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STATE OF ILLINOIS
Pollution Control Board

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

TO: Ms. Dorothy M. Gunn
Clerk of the Board
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601
(VIA AIRBORNE EXPRESS)

Marie E. Tipsord, Esq.
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601
(VIA AIRBORNE EXPRESS)

(PERSONS ON ATTACHED SERVICE LIST)

PLEASE TAKE NOTICE that I have filed today with the Clerk of the Illinois Pollution Control Board an original and nine copies of the **MOTION FOR RECONSIDERATION OF THE ILLINOIS POLLUTION CONTROL BOARD'S SECOND NOTICE OPINION AND ORDER** and **MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION OF THE ILLINOIS POLLUTION CONTROL BOARD'S SECOND NOTICE OPINION AND ORDER,** copies of which are herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
REGULATORY GROUP,

By: Thomas G. Safley
One of Its Attorneys

Dated: January 4, 2002

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CERTIFICATE OF SERVICE

I, Thomas G. Safley, the undersigned, certify that I have served copies of the attached MOTION FOR RECONSIDERATION OF THE ILLINOIS POLLUTION CONTROL BOARD'S SECOND NOTICE OPINION AND ORDER and MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION OF THE ILLINOIS POLLUTION CONTROL BOARD'S SECOND NOTICE OPINION AND ORDER upon:

Ms. Dorothy M. Gunn
Clerk of the Board
Illinois Pollution Control Board
James R. Thompson Center
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Chicago, Illinois 60601

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Hearing Officer
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by overnight delivery by depositing said documents in an Airborne Express drop box in Springfield, Illinois, on January 4, 2002, and upon:

SEE ATTACHED SERVICE LIST

by depositing said documents in the United States Mail in Springfield, Illinois on January 4, 2002.

Thomas G. Safley

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IERG:001/Fil/R01-13/Service List – Motion for Reconsideration, Memo

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

MOTION FOR RECONSIDERATION OF THE ILLINOIS POLLUTION CONTROL BOARD'S SECOND NOTICE OPINION AND ORDER

NOW COMES the ILLINOIS ENVIRONMENTAL REGULATORY GROUP ("IERG"), by one of its attorneys, Katherine D. Hodge of HODGE DWYER ZEMAN, pursuant to 35 Ill. Admin. Code § 102.700, and for its Motion for Reconsideration of the Illinois Pollution Control Board's ("Board") Second Notice Opinion and Order, states as follows:

1. The Board entered its Opinion and Order issuing the Board's antidegradation regulations for second notice ("Second Notice Opinion") on December 6, 2001.

2. As set forth in its Memorandum in Support of this Motion filed herewith, IERG has numerous concerns with the Board's Second Notice Opinion.

3. In light of these concerns, IERG hereby moves the Board to withdraw its Second Notice Opinion and to reissue the Board's antidegradation regulations for first notice.

4. Further, it is IERG's understanding that the Joint Committee on Administrative Rules ("JCAR") is scheduled to consider the Board's Second Notice Opinion on January 9, 2002.

5. The Board will not have sufficient opportunity to consider this Motion before JCAR's January 9, 2002, meeting, as the Board's next meeting is scheduled on

January 10, 2002, and as other participants to this rulemaking will not have sufficient time to respond to this Motion before JCAR's January 9, 2002, meeting.

6. As the Board is aware, Section 5-40(c) of the Illinois Administrative Procedure Act provides that "the second notice period" on a rulemaking:

> shall expire 45 days [after receipt by JCAR of notice of a proposed rulemaking] unless before that time the agency and the Joint Committee have agreed to extend the second notice period beyond 45 days for a period not to exceed an additional 45 days or unless the agency has received a statement of objection from the Joint Committee or notification from the Joint Committee that no objection will be issued.

5 ILCS 100/5-40(c) (emphasis added).

7. A representative of JCAR has informed the undersigned that because of this requirement of the Illinois Administrative Procedure Act, JCAR must consider the Board's Second Notice Opinion at JCAR's January 9, 2002, meeting unless the Board agrees to an enlargement of the second notice period.

8. Accordingly, IERG further hereby moves the Board to notify JCAR prior to January 9, 2002, that the Board agrees to an enlargement of the second notice period on the Board's antidegradation regulations sufficient to allow JCAR to postpone consideration of the Board's Second Notice Opinion until JCAR's February 2002 meeting.

9. This short postponement will allow other participants in this rulemaking sufficient time to respond to this Motion and will allow the Board sufficient time to consider this Motion.

10. This short postponement will further allow participants in this rulemaking time to address any concerns that they may have with the Board's Second Notice Opinion to JCAR should the Board deny IERG's Motion for Reconsideration.

WHEREFORE, the ILLINOIS ENVIRONMENTAL REGULATORY GROUP, by its counsel, HODGE DWYER ZEMAN, hereby moves the Illinois Pollution Control Board to reconsider its Second Notice Opinion as set forth in IERG's Memorandum in Support filed herewith, and further moves the Illinois Pollution Control Board to notify the Joint Committee on Administrative Rules before January 9, 2002, that the Illinois Pollution Control Board agrees to an enlargement of the second notice period on the Illinois Pollution Control Board's antidegradation regulations sufficient to allow the Joint Committee on Administrative Rules to postpone its consideration of the Illinois Pollution Control Board's Second Notice Opinion until February 2002.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
REGULATORY GROUP,

By: Katt D. Hodge
One of Its Attorneys

Dated: January 4, 2002

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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REVISIONS TO ANTIDEGRADATION	)	R01-13
RULES: 35 ILL. ADM. CODE 302.105,	)	(Rulemaking)
303.205, 303.206, AND 106.990 – 106.995	)	

MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION OF THE ILLINOIS POLLUTION CONTROL BOARD'S SECOND NOTICE OPINION AND ORDER

NOW COMES the ILLINOIS ENVIRONMENTAL REGULATORY GROUP ("IERG"), by one of its attorneys, Katherine D. Hodge of HODGE DWYER ZEMAN, pursuant to 35 Ill. Admin. Code § 102.700, and in support of its Motion for Reconsideration of the Illinois Pollution Control Board's ("Board") Second Notice Opinion and Order, states as follows:

I. INTRODUCTION

On August 30, 2000, the Illinois Environmental Protection Agency ("Illinois EPA") filed a proposal asking the Board to promulgate regulations regarding antidegradation of surface waters in the State of Illinois. The Board held three hearings regarding the Illinois EPA's proposal. IERG participated in, and filed post-hearing comments after, each of these hearings.

On June 21, 2001, the Board issued its Opinion and Order publishing the Board's proposed antidegradation regulations for first notice ("First Notice Opinion"). The Board thereafter held a hearing on its First Notice Opinion. IERG participated in, and filed post-hearing comments after, this hearing as well.

On December 6, 2001, the Board issued its Second Notice Opinion. Section 102.700 of the Board's procedural rules provides that persons may file "[m]otions for

reconsideration or modification of any Board order taking substantive action on a regulatory proposal." 35 Ill. Admin. Code § 102.700. IERG has numerous concerns with the Board's Second Notice Opinion, and hereby moves the Board to reconsider that Opinion as set forth below.

II. ANALYSIS

A. Proposed Section 102.810 – Notice of Petitions for ORW Designation

Sections 102.800 through 102.830 of the Board's proposed antidegradation regulations address the designation of Outstanding Resource Waters ("ORWs"). As the Illinois EPA stated at the November 17, 2000, hearing in this matter, the designation of a water body as an ORW would have "great ramifications" on the owners of property bordering that water body. Transcript of November 17, 2000, Hearing at 89. Such a designation will not simply set a discharge "target" to protect an environmental use; it will "set[] an absolute prohibition on some activities" on property bordering the water body, and will "preclude[]" the owner of such property from conducting "almost . . . any development" thereon. Id. at 88, 89.

Because an ORW designation effectively sets an absolute ban on the use of land, and thus will affect people's livelihoods, IERG has consistently argued that it is essential to notify any and all potentially affected persons of the submission of a petition to designate a water body as an ORW. See, e.g., August 9, 2001, Pre-Filed Testimony of Deirdre K. Hirner, at 16-20. Likewise, the Illinois EPA indicated its position at hearing that the ORW designation process must assure "that potentially [a]ffected property owners and other citizens have adequate notice" of a petition to designate a water body as an ORW. Transcript of November 17, 2000, Hearing at 88, l. 22 to 89, l. 1. In

accordance with this position, the Illinois EPA proposed that notice of a petition for an ORW designation be provided to not only the Illinois EPA, the Illinois Department of Natural Resources ("IDNR"), and the Attorney General, but also to the States Attorney, County Board, and Legislators for the area through which the water body at issue runs, and to NPDES Permit holders and permit applicants for the water body. Illinois EPA's March 20, 2001, Closing Comments, Attachment, proposed Section 303.205(c)(1)(I).

Despite the Illinois EPA's and IERG's agreement on this issue, the Board in its First Notice Opinion provided that notice of an ORW need only be provided to the Illinois EPA, IDNR, and the Attorney General. Board's First Notice Opinion at 25-26. After the hearing on the Board's First Notice Opinion, IERG again noted its concern regarding this issue, and proposed amending the Board's proposed Section 102.810 as follows:

> 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, the Illinois Department of Natural Resources [IDNR], ~~and~~ the Attorney General, the State's Attorney of each county in which the surface water body or water body segment runs, the chairperson of the County Board of each county in which the surface water body or water body segment runs, each member of the General Assembly from each legislative district in which the surface water body or water body segment runs, current NPDES permittees and NPDES permit applicants for discharges into the surface water body or water body segment, applicants for federally permitted activities that require a certification from the Agency pursuant to Section 401 of the Clean Water Act for the surface water body or water body segment, all owners of real property which is located adjacent or contiguous to the surface water body or water body segment, and to other persons as required by law. In addition, the notice must be published in a newspaper of general circulation in each county through which the surface water body or water body segment runs.

IERG's October 1, 2001, Post-Hearing Comments, Attachment A, at 1.

In its Second Notice Opinion, however, the Board again declined to include IERG's proposed revision to Section 102.810, stating as follows:

> 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.

Board's Second Notice Opinion at 11.

While IERG appreciates the Board's recognition of IERG's concerns regarding owners of property surrounding a proposed ORW, IERG disagrees with the Board's decision not to require more extensive notice of ORW petitions. First, while the Board's regulations do require notice of a rulemaking hearing in an area that would be affected by a rule, such notice is simply not sufficient given the severe effects that designation of an ORW would have. Notice should be made directly to potentially affected parties, not only in the newspaper, in order to ensure that potentially affected parties actually are aware of the proposed designation.

Further, under the Board's rules, notice of a rulemaking must include only "the date, time, place and purpose of such hearing." 35 Ill. Admin. Code § 102.416. IERG submits that this information will not be sufficient to notify the majority of potentially affected parties, who are unfamiliar with the Board's function and procedures, of the gravity of a proposal to designate an ORW. Under IERG's proposal, however, potentially affected parties would receive copies of the ORW designation petition itself, which would provide them the necessary information to determine whether and how the proposed designation would affect them.

Second, while the Board "commit[s] to including all potentially affected persons on the notice list of the rulemaking upon acceptance of the petition," the Board indicates only that it will "ask the Agency to provide information such as the names of NPDES permit holders and applicants along the proposed water body." This statement reflects a misunderstanding of IERG's position. The value of property is affected not only by events that limit the property's current use; the value of property is equally affected by events that limit the property's future use. Thus, every landowner along a proposed ORW – not simply National Pollutant Discharge Elimination System ("NPDES") permit holders or applicants – is a "potentially affected person[]." Under the Board's plan, landowners who plan to (or might someday plan to) build a facility on their property that requires an NPDES permit, or plan to sell their property to someone who intends to build such a facility, would not receive notice of the ORW petition. These parties are clearly "potentially affected" by an ORW designation. Likewise, farmers would not receive notice, and they are also clearly "potentially affected," as the Board's proposed Section

302.105(b) prohibits all degradation of ORWs, not just degradation caused by point source discharges.

Third, IERG does not understand the Board's reluctance to include its plan regarding notice to NPDES permit holders and applicants in the Board's rules. Environmental groups asked the Illinois EPA to seek this rulemaking in order to make the antidegradation review process more transparent through regulations detailing how that review process must take place. Parties who would be affected by an ORW designation are entitled to the same transparency, through regulations detailing who must be notified of a petition for an ORW designation and what information the Illinois EPA must provide to the Board to enable the Board to make such notification.

Thus, for the reasons stated above, IERG moves the Board to reconsider its decision not to include IERG's proposed revisions to the Board's Proposed Section 102.810 in the Board's Second Notice Opinion.

B. Proposed Section 102.820 – Support for ORW Designation

IERG also moves the Board to reconsider its decision not to include IERG's proposed revisions to the Board's Proposed Section 102.820, which sets forth the "information" that the proponent of an ORW designation must include in its Petition to the Board. As the Board is aware, IERG argued from the beginning of this rulemaking that ORWs should be designated in an adjudicatory proceeding, not in a rulemaking. See, e.g., IERG's March 19, 2001, Post Hearing Comments at 17-22. This procedure would place a clear burden of proof on the proponent of an ORW designation, which is appropriate given the severe effects that an ORW designation would have. And, this procedure makes sense because the Board's rules provide that Special Resource

Groundwaters – which are directly analogous to ORWs – are designated through the adjusted standard process, an adjudicatory procedure. 35 Ill. Admin. Code § 620.260.

In response to the Board's position on this issue, IERG withdrew its request that ORWs be designated through an adjudicatory rather than a regulatory proceeding. See IERG's October 11, 2001, Post-Hearing Comments at 19-20. As IERG stated when withdrawing that request, however, IERG still believes that the proponent in a regulatory proceeding before the Board has a minimum burden in moving the proposal forward, at least by presenting sufficient information to demonstrate the need for the proposed regulation. Id. at 20.

In order to make this concept clear, IERG proposed amending the Board's proposed subsections 102.820(b)-(g) to provide that the proponent of an ORW designation must set forth not merely a "statement" in support of the criteria detailed in those subsections, but also "supporting evidence." Id. at 20-21; Id., Exhibit A, at 2. The Board declined to adopt this proposed revision, however, stating that the Board's rulemaking procedures provide for the development of the record for the Board's consideration, and require that the proponent of a rule present testimony in support of that rule at hearing. Board's Second Notice Opinion at 11. Thus, the Board stated, "the burden of a proponent in a petition for ORW designation, modification or repeal need not be further articulated." Id.

IERG again must disagree. IERG's concern is that under the Board's proposal, no quantum of evidentiary support is required to start a rulemaking seeking designation of an ORW. This raises at least two concerns. First, without evidentiary support in an ORW petition, potentially affected parties are in effect required to prove a negative; that

is, to prepare and submit evidence that a water body should not be designated as an ORW. Second, potentially affected parties are required to prepare their position blind, without knowing to what evidence and argument they are responding, because no evidence or argument has been set forth.

The Board's argument that 35 Ill. Admin. Code § 102.428 provides that in a hearing on a proposed rule, "[p]roponents must present testimony in support of the proposal first," only highlights IERG's concerns. Section 102.428 does not specify what level of evidence a proponents' testimony must present, and does not provide that the Board will dismiss a rulemaking petition if the proponent does not provide any evidence in support of one or more of the criteria at issue. Thus, if a proponent does not present any testimony on one or more criteria, the respondent is left to prove a negative; that those criteria are not satisfied. On the other hand, if the proponent does present evidence at hearing – but was not required to do so in support of its petition – the respondent has been ambushed, and is forced to respond to evidence that it may have had no way to anticipate.

IERG acknowledges that the Board's proposed Section 102.820(h) would require a proponent to submit "[a] synopsis of all testimony to be presented by the proponent at hearing." However, as far as IERG is aware, the Board has never defined what level of detail such a synopsis must contain, and there is no guarantee that a synopsis will provide a respondent enough information about the proponent's evidence to enable the respondent to adequately prepare for hearing.

IERG reluctantly withdrew its position that ORWs should be designated through an adjudicatory proceeding. IERG is troubled that the Board has failed to require that

proponents of ORW designations provide some evidence in support of their petitions in order to protect parties that will be affected by such designations. Accordingly, IERG respectfully moves the Board to reconsider its position on this issue as well.

C. Proposed Section 302.105(b) – Lowering of ORW Water Quality

The Board's proposed Section 302.105(b)(1) provides in relevant part that ORWs "must not be lowered in quality except [by] . . . [a]ctivities that result in short-term, temporary (i.e., weeks or months) lowering of water quality" or by "[e]xisting site stormwater discharges." Board's Second Notice Opinion at 19. That is, to phrase Section 302.105(b)(1) differently, ORWs may be lowered in quality, but only by "[a]ctivities that result in short-term, temporary (i.e., weeks or months) lowering of water quality" or by "[e]xisting site stormwater discharges." Id.

The Board's proposed Section 302.105(b)(3)(B) provides, however, that "[a]ny activity listed in subsection (b)(1) or proposed increase in pollutant loading must also meet the following requirements: . . . B) The proposed increase in pollutant loading is necessary for an activity that will improve water quality in the ORW." Id.

IERG and the Environmental Groups have pointed out to the Board that these provisions are inconsistent. The purpose of Section 302.105(b)(1) is to allow lowering of ORW water quality in two, very narrow circumstances. See Section 302.105(b)(1). As the Illinois EPA stated in its Statement of Reasons in support of this rulemaking,

> [a]lthough the general rule is that an ORW shall not be degraded, there are exceptions to that rule that are proposed and evaluated using the criteria established in Section 302.105(b). "States may allow some limited activities which result in temporary and short-term changes in water quality [in ORWs], but such changes in water quality should not impact existing uses or alter the essential character or special use that makes the water an ONRW."

Illinois EPA's August 29, 2000, Statement of Reasons at 4 (quoting Water Quality Standards Handbook, Second Edition, EPA S23-B-94-005a, Chapter 4, Antidegradation, August 1994).

Section 302.105(b)(3)(B), however, does not allow lowering of water quality in these circumstances; it provides that the activities set forth in Section 302.105(b)(1), as well as other "proposed increase[s] in pollutant loading," may not occur unless they are necessary to "improve water quality." That is, for example, under Section 302.105(b)(3)(B), an "[e]xisting site stormwater discharge[]" would be allowed only if it was "necessary for an activity that will improve water quality in the ORW." If it was not necessary for an activity that would improve water quality, Section 302.105(b)(3)(B) apparently requires the facility to stop discharging site stormwater. Neither IERG nor the Environmental Groups believe that this was the intent of Section 302.105(b)(3).

In order to address this conflict, IERG and the Environmental Groups proposed the following revision to Section 302.105(b)(3):

> 3) Any activity listed in subsection (b)(1) or any other proposed increase in pollutant loading to an ORW must also meet the following requirements:
>
> A) All existing uses of the water will be fully protected; and,
>
> B) Except for activities falling under one of the exceptions provided in Subsection (b)(1)(A) or (B) above,
>
> i) The proposed increase in pollutant loading is necessary for an activity that will improve water quality in the ORW; and
>
> ~~C~~ii) The improvement could not be practically achieved without the proposed increase in pollutant loading.

See IERG's October 11, 2001, Post-Hearing Comments at 10-11.

The Board declined to adopt this revision, however, stating as follows:

> 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.

Board Second Notice Opinion at 5-6, 19.

IERG does not understand this statement. The Board's position appears to be that lowerings of ORW water quality are allowed for, and governed by, Section 302.105(b)(1) ("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)"), while increases in pollutant loading are governed by Section 302.105(b)(3) ("Subsection 302.105(b)(3)(B) allows for an increase in pollutant loading . . . . 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.") This is fine, except for the fact that by its own terms, Section 302.105(b)(3) applies not only to "proposed increase[s] in pollutant loading," but also to "[a]ny activity listed in subsection [302.105](b)(1)," i.e., to the two situations in which lowering of ORW water quality is meant to be permitted.

The conflict between these provisions is further illustrated by the fact that Section 302.105(b)(3)(B) makes Section 302.105(b)(1)(A) superfluous. Section 302.105(b)(1)(A) provides that an ORW may be lowered in water quality by "[a]ctivities

that result in short-term, temporary . . . lowering of water quality in an ORW." Section 302.105(b)(3)(B) provides that a proposed increase in pollutant loading is allowed only if, among other things, it is "necessary for an activity that will improve water quality in the ORW." If a "short-term, temporary . . . lowering of water quality" must, like other proposed increases in pollutant loading to an ORW, be "necessary for an activity that will improve water quality," then why does Section 302.105(b)(1)(A) exist? That is, why does it matter how long the lowering of water quality will last, if the only question is whether the proposed increase in pollutant loading is "necessary for an activity that will improve water quality"?

The only logical conclusion is that the two scenarios set forth in Section 302.105(B)(1), in which a lowering of water quality is allowed, are not meant to be subject to the requirements of Section 302.105(b)(3)(B) and (C). Activities that result in a short-term lowering of water quality, and existing site stormwater discharges, are meant to be allowed as long as existing uses are protected, regardless of whether they are "necessary for an activity that will improve water quality." The revision proposed by IERG and the Environmental Groups solves this problem. Accordingly, IERG moves the Board to reconsider its position on proposed Section 302.105(b)(3) as well.

D. Proposed Section 302.105(c)(2) – Trigger for Antidegradation Review

IERG also moves the Board to reconsider its position regarding proposed Section 302.105(c)(2). That Section, as currently drafted, provides in relevant part that:

> 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.

Board's Second Notice Opinion at 20.

In order to clarify exactly when Section 302.105(c)(2) requires the Illinois EPA to conduct an antidegradation review, IERG asked the Board to revise that Section to further provide 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 exceedance of such permit limit.

IERG's October 11, 2001, Post-Hearing Comments at 8-9. IERG also asked the Board to add similar language to the Illinois EPA's proposed Section 309.141(i). Id.

In response to this request, the Board acknowledged that neither the Illinois EPA nor the Environmental Groups objected to IERG's proposed revision to Section 309.141. Board's Second Notice Opinion at 6. Nevertheless, the Board refused to include IERG's proposed language on the grounds that it was unnecessary. Id.

IERG disagrees with the Board's decision not to include IERG's proposed revision to Section 302.105(c)(2) in the Board's Second Notice Opinion. Again, the point of this rulemaking is to establish a transparent antidegradation review process through detailed regulations. The Board's proposed Sections 302.105(c)(2) and 302.105(f) make how the Illinois EPA will conduct antidegradation reviews transparent and detailed. Permit applicants are entitled to the same transparency and detail regarding when the Illinois EPA will conduct antidegradation reviews. The language proposed by IERG is necessary to achieve this transparency and detail, and, especially in light of the fact that the other participants in this rulemaking did not object to this language, IERG moves the Board to reconsider its decision not to include it.

E. Proposed Section 302.105(d)(6) – General Permit Exemption

Finally, IERG moves the Board to reconsider the inclusion of the concept of "waters of particular biological significance" in its proposed Section 302.105(d)(6). As originally proposed by the Illinois EPA, Section 302.105(d)(6) provided that:

> Discharges permitted under a current general NPDES permit as provided by 415 ILCS 5/39(b), are not subject to facility-specific antidegradation review.

Illinois EPA's August 29, 2000, Motion for Acceptance, Attachment 7.

In its First Notice Opinion, however, the Board revised Section 302.105(d)(6) to provide as follows:

> Discharges permitted under a current general NPDES permit as provided by 415 ILCS 5/39(b) or a general CWA, Section 401 certification are not subject to facility-specific antidegradation review; however, the Agency must assure that individual permits or certification are required prior to all new pollutant loadings or hydrological modifications that necessitate a new, renewed or modified NPDES permit or CWA, Section 401 certification that affect waters of particular biological significance.

Board's First Notice Opinion at 32.

When making this change, the Board did not define or discuss the term "waters of particular biological significance." Further, the Board provided no justification to support the inclusion of this concept in Section 302.105(d)(6).

In its October 11, 2001, post-hearing comments, IERG provided four pages of objections to the inclusion of this concept in Section 302.105(d)(6), and to the Environmental Groups' suggestion that "waters of particular biological significance" be defined by a 1991 report prepared by the Illinois Department of Conservation. IERG's October 11, 2001, Post-Hearing Comments at 13-17. IERG hereby incorporates those

arguments as if they were set forth herein. In summary, regarding the 1991 report, IERG objected that:

1) The Environmental Groups never filed any evidence that the methodology used to prepare the report and the criteria used to identify the waters included therein had been made available for review by the regulated or scientific communities or had any scientific basis whatsoever;

2) The authors of the report explained in the report itself that the data on which they relied was incomplete;

3) The data used in the ten year old report is out of date; and,

4) In several instances, the authors of the report explain that a water body it considers "biologically significant" cannot even be preserved for reasons beyond anyone's control.

Id.

The Board provided a two-sentence response to these arguments, as follows:

> 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.

Board's Second Notice Opinion at 9.

IERG feels that the Board did not meaningfully consider whether to include the concept of "waters of particular biological significance" in the antidegradation regulations, and further disagrees with the Board's decision to include a reference to the 1991 Department of Conservation Report in its regulations. First, the concept of "waters of particular biological significance" conflicts with the Illinois EPA's intent in proposing this rulemaking. As set forth in the Illinois EPA's Statement of Reasons, the Illinois EPA proposed, in accordance with the United States Environmental Protection Agency ("USEPA") guidance, to establish three "tiers" of surface waters in the State of Illinois

for the purposes of the antidegradation regulations. Illinois EPA August 29, 2000, Statement of Reasons at 3-4. Specifically, the Illinois EPA's proposal was as follows:

- "Tier I . . . is based on achieving and maintaining existing stream uses, and sets the minimum level of protection" for water bodies. Id. at 3. "The Illinois EPA is proposing to explicitly ensure the protection of existing uses . . . by offering Section 302.105(a)." Id.

- "Tier 2 . . . addresses waters whose quality exceeds the levels necessary to support the propagation of fish, shellfish and wildlife and recreation in and on the water." Id. "High Quality Waters," or Tier 2 waters, "shall be protected by Illinois EPA's proposed Section 302.105(c)." Id.

- "Tier 3 . . . requires that high quality waters which constitute 'Outstanding National Resource Waters' . . . must be maintained and protected. To achieve the goals of Tier 3 the Illinois EPA is proposing the creation of a new designated use category, 'Outstanding Resource Waters' or 'ORWs' in Section 303.205." Id. at 4.

By including the concept of "waters of particular biological significance" in proposed Section 302.105(d)(6), however, the Board is creating a fourth class of waters, presumably somewhere between Tier 2, "high quality waters" and Tier 3, "ORWs." This conflicts with the Illinois EPA's intent as set forth in its Statement of Reasons. This likewise conflicts with the intent of the other parties to this rulemaking, who worked for two years to reach agreement on the basic structure of the antidegradation regulations before the Illinois EPA submitted its rulemaking proposal to the Board.

Second, the manner in which the Board has established this fourth class of waters is very disturbing. The Board has not defined this fourth class of waters. The Board has not provided any explanation in support of its decision to create this fourth class of waters. The Board did not establish this class of waters in a separate section or subsection of its proposed regulations, as it did with the other three classes of waters. See the Board's proposed Sections 302.105(a) (Tier I, or "Existing Uses"), 302.105(b) Tier 3,

"Outstanding Resource Waters"); and 302.105(c) (Tier 2, "High Quality Waters"). Rather, the Board established this fourth class of waters in an exception to an exception to the antidegradation assessment requirement. See proposed Section 302.105(d)(6). Finally, because of the Board's complete lack of comment on the concept of "waters of particular biological significance" in the Board's First Notice Opinion, IERG understood the inclusion of this concept in Section 302.105(d)(6) to be an error. See IERG's October 11, 2001, post-hearing comments at 13-14. IERG was obviously mistaken, but that is the Board's fault, not IERG's. The result of the Board's error is that the Board's lack of explanation deprived IERG and its members of the right to comment fully on the inclusion of this fourth class of waters.

Third, the Board has not provided any response to IERG's numerous and serious concerns with the 1991 "Biologically Significant Illinois Stream" report ("BSIS Report") put forward by the Environmental Groups, but, nevertheless, has proposed that Section 302.105(d)(6) provide that "[w]aters of particular biological significance may include streams listed in" this report. See Board's Second Notice Opinion at 21. IERG acknowledges that the Board indicated in its Second Notice Opinion that this report is "not . . . the definitive source" of waters of particular biological significance, "but rather [is] . . . a possible listing of waters of particular biological significance." This does not alleviate IERG's concern, however. This report is too badly flawed to be of any use in the antidegradation regulations. Further, because the Board has listed only this report, but has not defined the term "waters of particular biological significance" or provided any other guidance of any kind on what this term means, the Illinois EPA will have no choice but to look to this flawed report for guidance.

Fourth, the Board considered no evidence regarding the economic impact of including the "waters of particular biological significance" exception to Section 302.105(d)(6). As the Board is aware, Section 27(b) of the Illinois Environmental Protection Act requires that in adopting a rule, the Board shall consider "whether the proposed rule has any adverse economic impact on the people of the State of Illinois." 415 ILCS 5/27(b). The Board notes in its Second Notice Opinion that "the Agency's proposal addressed the economic reasonableness and technical feasibility of the proposal." Board's Second Notice Opinion at 11. As discussed above, however, the concept of "waters of particular biological significance" was not included in the Illinois EPA's original proposal; it arose after the Board had held three hearings on that proposal. Thus, the Board never considered any evidence regarding the economic impact that the "waters of particular biological significance" exception will have on the thousands of general permit holders in the State of Illinois; for example, on parties that will be required to seek an NPDES permit for stormwater runoff from construction sites.

For that matter, IERG submits that the Board's consideration of economic impact in whole is flawed. The Board states in its Second Notice Opinion that "[t]he remaining evidence in this record indicates that the rule is economically feasible and technically reasonable[,] and the Board so finds." Board's Second Notice Opinion at 12. The Board does not identify to what evidence it refers, however, and IERG is not aware of any evidence in the Record regarding economic impact.

Accordingly, in light of the above, IERG moves the Board to reconsider its decision to include the concept of "waters of particular biological significance" in proposed Section 302.105(d)(6).

III. RELIEF REQUESTED

As the Board is aware, "[a]fter commencement of the second notice period, no substantive change may be made to a proposed rulemaking unless it is made in response to an objection or suggestion of the Joint Committee." 5 ILCS 100/5-40(c). Thus, if the Board grants this Motion, the Board will need to withdraw its December 6, 2001, Second Notice Opinion and re-publish its proposed antidegradation regulations for first notice.

It is IERG's understanding, however, that the forty-five day second notice period on the Board's second notice opinion will expire on January 26, 2002, and that the Joint Committee on Administrative Rules ("JCAR") is therefore scheduled to (and currently must) consider the Board's Second Notice Opinion at its meeting set for January 9, 2002. The Board's next meeting is scheduled after that date, on January 10, 2002. Thus, the Board will be unable to consider this Motion before JCAR's January 9, 2002, meeting. Further, even if the Board could consider this Motion before JCAR's meeting, other participants in this rulemaking will not have sufficient time to join in or respond to this Motion by that date.

Accordingly, IERG hereby moves the Board to notify JCAR prior to January 9, 2002, that the Board agrees to an enlargement of the second notice period on the Board's antidegradation regulations sufficient to allow JCAR to postpone consideration of the Board's Second Notice Opinion until JCAR's February 2002 meeting. This short postponement will allow other participants in this rulemaking sufficient time to respond to this Motion and will allow the Board sufficient time to consider this Motion. This short postponement will further allow participants to this rulemaking time to address any

concerns that they may have with the Board's Second Notice Opinion to JCAR should the Board deny IERG's Motion for Reconsideration.

IV. CONCLUSION

WHEREFORE, the ILLINOIS ENVIRONMENTAL REGULATORY GROUP, by its counsel, HODGE DWYER ZEMAN, hereby moves the Illinois Pollution Control Board to reconsider its Second Notice Opinion as set forth above, and further moves the Illinois Pollution Control Board to notify the Joint Committee on Administrative Rules before January 9, 2002, that the Illinois Pollution Control Board agrees to an enlargement of the second notice period on the Illinois Pollution Control Board's antidegradation regulations sufficient to allow Joint Committee on Administrative Rules to postpone its consideration of the Illinois Pollution Control Board's Second Notice Opinion until February 2002.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
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Dated: January 4, 2002

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