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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	
REVISIONS TO ANTIDEGRADATION RULES:	)	R01-13
35 ILL. ADM. CODE 302.105, 303.205, 303.206, AND	)	(Rulemaking-Water)
106.990 –106.995	)	P.C. #43
	)	
	)	

Post Hearing Comments of Environmental Groups

Prairie Rivers Network, joined by Environmental Law & Policy Center, Friends of the Fox River, McHenry County Defenders, and Sierra Club, submits these post-hearing comments to highlight and emphasize several critical points.

The hearing held by the Illinois Pollution Control Board on February 6, 2001, focused on three issues that have been much addressed at all three hearings held by the Board: [1)]the appropriate "exceptions" to antidegradation review; [2)]whether "de minimis" and "significance" tests should be grafted on to the Illinois EPA proposal; and [3)]designation of Outstanding Resource Waters or ORWs.

We urge the Board to reject the numerous proposals that have been made for exemptions, significance tests and de minimis tests that would short circuit regulatory controls in the name of flexibility. We have supported much of the flexibility that the Agency has built into its original proposal, trusting that we, the Agency, and other interested parties will be able to work together to strike the proper balance between clean water, growth in our communities, and continued economic prosperity in Illinois. Further, we believe that the regulations regarding designation of ORWs should preserve flexibility for the Board as it weighs the merits of granting additional protections to waters of exceptional ecological or recreational significance.

Illinois, for better or worse, has seen massive alterations of its landscape, and corresponding historical changes in its hydrology, water quality, and diversity of aquatic species. According to Illinois EPA's most recent 305(b) report, over one third of the stream miles assessed in Illinois are impaired in some way (*Illinois Water Quality Report 2000*; IEPA/BOW/00-005; Illinois Environmental Protection Agency, Bureau of Water; April 2000). Less than 2% of the state's stream miles are rated as "Unique Aquatic Resources" or Class A streams and less than 15% of the state's waters are rated as "Highly Valued Aquatic Resources" or Class B streams (*Biological Stream Characterization: Biological Assessment of Illinois Stream Quality through 1993*; IEPA/BOW/96-058; Illinois Environmental Protection Agency; November 1996).

According to data collected by the Illinois Natural History Survey, less than 1,000 miles of Illinois' 30,000+ miles of streams support diverse aquatic communities, harbor populations of rare aquatic species or are otherwise considered "biologically significant." (*Biologically Significant Illinois Streams;* Project completion report F-110-R; Illinois Natural History Survey; September 1991)

These statistics are telling. To the best of our knowledge, one third of our assessed streams are not meeting the goals the Board and the State of Illinois established for water quality. Because of a variety of factors, a very small percentage of streams support "biologically significant" populations of fish, mussels, and other aquatic organisms. The Illinois Department of Natural Resources has found that one in five fish, one in five crayfish, one in three reptiles and amphibians, and over half the freshwater mussels present at the beginning of the 20th century were listed as threatened, endangered, or extirpated from our state at the end of the 20th century. (*The Changing Illinois Environment: Critical Trends*; ILENR/RE-EA-4/05 (SR); Illinois Department of Natural Resources; 1994; page 22)

Since Congress passed the Clean Water Act in 1972, much progress has been made to restore some of Illinois' most polluted waterways. This progress is largely due to the emphasis that has been placed on improving the chemical integrity of the state's polluted waters.

Of course, the Clean Water Act was intended to go beyond numerical measures of various chemicals and pollutants. The objective of the Act "is to restore and maintain the chemical, physical and biological integrity of the Nation's waters." (33 USC§ 1251(a)) One of the keystones to restoring the physical and biological integrity of the Nation's waters is a state's antidegradation policy.

A state's antidegradation policy is intended to create a process by which existing uses of our waters are protected (such as aquatic life, swimming, fishing, etc...), and by which waters whose quality is better than the established numerical goals are maintained and perhaps improved. Antidegradation is the backstop to making decisions which ultimately determine progress towards the objectives of the Act.

Beyond setting up a process for making informed decisions regarding the management of our waters, a state's antidegradation policy establishes a mechanism for protecting those waters that exhibit exceptional ecological or recreational significance. It is critical that this mechanism be fully capable of protecting Illinois' rich natural heritage as well as the purity of key recreational resources.

Exceptions to Antidegradation

We urge the board to not adopt any additional antidegradation exceptions. Many of the exceptions proposed by other parties cover activities which would be expected to receive only a rudimentary antidegradation review by the Agency. But even this rudimentary level of review may be important in some cases. It is preferable to have a rudimentary review of the potential impact to existing uses and water quality that is expedient and catches obvious problems, rather than to have a blanket exception that would preclude the Agency from making an assessment of any type.

We particularly object to the proposed exception for "Site storm water discharges covered by a Storm Water Pollution Prevention Plan as required in an individual NPDES permit." (Jeff Smith, Feb. 6, 2001, Tr. 28) The development of these plans is often included as a special condition of an NPDES permit. However the requirement to create any plan or conduct any type of monitoring should not be grounds for an exception from antidegradation review. An antidegradation review is done prior to permit issuance to determine the impacts of an activity on

water quality and existing uses. A Storm Water Pollution Prevention Plan is developed after a permit has been issued. Indeed, this exception, as drafted, may be based on the existence of a condition in a permit which has not even been drafted yet. By analogy, this would be like granting a driver's license on the presumption that the individual later develop a plan for learning how to drive. The demonstration must be made before, not after, the activity has been authorized.

Furthermore, it should be noted that the Agency does not review Storm Water Pollution Prevention Plans or investigate their implementation until a site inspection is conducted. (Illinois Environmental Protection Agency's Answers to Pre-filed Questions received March, 2001, page 5-6) It is quite likely that a discharge from a facility has occurred by the time the Agency even reviews the Storm Water Pollution Prevention Plan. The Board should reject an exception from antidegradation review based on the future development of a plan that will likely not even be examined until after a discharge occurs.

The same concerns are also raised by the Agency's proposed exception for general NPDES permits (proposed 302.105(d)(6)). According to the Agency there are over 8,678 facilities of various types covered under five different general permits (Illinois Environmental Protection Agency's Answers to Pre-filed Questions received March, 2001, page 3). To have a blanket exception for thousands of permits, and the thousands of facilities that will be covered by these and other general permits in the future is not appropriate.

There is no public notice when a discharger elects to operate under a general permit. For this reason the public is not given an opportunity to review and comment on facilities covered by a general permit. This deprives the Agency of the opportunity to receive information from the public about existing uses and other factors that might be revealed if it was an individual permit. More importantly, it means that the Agency will not even seek this information itself because general permits will not be subjected to an antidegradation review. Compounding these difficulties, the general permits which the Agency currently utilizes have never been subjected to an antidegradation review. For these reasons we urge that proposed 302.105(d)(6) be removed or, at a minimum, revised to ensure that general permits are not issued on waters where rare or pollution intolerant species are known to exist, or on waters that are otherwise biologically significant.

In the "Illinois Environmental Protection Agency's Answers to Pre-filed Questions received March, 2001" no mention is made of how many of the 8,678 facilities covered by general permits are inspected annually. However, it would take a monumental effort on the part of the Agency to inspect each of these facilities even a single time, much less more than once, given the available resources.

We refer you to pages 27-28 of our organizations' pre-filed testimony submitted on January 18, 2001 for additional discussion of our reservations regarding exceptions for general NPDES permits.

De Minimis and Significance

There is no need for any de minimis or significance tests and the Board should reject all of the proposals for de minimis and significance tests that have been made. The de minimis or significance test proposals, if adopted, would be more burdensome for the Agency than performing

the antidegradation demonstration the tests are designed to circumvent, and are contrary to the clean water goals established by Congress, the General Assembly, and the Board. As Board member Flemal observed at the February 6th, 2001 Board hearing, "if we concentrate a lot on exemptions and de minimises we start chipping away at the ultimate objective of the Clean Water Act." (Flemal, Feb. 6, 2001, Tr. 72)

In particular, the Illinois Environmental Regulatory Group (IERG), joined by several other parties, has proposed that the Agency be saddled with an extremely vague and complex significance test. IERG purports to fear that, without such a threshold test on antidegradation requirements, businesses seeking to add insignificant amounts of pollution to the water might be forced, through lengthy proceedings, to prove that their businesses provide economically or socially important functions in society. However, unless the Illinois Environmental Protection Agency is seized by Luddites, it is practically inconceivable that the Agency will take seriously a challenge to a permit that is based solely on a demand for proof that production of a legal product is economically or socially beneficial. The draft Agency proposal certainly does not suggest that such an argument would be taken seriously and we know of no environmental group that would object to a permit on such a basis.

The real question in allowing new pollution will always be whether the new pollution is really necessary to create the product or service that the applicant seeks to make. New pollution should never be exempted from making some form of such a demonstration, although in many cases the showing required will be fairly minimal. In a few cases where granting one permit may preclude other social or economic development, weighing of the relative contributions of the two proposals may be necessary, but that is as it should be. New pollution should not be allowed on a "first come, first served" basis.

Adoption of a complex "significance" test to avoid a hypothetical risk of the Agency acting in a wholly unprecedented manner, would add substantially to the Agency's burden. In the Environmental Groups' pre-filed questions to the Agency we asked if the Agency had the resources to conduct a complete analysis of the load allocations and pollutant loadings necessary to conduct the significance demonstration proposed by IERG. The Agency responded that, "it does not feel it has the resources to conduct a study of current load allocations." (Illinois Environmental Protection Agency's Answers to Pre-filed Questions received March, 2001, page 6)

Moreover, as discussed in our organizations' "Answers to Pre-filed Questions to the Environmental Groups", the IERG proposal completely misconceives what is "significant" under the Clean Water Act and the policies that have been established by Congress and this Board.

As the Board stated in its 1972 adoption of the present "nondegradation standard" found at 35 Ill. Adm. Code 301.105, the numeric and narrative standards "do not represent optimum water quality but the worst we are prepared to tolerate if economic conditions so require." (Supra p. 4) Numerical water quality standards have never been designed to be protective of every species that may be found in a state. According to the Agency, USEPA's numerical criteria, which serve as the basis for Illinois' standards, do not "require that every possible species within every trophic level be protected." (Frevert Testimony, Dec. 6, 2000, Tr. 24-25)

Clearly, gaps exist in our knowledge of specific chemicals' toxicity to terrestrial and aquatic organisms and gaps exist in our knowledge of how variation, both natural and anthropogenic, in

other water quality parameters impacts existing uses. Antidegradation is intended to provide the backstop to help fill these gaps, or at least ensure these gaps in our knowledge do not lead to unnecessary degradation of our waters.

In the Environmental Groups' testimony to the Board on February 6, 2001, Mr. Albert Ettinger gave a good example of why a de minimis exception creates problems when he asked the question, "Can you imagine how much arsenic a company would have to buy in order to use up nine percent of the assimilative capacity of the Mississippi River?" (Ettinger Testimony, Feb. 6, 2001, Tr. 130) In truth, it is hard to imagine how much arsenic this would be (or for that matter lead, mercury, or any of a number of toxic pollutants) because the number in staggeringly large. However a de minimis standard could theoretically allow for the discharge of such a huge quantity of pollution without any showing that this new pollution was necessary or that the discharge would not impact existing uses.

While it is plainly unthinkable to allow a nine percent increase in the amount of arsenic in the Mississippi for no good reason, it is little better to allow an unjustified increase to a smaller water like Nippersink Creek or the Sangamon River. We should preserve the water quality of all of our waters unless we have been shown a good reason why it is necessary to surrender that quality. This is particularly true given the gaps in our knowledge about the toxic effects of chemicals.

Finally, we would like to respond to a point regarding Ohio regulations raised at the Feb. 6, 2001 Board hearing. It was claimed that Ohio is the only state that does not have a de minimis exception. (Andes Testimony, Feb 6, 2001, Tr. 34-35) Further, in his testimony Mr. Fredric Andes told us of a presentation made to the Agency's working group by a staff person from Ohio EPA who told the group, "don't do what we did," on antidegradation. Mr. Andes implied the Ohio EPA representative was advising Illinois to not follow Ohio's example of not having a de minimis exception.

However, it is more likely that the Ohio EPA official was suggesting that Illinois not replicate Ohio's burdensome public participation process for antidegradation review, which requires a parallel public notice, hearing, and comment period separate from the NPDES permit process. Illinois EPA has not proposed to copy this unwieldy form of antidegradation implementation. Indeed, the Ohio official may have been referring to Ohio's mistake of adopting an antidegradation policy with broad exceptions that were thereafter struck down under the Clean Water Act by the Ohio courts.

Outstanding Resource Waters Designation

The Environmental Groups continue to object to the extensive list of parties that must receive a copy of the ORW petition in the Agency's proposal. We reiterate the position that the procedures and rules regarding notice be no more and no less extensive than similar proceedings which the Board presides over.

The point of requiring notification and service of a petition is to make sure all the interested parties are informed and able to participate in a proceeding. To serve the needs of public notification, the Board has a variety of methods to accomplish this, from the Illinois Register to its own website. The public has ample opportunity to learn of a proceeding to designate an ORW

under existing public notice and service provisions. There is no need to create special notice and service burdens for ORW petitioners. However, if the Board were to adopt a policy which required similarly burdensome notice and service restrictions for the other proceedings it oversees with regards to variances, site specific standards, etc... as well as extending similar requirements to NPDES permits, 401 water quality certifications, construction permits and the like, we would certainly be open to discussion of the matter.

We must remember that the point of soliciting public input is to acquire information and knowledge from as wide a variety of parties as are interested in participating. The current system of notice and service used in other proceedings has always satisfied the Board.

After all, the ramifications of designating an ORW wrongfully and issuing a permit that leads to long-term degradation have different outcomes for society as a whole. Issuance of a NPDES permit that is not restrictive enough can kill a stream. On the other hand, as Mr. Ettinger stated at the Feb. 6, 2001 Board hearing, the ramifications of wrongly designating an ORW are that, "we face the tragedy of having water that's a little too clean for the period until we repeal the ORW." This is a result we can probably bear.

The Environmental Groups would also urge the Board to strike the Agency's language regarding zero flow streams and ORW consideration (proposed 303.205(b)). This criteria has no justification and the Illinois Natural History Survey's own candidate list of ORWs included numerous streams which could be eliminated from consideration by this arbitrary criterion. As the Illinois Natural History Survey staff testified, "this idea of the 7Q10 zero having to have special considerations ... or requirements doesn't make sense from an ecological standpoint." (Cummings Testimony, Feb. 6, 2001, Tr. 180-181)

Further, we object to the requirements for extensive economic studies to be conducted and included in a petition for ORW designation. Our recommended change would be to simply require a statement identifying the anticipated impact as detailed in our January 18, 2001 pre-filed testimony (see our organizations' pre-filed testimony dated January 18, 2001, proposed 106.994(e)). According to Illinois Natural History Survey Chief David L. Thomas, "We find the present [Illinois EPA] proposal exceedingly difficult to comply with. If, in fact, one is to do a true economic evaluation, 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)

We further disagree with IERG's more strident requirement that a petitioner for an ORW designation be required to show that the benefits of "ORW designation would substantially outweigh lost economic and social benefits before granting an ORW designation." (Hirner Testimony, Feb. 6, 2001, Tr. 17)

Waters to be designated as ORWs will, in most if not all cases, be waters where there are high levels of biodiversity or where there are populations of rare species. It is unclear from IERG's proposed language how one is to weigh the social and economic benefits of these characteristics. It is exceedingly difficult to quantify these qualities. Clearly Mr. Thomas' testimony regarding Illinois EPA's proposed 106.994(e) applies even more so to IERG's socioeconomic criteria for ORW designation.

Furthermore, IERG's proposal requires that the social and economic benefits of recreational and ecological significance be weighed against hypothetical unknown future economic and social benefits. Not only would a petitioner for ORW designation be required to assign a dollar value to qualities such as recreational and ecological significance, it would be required to somehow conjure up what the economic future holds for the area.

Finally, we believe that proceedings to designate ORWs are best treated as regulatory proceedings. (see, Feb. 6, 2001 Transcript p. 58) This will allow the broadest public participation in decisions regarding such designations.

Conclusion

We thank the board for the opportunity to provide these comments. We feel it is essential that the Board adopt a strong antidegradation policy, free of questionable exceptions, that does not allow arbitrary levels of pollution to be discharged without review, and that establishes reasonable mechanisms for designation of Outstanding Resource Waters.

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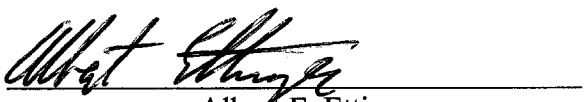
CERTIFICATE OF SERVICE

I, Albert F. Ettinger, certify that I have filed the above Post Hearing Comments of Environmental Groups, 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 March 20, 2001.



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