonwealth.

(4) Authorizations.

(a) An authorization to discharge to waters designated for protection under 314 CMR 4.04(2) may be allowed by the Department where the applicant demonstrates that:

1. The discharge is necessary to accommodate important economic or social development in the area in which the waters are located;

2. No less environmentally damaging alternative site for the activity, source for the disposal, or method of elimination of the discharge is reasonably available or feasible;

3. To the maximum extent feasible, the discharge and activity are designed and conducted to minimize adverse impacts on water quality, including implementation of source reduction practices; and

4. The discharge will not impair existing water uses nor result in a level of water quality less than that specified for the Class.

(b) An authorization to discharge to the narrow extent allowed in 314 CMR 4.04(3) may be granted by the Department where the applicant demonstrates compliance with 314 CMR 4.04(4)(a)2. through 4.

(c) Where an authorization is at issue, the Department shall circulate a public notice in accordance with 314 CMR 2.06. Said notice shall state an authorization is under consideration by the Department, and indicate the Department's tentative determination. The applicant shall have the burden of justifying the authorization. Any authorization granted pursuant to 314 CMR 4.04 shall not extend beyond the expiration date of the permit.

314 MA ADC 4.04

TEXT

(d) A discharge exempted from the permit requirement by 314 CMR 3.05(4) (discharge necessary to abate an imminent hazard) may be exempted from 314 CMR 4.04(4) by decision of the Department.

(e) A new or increased discharge specifically required as part of an enforcement order issued by the Massachusetts Department of Environmental Protection in order to improve existing water quality or prevent existing water quality from deteriorating may be exempted from 314 CMR 4.04(4) by decision of the Department.

(5) Control of Eutrophication. From and after the date 314 CMR 4.00 become effective there shall be no new or increased point source discharge of nutrients, primarily phosphorus and nitrogen, directly to lakes and ponds. There shall be no new or increased point source discharge to tributaries of lakes or ponds that would encourage cultural eutrophication or the growth of weeds or algae in these lakes or ponds. Any existing point source discharge containing nutrients in concentrations which encourage eutrophication or growth of weeds or algae shall be provided with the highest and best practical treatment to remove such nutrients. Activities which result in the nonpoint source discharge of nutrients to lakes and ponds shall be provided with all reasonable best management practices for nonpoint source control.

(6) Discharge Criteria. In addition to the other provisions of 314 CMR 4.00, any authorized discharge shall be provided with a level of treatment equal to or exceeding the requirements of the Massachusetts Surface Water Discharge Permit Program (314 CMR 3.00). Before authorizing a discharge all appropriate public participation and intergovernmental coordination shall be conducted in accordance with Permit Procedures (314 CMR 2.00).

<General Materials (GM) - References, Annotations, or Tables>

Mass. Regs. Code tit. 314, § 4.04

314 MA ADC 4.04

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Indiana

327 IAC 5-2-11.3 Great Lakes system dischargers antidegradation implementation procedures

Authority: IC 13-14-8; IC 13-14-9; IC 13-15-1-2; IC 13-15-2-1; IC 13-18-3

Affected: IC 13-11-2-24; IC 13-15-5-1; IC 13-18-4; IC 13-18-7; IC 13-23-13; IC 13-24-1; IC 13-25-5

Sec. 11.3. (a) For all waters within the Great Lakes system, the commissioner shall ensure that the level of water quality necessary to protect existing uses is maintained. In order to achieve this requirement, and consistent with 40 CFR 131.10, water quality standards use designations must include all existing uses. Controls shall be established as necessary on point and nonpoint sources of pollutants to ensure that the criteria applicable to the designated use are achieved in the water and that any designated use of a downstream water is protected. Where water quality does not support the designated uses of a waterbody or ambient pollutant concentrations are greater than water quality criteria applicable to that waterbody, the commissioner shall not allow a lowering of water quality for the pollutant or pollutants that prevents the attainment of such uses or the water quality criterion.

(b) For high quality waters that are not designated as an outstanding state resource water, the commissioner shall ensure that no action resulting in a significant lowering of water quality occurs unless an antidegradation demonstration has been completed pursuant to subdivision (3) and the information thus provided is determined by the commissioner pursuant to subdivision (4) to adequately justify the proposed lowering of water quality. In allowing such degradation, the commissioner shall assure water quality adequate to protect existing uses fully. Further, the commissioner shall assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control. The following provisions apply to high quality waters that are not designated as an outstanding state resource water:

(1) A significant lowering of water quality occurs when any of the following occur:

(A) A new or increased loading of any bioaccumulative chemical of concern (BCC) is proposed from any existing or new facility, either point source or nonpoint source, for which a new permit, permit modification, or other control document would be required, as a result of any activity, including, but not limited to, the following:

(i) Construction of a new regulated facility or modification of an existing regulated facility such that a new or modified permit is required.

(ii) Modification of an existing regulated facility operating under a current permit such that the production capacity of the facility is increased.

(iii) Addition of a new source of untreated or pretreated effluent containing or expected to contain any BCC to an existing wastewater treatment works, whether public or private.

- (iv) A request for an increased limit in an applicable permit.
- (v) Other deliberate activities that, based on the information available, could be reasonably expected to result in an increased loading of any BCC to any waters of the Great Lakes system.

(B) There is a new or increased permit limit for a substance that is not a BCC, from any existing or new facility, either point source or nonpoint source for which there is a permit or reviewable action, as a result of any activity, and the new or increased permit limit will result in both of the following:

(i) A calculated increase (calculated decrease for dissolved oxygen) in the ambient concentration of the substance outside of the designated mixing zone or volume, where applicable, in the receiving waterbody.

(ii) A lowering of water quality that is greater than a de minimis lowering of water quality. As used in this clause, "de minimis lowering of water quality" occurs if all of the following are satisfied for the substance under consideration and such a determination is consistent with applicable requirements and limitations in section 11.4 of this rule, including appropriate margin of safety allocations:

(AA) The proposed increase in mass discharged is less than ten percent (10%) of the unused loading capacity. The proposed increase in mass discharged shall be determined as follows:

$$M_p - M_E = \text{Proposed increase in mass discharged}$$

Where M_p =
:

= Monthly average mass effluent limitation for the parameter in the proposed discharge.

M_E =

= Monthly average mass effluent limitation for the parameter in the existing permit. If the existing permit does not contain a monthly average mass effluent limitation for the parameter, but does contain a weekly average or daily maximum mass limit, the existing weekly average or daily maximum permit limit shall be converted into a monthly average value to be used in this equation. If the existing permit does not contain a mass limit for the parameter, but does contain a concentration limit, this concentration limit shall be converted into a mass value, using the discharge flow determined under section 11.4(a)(9) of this rule, to be used in this equation. If the existing permit does not contain an effluent limit for the parameter, the actual monthly average mass discharged shall be used in this equation.

(BB) At least ten percent (10%) of the total loading capacity remains unused after the lowering of water quality.

(iii) The following definitions apply throughout this clause:

(AA) "Total loading capacity" means the product of the applicable water quality criterion times the sum of the existing effluent flow and the stream design flow for the

waterbody in the area where the water quality is proposed to be lowered, expressed as a mass loading rate.

(BB) "Unused loading capacity" means that amount of the total loading capacity not utilized by point source and nonpoint source discharges. The unused loading capacity is established at the time the request to lower water quality is considered.

Michigan

R 323.1098 Antidegradation.

(9) Except for water bodies designated as OSRWs, the following do not constitute a lowering of water quality:

(a) Increased loadings within the existing capacity and processes that are covered by the existing applicable control document, including the following:

(i) Normal operational variability.

(ii) Changes in intake water pollutants.

(iii) Increasing the production hours of the facility, for example, adding a second shift.

(iv) Increasing the rate of production.

(b) Changes in a control document that are not a result of changes in pollutant loading, but are the result of any of the following:

(i) Improved monitoring data.

(ii) New or improved analytical methods or sensitivity.

(iii) New or modified water quality values.

(c) Increased loadings of a pollutant which do not involve a BCC and which use less than 10% of the unused loading capacity that exists at the time of the request.

Ohio

OAC 3745-1-05

(D) Exclusions and waivers.

The exclusions and waivers described in paragraphs (D)(1)(a), (D)(1)(b), (D)(1)(d), (D)(1)(e) and (D)(3) of this rule do not apply to bioaccumulative chemicals of concern within the lake Erie basin.

(1) The following situations are excluded from the submittal and review requirements listed in paragraphs (B)(2)(c) to (B)(2)(g), (C)(6) and (C)(8) of this rule.

(a) Any source discharging to limited quality waters.

(b) Any de minimis net increase determined using the following criteria:

(i) For general high quality waters, any net increase in the discharge of a regulated pollutant that does not exceed ten per cent of the wasteload allocation to maintain water quality standards calculated using total maximum daily load procedures, provided the proposed lowering of water quality does not exceed eighty per cent of the wasteload allocation to maintain water quality standards calculated using total maximum daily load procedures.

(ii) For superior high quality waters, other than lake Erie, any net increase in the discharge of a regulated pollutant that results in less than a five per cent change in the ambient water quality concentration of the receiving water as projected to occur using total maximum daily load procedures, provided the proposed lowering of water quality does not exceed the portion of the remaining available assimilative capacity specified by the director pursuant to paragraphs (C)(7)(d) and (E) of this rule.

(iii) For lake Erie any net increase in the discharge of a regulated pollutant that does not exceed ten per cent of the water body pollutant assimilative capacity.

(iv) For state resource waters, any net increase in the discharge of a regulated pollutant that results in less than a five per cent change in the ambient water quality concentration of the receiving water as projected to occur under total maximum daily load procedures, provided the application of this exclusion is limited to a single exclusion per each five-mile long segment of stream designated as state resource water, or a single exclusion per lake, reservoir or wetland designated as state resource water.

Unofficial Text (See Printed Volume). Current through date and Register shown on Title Page.

b. If there are demonstrated, cost effective pollution control alternatives which would prevent the significant lowering of water quality as demonstrated under sub. (1) (d) 1., water quality based effluent limitations will be determined for the new or increased portion of the discharge based on the cost effective pollution control alternative which prevents the significant lowering of water quality.

(d) The department shall determine water quality based effluent limitations using the water quality criteria or secondary values derived according to ch. NR 102, 103, 104 or 105 for substances in the proposed new or increased discharge whose levels in the receiving water are of lesser quality than the water quality criteria or secondary values for the receiving water upstream of, or adjacent to, the discharge site.

(e) In addition to the provisions of pars. (a) to (c), if the department determines that a proposed new or increased discharge will result in lowering of water quality in downstream outstanding resource waters or a proposed new discharge would result in lowering of water quality in exceptional resource waters, other than for the reasons specified in s. NR 207.03 (2) (a), water quality based effluent limitations for substances in the new or increased portion of the discharge will be set to prevent the lowering of water quality in the downstream outstanding or exceptional resource water. Whenever s. NR 207.03 (2) (a) applies, effluent limitations shall be established using the procedures in this section.

History: Cr. Register, February, 1989, No. 398, eff. 3-1-89; renum. (1) (a) 1. a. to d. to be (1) (a) 1. b. and d. to f., cr. (1) (a) 1. a., c. and (d) 1. e., am. (2) (c) (intro.), 1. and (d), Register, August, 1997, No. 500, eff. 9-1-97.

NR 207.05 Determining significant lowering of water quality. (1) INDICATOR PARAMETERS. For each proposed new or increased discharge the department shall determine a list of water quality parameters for which the significant lowering of water quality test will be applied. The list shall consist of:

(a) Biochemical oxygen demand/dissolved oxygen, ammonia-nitrogen, and copper; or

(b) Some other list of substances for which water quality criteria or secondary values have been determined according to chs. NR 102 to 105, not to exceed 10 parameters, which is determined to be representative of the discharge.

(2) APPLICATION INFORMATION. Persons proposing a new or increased discharge shall use the following procedure to demonstrate to the department whether the discharge will result in a significant lowering of water quality:

(a) Determine the expected levels of the indicator parameters in the discharge.

(b) Determine existing levels of the indicator parameters upstream of, or adjacent to, the discharge site using applicable procedures in chs. NR 102 and 106 or specified by the department if

none of those procedures apply. Existing levels shall be based on the earliest source of data after March 1, 1989 unless a demonstration is made that there has been a change in existing levels resulting in a change in the assimilative capacity of the receiving water, in which case the existing levels shall be based on the data used in the demonstration.

(c) Calculate expected levels in the receiving water of the indicator parameters as a result of the proposed new or increased discharge. In calculating expected levels in the receiving water, the following shall be used:

1. Applicable design low flow rates or dilution ratios for the receiving water in ch. NR 102 or 106 or specified by the department if none of those rates or ratios apply.

2. The daily average discharge loading rates for the new or increased portion of a municipal discharge or the yearly average discharge loading rates for the new or increased portion of an industrial discharge.

(d) Compare the expected levels in the receiving water of each indicator parameter as calculated in par. (c) to:

1. The assimilative capacity multiplied by one-third for all indicator parameters except dissolved oxygen; or

2. The sum of the existing level multiplied by two-thirds and the water quality criterion multiplied by one-third for dissolved oxygen.

(3) PROCEDURE WAIVER. Persons proposing a new or increased discharge may choose to waive the procedure in sub. (2), and proceed directly to the economic and social development test in s. NR 207.04 (1) (c).

(4) DEPARTMENT DETERMINATIONS. The department shall determine that a proposed new or increased discharge will result in a significant lowering of water quality if either:

(a) The proposed new or increased discharge, along with all other new or increased discharges after March 1, 1989, taking into account any changes in assimilative capacity over time that have been demonstrated under sub. (2) (b), results in an expected level of an indicator parameter in the receiving water of either of the following:

1. Greater than one-third multiplied by the assimilative capacity for any indicator parameter other than dissolved oxygen; or

2. Greater than the sum of the existing level multiplied by two-thirds and the water quality criterion multiplied by one-third for dissolved oxygen.

(b) For a discharge to the Great Lakes system, the mass loading to the receiving water of any substance in the proposed new or increased discharge having a bioaccumulation factor greater than 1000 would be increased.

History: Cr. Register, February, 1989, No. 398, eff. 3-1-89; am. (1) (b) and (4) (b), Register, August, 1997, No. 500, eff. 9-1-97.

Minnesota

7050.0185 NONDEGRADATION FOR ALL WATERS.

Subp. 2. **Definitions.** For the purpose of this part, the following terms have the meanings given them:

G. "Significant discharge" means:

(1) a new discharge of sewage, industrial, or other wastes greater than 200,000 gallons per day to any water other than a class 7, limited resource value water; or

(2) an expanded discharge of sewage, industrial, or other wastes that expands by more than 200,000 gallons per day and that discharges to any water other than a class 7, limited resource value water; or

(3) a new or expanded discharge containing any toxic pollutant at a mass loading rate likely to increase the concentration of the toxicant in the receiving water by greater than one percent over the baseline quality. This determination shall be made using:

(a) data collected from the receiving water or from a water representative of the receiving water;

(b) the entire once in ten-year, seven-day low flow of the receiving water as defined in part 7050.0210, subpart 7; and

(c) a mass balance equation that treats all toxic pollutants as conservative substances.

BALDWIN'S OHIO ADMINISTRATIVE CODE
3745. ENVIRONMENTAL PROTECTION AGENCY
CHAPTER 3745-1. OHIO SURFACE WATER QUALITY STANDARDS

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Rules are current through December 31, 2000
Appendices are current through April 30, 1999

3745-1-05 ANTIDegradation

(A) Definitions.

(1) "Available pollutant assimilative capacity" means the water body pollutant assimilative capacity for a substance, as determined in paragraph (A)(26)(a) of this rule, minus the background pollutant load, or the quantity for a substance as calculated in paragraph (A)(26)(b) of this rule.

(2) "Background pollutant load" means the sum of: the upstream pollutant load of a substance; all tributary loads in the segment; and the pollutant loads from discharges in the segment that discharge the pollutant but are not receiving an allocation or permit limit for that pollutant. All portions of the background pollutant load shall be based upon appropriate methods identified in the total maximum daily load procedures, and shall be determined for all substances that impact the segment receiving the allocation.

(3) "Best available demonstrated control technology" means a wastewater treatment capable of meeting the effluent limitations in paragraph (A)(3)(a) or (A)(3)(b) of this rule, or a treatment designed as in accordance with the provisions of paragraphs (A)(3)(c) to (A)(3)(f) of this rule.

(a) For the discharge of sanitary wastewater from facilities using conventional treatment technologies, the effluent limitations in table 5-1 of this rule.

(b) For the discharge of sanitary wastewater from alternative treatment technologies such as lagoon systems, land application and controlled discharge systems, constructed wetland systems or combined sewer overflow control systems effluent limitations shall be developed on a case-by-case basis.

(c) For industrial direct discharges subject to federal effluent guidelines, the facility shall be designed to meet the most stringent of the new source performance standards, best conventional pollutant control technology, best available technology economically achievable and best practicable control technology currently available for the appropriate categorical guidelines of 40 C.F.R.

(d) For categorical industrial indirect dischargers, the facility shall be designed to meet categorical pretreatment standards for existing sources or categorical pretreatment standards for new sources as contained in Chapter 3745-3 of the Administrative Code.

(e) For non-categorical industrial direct or indirect discharges, effluent limitations will be developed based upon best engineering/professional judgment.

(f) For wastewater discharges resulting from clean-up of response action sites contaminated with volatile organic compounds, the facility shall include air-stripping, carbon columns, both, or equivalent treatment capable of achieving final thirty-day average effluent limits of five micrograms per liter or less for each individually regulated volatile organic compound.

(4) "Control document" means any authorization issued by a state or federal agency to any source of pollutants to waters under its jurisdiction that specifies conditions under which the source is allowed to operate.

(5) "Declining fish species" mean those native species that have declined in distribution across Ohio based on

collection records since 1978 compared to historical distributions of fish species documented in "Fishes of Ohio" (Trautman, 1981). No later than ninety days after the effective date of this rule, the director, in consultation with the director of the department of natural resources, shall establish and make available through public notice a registry of declining fish species. In the event that improved water quality results in the decline of any pollutant tolerant native fish species the director may elect not to include such species on the registry if the ecological risks appear minimal. The registry shall be revised periodically if public comments or other circumstances justify.

(6) "Existing discharge" means a direct discharge of pollutants to waters of the state in existence at the time of the applicant's request to transfer pollutant loading.

(7) "Existing effluent quality based permit limitations" mean discharge limits for specific pollutants specified in national pollutant discharge elimination system permits issued prior to July 1, 1993 that were derived from an analysis of effluent quality reported in monthly operating report data, including any negotiated limits that were based in part upon an analysis of effluent quality reported in monthly operating report data.

(8) "Existing source" means any treatment works that were built and operational under the terms of a national pollutant discharge elimination system permit prior to July 1, 1993, but does not include expansions or upgrades of existing treatment works authorized pursuant to rule 3745-31 [FN1] of the Administrative Code after July 1, 1993.

(9) "High quality waters" mean all surface waters of the state except limited quality waters. Pursuant to division (A)(2) of section 6111.12 of the Revised Code, five categories of high quality waters are hereby recognized and described in this paragraph. Designations of specific water bodies shall follow the procedures in paragraph (E) of this rule.

(a) "General high quality waters" are wetlands categorized as category 2 or 3 in accordance with rule 3745-1-54 of the Administrative Code and other surface waters that are not specifically designated limited quality waters, superior high quality waters, outstanding national resource waters, outstanding high quality waters, or state resource waters.

(b) "Superior high quality waters" are surface waters that possess exceptional ecological values, exceptional recreational values or both, and that have been so designated pursuant to paragraph (E) of this rule. Except as provided below, exceptional ecological values shall be assessed based upon a combination of the presence of threatened or endangered species and a high level of biological integrity. The following factors shall be considered in determining exceptional ecological value: providing habitat for Ohio or federal endangered species; providing habitat for Ohio threatened species; harboring stable populations of a declining fish species that coincide with the presence of suitable habitat for that species, or that coincide with an essential migration path between areas of suitable habitat for that species; and displaying a level of biological integrity equivalent to the exceptional warmwater habitat index of biotic integrity and/or invertebrate community index criteria values listed in rule 3745-1-07 of the Administrative Code.

Water bodies that exhibit a pattern of biological integrity equivalent to index of biotic integrity and, where applicable, invertebrate community index scores of fifty-six or greater at most sites are characteristic of a near-pristine aquatic habitat. Such waters, as well as other ecologically unique water bodies that have essentially undisturbed native faunas, but for which the biological criteria in rule 3745-1-07 of the Administrative Code do not apply, may be considered as possessing exceptional ecological values without the presence of threatened or endangered species.

Exceptional recreational values may include providing outstanding or unique opportunities for recreational boating, fishing or other personal enjoyment.

(c) "State resource waters" are surface waters so designated in rules 3745-1-08 to 3745-1-30 of the Administrative Code and all publicly owned lakes and reservoirs.

(d) "Outstanding national resource waters" and "outstanding high quality waters" are surface waters that have a national ecological or recreational significance, and that have been so designated pursuant to paragraph (E) of this rule. National ecological significance may include providing habitat for populations of federal endangered or threatened species or displaying some unique combination of biological characteristics in addition to those factors

REVISED STATUTES ANNOTATED OF THE STATE OF NEW HAMPSHIRE
TITLE L. WATER MANAGEMENT AND PROTECTION
CHAPTER 485-A. WATER POLLUTION AND WASTE DISPOSAL
CLASSIFICATION OF WATERS

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Current through End of 2000 Reg. Sess.

485-A:8 Standards for Classification of Surface Waters of the State.

It shall be the overall goal that all surface waters attain and maintain specified standards of water quality to achieve the purposes of the legislative classification. For purposes of classification there shall be 2 classes or grades of surface waters as follows:

I. Class A waters shall be of the highest quality and shall contain not more than either a geometric mean based on at least 3 samples obtained over a 60-day period of 47 Escherichia coli per 100 milliliters, or greater than 153 Escherichia coli per 100 milliliters in any one sample; and for designated beach areas shall contain not more than a geometric mean based on at least 3 samples obtained over a 60-day period of 47 Escherichia coli per 100 milliliters, or 88 Escherichia coli per 100 milliliters in any one sample; unless naturally occurring. There shall be no discharge of any sewage or wastes into waters of this classification. The waters of this classification shall be considered as being potentially acceptable for water supply uses after adequate treatment.

II. Class B waters shall be of the second highest quality and shall have no objectionable physical characteristics, shall contain a dissolved oxygen content of at least 75 percent of saturation, and shall contain not more than either a geometric mean based on at least 3 samples obtained over a 60-day period of 126 Escherichia coli per 100 milliliters, or greater than 406 Escherichia coli per 100 milliliters in any one sample; and for designated beach areas shall contain not more than a geometric mean based on at least 3 samples obtained over a 60-day period of 47 Escherichia coli per 100 milliliters, or 88 Escherichia coli per 100 milliliters in any one sample; unless naturally occurring. There shall be no disposal of sewage or waste into said waters except those which have received adequate treatment to prevent the lowering of the biological, physical, chemical or bacteriological characteristics below those given above, nor shall such disposal of sewage or waste be inimical to aquatic life or to the maintenance of aquatic life in said receiving waters. The pH range for said waters shall be 6.5 to 8.0 except when due to natural causes. Any stream temperature increase associated with the discharge of treated sewage, waste or cooling water, water diversions, or releases shall not be such as to appreciably interfere with the uses assigned to this class. The waters of this classification shall be considered as being acceptable for fishing, swimming and other recreational purposes and, after adequate treatment, for use as water supplies. Where it is demonstrated to the satisfaction of the department that the class B criteria cannot reasonably be met in certain surface waters at all times as a result of combined sewer overflow events, temporary partial use areas shall be established by rules adopted under RSA 485-A:6, XI-c, which meet, as a minimum, the standards specified in paragraph III.

III. The waters in temporary partial use areas established under paragraph II shall be free from slick, odors, turbidity, sludge deposits, and surface-floating solids of unreasonable kind or quantity, shall contain not less than 5 parts per million of dissolved oxygen; shall have a hydrogen ion concentration within the range of pH 6.0 to 9.0 except when due to natural causes; and shall be free from chemicals and other materials and conditions inimical to aquatic life or the maintenance of aquatic life. These criteria shall apply during combined sewer overflow discharges and up to 3 days following cessation of said discharge. At all other times the standards and uses specified in paragraph II shall apply.

IV. Notwithstanding anything contained in this chapter, the department in submitting classifications relating to

STATE OF NEW HAMPSHIRE
OFFICE OF LEGISLATIVE SERVICES
DIVISION OF ADMINISTRATIVE RULES
DEPARTMENT OF ENVIRONMENTAL SERVICES DIVISION OF WATER
CHAPTER ENV-WS 400. PROTECTION OF STATE SURFACE WATERS
PART ENV-WS 430. SURFACE WATER QUALITY REGULATIONS
Current through February 1, 2001.

Env-Ws 430.34 Antidegradation - Class B Waters.

(a) All No degradation of any class B surface waters having an existing water quality exceeding the minimum criteria of their legislated classifications shall occur unless as a result of an insignificant discharge, in (b) below, that has been approved by the department in accordance with Env-Ws 430.36 through Env-Ws 430.45.

(b) Insignificant discharges shall consist of the following:

(1) Short term or intermittent discharges from activities such as:

- a. Hydrostatic testing of pipelines;
- b. Fire pump test water;
- c. Reservoir maintenance;
- d. Lake restoration;
- e. Discharges from marina and boat maintenance docking facilities;
- f. Uncontaminated stormwater discharges; or
- g. Site cleanup activities;

(2) Permanent discharges such as:

- a. Uncontaminated noncontact cooling water;
- b. Unchlorinated swimming pool water; and
- c. Water treatment plant backwash water;

(3) Nonpoint source runoff from facilities that employ best management practices established by the department; and

(4) All other types of discharges that are not specifically mentioned above and which use less than 25% of the remaining assimilative capacity of the surface water for each parameter that is found in the discharger's effluent.

(c) Class B waters shall be maintained and protected from significant discharges, unless the applicant can demonstrate to the department, in accordance with Env-Ws 430.36 through Env-Ws 430.45, that allowing limited water quality degradation is necessary to accommodate important economic or social development in the area in which the surface water is located.

<General Materials (GM)- Agency Filing History, References, Annotations,
or Tables >

TEXAS ADMINISTRATIVE CODE
TITLE 30. ENVIRONMENTAL QUALITY
PART 1. TEXAS NATURAL RESOURCE
CONSERVATION COMMISSION
CHAPTER 307. TEXAS SURFACE WATER
QUALITY STANDARDS
Current through September 30, 2000.

§ 307.5. Antidegradation

(a) Application. The antidegradation policy and implementation procedures set forth in this section shall apply to actions regulated under state and federal authority which would increase pollution of the water in the state. Such actions include authorized wastewater discharges, TMDLs, waste load evaluations, and any other miscellaneous actions, such as those related to man-induced nonpoint sources of pollution, which may impact the water in the state.

(b) Antidegradation policy. In accordance with the Texas Water Code, §26.003, the following provisions establish the antidegradation policy of the agency.

(1) Tier 1. Existing uses and water quality sufficient to protect those existing uses will be maintained. Categories of existing uses are the same as for designated uses, as defined in §307.7 of this title (relating to Site-specific Uses and Criteria).

(2) Tier 2. No activities subject to regulatory action which would cause **degradation** of waters which exceed fishable/swimmable quality will be allowed unless it can be shown to the commission's satisfaction that the lowering of water quality is necessary for important economic or social development. **Degradation** is defined as a lowering of water quality by more than a de minimis extent, but not to the extent that an existing use is impaired. Water quality sufficient to protect existing uses will be maintained. Fishable/swimmable waters are defined as waters which have quality sufficient to support propagation of indigenous fish, shellfish, and wildlife and recreation in and on the water.

(3) Tier 3. Outstanding national resource waters are defined as high quality waters within or adjacent to national parks and wildlife refuges, state parks, wild and scenic rivers designated by law, and other designated areas of exceptional recreational or ecological significance. The quality of outstanding

national resource waters will be maintained and protected.

(4) Discharges which cause pollution that are authorized by the Texas Water Code, the Federal Clean Water Act, or other applicable laws will not lower water quality to the extent that the Texas Surface Water Quality Standards are not attained.

(5) Anyone discharging wastewater which would constitute a new source of pollution or an increased source of pollution from any industrial, public, or private project or development will be required to provide a level of wastewater treatment consistent with the provisions of the Texas Water Code and the Clean Water Act (33 United States Code, §§1251 et seq.). As necessary, cost-effective and reasonable best management practices established through the Texas Water Quality Management Program shall be achieved for nonpoint sources of pollution.

(6) Application of antidegradation provisions shall not preclude the commission or executive director from establishing modified thermal discharge limitations consistent with the Clean Water Act, § 316(a) (33 United States Code, §1326).

(c) Antidegradation implementation procedures.

(1) Implementation for specific regulatory activities.

(A) For TPDES permits for wastewater, the process for the antidegradation review and public coordination is described in the standards implementation procedures.

(B) For federal permits relating to the discharge of fill or dredged material under Federal Clean Water Act, §404, the antidegradation policy and public coordination is implemented through the evaluation of alternatives and mitigation under Federal Clean Water Act, §404(b)(1). State review of alternatives, mitigation, and requirements to protect water quality may also be conducted for federal permits which are subject to state certification, as authorized by Federal Clean Water Act, §401 and conducted in accordance with Chapter 279 of this title (relating to Water Quality Certification).

(C) Other state and federal permitting and regulatory activities which increase pollution of water in the state are also subject to the provisions of the

antidegradation policy as established in §307.5(a) and (b) of this title (relating to Antidegradation).

(2) General provisions for implementing the antidegradation policy.

(A) Tier 1 reviews will ensure that water quality is sufficiently maintained so that existing uses are protected. All pollution which could cause an impairment of water quality is subject to Tier 1 reviews. If the existing uses and criteria of a potentially affected water body have not been previously determined, then the antidegradation review will include a preliminary determination of existing uses and criteria. Existing uses will be maintained and protected.

(B) Tier 2 reviews apply to all pollution which could cause **degradation** of water quality where water quality exceeds levels necessary to support propagation of fish, shellfish, wildlife, and recreation in and on the water (fishable/swimmable quality). Guidance for determining which water bodies exceed fishable/swimmable quality is contained in the standards implementation procedures. For dissolved oxygen, analyses of **degradation** under Tier 2 will utilize the same critical conditions as are used to protect instream criteria. For other parameters, appropriate conditions may vary. Conditions for determining **degradation** will be commensurate with conditions for determining existing uses. The highest water quality sustained since November 28, 1975 (in accordance with EPA Standards Regulation 40 CFR 131) defines baseline conditions for determinations of **degradation**.

(C) Tier 3 reviews apply to all pollution which could cause **degradation** of outstanding national resource waters. Outstanding national resource waters are those specifically designated in this chapter.

(D) When **degradation** of waters exceeding fishable/swimmable quality is anticipated, a statement that the antidegradation policy will be pertinent to the permit

action will be included in the public notice for the permit application or amendment. If no **degradation** is anticipated, the public notice will so state.

(E) Evidence can be introduced in public hearings, or through the public comment process, concerning the determination of existing uses and criteria; the assessment of **degradation** under Tier 1, Tier 2, and Tier 3; the social and economic justification for lowering water quality; requirements and conditions necessary to preclude **degradation**; and any other issues which bear upon the implementation of the antidegradation policy.

(F) Interested parties will be given the opportunity to provide comments and additional information concerning the determination of existing uses, anticipated impacts of the discharge, baseline conditions, and the necessity of the discharge for important economic or social development if **degradation** of water quality is expected under Tier 2.

(G) The antidegradation policy and the general provisions for implementing the antidegradation policy apply to the determination of TMDLs and to waste load evaluations which allow an increase in loading. If the TMDL or waste load evaluation indicates that **degradation** of waters exceeding fishable/swimmable quality is expected, the public hearing notice will so state. Permits which are consistent with an approved TMDL or waste load evaluation under this antidegradation policy will not be subjected to separate antidegradation review for the specific parameters that are addressed by the TMDL or waste load evaluation.

Source: The provisions of this §307.5 adopted to be effective July 10, 1991, 16 TexReg 3400; amended to be effective July 13, 1995, 20 TexReg 4701; amended to be effective August 17, 2000, 25 TexReg 7722.

30 TX ADC § 307.5
END OF DOCUMENT

CERTIFICATE OF SERVICE

I, Katherine D. Hodge, the undersigned, certify that I have served a copy of the attached POST-HEARING COMMENTS OF THE ILLINOIS ENVIRONMENTAL REGULATORY GROUP upon:

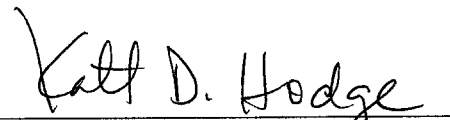
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Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center
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Chicago, Illinois 60601

by overnight delivery by depositing said documents in an Airborne Express drop box in Springfield, Illinois, on March 19, 2001, and upon:

SEE ATTACHED SERVICE LIST

by depositing said documents in the United States Mail in Springfield, Illinois on March 19, 2001.



Katherine D. Hodge

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Pollution Control Board

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