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STATE OF ILLINOIS
Pollution Control Board

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)

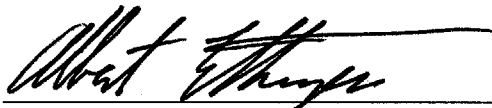
REVISIONS TO ANTIDegradation RULES:)

35 ILL. ADM. CODE 302.105, 303.205, 303.206, AND)
106.990 -106.995)

R01-13
(Rulemaking-Water)

NOTICE OF FILING

PLEASE TAKE NOTICE that on this date, August 10, 2001, I filed with Dorothy Gunn, Clerk of the Illinois Pollution Control Board, James R. Thompson Center, 100 West Randolph, Suite 11-500, Chicago, IL 60601, the enclosed Memorandum Regarding the Proposed Rules, First Notice, of the Environmental Law and Policy Center, Friends of the Chicago River, Prairie Rivers Network, and Sierra Club; the Pre-filed Testimony of Jack Darin; the Pre-filed Testimony of Robert J. Moore; and the Pre-Filed Testimony of Cynthia L. Skrukud.



Albert F. Ettinger (ARDC # 3125045)
*Counsel for Environmental Law & Policy
Center, Friends of the Fox River, Prairie
Rivers Network and Sierra Club*

August 10, 2001

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

MEMORANDUM REGARDING THE PROPOSED RULE, FIRST NOTICE,
OF THE ENVIRONMENTAL LAW AND POLICY CENTER, FRIENDS OF
THE FOX RIVER, PRAIRIE RIVERS NETWORK AND SIERRA CLUB

The Environmental Law and Policy Center of the Midwest, Friends of the Fox River, Prairie Rivers Network and the Illinois Chapter of the Sierra Club (collectively "Environmental Groups") submit this memorandum regarding the Proposed Rule, First Notice, issued by the Board with its Opinion and Order of June 21, 2001.

General Comments

The Environmental Groups believe that the rules proposed by the Board on first notice should be adopted as proposed, except as to a few provisions that should be clarified or strengthened. Generally the proposed rules create sound antidegradation standards and regulations for Illinois that should workably protect Illinois waters from injury to existing uses and unnecessary degradation. The Board has wisely rejected efforts to create arbitrary exceptions from the coverage of the rules that would have allowed Illinois waters to be degraded in a piecemeal fashion. The proposed provisions for designation and protection of Outstanding Resource Waters ("ORW") are also sound.

Specific Comments on Certain Provisions of the Proposed Rule

The Board did not adopt a number of the proposals made by the Environmental Groups in earlier memoranda and testimony in these proceedings. No purpose would be served by repeating herein arguments, suggestions or comments that the Board has already seen and presumably factored into its First Notice proposal or rejected. Some comment regarding certain provisions of the Board's First Notice Proposed Rule, however, is useful or necessary.

Proposed Section 102.810

The Environmental Groups believe that the notice provisions for petitions relating to the designation of an ORW is adequate.

Proposed Section 102.830(b)(1)

This provision contains language for designation of an ORW that speaks of "uniquely high" biological or recreational value. As was pointed out in one of the Board's questions to the Agency, see December 6, 2000 Tr. at 42-3, the term "unique" is somewhat ambiguous. The Board would improve the clarity of the proposed rule if it substituted "outstanding" or "very high" for "uniquely high". The most precise language to use, however, would be the federal language which is "of exceptional recreational or ecological significance." See 40 CF.R. §131.12(a)(3).

Proposed Section 302.105(d)(6)

The Environmental Groups appreciate that reconciling use of general permits with proper anti-degradation policy is difficult. We are pleased that the Board has seen fit to give direction to the Agency against the use of general permits for activities that may affect waters of "particular biological significance."

The Environmental Groups believe further that, particularly given the submissions and testimony offered by the Illinois Department of Natural Resources at the third hearing, the term “particular biological significance” can be more precisely set forth in the rules. The testimony of Rob Moore states proposed language to do this.

Proposed Section 302.105(f)

The Board was wise to adopt this section regarding performance of antidegradation assessments as part of the Board standards rather than leaving this matter for later Agency rule-making. It is critical that clear procedures be established for the Agency as soon as possible given the ongoing need to consider permit applications.

Proposed 302.105(f)(2)(B)

The meaning of this provision is unclear. Perhaps there is a misprint in this language. In any event, applicants should be required to go through the permitting process before taking any appeal to the Board.

Notice to the Illinois Department of Natural Resources

Consultation by the Agency with other state agencies with biological expertise (particularly the Illinois Department of Natural Resources) regarding permitting matters is of great importance to the process. This is recognized by the Board in proposed §302.105(f)(3)(C) where it is required that the comments of IDNR and certain other bodies be summarized in the fact sheet accompanying the public notice of the draft permit. However, the proposed rule does not clearly require that IDNR or other bodies with biological expertise be informed of permit applications or the assessment process. Obviously, there will never be any comments by IDNR

summarized in the public notice if IDNR receives no notice of the proposed permit prior to the time of the public notice.

Accordingly, we propose that a new subsection 302.105(f)(2)(E) be added stating that :

(E) After review pursuant to subsection (f)(2)(A)(i) or receipt of an application pursuant to subsection (f)(2)(A)(ii), the Agency shall notify the Illinois Department of Natural Resources of the review or application as soon as practicable to allow IDNR an opportunity to prepare comments or recommendations prior to issuance of the public notice required by 35 Ill. Adm. Code 309.109 or CWA Section 401.

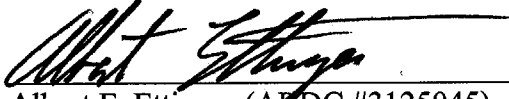
Proposed Section 303.205

Again the term “uniquely high” is used. For the reasons given above in our comment on proposed Section 102.840, “outstanding,” “very high” or use of the federal language is preferable.

CONCLUSION

The Board should adopt in final the antidegradation standards proposed by the Board on First Notice with the minor changes and clarifications presented and discussed in this memorandum.

Respectfully submitted,



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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD AUG 10 2001

STATE OF ILLINOIS
Pollution Control Board

IN THE MATTER OF:

Revisions to Antidegradation Rules:)
35 Ill. Adm. Code 302.105, 303.205,) R01-13
303.206 and 106.990-106.95)
)

**PRE-FILED TESTIMONY OF JACK DARIN
DIRECTOR, SIERRA CLUB, ILLINOIS CHAPTER**

Sierra Club submits the following Pre-filed Testimony of Jack Darin for presentation to the Pollution Control Board of the State of Illinois at the August 24th hearings scheduled in the above-referenced matter:

Testimony of Jack Darin, Director, Sierra Club, Illinois Chapter

My name is Jack Darin, and I am the Director of the Sierra Club, Illinois Chapter. The Sierra Club, Illinois Chapter consists of approximately 25,000 Sierra Club members in Illinois who are committed to protecting Illinois' environment for our families and for our future. Sierra Club members rely on Illinois' rivers, lakes, and streams for drinking water, recreation, and aesthetic value, and support efforts to protect and enhance aquatic wildlife habitat.

In general, the Sierra Club, Illinois Chapter supports the rule as proposed by the Board. If enacted, the Board's proposed rule will constitute a substantial and long overdue improvement in protection for Illinois water quality. Current non-degradation procedures implemented by the Illinois Environmental Protection Agency are insufficient to protect Illinois waters, and fall short of the protections required by the federal Clean Water Act. We applaud the Agency for their proposal to initiate this proceeding to remedy these shortcomings in existing procedures.

We believe the Board is correct in rejecting proposals to weaken the Agency's proposal. Any provision, such as a "de minimis" exemption or a "significance determination," that would allow for new increases in pollution to Illinois waters without review, would undermine the effectiveness of the rule proposed by the Board and be inconsistent with the federal Clean Water Act.

In addition, we believe that the procedures proposed by the Board for nominating Outstanding Resource Waters will allow for sufficient notification and involvement of affected parties, without unnecessarily inhibiting efforts by citizens to protect waters that may qualify for ORW status. However, we are somewhat concerned that the phrase "uniquely high biological or recreational quality" may be interpreted to exclude unusually high quality waters from ORW

protection if they share some fundamental characteristic with another Illinois waterbody. We suggest that "exceptionally" or "unusually" may be a better word in this context than "uniquely".

In summary, we applaud the Board for proposing what would be a substantial improvement in Illinois water quality standards, and urge you to approve and move forward with your proposal so that Illinois' rivers, lakes, and streams may soon enjoy the many societal and ecological benefits of effective antidegradation procedures.

Jack Darin
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Chicago, IL 60601

AUG 10 2001

BEFORE THE POLLUTION CONTROL BOARD OF THE STATE OF ILLINOIS
STATE OF ILLINOIS
Pollution Control Board

IN THE MATTER OF:

Revisions to Antidegradation Rules:)
35 Ill. Adm. Code 302.105, 303.205,) R01-13
303.206 and 106.990-106.95)

**PRE-FILED TESTIMONY OF ROBERT J. MOORE, EXECUTIVE DIRECTOR,
PRAIRIE RIVERS NETWORK**

Prairie Rivers Network submits the following Pre-filed Testimony of Robert J. Moore for presentation to the Pollution Control Board of the State of Illinois at the August 24th hearings scheduled in the above-referenced matter:

Testimony of Robert J. Moore, Executive Director, Prairie Rivers Network

My name is Robert J. Moore and I am the Executive Director of Prairie Rivers Network (Prairie Rivers), a position I have held since April, 1997. I represent Prairie Rivers Network at public meetings, hearings, and discussions of issues dealing with water quality policy and river conservation in the State of Illinois. My responsibilities include reviewing, commenting, and testifying on NPDES permits issued in Illinois and also reviewing and participating in discussions concerning water quality standards in Illinois. I am a currently member of the Illinois Department of Public Health's Onsite Wastewater Disposal Commission, the Illinois Department of Agriculture's Nutrient Management Task Force, and also serve on several Illinois EPA workgroups including ones addressing the Des Plaines River Use Attainability Analysis and the impending modification of Illinois' Subtitle D regulations, which address water pollution from mining activities. In addition, I represented Prairie Rivers on the Antidegradation Workgroup convened by Illinois EPA and whose efforts have led to the matter now before the Board.

The mission of Prairie Rivers Network is to protect and preserve the rivers and streams of Illinois and to promote the lasting health and beauty of the state's watershed communities. Founded in 1967, Prairie Rivers Network is a statewide organization that works on river conservation issues. Our organization is concerned about the protection of high quality waters throughout Illinois and the restoration of those waters whose quality has been degraded.

Comments on the June 21st Opinion of the Board

Prairie Rivers Network and others who value clean water and healthy lakes and streams would like to acknowledge the Board for their careful consideration of this important matter. Judging

from the number of public comments received by the Board on this matter, this issue is obviously a priority for members of the public who value the state's rivers. Today, Prairie Rivers would like to provide some specific comments on the Board's June 21st Opinion and Order.

Significance Determination

The Board's decision to not adopt a significance determination is one which Prairie Rivers Network fully supports. The proposals put forth for determining the significance of a discharge would have limited the Agency's ability to review alternatives that might reduce or eliminate a proposed discharge and been more burdensome, time consuming, and costly to the Agency and the discharger than conducting an antidegradation review. Adoption of a significance determination would have led to the deterioration of water quality in Illinois' waters.

The Board's decision to not adopt a significance test allows the Agency to determine the appropriate level of antidegradation review, with suitable input from the permittee and other interested parties. This is the best approach to take.

De minimis Exception

By not adopting the proposed language for a de minimis exception the Board has preserved the scope and intent of the Clean Water Act as well as the enabling federal regulations that specifically address the issue of antidegradation (40 CFR 130.12). De minimis provisions undermine the intent of antidegradation by allowing increases of pollutants into waters of the United States without any review and without any consideration of the necessity of that pollution. The Board correctly pointed out that the proposed de minimis exception would have allowed discharges of "bioaccumulative or persistent chemicals without an Agency review" and would allow discharges of pollutants which "may not be advisable in certain water bodies."

Prairie Rivers would also like to point out that the use of a de minimis provision, like the proposed significance test, could be more burdensome than an antidegradation review and could lead to the degradation of Illinois' waters. To determine if a discharge is indeed de minimis the discharger and the Agency must determine the "assimilative capacity" of the receiving waters and the impact a proposed discharge would have relative to other dischargers in the vicinity. According to the Agency, such a task would require resources which it does not have available (Illinois Environmental Protection Agency's Answers to Pre-filed Questions received March, 2001, page 6).

Designation of Outstanding Resource Waters

Prairie Rivers Network also agrees with the Board's decision to make the process of designating Outstanding Resource Waters (ORW) consistent with the scope and procedural requirements of other Board proceedings.

By simplifying the requirements for filing the petition and public notice the Board has made the process for designation more accessible to non-governmental organizations and has also made

the procedures for ORW designations consistent with similar proceedings that the Board administers.

Other Issues Considered by the Board Opinion

Prairie Rivers agrees with the Board's decision to include the Agency's proposed implementation rules as part of the Board's rulemaking. There is a need to have documented procedures for conducting antidegradation reviews in place at the time of the final rule's adoption. This will enable the Agency to immediately implement the final rule as it reviews pending and future applications for NPDES permits and 401 water quality certifications.

Prairie Rivers also appreciates the Board's recognition of the potential ecological significance of streams with 7Q10 flows of zero. As pointed out by Dr. David Thomas and Kevin Cummings of the Illinois Natural History Survey, there is little, if any reason to exclude these low flow streams from consideration as ORWs. As the Board observed, three of the four streams recommended for immediate designation as ORWs have 7Q10 flows of zero. The Board correctly struck the proposed language which made designation of a zero or low flow stream as an ORW more difficult.

Comments on the June 21st Order of the Board

Proposed 102.820(e)

Prairie Rivers does not object to inclusion of a statement of the scope described in 102.820(e), given that it is consistent with similar Board proceedings. However, the more detailed requirements described in subparagraphs (1)-(4) will be extremely difficult to provide to the Board. An analysis of these factors is difficult, if not impossible, to complete with data that would be reasonably available to members of the public, or government agencies for that matter.

Proposed 102.830(b)

The use of the phrase "uniquely high biological or recreational quality" in 102.830(b)(1) raises some questions as to what is meant by a water being "unique". This could be interpreted to mean that the waterbody is individually unique, or one-of-a-kind, in its biological or recreational value. We suggest that more general language be used that is consistent with the federal regulation on Outstanding National Resource Waters found at 40 CFR 131.12(a)(3) which states that ORWs be "of exceptional recreational or ecological significance."

We are also uncertain of how the Board will be able to judge the criteria described by 102.830(b)(2). The provision can be read to say that the Board will designate, or not designate, a water as an ORW based on the relative future environmental benefits of designation against the future economic benefits that would be lost as a result of designation.

The Board will make this decision based on information supplied by the petitioner under the proposed 102.820(e) as well as evidence entered into the record by other interested parties. As

we stated earlier, this type of regional economic analysis is inherently difficult. In addition it is exceedingly difficult to weigh environmental impacts against economic impacts. Dr. David Thomas of the Illinois Natural History Survey stated, "I have a particular concern because I'm not sure that ecological functioning has ever [been] taken into account economically." (Thomas Testimony, Feb. 6, 2001, Tr. 170-171) Obviously weighing the *future* environmental impacts against the *future* economic impacts is even more difficult.

In order to make a decision based on this criteria, the Board must somehow forecast the future environmental and economic conditions in the area proposed for ORW designation. This type of prognostication is very difficult to do on a regional scale.

Moreover, the federal regulations indicate the designation of an ORW is to be based solely on a water's ecological and/or recreational significance. There is no mention of the economic impacts of ORW designation. Prairie Rivers does see the value of including a statement on the economic impacts in the petition in order to make the ORW designation proceeding consistent with similar Board proceedings. We believe the decision of ORW designation should not be tied to a balance between uncertain future economic forecasts and the benefits of water quality and habitat protection.

Proposed 302.105(b)(1)(B)

It is unclear why degradation of an ORW is allowable as long as it is caused by an "existing site stormwater discharge" that meets state and federal stormwater regulations and does not violate "any water quality standards."

The proposed antidegradation rule itself is a water quality standard, so the proposed language of 302.105(b)(1)(B) is circular in its logic. The proposed 302.105(b)(1)(B) allows degradation of an ORW as long as it does not violate the antidegradation water quality standard which does not allow degradation of an ORW, unless of course the degradation is caused by a stormwater discharge that would not violate a water quality standard. This is a bit confusing.

It is also unclear why existing stormwater discharges should be allowed to contribute to the degradation of an ORW. If stormwater quality deteriorates over a period of time, to the point that it causes, or threatens to cause, the extirpation of a rare aquatic species or elimination of an existing use in an ORW, why should that degradation be allowable? Just because the degradation is caused by an existing stormwater discharge does not mean that the degradation is better or worse than degradation caused by any other source of pollution. The purpose of designating an ORW is to protect and preserve waters of exceptional ecological or recreational value, not to protect those waters from all sources of pollution except stormwater.

We therefore request that 302.105(b)(1)(B) be struck. It is inconsistent with the concept of an ORW, it is inconsistent with the intent of the proposed 302.105 and it is inconsistent with the federal antidegradation requirements found at 40 CFR 131.12(a)(3).

Proposed 302.105(d)(6)

We agree with the Board's inclusion of language that activities covered by general permits or a general CWA, Section 401 certification in waters of "particular biological significance" should not be exempted from an antidegradation review. For purposes of clarification, it may be helpful to define better what is to be interpreted as a water of "particular biological significance".

Prairie Rivers Network suggests the following language:

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

This proposed amendment would give more specific direction to the Agency about what is considered to be a "biologically significant" waterbody.

General Comment

In some parts of the proposed rule there is reference to a "CWA, Section 401 certification" but in other parts of the proposed rule the comma has been dropped. To maintain consistency, this should be corrected.

We would also like to submit for exhibits to the Board five pictures of Illinois streams which illustrate the natural beauty and qualities which the final rule adopted by the Board is intended to safeguard.

This concludes my testimony on the Amendments to 35 Ill. Adm. Code 302.105, 303.205, 303.206 and 106.990 through 106.95. I thank you for the opportunity to provide input to the Board on this important matter.

Robert J. Moore
Executive Director
Prairie Rivers Network
809 South Fifth Street
Champaign, Illinois 61820

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303.206 and 106.990-106.995)

PRE-FILED TESTIMONY OF CYNTHIA L. SKRUKRUD

The Friends of the Fox River submits the following Pre-Filed Testimony of Cynthia L. Skrukud for presentation at the August 24, 2001 hearing scheduled in the above-referenced matter:

Testimony of Cynthia L. Skrukud, Ph.D.

My name is Cindy Skrukud and I am the President of Friends of the Fox River. I have held the position as President since December 1999, previously having served as Vice-President since my election to the board in 1994. I chair the Friends' Water Quality Committee. In that capacity, I review NPDES permit applications within the Fox River watershed. I am also a member of the Fox River Ecosystem Partnership's Water Quality Committee. I also serve on the Nippersink Creek Watershed Planning Committee and am active with the Kishwaukee River Ecosystem Partnership.

Friends of the Fox River is a 11 year-old, non-profit organization dedicated to protecting and improving the health of the Fox River, the third largest tributary to the Illinois River with a watershed in Illinois covering 1720 square miles and encompassing 11 counties. The mission of the Friends of the Fox River is to *Build a Watershed of Caretakers* so our efforts involve not only the Fox River, but also the many high quality tributaries which drain to the Fox River and the high quality lakes found in the watershed.

Comments on June 21, 2001 Proposed Rule- First Notice

The Friends of the Fox River believe the amendments proposed by the Illinois Pollution Control Board to update the "nondegradation" rules satisfy the federal Clean Water Act's requirements for the State of Illinois to implement the concepts of antidegradation and outstanding resource waters.

We support the Board's decision to reject a number of changes suggested to the amendments initially proposed by the Illinois Environmental Protection Agency. Specifically, we support the rejection of a *de minimis* exception to the antidegradation requirements. We also support the rejection of the concept of a 'significance determination'. We believe that the Agency's proposal to subject all increases in pollutant loading to a case-by-case antidegradation review, with the level of review to be determined by the nature and amount of the pollutant-in-question, is appropriate.

Friends of the Fox River are in favor of a number of changes that the Board did make to the amendments proposed by the Agency. We support the Board's proposal to make the service of a petition for an Outstanding Resource Water (ORW) consistent with that required of other rulemakings. We also support the decision to strike the language that suggested that streams with zero 7Q10 flow would not be eligible for ORW designation.

We support that language which directs the Agency to require individual permits or certification, instead of general permits or certifications, when waters of particular biological significance are affected. We believe the language suggested in the testimony of Rob Moore of Prairie Rivers Network would further clarify this section (Section 302.105 (d)(6)).

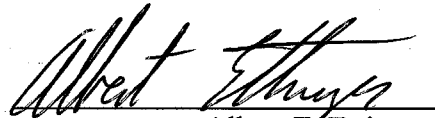
Friends of the Fox River also support the Board's decision to place the Agency's suggested procedures for implementing the antidegradation policy into the proposed rules (Section 302.105 (f)).

The Friends of the Fox River appreciate the work undertaken by many parties to update the Board's Antidegradation Rules for the waters of the State of Illinois. We have welcomed the opportunity to participate in the process. We look forward to receiving the Board's Final Rule on this matter and to implementation of the new rules to help achieve the goals of maintaining the high quality waters and preventing unnecessary deterioration of all waters of the State of Illinois.

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CERTIFICATE OF SERVICE

I, Albert F. Ettinger, certify that I have filed the above Memorandum Regarding the Proposed Rules, First Notice, of the Environmental Law and Policy Center, Friends of the Chicago River, Prairie Rivers Network, and Sierra Club; the Pre-filed Testimony of Jack Darin; the Pre-filed Testimony of Robert J. Moore; and the Pre-Filed Testimony of Cynthia L. Skrukud with an original and 9 copies on recycled paper, with the Illinois Pollution Control Board, James R. Thompson Center, 100 West Randolph, Suite 11-500, Chicago, IL 60601, and served all the parties on the attached Service List by depositing a copy in a properly addressed, sealed envelope with the U.S. Post Office, Chicago, Illinois, with proper postage prepaid on August 10, 2001.


Albert F. Ettinger

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