

ILLINOIS POLLUTION CONTROL BOARD  
December 6, 2001

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

Proposed Rule. Second Notice.

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

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

After the Board accepted this matter for hearing, the Board held three hearings before Board Hearing Officer Marie Tipsord. The first and third hearings (November 17, 2000 and February 6, 2001), were held in Chicago, Illinois. The second hearing (December 6, 2000), was held in Springfield, Illinois. Testimony was heard from the Agency, the Department of Natural Resources (DNR), Illinois Environmental Regulatory Group (IERG), American Bottoms Regional Wastewater Treatment Facility, Village of Sauget, Illinois, Prairie Rivers Network, the Environmental Law & Policy Center, Friends of the Fox River, McHenry County Defenders and the Sierra Club.<sup>1</sup> In addition, all of these participants except the Department filed post-hearing public comments. The Board received a total of 47 comments prior to the first notice, which included 42 comments from groups and individuals not named in this paragraph. On June 21, 2001, after reviewing the comments and testimony and making changes to the proposal based on those comments and testimony, the Board proceeded to first notice with the rules.<sup>2</sup>

After the Board adopted the first-notice proposal, the Board held a fourth hearing on August 24, 2001 in Chicago. At that hearing testimony was provided by Toby Frevert representing the Agency, Dierdre K. Hirner representing IERG, Jack Darin representing Sierra Club, Illinois Chapter, Cynthia L. Skrukrud representing Friends of the Fox River, and Robert J.

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

<sup>2</sup> For more details on the Board's first-notice opinion and order see Revisions to Antidegradation Rules: 35 Ill. Adm. Code 302.105, 303.205, 303.206, and 102.800-102.830, R01-13 (June 21, 2001).

Moore representing Prairie Rivers Network. All of these groups filed post-hearing comments that will be discussed in detail below. After reviewing the testimony and comments, the Board finds that it is appropriate to proceed to second notice with this rule.

### **SUMMARY OF THE PROPOSAL**

The proposed amendments add new requirements concerning antidegradation of waters in the State to the Board's current rules found at 35 Ill. Adm. Code 302.105. The proposal would designate the State's water resources to reflect the three tiers of the federal program. The proposal also adds procedures for the implementation of the program as a part of the National Pollutant Discharge Elimination System (NPDES) permit process.

Tier 1 in the federal scheme is based on achieving and maintaining existing stream uses. Prop. at 3. Tier 1 sets the minimum level of protection and is intended to be the absolute floor of water quality protection for all waters of the United States. *Id.* Tier 2 of the federal program addresses waters whose quality exceeds the levels necessary to support the propagation of fish, shellfish, or wildlife and recreation in and on the water. Water quality cannot be lowered below the level necessary to protect the "fishable/swimmable" uses and other existing uses. Prop. at 3. However, maintaining a level of water quality above the "fishable/swimmable" level is not always required and water quality may be lowered if necessary to accomplish important economic or social development in the area in which the waters are located. *Id.* and 40 C.F.R. 131.12(a)(2).

Tier 3 of the federal regulations requires that high quality water, which constitutes outstanding resource waters, must be maintained and protected. Prop. at 4. Examples of outstanding resource waters could include waters of national and state parks, wildlife refuges or water of exceptional recreational or ecological significance. *Id.* To reflect Tier 3 in Illinois, the Board is proposing rules at 35 Ill. Adm. Code 303 creating the category of waters classified as "outstanding resource waters" or ORWs. The Board also proposes adding a new Subpart to the Board's procedural rules at 35 Ill. Adm. Code 102 to regulate the process for classification of Outstanding Resource Waters.

### **PROPOSED CHANGES TO THE PROPOSAL**

As previously indicated the Board received three comments after the fourth hearing in this matter. The comments from the Agency, IERG, and the Environmental Groups indicate that there are areas of agreement for additional changes to the rule. The comments also indicate some disagreement. The following discussion will delineate the agreed-upon suggested changes and discuss the areas of disagreement. The discussion will begin with general comments and proceed to a section by section breakdown of suggested changes and the Board's response to the suggested changes. The Board will not specifically discuss suggested changes that are nonsubstantive, but the Board will accept most of those suggested changes.

#### **General Comments**

The Agency indicated in both the prefiled testimony and the final comments that the Agency generally supports the Board's proposal. PC 50 at 1; Exh. 38 at 1. However, the Agency has three areas of concern regarding the Board's inclusion of the antidegradation

implementation procedures in Part 302. First the Agency urges the Board to delete the implementation procedures from Part 302 and move the implementation procedures to Part 309. The Agency argues that under the organizational pattern set forth in Subtitle C of the Illinois Administrative Procedure Code, the requirements for permitting are set forth in Part 309. PC 50 at 5. The Agency points out that since the codification of environmental regulations the Board has followed the practice of centrally locating permit regulation by media, and such a practice decreases the potential for confusion among the regulated community and facilities in the permitting process. *Id.* The Agency urges the Board to continue this practice.

Secondly, the Agency indicated that because the Board had included Exhibit B from the proposal for rulemaking as Section 302.102(f), there were several concerns about the language as originally included. PC 50 at 2. Specifically, the Agency proposes that subsections 302.105(f)(2)(A)(i), (f)(2)(B) and (f)(2)(C) should be deleted from the rule. PC 50 at 3-4. The Agency indicates that these subsections address the Agency's commitment to interact with the regulated community prior to an application for an NPDES permit being filed. *Id.* The Agency asserts that the communication itself does not result in a permit, and it is not mandatory upon any applicant. Therefore, the Agency believes that the subsections should be deleted.

Finally, the Agency is concerned that the inclusion of the implementation procedures could be problematic for activities requiring a Section 401 of the Clean Water Act water quality certification (33 U.S.C. § 1341 (Section 401 certification)). PC 50 at 2; Exh. 38 at 2. The Agency points out that the proposed rule would apply the Section 302.105(f) procedures to permit applications as well as the review of activities requiring a Section 401 certification. Exh. 38 at 2. In contrast to the NPDES program, the Agency is not the delegated permitting agency for federal permits but must work with several federal permitting agencies in the Section 401 certification process. *Id.* Because of the need for coordination, the Agency argues that it is important that the procedures for the Section 401 certification process remain in Agency rules. *Id.* The Agency therefore requests that the reference to Section 401 certification be removed from Section 302.105(b)(4) and a new subsection (b)(5) be added.

IERG supports the Agency's suggested changes including new language in Part 309, deleting several subsections from 302.105(f), and removing references to Section 401 certification. PC 52 at 12. However, the Environmental Groups have concerns regarding the Agency's suggested changes. First, the Environmental Groups "oppose any changes being made to the First Notice Proposal that will cause substantial delay in the final enactment of protective regulations." PC 51 at 2. Secondly, the Environmental Groups object to the deletion of references to the Section 401 certification. The Environmental Groups assert that the Agency's suggested change would separate the procedures for conducting antidegradation review for NPDES permits from the procedures for reviewing Section 401 certifications. PC 51 at 5. The Environmental Groups argue that there would be no procedures established in this proceeding for Section 401 certifications. The Environmental Groups argue that the Agency does not point to any specific potential conflicts between state and federal rules or procedures. Further, the Environmental Groups assert that they are unaware of any potential conflicts. PC 51 at 5.

## **Discussion**

The Board appreciates the Agency suggestion that to remain consistent with other Board regulations the implementation procedures should be placed in Part 309 of the Board's rules. However, the Board agrees with the comment of the Environmental Groups that placing the implementation procedures into Part 309 at this late stage of the rulemaking would lead to an unnecessary delay for the reasons explained below.

Based on the Agency's original proposal, which did not include Part 309, the Board has published the proposed rule in the *Illinois Register* and Part 309 was not included in the Board's first-notice publication. Section 5-10 (c) of the Administrative Procedure Act (APA) (5 ILCS 100/5-5 *et seq.*) provides, in part, that:

No agency rule is valid or effective against any person or party, nor may it be invoked by the agency for any purpose, until it has been made available for public inspection and filed with the Secretary of State as required by this Act. 5 ILCS 100/5-10(c)

The APA sets out specific rulemaking requirements, which include giving at least 45-days notice of the agency's intended action in the *Illinois Register*. 5 ILCS 100/5-40(b). The notice shall include publishing the text of the proposed rule. 5 ILCS 100/5-40(b)(1). The APA's language is clear that the text of any proposed amendment must appear in the *Illinois Register* for first notice prior to the adoption of the rule. Although an agency may make changes in response to comments received during the first notice (5 ILCS 100/5-40(c)), the Board does not believe that this extends to opening and amending a new part. Therefore pursuant to the APA, the Board would be required to publish a first-notice proposal opening Part 309 and amending Part 309 as suggested by the Agency. In effect because of APA requirements, this action would return the antidegradation rule to first notice and would result in a substantial delay in promulgating this new rule. Therefore, the Board will not make the change suggested by the Agency to move the implementation procedures to Part 309 in this rulemaking.

The Board notes that the Agency recently proposed a new rulemaking (R02-11) to the Board entitled, Water Quality Triennial Review: Amendments to 35 Ill. Adm. Code 302.208(e)-(g), 302.504(a), 302.575(d), 303.444, 309.141(h) and Proposed 35 Ill. Adm. Code 301.267, 301.313, 301.413, 304.120, and 309.157. In R02-11, the Agency proposed amendments to both Parts 309 and 302. Therefore, the Agency could propose that the implementation procedures for Part 309 be placed in R02-11 without delaying the instant rulemaking which has been before the Board since August 30, 2000.

The Board has reviewed the Agency's request that the Clean Water Act (CWA) Section 401 certification language be removed from Section 302.105(b)(4). A Section 401 certification under the CWA is when an applicant for a federal permit to conduct any activity that results in a discharge to navigable waters must first obtain a certification from the Agency that the discharge complies with applicable water quality and effluent standards. The Agency had included the Section 401 certification provisions in the original proposal to the Board and this inclusion was not an issue prior to the Board's proceeding to first notice. The Agency asserts that procedures for Section 401 certifications should remain in Agency rules and therefore, the references to Section 401 certifications should be removed. However, the Environmental Groups disagree and correctly point out that absent this provision there would be no procedures established in this

proceeding for antidegradation review of Section 401 certifications. The Board believes that a procedure should be in place to review discharges subject to Section 401 certification for potential degradation of waters of the State. Therefore, the Board will leave in references to Section 401 certifications.

The Agency has made several specific suggestions for changes to be made in the language proposed at Section 302.105(f), including a suggestion that portions of Section 302.105(f) be deleted. The Board will make the changes suggested by the Agency where feasible and incorporate them in Section 302.105(f). The Board notes that one suggestion by the Agency is to add the phrase “but not limited to” after the word “included” in several places. The Board will not make that change as the phrase “but not limited to” is redundant because “included” does not mean the subsequent listing is an exhaustive list.

### **Section 302.105(b)**

IERG states that it assumes the Board did not intend Section 302.105(b)(3)(B) and (C) to apply only to activities authorized under Section 302.105(b)(1)(A) and (B) and indicates that IERG has discussed language with the Environmental Groups. IERG also seeks clarification in the Board’s opinion and order of the Board’s intent concerning Section 302.105(b)(3)(B). IERG is unsure of the Board’s intent for the requirement “that increases in loading to ORWs improve water quality.” PC 52 at 11.

The Environmental Groups agree with IERG’s assumption that the Board did not intend Section 302.105(b)(3)(B) and (C) to apply to activities authorized under Section 302.105(b)(1)(A) and (B) and offers identical language to clarify the rule. In addition, the Environmental Groups suggest language to clarify that the provisions of Section 302.105(b)(1)(B) allows stormwater discharges in existence when the ORW is designated. PC 51 at 24-25. The Environmental Groups believe that Section 302.105 (b)(1)(B) might be read to allow degradation of an ORW and also prevent certain loadings that were “probably intended to be allowed.” PC 51 at 23.

### **Discussion**

In response to IERG’s uncertainty regarding Section 302.105(b)(3)(B), the Board notes that increases in loading of one constituent that may reduce the loading of one or more constituents may be an improvement in water quality. Also, adding a new constituent that would eliminate a bioaccumulative chemical of concern is an additional example of an activity that may improve water quality. However, this is not an exhaustive list and the Board does not intend that it should be.

Regarding IERG’s comments pertaining to the intent of Section 302.105(b)(3)(B) and (C), the Board notes that IERG correctly assumes that the increase in pollutant loadings to an ORW is not limited to the activities listed in Section 302.105(b)(1). Subsection 302.105(b)(3)(B) allows for an increase in pollutant loading under a very limited circumstance where such an increase is necessary for an activity that will improve the quality of the ORW. The Board does not consider an increase in pollutant loading pursuant to subsection 302.105(b)(3)(B) as lowering the quality of an ORW. In this regard, the Board notes that the

proposed regulations prohibit the lowering of quality of an ORW, except for the activities listed in Section 302.105(b)(1). The Board declines to make the change to Section 302.105(b)(3) suggested by IERG and the Environmental Groups. Furthermore, the Board declines to make the suggested change to Section 302.105(b)(1)(B) regarding stormwater discharges to an ORW offered by the Environmental Groups. The Board believes the rule as written very clearly reflects that only stormwater discharges in existence on the day an ORW is designated are allowed if such discharges are in compliance with applicable stormwater discharge and water quality regulations. The Board believes that adopting the Environmental Groups' proposed language would narrow the scope of the exception by limiting the applicability to only discharges that require an NPDES permit or Section 401 certification.

### **Section 302.105(c)(2)**

The Agency suggests that a new sentence be added Section 302.105(c)(2) and Section 302.105(f)(2) that indicates that the Agency will make antidegradation assessments on a case-by-case basis. PC 50 at 7. The Agency makes this request in response to IERG's testimony at the August 24, 2001 hearing. The Agency states that the Environmental Groups and IERG met and agree that this concept should be included in the rule.

IERG agrees that this language should be added and further suggests that Section 302.105(c)(2)(B) be amended to reflect that the Agency's decision will be made on a case-by-case basis. PC 52 at 3-4. IERG also suggests that the language be clarified in this section to clearly identify to the regulated community when an antidegradation review is triggered. PC 52 at 8. Although IERG had initially suggested language, IERG had subsequent discussions with the Agency, which has led to IERG's suggestion in this comment. *Id.* IERG wishes to explicitly state "that which is implicit in the Board's proposal" that for constituents for which a limit is expressly stated in a permit, the antidegradation process is triggered by an applicant's request that would exceed that permit limit. PC 52 at 8-9. IERG would ask that the same language be added in Section 302.105(f).

The Environmental Groups indicate that they do not object to the inclusion of the case-by-case language proposed by the Agency. PC 51 at 6. The Environmental Groups also do not object to the language proposed by IERG; however, the Environmental Groups believe such language is repetitive. PC 51 at 7.

### **Discussion**

The Board notes that all permit decisions made by the Agency are based on the specifics of the permit application, utilizing both the Agency's rules and the Board's rules. As there appears to be no objection to the inclusion of this language the Board will make the suggested change in Section 302.105(c)(2). However, the Board agrees that the further inclusion of the language in subsection (c)(2)(B) is repetitive and the Board will not make that change.

The Board declines to amend Section 302.105(c)(2) and (f)(1) to add the language suggested by IERG. The Board believes that the language in these subsections is clear on its face.

### **Section 302.105(c)(2)(C)**

IERG indicates that it has reconsidered its request to include a *de minimis* exception in the rule. PC 52 at 7. However, IERG suggests that the Board add to Section 302.105(c)(2)(C) a new subsection to allow the Agency to consider a *de minimis* demonstration as one of its sources of information in making an antidegradation assessment. *Id.* IERG would have the applicant prepare the demonstration and the demonstration would show that the increased loading of a pollutant (other than a bioaccumulative chemical of concern) does not utilize more than 10% of the assimilative capacity of the receiving waters. *Id.*

### **Discussion**

In the Board's first-notice opinion and order, the Board addressed the issue of a *de minimis* exception at length. The Board stated that:

The Board notes that since the proposed exception does not make any distinctions based on the nature and characteristics of the discharge, IERG's proposal would allow discharge of bioaccumulative and persistent chemicals without an Agency review as long as the increased level is below the *de minimis* level. Discharge of even small amounts of such chemicals may not be advisable in certain water bodies. Further, the Board agrees with the Agency that the actual determination of the assimilative capacity of receiving water body may take as much effort as performing the antidegradation review. Revision to Antidegradation Rules: 35 Ill. Adm. Code 302.105, 303.205, 303.206, And 102.800-102.830 R01-13 (June 21, 2001) *slip. op.* at 16.

Although IERG has modified its request for a *de minimis* exception, the Board believes that the Board's decision to not include a *de minimis* exception in these rules is appropriate for Illinois. Therefore, the Board will stand by the discussion in the first-notice opinion.

### **Section 302.105(d)(5)**

During the August 24, 2001 hearing, IERG made a suggestion regarding non-contact cooling water, and there was extensive discussion on the record at the hearing regarding non-contact cooling water. Tr. 8/24/01 at 12, 25-30. The Agency agreed to review the language after the hearing and has proposed a change. The Agency noted that the additive discussed is chlorine and the suggested change would present minimal environmental impact, due to the technical reliability of de-chlorination processes. Further the Agency believes the suggested language change would provide a benefit to the regulated community. PC 50 at 8.

IERG concurs with the Agency's suggested language. IERG indicates that the regulated community and the Agency "have come to understand that application of this exception to non-contact cooling water containing only the additive chlorine, and where dechlorination occurs before discharge is an acceptable compromise." PC 52 at 6.

The Environmental Groups oppose the suggested language change. Specifically, they argue that the record does not contain enough information to determine that chlorine is removed by processing to the extent that chlorine never poses a danger to aquatic life. PC 51 at 7. The

Environmental Groups further argue that the lack of an exemption for chlorine would impose little hardship due to the case-by-case approach proposed to the Board. PC 51 at 8.

### **Discussion**

The Board appreciates the concerns expressed by the Environmental Groups. However, the language agreed to by IERG and the Agency would require the removal of chlorine and the maintenance of an effluent limit. The Board feels these safeguards will ensure that there is no environmental harm and the Board will therefore accept the language change.

### **Section 302.105(d)(6)**

The Agency indicates that the Section 401 certification process does not use the phrase “general” Section 401 certification. PC 50 at 9. To avoid potential confusion, the Agency suggests that this subsection be amended to replace the phrase “general CWA, Section 401 certification” with “for nationwide or regional Section 404 of the CWA permit.” PC 50 at 9. The Agency stated that IERG and the Environmental Groups also suggest the language be clarified to better reflect the certification process when an activity is subject to a nationwide permit. *Id.*

In addition to the Agency’s suggestion in this subsection, IERG suggests that the language “waters of particular biological significance” be deleted. IERG argues that the Board does not discuss this phrase in the opinion and IERG is uncertain what the Board means by the term. PC 52 at 13. IERG asks if the Board intended to use “Outstanding Resource Waters” in this subsection.

IERG notes that the Environmental Groups endorse the use of “waters of particular biological significance” and the Environmental Groups suggest that the Agency rely on the 1991 report prepared by the Illinois Department of Conservation<sup>3</sup> titled “Biologically Significant Illinois Streams” to determine what constitutes “waters of particular biological significance.” PC 52 at 14. IERG objects to relying on the 1991 publication. PC 51 at 14. IERG asserts that the Environmental Groups have not filed evidence of the methodology used to identify waters in the 1991 publication and the authors do not explain what data was relied on. Further the data in the 1991 publication is out of date and the 1991 publication indicates that some of the water bodies identified cannot be saved. PC 51 at 15-16.

The Environmental Groups suggest clarifying “waters of particular biological significance” by deleting the phrase and replacing it with:

which include waters identified by the Illinois Department of Natural Resources to be biologically significant, waters known to contain state or federally listed threatened or endangered species, or water identified as having high levels of biodiversity. PC 51 at 26

### **Discussion**

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<sup>3</sup> One of the agencies combined to form the Illinois Department of Natural Resources.



The Board will make the change suggested by the Agency and agreed to by IERG and the Environmental Groups by replacing “general CWA, Section 401 certification” with “for nationwide or regional Section 404 of the CWA permit.” With regard to the phrase “waters of particular biological significance” the Board will add a reference to the Illinois Department of Conservation publication entitled “Biologically Significant Illinois Streams.” The Board will not make this publication the definitive source but rather list it as a possible listing of waters of particular biological significance.

### **Section 302.105(f)(1)(G)**

The Environmental Groups have suggested that the Board’s regulations should make clear that the Illinois Department of Natural Resources should be notified of proposals to allow new or increased pollution to Illinois waters. PC 51 at 26. The Environmental Groups assert that DNR has broad responsibilities under DNR’s general powers and under the Illinois Endangered Species Act to protect Illinois aquatic life. *Id.*

IERG opposes the language suggested by the Environmental Groups. PC 52 at 21-22. IERG argues that the General Assembly has given authority to specified agencies to administer environmental programs. *Id.* IERG maintains that only the General Assembly can give DNR a role in administering the antidegradation regulations in Illinois, and since the General Assembly has not done so, IERG opposes the Board entitling DNR to have such involvement. *Id.*

### **Discussion**

The Board agrees with IERG that only the General Assembly may give DNR the authority to administer any part of the antidegradation regulations in Illinois. However, the Board notes that any one may comment on draft NPDES permits and that would include DNR. The Board further notes that under the proposal, as DNR does in all rulemaking proceedings, DNR will be notified of a petition for outstanding resource water (ORW) designation. Therefore, the Board believes that providing DNR notice of a permit application would not be beyond the Board’s authority and the Board will amend the proposal to provide that DNR receive notice of permit applications.

### **Part 102**

IERG expresses concerns about the Board’s amendments to Part 102. First, IERG feels that the notice requirements of Part 102 are insufficient to notify all prospective landowners and interested parties. Secondly, IERG maintains that proponents of an ORW designation should have an obligation to support and petition for ORW designation and the requirements of Part 102 do not sufficiently provide for such proof.

Regarding notification, IERG points out that the Board requires newspaper publication of petitions for adjusted standards (35 Ill. Adm. Code 104.408) and newspaper notice and additional written notice for petitions for variances (35 Ill. Adm. Code 214(a), (b)). IERG reiterates the testimony of Toby Frevert from the November 17, 2000 hearing in which he indicated that the ramifications of a decision to designate an ORW are more significant than those of an adjusted standard or variance. Tr. 11/17/00 at 88; PC 52 at 18. IERG quotes testimony from Mr. Frevert that indicates the willingness of the Agency to assist in notification of potentially interested

parties. PC 52 at 19, citing Tr. 8/24/01 at 15-20. IERG states that it is “unequivocally convinced that its proposed expanded notification requirements are justified and strongly urges the Board to adopt the necessary notification requirements.” PC 52 at 18.

IERG also believes that additional language should be added to the Part 102 proposed amendments that would require a proponent of an ORW designation to submit supporting documentation to prove the designation is warranted. PC 52 at 19. IERG maintains that a proponent of an ORW designation, modification or repeal “has an obligation to offer sufficient evidence in support of its position to allow the Board to meaningfully consider” the statutory factors in Section 27 of the Act (415 ILCS 5/27 (2000)). PC 52 at 20. IERG argues that any proponent in a regulatory proceeding before the Board has a minimum burden in moving a proposal forward. *Id.* Therefore, IERG suggests that the Board amend its proposal for Part 102 to reflect these ideas.

The Agency did not comment on this specific proposal by IERG. However, the Environmental Groups oppose the suggestions. The Environmental Groups believe that the Board’s proposal sets forth sufficient notice requirements and the Agency’s testimony concerning the Agency’s willingness to assist in notification supports the Board’s decision. PC 51 at 15. The Environmental Groups also believe that newspaper notice is not necessary. PC 51 at 16.

The Environmental Groups maintain that the scope and burden of the petition for ORW designation must be kept to a reasonable level or the opportunity to petition for a designation will be frustrated. PC 51 at 16. The Environmental Groups agree that the record before the Board must demonstrate compliance with the Board regulations; however, placing the burden on the proponent should be rejected. PC 51 at 16-17.

The Environmental Groups also made a specific request that the language at Section 102.830(b)(2) be amended. The Environmental Groups suggest deleting the phrase “uniquely high biological or recreational quality” and using the phrase “exceptional recreational or ecological significance”. PC 51, Attachment 1 at 3; Tr. 8/24/01 at 63-64. The Environmental Groups argue that this language is more appropriate as it reflects the federal language found at 40 C.F.R. 131.12(a)(3).

## **Discussion**

First the Board will address the concern of IERG that the proposal does not require a minimum burden of going forward with the proposal and that the requirements of Part 102 do not require sufficient support of the petition. The Board notes that in its first-notice opinion and order the Board addressed IERG’s concern about a “burden of proof”. The Board stated:

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

rulemaking process will allow for development of the most complete record possible, allowing ample opportunities for those in support or opposition to present opinions to the Board on the designation of an ORW. The Board can then weigh all the information and evidence in the record and determine if the designation of an ORW is warranted. Furthermore, this same rulemaking process will be available to repeal an ORW designation should circumstances change concerning that body of water. Revision to Antidegradation Rules: 35 Ill. Adm. Code 302.105, 303.205, 303.206, and 102.800-102.830 R01-13 (June 21, 2001) *slip. op.* at 22.

The Board is convinced that the position articulated regarding burden of proof at first notice is just as relevant to IERG's concerns expressed in this opinion. Furthermore, the proposal at Section 102.830 specifies when a petition might be dismissed and when the Board will grant ORW status. Thus, the Board finds that the burden of a proponent in a petition for ORW designation, modification or repeal need not be further articulated and the Board declines to add additional language to the proposal.

IERG has also suggested that the Board require the proponent to notify many different individuals and groups and to provide newspaper notification of the petition. The Board believes that the rulemaking process affords ample notice of an action and additional notice by the petitioner is not warranted. IERG suggests that since newspaper publication is required of variances and adjusted standards it should be required for ORW petitions. However, under Section 27 of the Act a hearing is required in a rulemaking whereas a hearing is not required in either an adjusted standard or variance. Further, the Board's rules require notice of the rulemaking hearing be published in the area affected. See 35 Ill. Adm. Code 102.416. Thus, newspaper notice of the petition will be given by the Board indicating that a hearing has been scheduled.

The Board is cognizant of IERG's concerns that landowners that may be affected be notified. The Agency has indicated it will assist in notifying potentially affected persons. To ensure that notification occurs, the Board will commit to including all potentially affected persons on the notice list of the rulemaking upon acceptance of the petition. The Board will ask the Agency to provide information such as the names of NPDES permit holders and applicants along the proposed water body or water body segment. The Board will send copies of Board opinion and orders to those persons on the notice list. The Board need not make a change to the rule to reflect this policy.

The Board will adopt the proposed change offered by the Environmental Groups to Section 102.830(b)(2) by deleting "uniquely high biological or recreational quality" and inserting "exceptional recreational or ecological significance". In order to ensure that the rule is consistent, the Board will also make this change in Section 303.205.

### **ECONOMIC REASONABLENESS AND TECHNICAL FEASIBILITY**

As indicated in the Board's first-notice opinion and order, the Agency's proposal addressed the economic reasonableness and technical feasibility of the proposal. The Agency indicated that the proposal is a revision of the existing State water quality standard. Prop. at 6.

The Agency maintains that the revision updates and clarifies existing policy and is expected to lessen the economic burden on the regulated community by listing activities that are already considered in compliance with the requirements without the need for an individual antidegradation review. *Id.* The Agency also asserts that the standard establishes criteria, which will provide better guidance for determining compliance with the antidegradation standard. *Id.*

On June 25, 2001, pursuant to Section 27(b) of the Act, the Board requested that the Department of Commerce and Community Affairs (DCCA) conduct an economic impact study on the proposed rule. On March 10, 2000, DCCA had informed the Board that it would not be doing economic impact studies. At the August 24, 2001 hearing the Board provided copies of the DCCA letter and the Board's June 25, 2001 letter. The Board received no comments on the letter.

In this proceeding the Board has received 52 public comments and held four hearings. The only issue of economic concern has been the impact of declaring a water and Outstanding Resource Water. As the Board will be using rulemaking procedures for those designations, the economic impact of such a designation will be examined with each proposal. The remaining evidence in this record indicates that the rule is economically feasible and technically reasonable and the Board so finds.

### **CONCLUSION**

The Board today proceeds to second notice with the proposal. The Board finds that the proposal is economically reasonable and technically feasible. The second notice proposal will include changes suggested by the participants to clarify the rule.

### **ORDER**

The Board directs that the following rule be submitted to the Joint Committee on Administrative Rules for second notice.

#### SUBPART H: OUTSTANDING RESOURCE WATER DESIGNATION

Section 102.800      Applicability

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

(Source: Added at 25 Ill. Reg. \_\_\_\_\_, effective \_\_\_\_\_)

Section 102.810      Petition

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

(Source: Added at 25 Ill. Reg. \_\_\_\_\_, effective \_\_\_\_\_)

Section 102.820      Petition Contents

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

- a) The language of the proposed rule, amendment, or repealer identifying the surface water body or water body segment being proposed for designation, amendment, or repeal as an a ORW. Language being added must be indicated by underscoring, and language being deleted must be indicated by strike-outs. The proposed rule must be drafted in accordance with 1 Ill. Adm. Code 100.Subpart C;
- b) A statement describing the specific surface water body or water body segment for which the ORW designation, amendment, or repeal is requested and the present designation of the surface water body or water body segment;
- c) A statement describing the area in which the specific surface water body or water body segment exists including:
  - 1) The existence of wetlands or natural areas;
  - 2) The living organisms in that area, including endangered or threatened species of plants, aquatic life or wildlife listed pursuant to the Endangered Species Act, 16 USC 1531 et seq. or the Illinois Endangered Species Protection Act, [41 ILCS 10].
- d) A statement supporting the designation, the amendment, or the repeal, including the health, environmental, recreational, aesthetic or economic benefits of the designation, the amendment, or the repeal thereof;
- e) A statement identifying the ~~ORW designation's~~ anticipated impact on economic and social development of the ORW designation, amendment, or repeal. This statement should include:
  - 1) Impacts on the regional economy;
  - 2) Impacts on regional employment;
  - 3) Impacts on the community;
  - 4) A comparison of the health and environmental impacts to the economic impact of an ORW designation-;

- f) A statement describing the existing and anticipated uses of the specific surface water body or water body segment for which the ORW designation, amendment, or repeal is requested;
- g) A statement describing the existing water quality of the specific surface water body or water body segment warranting the ORW designation, amendment, or repeal;
- h) A synopsis of all testimony to be presented by the proponent at hearing;
- i) Copies of any material to be incorporated by reference within the proposed designation pursuant to Section 5-75 of the Administrative Procedure ~~Procedures~~ Act;
- j) Proof of service upon all persons required to be served pursuant to Section 102.810 of this Part;
- k) Unless the proponent is the Agency, or Illinois Department of Natural Resources or receives a waiver by the Board, a petition signed by at least 200 persons, pursuant to Section 28 of the Act and Section 102.160(a); and
- l) Where any information required by this Section is inapplicable or unavailable, a complete justification for such inapplicability or unavailability.

(Source: Added at 25 Ill. Reg. \_\_\_\_\_, effective \_\_\_\_\_)

Section 102.830      Board Action

- a) Dismissal
  - 1) Failure of the proponent to satisfy the content requirements for proposals under this Subpart or failure to respond to Board requests for additional information will render a proposal subject to dismissal for inadequacy.
  - 2) Failure of the proponent to pursue disposition of the petition in a timely manner will render a petition subject to dismissal. In making this determination, the Board may consider factors, including the history of the proceeding and the proponent's compliance with any Board or hearing officer orders.
  - 3) Any person may file a motion challenging the sufficiency of the petition pursuant to 35 Ill. Adm. Code 101.Subpart E.
- b) Designation of ORW. The Board must designate a surface water body or water body segment as an ORW and list it in 35 Ill. Adm. Code 303.206 if it finds:

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

(Source: Added at 25 Ill. Reg. \_\_\_\_\_, effective \_\_\_\_\_)

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

Section

302.100	Definitions
302.101	Scope and Applicability
302.102	Allowed Mixing, Mixing Zones and ZIDS
302.103	Stream Flows
302.104	Main River Temperatures
302.105	<u>Antidegradation</u> <del>Nondegradation</del>

SUBPART B: GENERAL USE WATER QUALITY STANDARDS

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302.203	Offensive Conditions
302.204	pH
302.205	Phosphorus
302.206	Dissolved Oxygen
302.207	Radioactivity
302.208	Numeric Standards for Chemical Constituents
302.209	Fecal Coliform
302.210	Other Toxic Substances
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302.212	Ammonia Nitrogen and Un-ionized Ammonia
302.213	Effluent Modified Waters (Ammonia)

### SUBPART C: PUBLIC AND FOOD PROCESSING WATER SUPPLY STANDARDS

#### Section

302.301	Scope and Applicability
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302.303	Finished Water Standards
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### SUBPART D: SECONDARY CONTACT AND INDIGENOUS AQUATIC LIFE STANDARDS

#### Section

302.401	Scope and Applicability
302.402	Purpose
302.403	Unnatural Sludge
302.404	pH
302.405	Dissolved Oxygen
302.406	Fecal Coliform (Repealed)
302.407	Chemical Constituents
302.408	Temperature
302.409	Cyanide
302.410	Substances Toxic to Aquatic Life

### SUBPART E: LAKE MICHIGAN BASIN WATER QUALITY STANDARDS

#### Section

302.501	Scope, Applicability, and Definitions
302.502	Dissolved Oxygen
302.503	pH
302.504	Chemical Constituents
302.505	Fecal Coliform
302.506	Temperature
302.507	Thermal Standards for Existing Sources on January 1, 1971
302.508	Thermal Standards for Sources under Construction But Not in Operation on January 1, 1971
302.509	Other Sources
302.510	Incorporations by Reference
302.515	Offensive Conditions
302.520	Regulation and Designation of Bioaccumulative Chemicals of Concern (BCCs)
302.521	Supplemental Antidegradation Provisions for BCCs
302.525	Radioactivity
302.530	Supplemental Mixing Provisions for BCCs
302.535	Ammonia Nitrogen
302.540	Other Toxic Substances



302.545	Data Requirements
302.550	Analytical Testing
302.553	Determining the Lake Michigan Aquatic Toxicity Criteria or Values - General Procedures
302.555	Determining the Tier I Lake Michigan Basin Acute Aquatic Life Toxicity Criterion (LMAATC): Independent of Water Chemistry
302.560	Determining the Tier I Lake Michigan Basin Acute Aquatic Life Toxicity Criterion (LMAATC): Dependent on Water Chemistry
302.563	Determining the Tier II Lake Michigan Basin Acute Aquatic Life Toxicity Value (LMAATV)
302.565	Determining the Lake Michigan Basin Chronic Aquatic Life Toxicity Criterion (LMCATC) or the Lake Michigan Basin Chronic Aquatic Life Toxicity Value (LMCATV)
302.570	Procedures for Deriving Bioaccumulation Factors for the Lake Michigan Basin
302.575	Procedures for Deriving Tier I Water Quality Criteria in the Lake Michigan Basin to Protect Wildlife
302.580	Procedures for Deriving Water Quality Criteria and Values in the Lake Michigan Basin to Protect Human Health – General
302.585	Procedures for Determining the Lake Michigan Basin Human Health Threshold Criterion (LMHHTC) and the Lake Michigan Basin Human Health Threshold Value (LMHHTV)
302.590	Procedures for Determining the Lake Michigan Basin Human Health Nonthreshold Criterion (LMHHNC) or the Lake Michigan Basin Human Health Nonthreshold Value (LMHHNV)
302.595	Listing of Bioaccumulative Chemicals of Concern, Derived Criteria and Values

#### SUBPART F: PROCEDURES FOR DETERMINING WATER QUALITY CRITERIA

Section	
302.601	Scope and Applicability
302.603	Definitions
302.604	Mathematical Abbreviations
302.606	Data Requirements
302.612	Determining the Acute Aquatic Toxicity Criterion for an Individual Substance – General Procedures
302.615	Determining the Acute Aquatic Toxicity Criterion - Toxicity Independent of Water Chemistry
302.618	Determining the Acute Aquatic Toxicity Criterion - Toxicity Dependent on Water Chemistry
302.621	Determining the Acute Aquatic Toxicity Criterion - Procedures for Combinations of Substances
302.627	Determining the Chronic Aquatic Toxicity Criterion for an Individual Substance - General Procedures
302.630	Determining the Chronic Aquatic Toxicity Criterion - Procedure for Combination of Substances
302.633	The Wild and Domestic Animal Protection Criterion

302.642	The Human Threshold Criterion
302.645	Determining the Acceptable Daily Intake
302.648	Determining the Human Threshold Criterion
302.651	The Human Nonthreshold Criterion
302.654	Determining the Risk Associated Intake
302.657	Determining the Human Nonthreshold Criterion
302.658	Stream Flow for Application of Human Nonthreshold Criterion
302.660	Bioconcentration Factor
302.663	Determination of Bioconcentration Factor
302.666	Utilizing the Bioconcentration Factor
302.669	Listing of Derived Criteria

APPENDIX A   References to Previous Rules

APPENDIX B   Sources of Codified Sections

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

**SOURCE:** Filed with the Secretary of State January 1, 1978; amended at 2 Ill. Reg. 44, p. 151, effective November 2, 1978; amended at 3 Ill. Reg. 20, p. 95, effective May 17, 1979; amended at 3 Ill. Reg. 25, p. 190, effective June 21, 1979; codified at 6 Ill. Reg. 7818; amended at 6 Ill. Reg. 11161, effective September 7, 1982; amended at 6 Ill. Reg. 13750, effective October 26, 1982; amended at 8 Ill. Reg. 1629, effective January 18, 1984; peremptory amendments at 10 Ill. Reg. 461, effective December 23, 1985; amended at R87-27 at 12 Ill. Reg. 9911, effective May 27, 1988; amended at R85-29 at 12 Ill. Reg. 12082, effective July 11, 1988; amended in R88-1 at 13 Ill. Reg. 5998, effective April 18, 1989; amended in R88-21(A) at 14 Ill. Reg. 2899, effective February 13, 1990; amended in R88-21(B) at 14 Ill. Reg. 11974, effective July 9, 1990; amended in R94-1(A) at 20 Ill. Reg. 7682, effective May 24, 1996; amended in R94-1(B) at 21 Ill. Reg. 370, effective December 23, 1996; expedited correction at 21 Ill. Reg. 6273, effective December 23, 1996; amended in R97-25 at 21 Ill. Reg. 1356, effective December 24, 1997; amended in R99-8 at 23 Ill. Reg. 11249, effective August 26, 1999; amended in R01-13 at 25 Ill. Reg. \_\_\_\_\_, effective \_\_\_\_\_.

#### SUBPART A: GENERAL WATER QUALITY PROVISIONS

##### Section 302.105      Antidegradation

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

##### a)      Existing Uses

Uses actually attained in ~~the~~ a surface water body or water body segment on or after November 28, 1975, whether or not they are included in the water quality standards, must

be maintained and protected. Examples of degradation of existing uses of the waters of the State include:

- 1) an action that would result in the deterioration of the existing aquatic community, such as a shift from a community of predominantly pollutant-sensitive species to pollutant-tolerant species or a loss of species diversity;
  - 2) an action that would result in a loss of a resident or indigenous species whose presence is necessary to sustain commercial or recreational activities; or
  - 3) an action that would preclude continued use of a surface water body or water body segment for a public water supply or for recreational or commercial fishing, swimming, paddling or boating.
- b) Outstanding Resource Waters
- 1) Waters that are designated as Outstanding Resource Waters (ORWs) pursuant to 35 Ill. Adm. Code 303.205 and listed in 35 Ill. Adm. Code 303.206 must not be lowered in quality except as provided below:
    - A) Activities that result in short-term, temporary (i.e., weeks or months) lowering of water quality in an ORW; or
    - B) Existing site stormwater discharges that comply with applicable federal and State stormwater management regulations and do not result in a violation of any water quality standards.
  - 2) Any activity in subsections (b)(1)(A) or (b)(1)(B) that requires a National Pollutant Discharge Elimination System (NPDES) or a Clean Water Act (CWA) Section 401 certification must also comply with subsection (c)(2).
  - 3) Any activity listed in subsection (b)(1) or proposed increase in pollutant loading must also meet the following requirements:
    - A) All existing uses of the water will be fully protected;
    - B) The proposed increase in pollutant loading is necessary for an activity that will improve water quality in the ORW; and
    - C) The improvement could not be practicably achieved without the proposed increase in pollutant loading.
  - 4) Any proposed increase in pollutant loading requiring an NPDES permit or a CWA 401 certification for an ORW must be assessed pursuant to subsection (f) to determine compliance with this Section.
- c) High Quality Waters

- 1) Except as otherwise provided in subsection (d) of this Section, waters of the State whose existing quality is better than any of the established standards of this Part must be maintained in their present high quality, unless the lowering of water quality is necessary to accommodate important economic or social development.
- 2) The Agency must assess any proposed increase in pollutant loading that necessitates a new, renewed or modified NPDES permit or any activity requiring a CWA Section 401 certification to determine compliance with this Section 302.105. The assessment to determine compliance with Section 302.105 must be made on a case-by-case basis. In making this assessment, the Agency must:
  - A) Consider the fate and effect of any parameters proposed for an increased pollutant loading; and
  - B) Assure the following:
    - i) The applicable numeric or narrative water quality standard will not be exceeded as a result of the proposed activity;
    - ii) All existing uses will be fully protected;
    - iii) All technically and economically reasonable measures to avoid or minimize the extent of the proposed increase in pollutant loading have been incorporated into the proposed activity; and
    - iv) The activity that results in an increased pollutant loading will benefit the community at large.
  - C) Utilize the following information sources, when available:
    - i) Information, data or reports available to the Agency from its own sources;
    - ii) Information, data or reports supplied by the applicant;
    - iii) Agency experience with factually similar permitting scenarios; or
    - iv) Any other valid information available to the Agency.
- d) Activities Not Subject to a Further Antidegradation Assessment

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

- 1) Short-term, temporary (i.e., weeks or months) lowering of water quality;
- 2) Bypasses that are not prohibited at 40 CFR 122.41(m);
- 3) Response actions pursuant to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), as amended, corrective actions pursuant to the Resource Conservation and Recovery Act (RCRA), as amended or similar federal or State authority, taken to alleviate a release into the environment of hazardous substances, pollutants or contaminants which may pose a danger to public health or welfare;
- 4) Thermal discharges that have been approved through a CWA Section 316(a) demonstration;
- 5) New or increased discharges of a non-contact cooling water;

A without additives, except as provided in subsection (d)(5)(B) 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; or

B containing chlorine when the non-contact cooling water is treated to remove residual chlorine, and returned to the same body of water from which it was taken, as defined in 35 Ill. Adm. Code 352.104, provided that the discharge complies with applicable Illinois thermal and effluent standards at 35 Ill. Adm. Code 302, 303, and 304.

- 6) Discharges permitted under a current general NPDES permit as provided by 415 ILCS 5/39(b) or a ~~general CWA, Section 401 certification nationwide or regional Section 404 of the CWA permit~~ are not subject to facility-specific antidegradation review; however, the Agency must assure that individual permits or certifications are required prior to all new pollutant loadings or hydrological modifications that necessitate a new, renewed or modified NPDES permit or CWA, Section 401 certification that affects waters of particular biological significance. Waters of particular biological significance may include streams listed in a 1991 publication by the Illinois Department of Conservation entitled “Biologically Significant Illinois Streams; or
- 7) Changes to or inclusion of a new permit limitation that does not result in an actual increase of a pollutant loading, such as those stemming from

improved monitoring data, new analytical testing methods, new or revised technology or water quality based effluent limits.

e) Lake Michigan Basin

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

f) Antidegradation Assessments

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

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

- D) Assessments of alternatives to proposed increases in pollutant loading or activities subject to Agency certification pursuant to Section 401 of the CWA that result in less of a load increase, no load increase or minimal environmental degradation. Such alternatives may include:
- i) Additional treatment levels, including no discharge alternatives;
  - ii) Discharge of waste to alternate locations, including publicly-owned treatment works and streams with greater assimilative capacity; or
  - iii) Manufacturing practices that incorporate pollution prevention techniques.
- E) Any additional information the Agency may request.
- F) Proof that a copy of the application has been provided to the Illinois Department of Natural Resources.~~Any of the information sources identified in subsection 302.105(d) (3).~~
- 2) The Agency must complete an antidegradation ~~demonstration~~ assessment review in accordance with the provisions of this Section on a case-by-case basis.
- A) The Agency must consider the criteria stated in Section 302.105(c)(2);~~The antidegradation assessment pursuant to this Section is a part of the NPDES permitting process or the CWA Section 401 certification process. However, applicants may initiate communication with the Agency, preferably during the planning stage for any load increase. Communication will help assure the adequacy of information necessary to constitute an antidegradation demonstration and avoid or minimize delays and requests for supplemental information during the permitting stage. The Agency review process must be initiated by:~~
- i) ~~an informal or preliminary request of a proponent of a project prior to filing of a permit application; or~~
  - ii) ~~receipt of application for an NPDES permit issuance, renewal or modification, or a CWA Section 401 certification.~~
- B) The Agency must consider the information provided by the applicant pursuant to subsection (f)(1).~~A proponent seeking an~~

~~immediate review of the results of the Agency's review pursuant to subsection (f)(2)(A)(ii) must do so within the NPDES permit process or the CWA Section 401 certification process.~~

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

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

~~ii) verbally to verbal requests; or~~

~~iii) in a manner otherwise agreed upon.~~

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

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

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

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

3) The Agency will conduct public notice and public participation through



the public notice procedures found in 35 Ill. Adm. Code 309.109 or CWA Section 401 certifications. The Agency must incorporate the following information into a fact sheet accompanying the public notice:

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

(Amended at 25 Ill. Reg. \_\_\_\_\_, effective \_\_\_\_\_)

#### Section 302.105 ~~Nondegradation~~

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

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

PART 303  
WATER USE DESIGNATIONS AND SITE SPECIFIC WATER QUALITY  
STANDARDS

## SUBPART A: GENERAL PROVISIONS

Section	
303.100	Scope and Applicability
303.101	Multiple Designations
303.102	Rulemaking Required

## SUBPART B: NONSPECIFIC WATER USE DESIGNATIONS

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

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

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

## SUBPART D: THERMAL DISCHARGES

Section	
303.500	Scope and Applicability

## 303.502 Lake Sangchris Thermal Discharges

APPENDIX A References to Previous Rules

APPENDIX B Sources of Codified Sections

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

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

SUBPART B: NONSPECIFIC WATER USE DESIGNATIONS

## Section 303.205 Outstanding Resource Waters

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

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

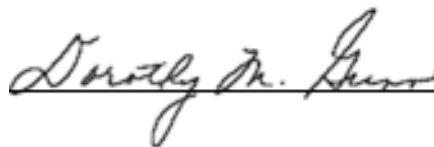
(Source: Added at 25 Ill. Reg. \_\_\_\_\_, effective \_\_\_\_\_)

## Section 303.206 List of Outstanding Resource Waters

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

(Source: Added at 25 Ill. Reg. \_\_\_\_\_, effective \_\_\_\_\_)

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on December 6, 2001 by a vote of 5-0.

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

Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board