

ILLINOIS POLLUTION CONTROL BOARD

February 21, 2002

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)

Adopted Rule. Final Order.

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. Today, the Board adopts the rules for final notice.

PROCEDURAL BACKGROUND

After the Board accepted this matter for hearing, the Board held three hearings before Board Hearing Officer Marie Tipsord. At those hearings 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 (American Bottoms), Prairie Rivers Network, the Environmental Law & Policy Center, Friends of the Fox River, McHenry County Defenders and the Sierra Club.¹ In addition, all of these participants, except DNR, 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.²

After the Board adopted the first-notice proposal, the Board held a fourth hearing and at that hearing testimony was provided by Toby Frevert representing the Agency, Dierdre K. Hirner

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

² 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).

representing IERG, Jack Darin representing Sierra Club, Illinois Chapter, Cynthia L. Skrukud representing Friends of the Fox River, and Robert J. Moore representing Prairie Rivers Network. All of these groups also filed post-hearing comments.

On December 6, 2002, the Board adopted a second-notice opinion and order that included additional amendments to the proposal suggested during the first-notice period. The Board directed that the proposal be submitted to the legislative Joint Committee on Administrative Rules (JCAR) for second-notice review. During the pendency of JCAR review, on January 7, 2002, the Board received two motions for reconsideration in this proceeding. Specifically, the IERG and the Illinois Association of Wastewater Agencies (IAWA) filed motions asking the Board to reconsider the December 6, 2001 opinion and order sending this matter to second notice. On January 18, 2001, the Board received two responses to the motion to reconsider filed by the Environmental Groups and the Agency. On January 22, 2002, IERG filed a motion for leave to file a reply to the Agency's response. The Board denied the motion for leave to file reply; however the Board did grant IERG's motions to reconsider in part. The Board granted IERG's motion by agreeing to amend Section 302.105(b)(3) as suggested by IERG and agreed to by the Environmental Groups. The Board denied the motion filed by IAWA in its entirety. On February 19, 2002, the Board received a certification of no objection from the JCAR.

SUMMARY OF THE PROPOSAL

The proposed amendments add new requirements to the Board's rules 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 amendments at 35 Ill. Adm. Code 303 create the category of waters classified as "outstanding resource waters" or ORWs. The Board adds 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.

ISSUES AT FIRST NOTICE

At first notice, the record in this rulemaking clearly reflected that all the participants supported some part of the rulemaking. However the participants did not agree on several issues. First, IERG, the Chemical Industry Council of Illinois (CICI) and American Bottoms, proposed that the Agency conduct a significance test prior to an antidegradation review. Second, those same groups supported a *de minimis* exception to the antidegradation requirements. Third, the participants did not agree on the procedure the Board should use to designate a water as an ORW. Fourth, IERG sought the inclusion of proposed Agency implementation procedures in Part 302.

Significance Determination

At first notice the Board recognized that all proposed increases in pollutant loadings should not require the same level of review to demonstrate compliance with the antidegradation standard. The Board indicated that implementation procedures for antidegradation reviews should allow the Agency to decide on a case-specific basis what level of review is appropriate. Furthermore, the Board indicated that antidegradation implementation procedures should not limit the Agency's ability to ensure compliance with the antidegradation standard's main objective of identifying and implementing alternatives that reduce or eliminate the increased loadings. For these reasons, the Board found that IERG's proposed significance determination procedure precluded the Agency from performing analyses of alternatives and benefits unless the proposed increase was determined to have a significant impact on the receiving stream.

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

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

De Minimis

At first notice, the Board noted that the *de minimis* exception proposed by IERG was similar to the significance determination in that the exception defined what constitutes lowering of water quality. While significance determinations may be viewed as a narrative standard, the *de minimis* exception defines the lowering of water quality on a quantitative basis. A number of

other states have adopted different types of quantitative significance tests or combination of quantitative or qualitative tests. Although *de minimis* exception may be helpful in focusing Agency's resources on only those increased loadings that pose a significant threat to water quality, the proposed *de minimis* exception raised a number of concerns.

The Board noted that since the proposed exception did 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 agreed with the Agency that the actual determination of the assimilative capacity of receiving water body might take as much effort as performing the antidegradation review.

For these reasons, the Board declined to adopt the *de minimis* exception proposed by IERG at first notice. The Board indicated that the Agency should have the opportunity to review any proposed increase in pollutant loading. In this regard, the Board noted that the Agency would have had an opportunity to review the proposed increase in pollutant loading with respect to all the exceptions proposed under Section 302.105(d).

ORW designations

After carefully reviewing the testimony and comments presented on the issue of what process the Board should use in making the ORW designation, the Board found that the proper avenue for ORW designation is rulemaking under Title VII of the Act (415 ILCS 5/Title VII (2000)) and 35 Ill. Adm. Code 102 of the Board's procedural rules. Many of the concepts advocated by the commentors are included in the ORW designation rulemaking process. Additionally, by virtue of the rulemaking process, many informational and service requirements sought by the Agency and IERG will be unnecessary.

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

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

published as a part of the Illinois Administrative Code allowing anyone interested to readily identify such designated waters.

Furthermore, the Board's own rulemaking procedures enunciated in Section 27 of the Act requires the Board to "take into account the existing physical conditions, the character of the area involved, including the character of surrounding land uses, zoning classifications, the nature of the existing air quality, or receiving body of water, as the case may be, and the technical feasibility and economic reasonableness of measuring or reducing the particular type of pollution." 415 ILCS 5/27(a) (2000). Thus the Board will be required to examine land use, including zoning, the body of water, existing physical conditions of the body of water, technical feasibility, and economics as a part of any rulemaking requesting an ORW designation.

Also at first notice the Board indicated that it did not agree with IERG's position that a "burden of proof" must be established in the ORW designation process. The Board noted that 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. The Board pointed out that the rulemaking process allows 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.

At first notice the Board further opined that a rulemaking is the more appropriate forum for determining if a body of water should be designated an ORW because of the ability to appeal a Board rule. Section 29(a) of the Act provides:

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

Proposed Rule on ORW designation

Having determined that the Board will use the rulemaking process for the designation of ORWs, the Board proposed amendments to the procedural rules to set forth the process to be used. The proposed amendments include the requirements for notice of an ORW designation petition, informational requirements for all petitions, and procedures the Board will follow when receiving an ORW designation petition.

Inclusion of Agency Procedures in Part 302

The Board included in the first-notice proposal procedures that the Agency had indicated would be adopted as a part of Agency rules. The Board proposed those procedures at Section 302.105(f).

ISSUES AT SECOND NOTICE

As indicated above, the Board held an additional hearing after the Board adopted the first-notice opinion and order in this matter. At that hearing and in the final comments the participants raised some additional issues and reiterated other issues³. Specifically, the Agency made several suggestions to the language the Board had proposed, including suggested amendments to Section 302.105(f), 302.105(c)(2), 302.105(d)(5), and 302.105(d)(6). IERG also offered specific language changes as well as reiterating the request for *de minimis* exception. IERG also sought changes to the rulemaking procedures for ORW designations including the inclusion of a burden of proof. The Environmental Groups joined in certain of the suggested changes by IERG and the Agency and suggested further changes to Section 302.105(d)(6) and 302.105(f)(1)(G).

Section 302.105(f)

The Agency indicated in both the prefiled testimony and the final comments that although the Agency generally supports the Board's proposal (PC 50 at 1; Exh. 38 at 1), the Agency had three areas of concern regarding the Board's inclusion of the antidegradation implementation procedures in Part 302. First the Agency urged the Board to delete the implementation procedures from Part 302 and move the implementation procedures to Part 309. 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 proposed that subsections 302.105(f)(2)(A)(i), (f)(2)(B) and (f)(2)(C) be deleted from the rule. PC 50 at 3-4. Finally, the Agency expressed concern 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 Board noted its appreciation for the Agency suggestion that to remain consistent with other Board regulations by placing the implementation procedures in Part 309 of the Board's rules. However, placing the implementation procedures into Part 309 would lead to an unnecessary delay because of the requirements of the Administrative Procedure Act (APA) (5 ILCS 100/5-5 *et seq.*).

The Board also noted 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 declined to accept the Agency's request that the CWA Section 401 certification language be removed from Section 302.105(b)(4). A Section 401 certification under the CWA is required when an applicant for a federal permit to conduct any activity that results in

³ For more details on the Board's second-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 (Dec. 6, 2001).

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.

Section 302.105(b)

IERG in testimony, comments, and again in its motion to reconsider expressed concern that 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). IERG also sought clarification in the Board's opinion and order of the Board's intent concerning Section 302.105(b)(3)(B).

The Environmental Groups agreed with IERG 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 offered identical language to clarify the rule. In addition, the Environmental Groups suggested language to clarify that the provisions of Section 302.105(b)(1)(B) allow 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.

In response to IERG's uncertainty regarding Section 302.105(b)(3)(B), the Board noted in the second-notice opinion and order 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.

Regarding the comments pertaining to the intent of Section 302.105(b)(3)(B) and (C), the Board noted 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).

At second notice, the Board declined to make the change to Section 302.105(b)(3) suggested by IERG and the Environmental Groups. However, upon reconsideration the Board did agree to make the change and the adopted rule reflects that change.

The Board also declined to make the suggested change to Section 302.105(b)(1)(B) regarding stormwater discharges to an ORW offered by the Environmental Groups. 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 opined 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 suggested and the Board agreed that a new sentence be added to 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. IERG agreed 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 suggested 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.

The Board declined to make the suggestions by IERG to the rest of this section. The Board found that the further inclusion of the language in subsection (c)(2)(B) would be repetitive and amendments to Section 302.105(c)(2) and (f)(1) were unnecessary, as these subsections are clear.

Section 302.105(c)(2)(C)

In comments and testimony, IERG indicated that IERG reconsidered the request to include a *de minimis* exception in the rule. PC 52 at 7. However, IERG suggested 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.* Although IERG modified the request for a *de minimis* exception, for the reasons discussed in the first-notice opinion and order, the Board declined to make the change.

Section 302.105(d)(5)

IERG and the Agency agreed to a suggestion regarding non-contact cooling water and the Board adopted the suggested change.

Section 302.105(d)(6)

The Agency suggested and the Board agreed to amend this subsection by replacing the phrase "general CWA, Section 401 certification" with "for nationwide or regional Section 404 of the CWA permit." PC 50 at 9.

In addition to the Agency's suggestion in this subsection, IERG suggested that the language "waters of particular biological significance" be deleted. IERG reiterated this argument in the motion to reconsider. The Environmental Groups suggested 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

The Board added a reference to the Illinois Department of Conservation publication entitled "Biologically Significant Illinois Streams". The Board declined to 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 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 Board agreed with this suggestion and added language to the rule requiring that DNR be served with a copy of petitions.

Part 102

IERG expressed the following concerns about the Board's amendments to Part 102. First, IERG believes that the notice requirements of Part 102 are insufficient to notify all prospective landowners and interested parties. Secondly, IERG maintained 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.

The Board addressed, in its first-notice opinion and order, IERG's concern about a "burden of proof" and the Board repeated the comment in the second-notice opinion and order. The Board noted that the proposal at Section 102.830 specifies when a petition might be dismissed and when the Board will grant ORW status. Thus, the Board found that the burden of a proponent in a petition for ORW designation, modification or repeal need not be further articulated and the Board declined to add additional language to the proposal.

The Board also declined to place additional persons on the list of persons to be served with petitions for rulemakings to designate ORWs. The Board did indicate that to ensure that notification occurs, the Board would 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 did not make a change to the rule to reflect this policy.

ECONOMIC REASONABLENESS AND TECHNICAL FEASIBILITY

As indicated in the Board's first-notice opinion and order and again in the second-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 and updates and clarifies existing policy. The proposal 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.

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.

In this proceeding the Board has received 52 public comments and held four public hearings. The only issue of economic concern raised by the participants has been the potential impact of designating an 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 final notice with the proposal. The Board finds that the proposal is economically reasonable and technically feasible. The final 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 26 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 26 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 [5 ILCS 100/5-75];
- 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 26 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 26 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> Nondegradation

SUBPART B: GENERAL USE WATER QUALITY STANDARDS

Section

302.201	Scope and Applicability
302.202	Purpose
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
302.211	Temperature
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
302.302	Algicide Permits
302.303	Finished Water Standards
302.304	Chemical Constituents
302.305	Other Contaminants
302.306	Fecal Coliform

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
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- 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 26 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 state stormwater management regulations and do not result in a violation of any water quality standards.
- 2) Any activity in subsection (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 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
 - ↪ii) 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 this Section 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.
 - 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; and
 - 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 CWA Section 404 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 this Section, 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 26 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

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SUBPART C: SPECIFIC USE DESIGNATIONS AND SITE
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Section

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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 26 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 (“ORW²”) 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.

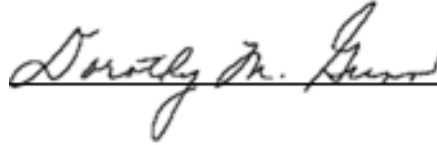
(Source: Added at 26 Ill. Reg. _____, effective _____)

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 26 Ill. Reg. _____, effective _____)

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on February 21, 2002, by a vote of 7-0.

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

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board