

ORIGINAL

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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STATE OF ILLINOIS  
Pollution Control Board

IN THE MATTER OF: )  
)  
REVISION TO ANTIDegradation RULES: )  
35 ILL. ADM. CODE 302.105, 303.205, )  
303.206, and 106.990 – 106.995 )  
)

R01-13  
(Rulemaking – Water)

*P.C.#41*

NOTICE OF FILING

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

Marie Tipsord  
Hearing Officer  
Illinois Pollution Control Board  
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Chicago, Illinois 60601  
(VIA FEDERAL EXPRESS)

Attached Service List

PLEASE TAKE NOTICE today that I have filed with the Clerk of the Illinois Pollution Control Board the COMMENTS OF THE CHEMICAL INDUSTRY COUNCIL OF ILLINOIS, a copy is herewith served upon you.

Respectfully Submitted,

By: *CM Bianco*  
Christie M. Bianco

Date: March 19, 2001

Christie M. Bianco  
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**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD** STATE OF ILLINOIS  
*Pollution Control Board*

**IN THE MATTER OF:**

**REVISION TO ANTIDegradation RULES:)**  
**35 ILL. ADM. CODE 302.105, 303.205,**  
**303.206, and 106.990 – 106.995**

**R01-13**  
**(Rulemaking – Water)**

**COMMENTS OF THE CHEMICAL INDUSTRY COUNCIL OF ILLINOIS**

NOW COMES the CHEMICAL INDUSTRY COUNCIL OF ILLINOIS (CICI) through its Regulatory Affairs Director, Christie M. Bianco, and hereby submits the following comments relating to the above-referenced matter.

CICI is a not-for-profit, statewide association that represents 189 corporations, over one hundred of which are chemical firms who manufacture, blend, distribute and sell chemicals. The chemical industry in the state of Illinois ranks third in the United States in chemical exports, fourth in value of chemical shipments and maintains more than 62,000 employees.

CICI appreciates the opportunity to comment on the Illinois Environmental Protection Agency's (Agency) Antidegradation proposal and the process the Agency used to draft and promulgate the proposal. As members of the regulated community we welcomed the opportunity to participate in a workgroup, established by the Agency in 1998, to address antidegradation issues. CICI members contributed to the process and played a key role in many of the enhancements and modifications to the Agency's original proposal.

CICI has worked closely with the Illinois Environmental Regulatory Group (IERG) throughout this rulemaking process and together both groups submitted comments, in January 2000, to the Agency's antidegradation proposal (a copy of those comments are attached). We have reviewed and endorse the comments submitted by IERG on March 19, 2001. We also

endorse IERG's proposed revisions to the Agency's proposal that were submitted as part of their pre-filed testimony at the February 6, 2001, Illinois Pollution Control Board (Board) hearing.

In the past, we have stated our belief that the current procedures utilized by the Agency to make antidegradation determinations are technically sound, legally sufficient and conducted in a manner consistent with the intent of Federal and State laws and regulations. We also stated that if such procedures fall short in any manner, it is in the area of public disclosure and Outstanding Resource Water (ORW) designation procedures. CICI still holds this position.

The process for drafting the Agency's proposal has been an open and inclusive one. We thank the Agency for their efforts and would like to take this opportunity to identify portions of the Agency's proposal that are of concern to CICI and its member companies. The following issues will be addressed in these comments:

- The language in the Agency's proposal is ambiguous as to which kind of permit actions trigger an antidegradation review;
- The Agency's omission of a significance test to determine the need for a comprehensive antidegradation review;
- The Agency's exclusion of any kind of de minimis exemption;
- Illinois Department of Natural Resources' proposal to designate four streams as ORWs and the importance of a clear procedure for designating an ORW.

#### Clarification

Our first area of concern is the language the Agency uses, or does not use, to describe which increases in pollutant loading trigger antidegradation review. Section 302.105 of the Agency's proposal uses the phrase, "any proposed increase in pollutant loading subject to an NPDES permit or CWA Section 401 certification," as the qualifier. We would like to clarify the intent of the Agency to mean only proposed increases in pollutant loading, which are above a

currently permitted or authorized level, would be subject to antidegradation review. At the first Pollution Control Board hearing, held on November 17, 2000, Toby Frevert was asked to clarify the Agency's intent. In response to a question Mr. Frevert stated, "...the antidegradation review would not come into place unless you filed an application for an increase over and above those levels that are already authorized in your permit" (Frevert Testimony, November 17, 2000, Tr. 46). CICI supports this clarification.

### Significance Determination

One issue the Agency and environmental groups have expressed concern over is the ever-increasing burden on the Agency's staff and resources. It is exactly for this reason the Pollution Control Board should endorse the concept of a significance test to determine whether a comprehensive antidegradation review is necessary. This in no way suggests that some increases in loadings should not receive any kind of review by the Agency.

CICI members worked closely with IERG and were instrumental in drafting the significance determination provisions reflected in Section 302.105(c)(2) of the proposed revisions IERG submitted to the Board on January 18, 2001.

These revisions would require applicants seeking a significance determination to provide the Agency with information (nature of the proposed discharge, quality and characteristics of the receiving water, etc.) necessary to make the determination. It also allows the Agency to utilize any relevant information or resources they might have, including data, reports, and experience with similar scenarios. After thoroughly reviewing the information, if the Agency determines that the proposed increase in loading or activity would not have a significant impact on the overall water quality or existing uses of the receiving water, then no further review is required. However, if the Agency determines the increase would have a significant impact on the receiving water, they would conduct a further, more in-depth review of the application. This process saves

the Agency time and resources by allowing them to focus their attention on applications that propose increased loadings or activities that have a considerable impact on water quality.

Like the Agency, time and resources are at a premium for many businesses. The current language requires an applicant of an NPDES permit or a Section 401 certification to provide volumes of information, including social and economic data that may be unnecessary for the Agency to conduct a thorough review. Having the option to determine, up front, whether the proposed increase will have a significant impact on the quality of the receiving water is crucial.

#### De Minimis Exception

CICI has always supported a de minimis exception in the antidegradation rule and endorses the de minimis exception included in Section 302.105(d)(12) of IERG's proposed revisions. The language states that "an increase in pollutant loading that results in a lowering of quality that is less than a de minimis lowering of water quality...shall not be subject to a further antidegradation assessment..." It goes on to state that a "de minimis lowering of water quality" occurs if the proposed increase in mass discharged is less than 10% of the unused loading capacity and then explains how to calculate the increase in mass discharged. This language is very comparable to language proposed by U.S. Environmental Protection Agency (USEPA) in its 40 CFR Parts 122 et al. Water Quality Guidance for the Great Lakes System and Correction: Proposed Rules (Fed. Register, Volume 58, Number 72, April 16, 1993) and provisions used by other USEPA Region V states.

If the information were available to make the de minimis determination, it would save the Agency from spending unnecessary time and resources on reviewing an antidegradation demonstration. We acknowledge that not every situation will qualify for a de minimis determination. However, where the information is available, it should be a viable option to an antidegradation application.

Some have argued that allowing an arbitrary percentage increase is not scientific. In their proposed Water Quality Guidance, USEPA states:

...the 10 percent value chosen as a threshold represents a reasonable balance between the need of the regulatory agencies to limit the number of actions involving non-BCCs that are subjected to the detailed antidegradation demonstration requirements and the need to protect and maintain water quality.

We support this argument and ask the Board to consider including the proposed de minimis language in its final decision.

#### Illinois Department of Natural Resources' Proposal

A final issue of concern is the eleventh hour proposal by the Illinois Department of Natural Resources (IDNR) to designate four streams as Outstanding Resource Waters (ORWs) and to identify 41 additional streams and stream segments for future ORW listing.

Two groups (Illinois Environmental Regulatory Group and Illinois Steel Group) filed motions to strike the testimony, first introduced as pre-filed testimony at the Board's final public antidegradation hearing. The groups argued that the purpose of rulemaking proceeding underway was to establish the procedural rules by which the Board will designate ORWs. The reasoning is clear: since the procedural regulations are not yet in place, it is premature for the IDNR to request designation of specific water bodies.

CICI agrees with this argument and thanks the Board for their decision not to designate the waters bodies at this time.

In terms of how ORW designation fits in with this proposed rulemaking, it is important to recognize the tremendous social, environmental and economic impacts ORW designation would have on a given water body's existing and future uses. An ORW designation not only affects the water body; it also poses major implications for property owners adjacent to the water body.

Therefore, it is imperative that any final rules specify what information a person seeking an ORW designation must submit in support of the designation and make the petitioner of an ORW designation responsible for assuring that property owner's rights are not compromised without considering all relevant information.

Mr. Frevert repeatedly testified that the Agency would not require more information than necessary in a permit application or require a full review where it is not necessary. It is extremely doubtful, however, that the proposed rules give the Agency authority to require less than a full antidegradation review, including full consideration of alternatives. Moreover, it is not clear that the Board would have the authority to affirm an Agency decision based on less than a complete application and review, in the event of a third party appeal. Only through amendments as proposed by IERG and supported by these comments will the Agency be authorized and required to consider such application; and the Board be given standards by which to review the Agency's decision.

We thank the Board for their consideration of these comments.

Respectfully Submitted,  
Chemical Industry Council of Illinois

By: *CM Bianco*  
Christie M. Bianco

Dated: March 19, 2001

Christie M. Bianco  
Regulatory Affairs Director  
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COMMENTS ON BEHALF OF  
THE ILLINOIS ENVIRONMENTAL REGULATORY GROUP  
THE CHEMICAL INDUSTRY COUNCIL OF ILLINOIS

The following comments are submitted on behalf of the business community by the Illinois Environmental Regulatory Group (IERG) and the Chemical Industry Council of Illinois (CICI). Both IERG and CICI have been, and will continue to be, active participants in the discussions regarding the implementation of a workable anti-degradation procedure for Illinois. The comments attached reflect the input of our respective memberships, many of whom will be directly affected by the outcome of these discussions.

Prior to detailing our specific comments, we believe it is imperative to put such comments in perspective. Accordingly, IERG and CICI request that IEPA review our comments with the following general principles in mind:

1. The business community continues to believe that the current procedures utilized by the IEPA as regards anti-degradation are technically and legally adequate. If such procedures fall short in any manner, it would be in the area of public disclosure and ORW designation procedures. Accordingly, we continue to maintain the position articulated in the proposal submitted to the IEPA on May 11, 1999, and would urge that the IEPA give serious consideration to this course of action. The business community reserves its prerogative to advance this position in whatever forum necessary.
2. Recognizing that the IEPA may elect to proceed to rulemaking, the business community has prepared a set of *conceptual comments* as detailed below. We emphasize the word *conceptual* in that our comments today are aimed at highlighting areas of major concern rather than attempting to propose final language suggestions. As discussions proceed, the business community will continue to offer constructive critique of any proposed language and input regarding increasingly fine tuned language. It is important that the IEPA understand that the comments we offer today do not constitute language that we would necessarily support in a Board proceeding. While we are open to listening to rationales for why rulemaking is a necessary and/or preferred option, our current position remains as stated in #1 above.

3. The business community believes the comments submitted today, along with the comments of other interested parties, should serve as discussion points for future meetings. At this point, we believe another draft proposal from the IEPA would be counterproductive. Rather a compilation of comments reflecting the differing points of view should be prepared by the IEPA to facilitate discussion on the merits of the major issues articulated by all parties.
4. Our comments below contain a brief rationale for our suggested changes as well as language that would reflect such changes. While we stress the issue raised in point #1 above, the basic philosophical tenants that our suggestions attempt to address are as follow:
  - A. The scope of an anti-degradation review must be consistent with the intent of the Clean Water Act. The ultimate decision-making power, as to whether a discharge will constitute unacceptable degradation, rests with the IEPA (with appeal procedures as allowed under law). How such a decision is made must be a blend of solid information, experience and professional judgment. To effectively utilize the resources of both the regulators and the regulated, a reasonable cut must be made regarding applicability. There are specific activities and levels of discharges that, through past experience and judgment, can be eliminated from review. To not allow for up front exemptions would cause review for review's sake. The business community suggests that, given the limited resources available, it would be much more prudent to do a good review job on all *relevant* permits than a poor job on all permits.
  - B. Alternative options must be based in reality. Clearly, one can theorize a myriad of technical options for the ultimate permit proposal. However, when the decision-maker must determine if an option should be utilized – or even considered – a measure of feasibility and reasonableness must be applied. The regulations must clearly state that a rational benchmark for decision-making applies. To do otherwise would simply hold each and every permit decision open for appeal. The business community is rightly concerned that an open-ended review will, rather than yield a final decision avoiding third party permit appeals, provide information for filing such appeals.
  - C. In any petition to change a rule or reclassify a regulatory designation, the burden of proof rests with the petitioner. Because the designation of Outstanding Resource Waters will have profound impacts on land use and landowners, it is imperative that petitioners meet a high standard of proof in such cases.

As noted above, the business community believes that all of the above objectives (absent the ORW issue) can be achieved under the framework outlined in our May 11, 1999, proposal. Our position notwithstanding and in an effort to demonstrate our willingness to constructively participate in the ongoing dialogue, we offer the following comments and a brief rationale for each such comment. We will be prepared to discuss these comments at the upcoming meeting.

Section 302.105 Nondegradation AntiDegradation

The business community supports and would urge the IEPA to maintain the IEPA's replacement of the term "necessary" with "important". However, the business community believes that, rather than include the remainder of the IEPA's proposed additions to this section, the IEPA should mirror, to the extent possible, the language utilized in section 40 CFR 131.12(a)(2). Such language would more effectively accomplish the goals of an antidegradation program. We would suggest the following:

Section 302.105 Nondegradation AntiDegradation

- (a) ~~Except as otherwise provided in Section 302.521, waters whose existing quality is better than the established standards at their date of 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 important economic or social development. Any lowering of water quality authorized through an NPDES permit or Clean Water Act Section 401 water quality review pursuant to demonstrated social or economic need shall be sufficiently restricted that it will not interfere with or become injurious to (eliminate or preclude) any beneficial uses made of or practicably possible in such waters.~~
- (a) Where the quality of the water exceeds levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected unless the Agency finds that allowing lower water quality is necessary to accommodate important economic or social developments in the area in which the waters are located. In allowing such degradation or lower quality, the Agency shall assure water quality adequate to protect existing uses fully. Further, the Agency shall assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources.

Section 302.105(b) Antidegradation

The business community believes that the IEPA's proposed Section 302.105(b) should be deleted from its draft revision. The inclusion of this language is not necessary in order for the Illinois antidegradation standard to comply with Federal antidegradation requirements, nor would this standard be the appropriate vehicle for the contemplation of such requirements. Further, the proposed language is premature. While industry appreciates the concern that chemicals scientifically determined to be harmful to human hormonal activity and overall health be identified and controlled, the proposed language preempts the U.S. Environmental Protection Agency ("USEPA"). Even after the multi-year EDSTAC process--sponsored by the USEPA--resulted in a consensus report that recommended a three-tiered program of screening and testing, the USEPA has not yet generated the first tier of its plan. A validated and standardized

screening and testing program for chemicals to determine their effect, if any, on hormones is first required.

The business community has drafted a new Section 302.105(b) which addresses the applicability of the antidegradation standard and ensures the exemptions, set forth in the implementation procedures, are incorporated into the antidegradation standard itself. We would recommend the following language:

~~(b) In assessing the adequacy of a demonstrated need pursuant to paragraph (a) the Agency shall consider the fate and effect of any parameters proposed for increased discharge including their persistence tendency to bioaccumulate and any potential endocrine or hormonal effects.~~

**(b) Applicability (NEW SUB-SECTION PROPOSED BY INDUSTRY)**

The provisions of this section shall be applicable to the administration of the NPDES program, as such program applies to ~~point-source~~ NPDES permits and section 401 water quality permits. Provided however, if the permit applicant chooses to and can demonstrate to the Agency's satisfaction that any such new permit or permit requesting an increased pollutant loading will not result in

- a) an increased pollutant loading of greater than 20% above previously permitted limitations; or
- b) the use of greater than 25% of the remaining assimilative capacity of the receiving water body, whichever is greater,

then such new permit or permit requesting an increased pollutant loading is not subject to the provisions of this section.

~~(c) Waters that are classified as Outstanding Resource Waters shall not be lowered in quality through any action subject to NPDES or Clean Water Act Section 401 water quality certification requirements unless such actions are allowed under Board regulations or Agency procedures.~~

**Section 303.205 Outstanding Resource Waters**

~~(a) Outstanding Resource Waters are those waters specifically designated within this section. In addition to all other applicable use designations and water quality standards contained in this Subtitle. Outstanding Resource Waters are subject to the antidegradation provisions of Section 302.105(c).~~

Section 303.205(b)

*Designation of a water body as an ORW has profound economic as well as environmental impacts. Such designations should not be made unless the party proposing such a designation is prepared to fully articulate the justification and build an adequate record of the proceeding. The business community could support a Board rule which allows for the designation of ORWs if the procedure used for such designation were sufficiently rigorous, open, and limited to clearly defined reaches of a waterbody. To accomplish this end, the business community would suggest the procedure for designation of an ORW be similar to that which is required for Class III groundwater. The procedure, at Section 35 IAC 620.260, could be modified to replace the Agency's proposed section as follows:*

**Section 303.205(b) Classification of segments of a surface water as an Outstanding Resource Water by Adjusted Standard**

- (b) Any person may petition the Board to classify a segment of surface water as an **Outstanding Resource Water** in accordance with the procedures for adjusted standards specified in Section 28.1 of the Act and 35 Ill. Adm. Code 106. Subpart G. In any proceeding to reclassify specific segments of a surface water by adjusted standard, in addition to the requirements of 35 Ill. Adm. Code 106. Subpart G, and Section 28.1(c) of the Act, the petition shall include a statement supporting why the designation should be made and shall, at a minimum, contain information to allow the Board to determine:
- 1) The specific segment(s) of a surface water for which reclassification is requested, including but not limited to geographical extent of the specific segment of the surface water;
  - 2) Whether the proposed change or use restriction ~~is necessary for~~ would interfere with economic or social development, by providing information including, but not limited to, the impacts of the standards on the regional economy, social benefits such as loss of jobs or closing of facilities, economic impacts on existing adjacent landowners, and economic analysis contrasting the health and environmental benefits with costs likely to be incurred in meeting the standards;
  - 3) Existing and anticipated uses of the specific segment of the surface water and associated drain off area;
  - 4) Existing and anticipated water quality and associate biological communities of the specific segment of the surface water;
  - 5) Existing and anticipated contamination, if any, of the specific segment of the surface water;
  - ~~6) Technical feasibility and economic reasonableness of eliminating or reducing contamination of the specific or of maintaining existing water quality;~~

- ~~7) The anticipated time period over which contaminants will continue to affect the specific;~~
  - ~~8) Existing and anticipated impact on any potable water supplies due to contamination;~~
  - 9) Availability and cost of alternate water sources or of treatment for those users adversely affected;
  - 10) Negative or positive effect on property values; and negative or positive effect on Wetlands, natural areas, and the life contained therein, including endangered or threatened species of plant, fish or wildlife listed pursuant to the Endangered Species Act, 16 U.S.C. 1531 et seq., or the Illinois Endangered Species Protection Act [41 ILCS 10];
  - 11) **That the headwaters of the segment of the surface waters are located in an area that is not impacted by existing man made development.**
- (c) **Public Hearings: The Board shall hold at least one public hearing in the county in which the segment of the surface water proposed for reclassification is located.**
- (d) **Decision Standards: Following the close of the record in the ORW petition process the Board shall grant the petition only if it finds, based on the record of the proceeding, that:**
1. Designating the specific segment of the surface water as an ORW is necessary to protect that water; and
  2. The economic hardships caused by such grant do not outweigh the environmental benefits derived; and
  3. The petitioner has provided sufficient information and demonstrations on each of the factors in subsection (b) of this section to allow the Board to reach the required determinations.

### Implementation Procedures

#### Section 1 -- Introduction

*The business community has concluded that these procedures, if adopted, should be limited to those permitting activities which can be so governed practically. Further, we believe that the applicability of these procedures should be limited to new or increased loads which exceed a reasonable de minimus standard.*

*The business community suggests that the proposed Section 1 Introduction be modified as follows:*

### Section 1 -- Introduction

35 IAC 105 establishes an antidegradation standard for all surface waters of the state. These procedures specify the measures IEPA will follow to apply the basic provisions of 302.105 in its administration of the NPDES program, and section 401 water quality review within the state of Illinois. Supplemental antidegradation provisions found at 35 IAC 302.521 also apply to those surface waters within the Lake Michigan Basin as designated in 35 IAC 303.443. Implementation procedures for supplemental Lake Michigan requirements can be found at 35 IAC.352.900.

**Except as provided in the exemptions of section 2 below, any application for issuance of a new or modified NPDES permit that meets the applicability criteria of 302.105(b), must be reviewed by the Agency to assure that the application adheres to the antidegradation principles as contained in 35 IAC 302.105. It is the responsibility of the permit applicant to provide sufficient information to allow the Agency to complete its review and determine the appropriate disposition of the application.**

### Section 2 -- Exceptions

*The business community agrees that the "exceptions" proposed by the IEPA are both necessary and proper if an antidegradation process is to function in the real world. The absence of exceptions will bog the IEPA down in an endless review of permits that have virtually no environmental impact. Further, because the exceptions to the antidegradation review process are so crucial to the effectiveness of the standard, the exceptions should be incorporated into the antidegradation standard itself, as mentioned above in regard to our proposed applicability subsection, Section 302.105(b).*

*The business community believes that the exceptions should take two forms. The first should be those exceptions which, by definition, are excluded from review. The business community generally agrees with those exceptions proposed by the IEPA in its draft, and has recommended language modifications and three additional such exceptions, #10, #11 and #12, as set forth below.*

*The second is equally essential as the first. It is proposed by the applicant at the time of permit application, and is to be determined by the Agency on a case-by-case basis. The business community has drafted language set forth below as exception 13. Proposed "Exception 13" together with the proposed Section 1 language establishing a de minimus threshold address industry's concern that discharges at the "low end of pollution potential" need not undergo the full antidegradation demonstration required in the IEPA's implementation procedures.*

## Section 2 – Exceptions

~~Except as provided herein, any proposed increase in pollutant loading above previously permitted levels shall be construed as a potential degradation of the receiving water and subject to antidegradation review.~~ The Agency may authorize an activity that will not result in an exceedance of a numeric or other narrative water quality standard without an antidegradation demonstration for the following proposed actions:

1. Discharges of chloride, sulfate, and total dissolved solids, and the thermal loading that has been established under an approved Clean Water Act Section 316(a) demonstration;
2. Short-term temporary (i.e., weeks or months) lowering of water quality;
3. Bypasses that are not prohibited at 40 CFR 122.41(m); ~~or~~
4. Response actions pursuant to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), as amended, OPA-90, or similar federal corrective actions pursuant to the Resource Conservation and Recovery Act (RCRA), as amended, 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;
5. Changes to **or inclusion of a new permit limitation** that does not result in an actual increase of a pollutant loading, such as those stemming from improved monitoring data, new analytical testing methods, new or revised technology or water quality based effluent limits (WQBELs);
6. New or increased discharges of a non-contact cooling water provided that the thermal component complies with applicable Illinois thermal standards;
7. Site stormwater discharges provided the discharge complies with applicable federal and state stormwater management regulations **or applicable permits**, and will not result in a violation of Illinois water quality standards; *- included in DRU, but not HQW - ask Toby*
8. A new or increased loading that results in a de minimus increase of a non-bioaccumulative pollutant to a water body which does not contain any known state or federally classified threatened or endangered species, and which is not expected to result in a discernable lowering of water quality;
- ~~9. Some form of an offset program involving a third party such that there is no net load increase and the third party activity is enforceable through the NPDES permit.~~  
New or Increased discharges of a pollutant where **THE PERMITEE ENTERS INTO A VOLUNTARY AGREEMENT UNDER WHICH** there is a contemporaneous and enforceable decrease in the actual loading of that pollutant

from sources contributing to the same body of water such that there is no net increase in the loading of that pollutant;

10. Discharges authorized by a site-specific adjusted standard or variance issued by the Illinois Pollution Control Board;
11. A new or increased discharge of a non-BCC chemical where the new or increased discharge is necessary to accomplish a reduction in the release of one or more air pollutants, provided the applicant demonstrates that an emissions reduction for the air pollutant(s) is necessary to meet a federal or state air quality standard or will substantially reduce human exposure to a hazardous air pollutant subject to a federal or state air quality standard;
12. A new or increased discharge of a non-BCC chemical if the applicant demonstrates that the new or increased discharge is necessary to accomplish a reduction in the discharge of another pollutant or pollutant parameter that will result in an overall improvement in the water quality of the receiving water; or
13. Any other action which the applicant proposes, at the time of filing a permit application, and which the Agency concurs will not violate the antidegradation procedures of 35 IAC 302.105. The Agency shall indicate that a request for exception was requested, as well as their decision regarding such request, in the fact sheet for such permit.

#### Section 3A Demonstrations/Criteria

*The business community agrees, in principle, with the IEPA's proposed Section 3A. However, in order to further clarify the section and make the point that not each and every theoretical alternative need be explored, the business community would suggest the following modifications:*

#### Section 3A – Demonstrations/Criteria

A demonstration that ~~a load increase~~ an increase of a permit limit of a regulated parameter or other lowering of water quality is allowable under the antidegradation water quality standard (302.105) will be assessed under the following criteria:

1. No applicable numeric or narrative water quality standard will be exceeded as a result of the proposed activity;
2. All applicable water use designations pursuant to Illinois Pollution Control Board Regulations, Title 35, Part 303 shall be fully protected: ~~There shall be no deterioration in aquatic community diversity or loss of sensitive species (including state or federally classified threatened or endangered species) in waters classified for aquatic life use protection.~~

3. **Economically reasonable and technically feasible** ~~a~~Alternative approaches to ~~accomplish the social or economic benefit intended to result from the permitted activity with minimal load increase or environmental disruption~~ shall be identified and evaluated. All reasonable alternatives shall be incorporated into the proposed activity to minimize the extent of load increase or other potentially degrading result; and
4. The benefit **economic or social development** to be achieved through the proposed activity shall pertain to the community at large: ~~and not exclusive to limited individual entities. For instance, economic development can be characterized through increased employment opportunities and increased tax base within the community.~~

Section 3B -- Demonstrations/Required Information

*The business community understands Section 3B to identify information which the IEPA believes it needs to begin antidegradation determinations on proposed or new increased discharges. The IEPA has stated that, consistent with its current practice, the integration of the antidegradation standard into the permitting and certification process must be interactive. The business community agrees that it is advantageous for the applicant and the Agency to initiate discussions very early in the permit application process. This is necessary to allow ample time and opportunity to determine the potential effects and benefits of the proposed new or increased discharge, and to review the proposed discharge in terms of antidegradation. The business community further agrees that the Agency should have the information that it needs to wholly fulfill its obligations. In an effort to achieve a codification of this type of interactive, informed process, the business community would suggest the following modifications to the IEPA's proposed language:*

Section 3B -- Demonstrations/Required Information

Information necessary for ~~a load increase~~ **an increase of a permit limit** of a regulated parameter or other potentially degrading activities that should accompany an application include:

1. Identification of the affected reach of water to receive the load increase or otherwise affected by the proposed activity;
2. Identification and quantification of the parameters that will experience an increased loading or other potentially degrading result within the affected waterbody (For instance, in situations such as a 401 certification for construction activity within a stream, identify and characterize how stream aeration and oxygen concentrations will be affected.);
3. The purpose and anticipated benefits of the proposed activity. Such benefits include but are not limited to:
  - a.) Providing a centralized wastewater collection and treatment for a previously unsewered community;

- b.) Expansion to provide adequate service for reasonably anticipated residential or industrial growth consistent with a community's long range urban planning;
- c.) Addition of a new product line or production increase or modification at an industrial facility;
- d.) Increasing or retaining current employment levels at a facility.

~~(For instance, benefits could be provision of centralized wastewater collection and treatment for a previously unsewered community; expansion to provide adequate service for reasonably anticipated residential or industrial growth consistent with a community's long range urban planning; addition of a new product line or production increase at an industrial facility.); and~~

- 4. A description of ~~the various technically reasonable and economically feasible alternatives evaluated by the applicant which are intended to accomplish the desired action that result in less of a load increase or no load increase, and an assessment of the reasonableness of each alternative;~~ and ~~(Alternatives can include additional treatment levels including no discharge alternatives, discharge of waste to alternate locations including POTW's and streams with greater assimilative capacity, manufacturing practices that incorporate pollution prevention techniques.)~~
- 5. Such additional information regarding the characteristics of the receiving body of water that the applicant believes is not otherwise available to the Agency and is necessary to allow the Agency to fulfill its obligations under this part.

#### Section 4 -- Discharge to Outstanding Resource Waters

The Board Regulation at Section 302.105(c) specifies that Outstanding Resource Waters shall not be lowered in quality through any action subject to NPDES or Clean Water Act Section 401 water quality certification requirements. New sources or load increases from existing sources will not be allowed unless the Agency makes a determination that:

- a) All existing uses of the water will be fully protected;
- b) The new or increased discharge is necessary for an activity that will improve water quality in the Outstanding Resource Water; and
- c) The improvement could not practicably be achieved without the new or increased discharge, or if the proposed discharge involves:
  - 1. Non contact cooling water in compliance with applicable thermal standards; or
  - 2. Discharge of site stormwater runoff subject to federal and state stormwater management regulations.

### Section 5A -- Initiation of Review Process

*The business community recommends the deletion of Section 5A from IEPA's draft proposal. We agree that early initiation of the interactive process between the permit or certificate applicant and the Agency is essential to the effectiveness of NPDES permitting or certification processes. But, we do not agree that this activity needs to be specifically prescribed within formal implementation guidelines, as a deviation from such activity by the Agency or the applicant is not equivalent to a failure to comply with the antidegradation standard.*

### ~~Section 5A -- Initiation of Review Process~~

~~Applicants should initiate early communication with the Agency, preferably during their planning stage for any significant expansion or new source. Early communication will generally help assure the adequacy of information necessary to constitute an adequate demonstration and avoid or minimize delays and supplemental information requests during the permitting stage. The Agency review process will be initiated by:~~

- ~~1. request of a proponent of a project prior to filing of a permit application; or~~
- ~~2. receipt of an application for NPDES issuance or Section 401 certification.~~

### Section 5B -- Results of Review Process

*The business community understands that the end result of an Agency review of a request to lower water quality will be a written analysis addressing each criterion listed in Section 3. Based on that analysis, the Agency will reject or accept the proposal in whole or in part, or will work with the applicant to modify the proposal to make the project workable. The Agency's final decision in this regard will be routed through the existing NPDES and 401 public notice processes. The Agency does not intend to initiate a new and separate process specifically for antidegradation reviews. The business community believes, while the IEPA's proposed language describes this process, the following language would make the process more clear to NPDES permit or certificate applicants as well as to the public.*

### Section 5.B -- Results of Review Process

The Agency's review of demonstrated need for a lowering of water quality will yield a written analysis addressing each criterion contained in Section 3, along with a preliminary decision.

1. If the tentative Agency's preliminary decision is to reject the applicant's demonstration or to find that some lowering (but less than the original request of the applicant through the use of reasonably available alternatives) of water quality is allowable, the Agency shall provide a written analysis to the applicant. The Agency will be available to consult with the applicant regarding any deficiencies that led to the disapproval Agency's findings as well as options to remedy conflicts with the Board standard that led to the proposed rejection.

2. If the tentative preliminary decision is to accept the demonstration and proceed toward authorization of a load increase, or if the applicant and the Agency agree that some lowering (but less than the original request of the applicant through usage of reasonably available alternatives) of water quality is allowable, the Agency will proceed with the public notice process of the NPDES permit or Section 401 certification and include the written analysis as a part of the fact sheet accompanying the public notice.
- ~~3. If the agency review yields the tentative decision that some lowering of water quality is allowable, but less than the original request of the applicant through usage of reasonably available alternatives (i.e. application of additional treatment, relocation of discharge to a less sensitive location) and if that reduced loading increase is acceptable to the applicant, then the Agency will proceed to public notice.~~
4. If the reduced loading allowance is not acceptable to the applicant or if the Agency intends to reject the applicant's demonstration, the Agency will transmit its written analysis to the applicant. ~~If this occurs after receipt of the NPDES permit application or 401 certification request, this will be provided~~ in the context of an NPDES permit or certification denial.

#### Section 5C -- Public Participation

*The business community agrees that public participation is vital to the success of the NPDES permitting and certification process. We have consistently supported efforts to make the process more transparent to all affected parties, including the public. The business community understands that the Agency's decision to tentatively authorize a load increase or to lower water quality will be subject to the notice and review procedures for NPDES permits or 401 certifications, not via new or added processes. Further, we understand that the Agency's current fact sheet will be expanded to include information pertinent to the antidegradation review. The business community suggests the following language modifications and additions to the IEPA's draft language for inclusion in the fact sheet in order to ensure that the public has access to information that is both relevant and helpful.*

#### Section 5C -- Public Participation

If the Agency preliminarily determines to authorize a load increase or other action that may result in a lowering of water quality, public notice and comment opportunity will be achieved through the public notice procedures followed for issuance of NPDES permits (35 IAC 309.109) or Section 401 water quality certifications. To assure adequate information for meaningful public review and comment, the Agency will incorporate the following information into a fact sheet accompanying the public notice:

1. A description of the activity, including identification of water quality parameters which will experience an increased mass discharge:

2. Identification of the affected water segment, any downstream water segment also expected to experience a lowering of water quality, ~~characterization of~~ the designated and current uses of the affected segments and identification of which uses are most sensitive adversely affected by the proposed activity or load increase;
3. 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 appropriate entities the Agency consults regarding the proposal;
4. An overview of alternatives considered to accomplish the proposed activity ~~(including resulting social/economic benefits)~~ and identification of any provisions or alternatives undertaken by the applicant or imposed to lessen the load increase or other lowering of water quality associated with the proposed activity;
5. An overview of the purpose and anticipated benefits of the proposed activity; and
6. The name and telephone number of a contact person at the Agency who can provide additional information.

Friday  
April 16, 1993

# Federal Register

Post-it* Fax Note	7671	Date	# of page
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## Part II

### Environmental Protection Agency

40 CFR Parts 122 et al.  
Water Quality Guidance for the Great Lakes System and Correction: Proposed Rules

quality waters of the Great Lakes System.

**b. Relationship of EEQ to Implementation Procedure 8.** During development of the EEQ provisions in the proposed Guidance, concerns were expressed regarding EEQ limitations or restrictions that reflected nondetectable discharges. In particular, the relationship between the EEQ requirements of the Antidegradation Policy and the requirements of procedure 8 of appendix F to part 132 was questioned, and concerns raised that the EEQ requirements would necessitate fish bio-uptake studies (procedure 8.F.1 of appendix F). EPA believes that the EEQ and procedure 8 of appendix F provisions operate independently and that fish bio-uptake studies will not necessarily result from the application of EEQ requirements. Procedure 8 of appendix F requires that permits include certain provisions if the WQBEL for a pollutant is below the detection level. For BCCs, one of these provisions is a fish bio-uptake study to determine if the discharge of a pollutant is occurring at a rate or level that results in unacceptable accumulation in fish tissue. The requirements of procedure 8 of appendix F, including fish bio-uptake studies, only apply when the regulatory agency has determined, using procedures 3 and 5 of appendix F, that a WQBEL for the BCC in question is necessary.

Like the implementation procedures, the EEQ provisions of the Antidegradation Policy also direct that controls be placed on the discharge of BCCs. The regulatory agency may choose that the controls take the form of numeric effluent limitations, or may choose to use other mechanisms to maintain EEQ for the BCCs, such as were discussed under "Options for EEQ Controls". The basis for the EEQ restrictions, whatever their form, is to prevent the significant lowering of water quality. The EEQ restrictions are not based on implementation procedures 3 or 5 of appendix F. They do not generally take the place of WQBELs developed pursuant to these procedures. Consequently, they would generally not be subject to the fish bio-uptake study requirements of procedure 8 of appendix F. The regulatory agency is always free to require fish bio-uptake studies in conjunction with EEQ requirements, but such studies are not mandated by this proposed Guidance.

EPA is aware of only one circumstance in which EEQ permit conditions would necessarily require the use of fish bio-uptake studies, and this would result not from the antidegradation requirements, but

because the regulatory agency would have chosen to use an EEQ limit in a permit in place of an otherwise necessary WQBEL. A regulatory agency may choose to include numeric EEQ effluent limitations for a BCC, which would otherwise be required to be limited by a WQBEL developed pursuant to procedures 3 and 5 of appendix F. If the EEQ limit was more restrictive than the WQBEL and would ensure compliance with the WQBEL, then the agency may choose to use it in the effluent limits table as a substitute for the WQBEL. Where such an application of EEQ required a limitation that was below the detection limit, the regulatory agency would have to apply procedure 8 of appendix F, including the fish bio-uptake studies.

EPA believes that the Antidegradation Policy and implementation procedures, as written, lead to the above conclusions. EPA would welcome comments and suggestions on how to clarify the proposed Guidance to remove ambiguity. EPA would also welcome comments on whether or not the proposed Guidance should be changed to require fish bio-uptake studies in conjunction with EEQ requirements for nondetectable BCCs.

**E. De Minimis Lowering of Water Quality**

**1. Background**

EPA and the Great Lakes States, in prioritizing situations that would be considered significant lowering of water quality in HQWs, drew a distinction between BCCs and other pollutants. As discussed in detail above, significant lowering of water quality for BCCs focuses on EEQ. In contrast, for pollutants other than BCCs ("non-BCCs") the definition of significant lowering of water quality keys off of increases in permit limits, and allows exemptions for de minimis increases and increases that result in no change in ambient concentration outside of any applicable mixing zone.

The "de minimis test" is a series of criteria that ensure that the lowering of water quality does not result from a BCC, and then assess the degree to which water quality is lowered by a pollutant, in comparison to the ability of the waterbody to assimilate the pollutant. Use of the de minimis test to exempt an action from an antidegradation review is a discretionary decision of the Director. Even when the lowering of water quality for a particular situation (i.e., a specific pollutant in a particular waterbody) may be considered de minimis and therefore not subject to antidegradation

demonstration requirements, there may still be constraints on relaxing the limitation for the pollutant in question because of the requirements of the implementation procedures, such as those for margins of safety.

**2. Detailed Description of De Minimis Test**

**a. Specific Tests Included in De Minimis Demonstration.** For substances other than BCCs, a lowering of water quality may be considered de minimis if:

- i. The lowering of water quality uses less than 10 percent of the unused assimilative capacity; and,
- ii. For pollutants included on Table 5 of proposed section 132.4, at least 10 percent of the total assimilative capacity remains unused after the lowering of water quality.

The de minimis tests rely on the concept of assimilative capacity, which is the ability of a waterbody to receive the discharge of pollutants and still attain applicable water quality standards. The total assimilative capacity is determined as the product of the applicable water quality criteria times the critical low flow, or designated mixing volume in the case of lakes, for the waterbody in the area where the water quality is proposed to be lowered, expressed as a mass loading rate. The unused assimilative capacity is that amount of the total assimilative capacity not utilized by point source and nonpoint source discharges, including background. The unused assimilative capacity is established at the time the request to lower water quality is considered. The total assimilative capacity should remain relatively constant over time, changing only as the applicable criteria change or the critical low flow of the receiving water changes, for instance, due to physical diversions or new flow data used to calculate the critical low flow. The unused assimilative capacity will be redefined each time a de minimis test is conducted and may increase or decrease due to, for instance, improvements in water quality, or increased uses of the waterbody, respectively. EPA recognizes that some pollutants will not be amenable to this procedure for calculating total assimilative capacity (e.g., pH, color, alkalinity, dissolved oxygen, salinity, temperature). For such pollutants the Director should employ other techniques to determine total assimilative capacity, as appropriate.

With the first de minimis criterion identified above, EPA and the Great Lakes States and Tribes have established a threshold below which the lowering of

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water quality may not be considered significant enough to warrant a thorough antidegradation review. It is proposed that a single action which lowers water quality less than ten percent of the total amount that might have been available to accommodate all new actions could be considered insignificant by the Director when determining if that action must satisfy antidegradation requirements. EPA and the Great Lakes States and Tribes believe that the 10 percent value chosen as the threshold represents a reasonable balance between the need of the regulatory agencies to limit the number of actions involving non-BCCs that are subjected to the detailed antidegradation demonstration requirements and the need to protect and maintain water quality. In particular, it is believed that any individual decision to lower water quality for non-BCCs that is limited to 10 percent of the unused assimilative capacity represents minimal risk to the receiving water and its ability to support all existing uses. The Director always has the ability to override the results of a de minimis test to determine that an action must satisfy antidegradation demonstration requirements if information is available to the Director that suggests that the lowering of water quality should be considered significant. Note also that each successive lowering of water quality on an individual waterbody segment will have to be smaller than the previous lowering, in absolute terms, for it to be considered de minimis. (For example, if the first time that water quality on a stream were lowered, the unused assimilative capacity was 100 pounds per day, the de minimis amount would have been up to 10 pounds per day. Presuming an action went forward as de minimis, using 9.5 pounds per day, the resulting unused assimilative capacity for that segment would be 90.5 pounds per day. The next action would have to involve an increase of less than 9.05 pounds per day to be considered de minimis, and so on.) EPA welcomes comment on this criterion and is especially interested in examples of de minimis thresholds that are currently used by States or Tribes in water quality decision-making, and the rationale that the State or tribe relied upon in the choice of the threshold.

The second criterion involves pollutants that would not be subject to the implementation procedures in this proposed Guidance. (These pollutants are listed in Table 5 of proposed section 132.4; the reader is referred to section II F of this preamble for a discussion of

these pollutants.) This criterion ensures that a margin of safety (MOS) is set aside for such pollutants so that the de minimis lowering of water quality cannot utilize the entire assimilative capacity. Under this criterion, an action involving non-GLWQI pollutants may be considered de minimis only if at least ten percent of the total assimilative capacity remains unused after the action occurs.

All pollutants that are covered by the implementation procedures are subject to the requirements related to TMDLs, WLAs, LAs and margins of safety (MOSs). In particular, the MOS requirements would set aside a portion of what the de minimis test terms the unused assimilative capacity when decisions are made regarding discharge limitations. Actions that result in a lowering of water quality, the size of which might be considered de minimis under the antidegradation procedures, might not be allowable under the implementation procedures, because the margin of safety requirements might preclude any increase of the discharge mass loading rate limits. In this manner, for the GLWQI pollutants, the Implementation and Antidegradation Procedures complement each other to ensure that de minimis decisions would not use up the entire unused assimilative capacity. However, as discussed below, under "3. Issues", EPA has concerns regarding the effectiveness of this procedure and is inviting comment on an additional alternative.

b. *Examples.* The following examples illustrate how the de minimis test works:

i. *Example 1.* In a stream tributary to a Great Lake, the most stringent applicable water quality standards for cadmium is 1.8 ug/L. The critical low flow of the stream is the 7Q10 of 3000 cfs. The resulting total assimilative capacity of this stream for cadmium is 29 pounds per day. At the time the request is made to increase the loading of cadmium to the stream, existing point and nonpoint sources and background contribute 14 pounds of cadmium per day to the stream segment, resulting in an unused assimilative capacity of 15 pounds per day. Provided that the increase sought is less than 1.5 pounds per day, the increase may be considered de minimis.

ii. *Example 2.* For a discharge directly to a Great Lake, the total assimilative capacity is based on an allowable dilution of 10 to one. Assuming that the background concentration of iron was 0 ug/L, to meet a chronic water quality standards for iron of 300 ug/L the effluent limit for iron would be 10 times 300 ug/L, which is 3,000 ug/L (or three

mg/L). For a discharge of one MGD, the maximum allowable load is 25 pounds per day.

Analysis of available data shows that the background concentration of iron attributable to all point and nonpoint sources is 100 ug/L. Therefore, the unused assimilative capacity is 300—100 or 200 ug/L, which translates to 17 pounds per day. The de minimis amount for iron for the one MGD discharge is 10 percent of 17 pounds per day, or 1.7 pounds per day.

iii. *Example 3.* In a stream tributary to a Great Lake, the dissolved oxygen standard (a Table 5 "excluded" pollutant) is four mg/L at critical flow and temperature conditions. The existing daily average dissolved oxygen in the stream is six mg/L. The unused assimilative capacity is two mg/L. The de minimis dissolved oxygen impact is 10 percent of two mg/L or 0.2 mg/L. An assimilative capacity analysis of the tributary in question would be conducted to identify the biological oxygen demand (BOD<sub>5</sub>) load that would achieve four mg/L, six mg/L, and the load increment that is equivalent to 0.2 mg/L of dissolved oxygen impact. A BOD<sub>5</sub> loading increase that corresponds to 0.2 mg/L dissolved oxygen impact could be considered de minimis, because 10 percent of the total assimilative capacity remains unused. In contrast, if the existing dissolved oxygen was 4.4 mg/L, then no increase in BOD could be de minimis because more than 90 percent of the total assimilative capacity would be utilized after the increase, i.e., the resulting dissolved oxygen would go below 4.4 mg/L.

3. Issues

During the GLWQI Technical Work Group discussions regarding the use of a de minimis test and the criteria that should define it, numerous issues were deliberated, and several alternatives considered. In addition to comments on the de minimis test laid out in the proposed Guidance, EPA solicits comments on the issues and decisions discussed below. Also, as discussed above, under C.2 "Significant Lowering of Water Quality", EPA is inviting comment on whether the use of the de minimis test should be extended to BCCs. EPA is interested in suggestions regarding any changes that should be made to the de minimis tests to address BCCs if such a change were made to the proposed Guidance.

a. *Use of Assimilative Capacity in De Minimis Decision.* EPA notes that the assimilative capacity described above is functionally the same as the loading capacity that is defined in the Federal

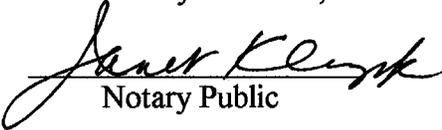
**CERTIFICATE OF SERVICE**

I, Christie M. Bianco, the undersigned, hereby certifies that copies of the COMMENTS OF THE CHEMICAL INDUSTRY COUNCIL OF ILLINOIS were served upon those persons on the attached service list by depositing said documents in envelopes affixed with sufficient postage into the U.S. Mail on the 19<sup>th</sup> day of March, 2001.

  
\_\_\_\_\_  
Christie M. Bianco

SUBSCRIBED AND SWORN TO BEFORE ME

This 19<sup>th</sup> day of March, 2001

  
\_\_\_\_\_  
Notary Public



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