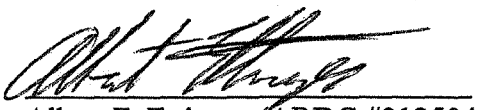
BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF	)	
	)	
REVISIONS TO ANTIDEGRADATION RULES	)	R01-13
35 ILL. ADM. CODE 302.105, 303.205, 303.206, AND	)	(Rulemaking - Water)
106.990 - 106.995	)	
	)	
	)	

NOTICE OF FILING

PLEASE TAKE NOTICE that ON THIS DATE, January 18, 2002, I filed with Dorothy Gunn, Clerk of the Illinois Pollution Control Board, James R. Thompson Center, 100 West Randolph, Suite 11-500, Chicago, IL 60601, the enclosed Response of the Environmental Law and Policy Center, Friends of the Fox River, Prairie Rivers Network and Sierra Club to Certain Motions for Reconsideration, and a comment letter by Prairie Rivers Network with an attachment, copies of which are herewith served upon you.



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January 18, 2002

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

IN THE MATTER OF:	)	
	)	
Revisions to Antidegradation Rules:	)	R01-13
35 Ill. Adm. Code 302.105, 303.205,	)	
303.206 and 106.990-106.995	)	

RESPONSE OF THE ENVIRONMENTAL LAW AND POLICY CENTER, FRIENDS OF THE FOX RIVER, PRAIRIE RIVERS NETWORK AND SIERRA CLUB TO CERTAIN MOTIONS FOR RECONSIDERATION

The Illinois Environmental Regulatory Group ("IERG") and the Illinois Association of Wastewater Agencies ("IAWA") have filed motions for reconsideration that are almost entirely without merit. The Environmental Law and Policy Center, Friends of the Fox River, Prairie Rivers Network and Sierra Club (collectively "Environmental Groups") hereby responds to these motions.

No substantive changes need to be made to the Second Notice rules proposal in response to the IERG and IAWA motions. With regard to one section of the Second Notice proposal, a clarifying change should be made. This non-substantive change can be made without subjecting the public and the Illinois environment to the administrative, environmental and economic damage that would be incurred by sending the rules back to First Notice. Moreover, such a change would accord with the suggestion made January 9, 2002, by the Joint Committee on Administrative Rules.

There are no substantial economic costs to adopting these rules. To a large extent, these rules elaborate on and clarify existing regulations. See 35 Ill. Admin. Code 302.105. The claim by IERG and IAWA that the portion of the rules regarding designation of outstanding resource waters ("ORWs") will impose major new costs ignores the fact that no ORWs have been designated and none can be designated in the future without extensive further proceedings at which the costs of the designation will be considered fully.

On the other hand, the costs of further delay in establishing antidegradation rules that comply with federal law are substantial. The requirements of the current nondegradation rule, 35 Ill. Admin. Code 302.105, are not legally sufficient because they do not provide implementation procedures or allow for ORW designations.[1] The current rules do not give adequate instructions to National Pollutant Discharge Elimination System ("NPDES") permit writers or Illinois EPA officials responsible for making certification decisions under Section 401 of the Clean Water Act, 33 U.S.C. §1341 ("CWA 401 certification"). Failure to enact antidegradation implementation rules seriously compromises Illinois implementation of federal requirements mandated by the Clean Water Act. Moreover, while the Agency is attempting to issue sound permits under the existing standard and unpublished interim rules, the continuing hiatus in the rules has led to confusion and permitting of pollution that could have been avoided with better procedures and planning.

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[1] See ~~PUD No.1 of Jefferson County v. Washington Department of~~ Ecology, 511 U.S. 700, 718-19 (1994); The Raymond Proffitt Foundation v. U.S. Environmental Protection Agency, 930 F.Supp. 1088 (E.D. Pa. 1996); Columbus & Franklin County Metropolitan Park District v.Shank, 65 Ohio St. 86, 600 N.E. 2d 1042 (1992); 40 CFR §§131.6, 131.12.

None of the substantive objections and proposals stated by IERG and IAWA in their motions have any sound basis. Indeed, for very good reason, they have all been rejected by the Board in the past. With the exception of a clarification regarding proposed 302.105(b), none of the non-substantive wording changes proposed by IERG and IAWA should be adopted by the Board either.

I. All But One of the IERG/IAWA Proposals Is Totally Without Merit

A. ~~IERG's Proposed Changes to Section 102.810 Relating to the Notice to Be Given~~ of an ORW Petition Should Be Rejected.

IERG continues to play its broken record seeking to impose prohibitively burdensome and unnecessary notice requirements on petitions for outstanding natural resource water designations. The skips and scratches on this record sound no better than they did before. The notice that will be given under the rules of ORW petitions is as great or greater than the notice given for other matters of comparable significance. See 35 Ill. Admin. 104.202. Further, both the Board and the Agency have committed to assuring broad public notice. Opinion and Order p. 12. The chances of an ORW petition slipping through the Board unnoticed by property owners and businesses that could be affected by it are somewhere between zero and none .

IERG, in response to the First Notice Order, proposed that petitioners for ORW designations be required to send voluminous petition materials to every NPDES permit holder and property owner in the area, and now feigns ignorance as to why the Board would reject this wasteful requirement. (Motion for Reconsideration p. 4). IERG would have no trouble seeing the burden if it were to be proposed seriously that IERG members seeking NPDES permits, site specific standards or variances be required to send lengthy petitions to a long list of persons

potentially affected by the new pollution, such as all the people using the affected water for drinking, fishing or boating.

And it must be stressed that, under the proposed rules, an ORW designation only keeps water clean for the future. An ORW designation can be repealed through the same process that designated it. On the other hand, an improperly granted NPDES permit, site specific standard or variance could wreak irreversible damage to public health or wildlife.

The one thing that is novel on this point in IERG's motion for reconsideration is the hysterical hyperbole IERG offers in support of its argument. Contrary to IERG's claim (IERG Motion to Reconsider p. 2), an ORW designation most certainly does not set "an absolute ban on the use of land." An ORW designation does not prevent any existing use and does not prevent any future uses except for those that would require increasing pollutant loadings to a ORW from a regulated source. Perhaps some IERG members cannot imagine using a piece of property without being allowed to add new pollution to the state's waters from it, but few land uses actually require that new water pollution be created. On this point, IERG and IAWA might consult the more creative of their members who are developing ways to handle wastewater that do not involve sending it to the nearest stream with as high a loading of pollutants as the Illinois Environmental Protection Agency ("IEPA") can legally tolerate.

B. The proposed changes to Section 102.820 should be rejected.

IERG not only asks that copies of a petition for an ORW designation be sent to large numbers of property owners and businesses, IERG asks that the petition itself be supported with evidence filed with the petition. The fact that the petition must be supported with evidence at the

hearing is not good enough for IERG. IERG purports to fear that the Board will allow petitioners to surprise petition opponents with unanticipated evidence at hearings and then not allow the opponents time to respond. Not even the requirement of Second Notice section 102(h) that petitioners support their petition with a synopsis of the testimony is sufficient to allay IERG's claimed fears of surprise.

IERG is engaging in either paranoia or disingenuous argument. As written, the rules require more of petitioners for ORWs than for persons seeking permission to increase pollution. The Board rules provide for extensive notice to the public of Board proceedings. There is no reason to require still more protections against an ORW designation being made without full consideration of all the evidence. Indeed, if IERG's real object is to make it so difficult to petition for an ORW designation that there will be few or no petitions, it has already accomplished its mission.

C. IERG's Proposed Change to Section 302.105(b) Adds some Clarity and Should Be Accepted by the Board.

The Environmental Groups believe that the Board's December 6, 2001 Opinion and Order makes clear that there is no substantial issue relating to 302.105(b). The language of the opinion quoted by IERG (Motion for Reconsideration p. 11) states that pollutant loadings falling into the categories listed in 302.105(b)(1) are allowed as well as those falling under 302.105 (b)(3). However, the rule language could be clearer.[2]

[2] One can only wish that the rest of the Illinois Administrative Code had so few issues.

The wording change proposed by IERG for 302.105(b)(3) is clearer than the Second Notice language.[3] Making the technical amendment proposed by IERG to this section without returning to First Notice, would comply fully with the suggestion of the Joint Committee on Administrative Rules ("JCAR"). It also would comply with the Administrative Procedure Act which explicitly allows non-substantive changes and changes made at the suggestion of JCAR. 5 ILCS 100/5-40(c).

D. IERG's Proposed Clarification of 302.105(c) Makes the Rule Less Clear and Should Be Rejected.

IERG's proposed change to 302.105(c), interpreted one way is totally redundant and unnecessary. Under other possible readings of IERG's proposal, the proposal is legally erroneous and inconsistent with the Clean Water Act. The Environmental Groups failed to object to IERG's proposed language when it was proposed in October, because they did not notice it, and are thankful that the Board wisely rejected it. The Board should reject this language again.

The first sentence of Section 302.105(c) of the Second Notice Board proposal makes quite clear that only increases in pollutant loadings that necessitate a new permit or a change in an existing permit are subject to antidegradation analysis. IERG asks, however, that the same thing be said again in a slightly different way by proposing that language be added stating that "if a pollutant is subject to an existing permit limit, an [antidegradation] assessment shall not be required unless the proposed increase in pollutant loading would result in an exceedence of such limit." (Motion for Reconsideration p. 13). This redundant language does not add transparency, it

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[3] Given the rest of the positions taken in this response, we trust that our agreement with IERG in this instance will not cause us to be accused of tepid advocacy.

adds confusion.

We assume that IERG does not mean any substantial harm (in this case) but sought only to add yet more language to the rules saying that if a pollution loading is already permitted, it need not go through an antidegradation analysis to continue to be permitted. But IERG's proposal inadvertently creates ambiguity in two ways. This can be illustrated by looking at possible revisions to a hypothetical existing permit that allows a discharge of 1 million gallons per day of wastewater containing two pollutants, A and B, each at concentrations of 1 part per million.

First, a discharger holding this hypothetical existing permit that seeks to increase its discharge of A, but not B, could argue that under the proposed IERG language, there should be no antidegradation analysis of the increase in A because "a pollutant" (B) is subject to an existing permit limit and the proposed increased loading of A would not result in an exceedence of the existing permit limit for B. Second, it might be argued that increasing the loading (e.g. discharging 2 million gallons per day), without increasing the concentration, of A or B or both is permissible because both A and B are subject to an existing permit limit (concentration $\leq$ 1ppm) and the increased loading would not result in an exceedence of that limit. One would hope that the Agency and the Board would reject such interpretations of the IERG proffered language if it became part of the rule given that those interpretations would clearly violate the intent of the Board and the purpose of antidegradation. Still, the effect of the language proposed by IERG if added to the rule, would be pernicious.

G. The Board Should Reject Proposed IERG Changes to Section 302.105(d)

IERG argues strenuously against language in the rule directing the Agency not to allow new pollution under a general permit where it would affect waters of particular biological significance. IERG claims that this language creates a new "tier 4" set of protections that are somehow inconsistent with the IEPA proposal and agreements reached by the workgroup that met for two and a half years before the Agency submitted its proposal a year and a half ago.[4]

In fact, IERG's "tier 4" is a mirage. Once again IERG is attacking a strawman and misrepresents the import of the Board's Second Notice proposal. The Board language that IERG is attacking here actually represents a compromise.

The language in issue does not determine when new pollution affecting waters of particular biological significance can be permitted. The question is only whether such an activity can be permitted under the quickie general permit procedure that allows for permitting without any notice or other process to the public or the Illinois Department of Natural Resources ("IDNR"). Because of the great danger of improper pollution being allowed under these circumstances, the Environmental Groups initially opposed any use of general permits to allow new pollution. On this and many other issues, the Environmental Groups did not get their way.

However, in order to reign in slightly the danger to the environment of allowing new pollution under general permits, the Board has directed the Agency not to allow new pollution

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[4] It is ironic that IERG pretends to be concerned about the sanctity of the Agency proposal and the workgroup process. Throughout these proceedings the Environmental Groups have generally supported the Agency proposal and urged only a few changes, mainly as to general permits, where it was felt that the Agency proposal was not sufficiently protective. On the other hand, IERG has made numerous broad attacks on the Agency proposal.

affecting waters of particular biological significance under general permits but instead to regulate such new pollution under individual permits that are subject to an antidegradation analysis. The Board further stated that the Agency could consult a document, created after years of study by IDNR, in determining some of the circumstances in which the Agency should not allow new pollution under a general permit. Of course, a finding by the Agency that the new pollution cannot be allowed under a general permit does not mean that it cannot be permitted, only that the public notice and other protections afforded for normal permitting is required.

The limitation on the use of general permits developed by the Board is very minor as to effect on dischargers and may not significantly change Illinois procedures at all. Only a very few waters are listed as "biologically significant" in the IDNR document mentioned in the rule. Moreover, IEPA already has authority to limit the use of general permits when it feels that fast-track procedures are not appropriate. As explained by Tom McSwiggen, Chief of the Water Permits Section of IEPA:

> The Agency has the option at any time to reject a notice of intent [by an applicant to discharge under a general permit] and to make that particular applicant, if there [are] reasons to do so, to apply for a site specific permit. Just because we have issued a general permit doesn't mean that everybody should be put under it, even though they may find themselves under this particular definition. (November 2001 Transcript at 181)

Similarly, the IDNR document that the proposed rules provides that IEPA may use, is already being used by IEPA. See Post-Hearing Comments of the Environmental Groups, filed October 11, 2001, Ex. FOUR.

IERG's claim that this provision might have a substantial economic impact is false.[5] Strict adherence to the contested rules provision by IEPA will at most cause some permits affecting less than 3% of the state's stream miles to be addressed on an individual basis rather than under the general permitting system that does not provide for notice or opportunity for comment. (Testimony of Rob Moore, August 24, 2001 Transcript at 85). Possibly as a result of the normal procedural protections being used, some pollution will not be permitted by IEPA that would have been permitted under the quick and dirty general permitting procedures.

II. The Economic Analysis of the Proposed Rules Was More than Adequate

Particularly in view of the limited regulatory effect of the new rules, the economic analysis of all of the portions of the proposed rules was more than sufficient as a matter of logic and law. Further, preparation of a formal Economic Impact Statement was not necessary or even possible in this proceeding.

The economic effect of these new rules should not be large. Regarding all of the proposed rules other than the provisions for designation of ORWs, there is a pre-existing standard, 35 Ill. Admin. Code 302.105, that is supposed to be doing most of what the new rules are to do. The difference is that the new rules set forth workable implementation procedures and comply with the Clean Water Act. While there is inevitably going to be a transition period during which people learn to work under the new rules, continuing to stumble through under a vague standard and unpublished implementation rules is not of any real benefit to any interest group or economic

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[5]IERG's claim is also very interesting because it suggests that IERG believes that its members are now able to take advantage on a wholesale basis of the existing general permits to add pollution to biologically significant Illinois waters. If the Board believes this is true, it should promptly move to revoke the existing general permits.

sector.

Like the rest of the rules, the ORW provisions are mandated by federal law.[6] The proposed rules will have no effect on the economy at this point because there are no ORWs. If and when an ORW petition is filed, there will be much opportunity under the rules to consider the potential economic costs of the individual ORW designation that is sought. A petition that would have a significant net economic cost to the economy is unlikely to be granted by the Board.

As all the parties to the proceeding are aware, an Economic Impact Statement was not prepared in this case because the Department of Commerce and Community Affairs declined to prepare one. The Board properly considered the need for an Economic Impact Statement and the potential economic effect of the rules. (Opinion and Order p.12-13) The law is clear that an Economic Impact Statement is not necessary under the circumstances of this case. In Matter of: Toxic Air Contaminants List, 1992 Ill. Env Lexis 115 (January 23, 1992); In Matter of: Application of California Motor Vehicle Control Program in Illinois, 1992 Ill. Env Lexis 14 (January 9, 1992).

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[6] See The Raymond Proffitt Foundation, 930 F. Supp. At 1090-91; 40 CFR 131.12(a)(3).

CONCLUSION

None of the participants to this proceeding got everything they wanted. But the rules fashioned by the Board are very fair and should prove workable and reasonably protective of the environment. The Board's Second Notice Proposal needs no substantive changes. With the one technical change that could be made to Section 302.105(b)(3) discussed above, the proposal should be adopted by the Board promptly so that it can begin to govern NPDES permitting and CWA Section 401 certification decisions in Illinois.

Respectfully submitted,

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January 17, 2002

Prairie Rivers Network

Protecting Illinois' Streams

January 17, 2002

Ms. Dorothy Gunn
Clerk of the Board
Illinois Pollution Control Board
100 W. Randolph St., Suite 11-500
Chicago, Illinois 61601

To the Illinois Pollution Control Board:

Prairie Rivers Network submits these comments in response to the motions by the Illinois Environmental Regulatory Group (IERG) and the Illinois Association of Wastewater Agencies (IAWA). Attached to this letter is a copy of comments submitted to the Joint Committee on Administrative Rulemaking by Prairie Rivers Network and thirty-one other conservation organizations that are deeply concerned about any further delay in these proceedings.

For over four years these rules have been discussed, debated, haggled over, and examined. For four years IERG and IAWA have participated in these proceedings as have numerous other organizations including Prairie Rivers Network. For these rules to be further delayed because of objections by IERG and IAWA which have been discussed *and rejected* repeatedly is a disservice to all those parties who have worked so hard on these rules, including the Illinois EPA and the Illinois Pollution Control Board.

We urge the board to reject all of IERG's and IAWA's changes and resubmit these rules to JCAR as expeditiously as possible.

Sincerely,

Robert J. Moore
Executive Director
Prairie Rivers Network

Attachments

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Prairie Rivers Network

Protecting Illinois' Streams

January 4, 2002

Joint Committee on Administrative Rulemaking
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Springfield, Illinois 62706

RE: Revision to Antidegradation Rules

Dear Members:

We the undersigned are writing in support of the "Revision to antidegradation rules: 35 Ill. Adm. Code 302.105, 303.205, 303.206, and 102.800-102.830" recently put on second reading by the Illinois Pollution Control Board.

The proposed revisions are much needed and are necessary to fulfill Illinois' goals of protecting and restoring our state's water resources.

These rules should ensure that Illinois lakes and streams are not unnecessarily degraded, and that high quality streams are protected and maintained. The rules also establish a process for designating waters of exceptional recreational or ecological significance as "Outstanding Resource Waters."

The rules are needed to comply with the federal Clean Water Act. The Illinois Environmental Protection Agency's proposal to the Illinois Pollution Control Board was the result of a two-year stakeholder process involving all of the affected parties that chose to participate. The Pollution Control Board gave the Agency's proposed rules an incredible amount of attention and scrutiny over the past two years. Although no one came out of the process getting everything they wanted, the rules finally adopted by the Board are fair, reasonable and protective of the environment. We urge JCAR to immediately adopt these rules as final.

Sincerely,

Robert Moore, Executive Director
Prairie Rivers Network

Other Illinois organizations also signing on to this letter:

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CERTIFICATE OF SERVICE

I, Albert F. Ettinger, certify that I filed the above Notice Filing together with an original and 9 copies of the *Response of the Environmental Law and Policy Center, Friends of the Fox River, Prairie Rivers Network and Sierra Club to Certain Motions for Reconsideration, and a comment letter by Prairie Rivers Network with an attachment*, with the Illinois Pollution Control Board, James R. Thompson Center, 100 West Randolph Street, Suite 11-500, Chicago, IL 60601, and served the parties on the attached Service List by depositing a copy in a properly addressed, sealed envelope with the U.S. Post Office, Chicago, Illinois, with proper postage prepaid on January 18, 2002.

Albert F. Ettinger

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January 18, 2002

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