BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

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

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

(PERSONS ON ATTACHED SERVICE LIST)

PLEASE TAKE NOTICE that I have filed today with the Clerk of the Illinois Pollution Control Board an original and nine copies of **PRE-FILED TESTIMONY OF DEIRDRE K. HIRNER, PRE-FILED TESTIMONY OF JEFFREY P. SMITH, PRE-FILED TESTIMONY OF FREDERIC P. ANDES**, and **PRE-FILED TESTIMONY OF BILL COMPTON,** copies of which are herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
REGULATORY GROUP,

By: Katherine D. Hodge
One of Its Attorneys

Dated: January 18, 2001

Katherine D. Hodge
HODGE & DWYER
3150 Roland Avenue
Post Office Box 5776
Springfield, Illinois 62705-5776
(217) 523-4900

Karen L. Bernoteit
Illinois Environmental Regulatory Group
215 East Adams Street
Springfield, Illinois 62701
(217) 522-5512

CERTIFICATE OF SERVICE

I, Katherine D. Hodge, the undersigned, certify that I have served a copy of the attached PRE-FILED TESTIMONY OF DEIRDRE K. HIRNER, PRE-FILED TESTIMONY OF JEFFREY P. SMITH, PRE-FILED TESTIMONY OF FREDRIC P. ANDES, and PRE-FILED TESTIMONY OF BILL COMPTON upon:

Ms. Dorothy M. Gunn
Clerk of the Board
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601

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

by overnight delivery by depositing said documents in an Airborne Express drop box in Springfield, Illinois, on January 18, 2001, and upon:

SEE ATTACHED SERVICE LIST

by depositing said documents in the United States Mail in Springfield, Illinois on January 18, 2000.

Katherine D. Hodge

IERG:001/R Dockets/Fil/R01-13 COS – Testimony

SERVICE LIST

Ms. Kay Anderson
American Bottoms RWTF
One American Bottoms Road
Sauget, Illinois 62201

Frederic P. Andes, Esq.
Barnes & Thornburg
2600 Chase Plaza
10 South LaSalle Street
Chicago, Illinois 60603

Ms. Christine Bianco
Director of Regulatory Affairs
Chemical Industry Council of Illinois
9801 West Higgins Road
Suite 515
Rosemont, Illinois 60018

Christine S. Bucko, Esq.
Assistant Attorney General
Illinois Attorney General's Office
Environmental Bureau
188 West Randolph Street
20th Floor
Chicago, Illinois 60601

Mr. Jack Darin
Sierra Club, Illinois Chapter
200 North Michigan Avenue
Suite 505
Chicago, Illinois 60601

Mr. Albert F. Ettinger
Environmental Law & Policy Center
35 East Wacker Drive
Suite 1300
Chicago, Illinois 60601-2110

Susan M. Franzetti, Esq.
Sonnenschein Nath & Rosenthal
8000 Sears Tower
233 South Wacker Drive
Chicago, Illinois 60606

James T. Harrington, Esq.
Ross & Hardies
150 North Michigan Avenue
Suite 2500
Chicago, Illinois 60601

John M. Heyde, Esq.
Sidley & Austin
Bank One Plaza
10 South Dearborn Street
Chicago, Illinois 60603

Richard J. Kissel, Esq.
Gardner, Carton & Douglas
Quaker Tower
321 North Clark Street
Suite 3400
Chicago, Illinois 60610-4795

Sharon Marie Neal, Esq.
Law Department
ComEd - Unicom
125 South Clark Street
Chicago, Illinois 60603

Mr. Jerry Paulson
McHenry County Defenders
804 Reginact
Woodstock, Illinois 60098

Mr. Irwin Polls
Metropolitan Water Reclamation District
Environmental Monitoring
6001 West Pershing Road
Cicero, Illinois 60804-4112

Ms. Cindy Skrudkrud
4209 West Solon Road
Richmond, Illinois 60071

Connie Tonsor, Esq.
Assistant Counsel
Division of Legal Counsel
Illinois Environmental Protection Agency
1021 North Grand Avenue East
Post Office Box 19276
Springfield, Illinois 62794-9276

Ms. Georgia Vlahos
Department of the Navy
Naval Training Center
2601A Paul Jones Street
Great Lakes, Illinois 60088-2845

Charles W. Wesselhoft, Esq.
Ross & Hardies
150 North Michigan Avenue
Suite 2500
Chicago, Illinois 60601

Mr. Stanley Yonkauski
Illinois Department of Natural Resources
524 South Second Street
Springfield, Illinois 62701

IERG:001/Fil/R01-13/Service List

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

PRE-FILED TESTIMONY OF DEIRDRE K. HIRNER

NOW COMES the ILLINOIS ENVIRONMENTAL REGULATORY GROUP ("IERG"), by one of its attorneys, Katherine D. Hodge of HODGE & DWYER, and submits the following Pre-Filed Testimony of Deirdre K. Hirner for presentation at the February 6, 2001 hearing scheduled in the above-referenced matter:

Testimony of Deirdre K. Hirner

Good Morning. My name is Deirdre K. Hirner, and I am the Executive Director of the Illinois Environmental Regulatory Group ("IERG"). I hold a Ph.D. in Land Use Planning from Texas Tech University, have served in the Office of Governor of the State of Missouri as Chief Public Policy Advisor, and was, for six years, the Director of Missouri's largest conservation group, the 35,000-member Conservation Federation, which focused on building broad-based support for a balanced approach to environmental protection measures.

On behalf of IERG and its member companies, I want to thank the Illinois Pollution Control Board ("Board") for the opportunity to present this testimony today. As some of you may know, IERG requested that the Board schedule this third hearing for the purpose of allowing additional testimony in response to the proposal of the Illinois Environmental Protection Agency ("Illinois EPA" or "Agency"). IERG appreciates the fact that the Board granted this request and is holding this hearing today. IERG believes

that this hearing will provide the Board valuable information that will allow the Board to more completely consider the Agency's proposal and promulgate a fairer and more effective final rule.

My testimony today is offered to present IERG's proposed revisions to the Agency's proposal and to provide more detailed testimony on IERG's areas of concern with that proposal and in support of IERG's proposed revisions. In conjunction with my testimony today, representatives of two of IERG's member companies, and attorney Fred Andes of the law firm of Barnes & Thornburg, will present testimony in support of IERG's proposed revisions.

Background

As I noted in my testimony on behalf of IERG at the December 6, 2000, hearing in this matter, IERG has several general areas of concern regarding the Agency's proposal. Again, those areas of concern are as follows:

1. the Agency's proposal does not contain a significance test to determine the need for a comprehensive antidegradation review;

2. the Agency's proposal does not contain needed exceptions to the individual demonstration pursuant to the proposed Board standard;

3. the Agency's proposal requires extensive up-front data submissions from an applicant for an NPDES permit or Section 401 certification which may not be necessary;

4. the Agency's proposal does not contain sufficient requirements for ORW designations; and

5. the Agency's proposal lacks clarity as it relates to definitions of some of the provisions and terms proposed.

In preparation for this hearing, IERG has filed proposed revisions to the Agency's proposal that address IERG's concerns. See Exhibit A to my pre-filed testimony, which contains IERG's Proposed Revisions to the Agency's Proposal for Part 302 and Exhibit B, which contains IERG's Proposed Revisions to the Agency's Proposal for Part 303. I would like to take this opportunity to briefly explain IERG's proposed revisions and to demonstrate how those revisions would result in a clearer, more workable set of regulations that would still accomplish the goal of antidegradation.

Significance Determination

As noted in my December 6, 2000 testimony, the business community believes that antidegradation procedures should be applied in a tiered fashion similar to that practice suggested in USEPA's Region VIII Guidance: "Antidegradation Implementation," dated August 1993. The first step in this process should be a determination of whether a proposed action is of such significance that a formal antidegradation review is necessary. If not, a finding of insignificance should, in and of itself, constitute an appropriate antidegradation review. IERG firmly believes that some increased loadings warrant an insignificance determination because they are, by their nature, of such limited significance that they do not require a comprehensive antidegradation assessment.

Accordingly, IERG has proposed a revision to the Agency's proposed Section 302.105(c)(2) that would provide for such a tiered approach. IERG's proposed revision would allow applicants for certain new, renewed, or modified NPDES permits or CWA

Section 401 certifications to ask the Agency, as part of its application, to determine whether the proposed increase in pollutant loading or other activity or discharge will have a significant impact on the overall water quality or existing uses of the receiving water. Any applicant seeking such a determination would be required to provide the Agency necessary information relating to the nature of the proposed discharge and the quality and characteristics of the receiving water to assist the Agency in making the determination.

If the Agency determined that the proposed increase in pollutant loading or activity or discharge would not have a significant impact on the overall water quality or existing uses of the receiving water, no further review would be required. If the Agency determined that the proposed increase in pollutant loading or activity or discharge would have a significant impact on the overall water quality or existing uses of the receiving water, the Agency would conduct a further review of the application. This further review would assure that (1) the applicable numeric or narrative water quality standard will not be exceeded as a result of the proposed activity; (2) all existing uses of the receiving water will be fully protected; (3) all technically and economically reasonable measures to avoid or minimize the extent of the proposed increase in pollutant loading have been incorporated into the proposed activity; and, (4) the proposed activity will benefit the community at large. Details of the Agency's significance determination would be included in the permit fact sheet, a component of the Agency's proposed implementation procedures.

Incorporating this tiered approach into the antidegradation review procedure is consistent with the exceptions from antidegradation review contained in the Agency's proposed Section 302.105(d). The fact that the Agency has included such exceptions in

that provision recognizes that some effects on water quality are truly insignificant and should not be subjected to a comprehensive antidegradation review. IERG's proposed inclusion of a tiered approach to antidegradation review expands on this concept by providing for only a limited review of those proposed discharges that are not excepted from review under proposed Section 302.105(d) but are still "insignificant." This will allow proponents of proposed discharges and the Agency to protect water quality by focusing their time and resources on those increased loadings that truly are "significant."

Limited Exceptions

The Agency has recognized the need for exceptions to the requirement for a comprehensive antidegradation assessment by including six such exceptions in proposed Section 302.105(d). IERG applauds the Agency's recognition of the need for exceptions to a comprehensive antidegradation review. As stated in my December 6, 2000 testimony, the absence of such exceptions would bog the Agency down in an endless review of permits that have virtually no environmental impact.

IERG has proposed that additional, similar exceptions be included in proposed Section 302.105(d). Many of these proposed exceptions have been implemented by other Region V states. Mr. Fred Andes of the law firm of Barnes & Thornburg will present testimony regarding the experience of these other states with these exceptions and in support of the inclusion of these exceptions in Illinois' regulations.

As Mr. Andes testimony will demonstrate, like the exceptions proposed by the Agency, none of the exceptions proposed by IERG would pose any threat to the quality of water in Illinois. Rather, they would only allow for activities that (1) are already in compliance with other applicable laws to go forward without subjecting the persons

conducting those activities to the time and expense of another review of information that either the state or federal government has already reviewed, and/or (2) result in an improvement to water quality.

IERG has also proposed an exception for increases in pollutant loading that would result in a de minimis lowering of water quality. By the term "de minimis," IERG means that the proposed increase in mass discharge is less than ten percent (10%) of the unused loading capacity of the receiving water.

Several other states in USEPA's Region V have found such a de minimis approach to be workable and protective of water quality. Further, the Agency indicated at the November 17, 2000 hearing in this matter that it was not opposed to the concept of a de minimis exception to the requirement of a comprehensive antidegradation review. Mr. Andes will provide further testimony in support of this de minimis exception.

Up-Front Data Submissions

As noted in my previous testimony, while IERG agrees that the Agency must have the information that it needs to conduct an antidegradation review, IERG believes that the language proposed by the Agency places an undue burden upon an applicant for an NPDES permit or a Section 401 certification to provide volumes of information that may be unnecessary for the Agency to thoroughly conduct its review. Accordingly, IERG has proposed revisions to proposed Section 302.105 that would require applicants to file only information that is necessary for the Agency's review. The Agency would, of course, be able to request any further information that it required.

This proposed revision gives the Agency the ability to exercise discretion as to what information applicants must submit and lessens the burden on applicants by

relieving them of the obligation to file information that would not be helpful to the Agency. Further, this proposed revision is consistent with the testimony of Agency witness Toby Frevert at the November 17, 2000, hearing in this matter, where Mr. Frevert stated that there are many instances in which some of the data submissions required by the Agency's proposed rule would not be needed by the Agency to conduct its antidegradation review. See November 17, 2000, Transcript at pp. 78 to 80.

IERG has also proposed a revision at subsection 302.105(c)(2)(B)(iii) that would allow the Agency to rely on its own data sources when conducting an antidegradation review, such as data or reports in the Agency's possession and Agency experience with factually similar permitting scenarios. This data will be invaluable to the Agency when conducting an antidegradation review, and this regulation should explicitly provide that the Agency is authorized to consider such data when conducting such a review. Further, IERG's proposed revision is consistent with the testimony of Mr. Frevert at the November 17, 2000, hearing in this matter indicating that the Agency intends to consider any information at its disposal when conducting an antidegredation review, regardless of where that information came from. See November 17, 2000, Transcript at pp. 61 to 63.

ORW Designations

As the Agency recognized at the November 17, 2000, hearing in this matter, the designation of a water body as an ORW has the potential for profound economic impact, environmental restriction and broad ramifications for surrounding property owners, particularly in terms of land use options. See November 17, 2000, Transcript at pp. 88 to 89. The implication of designating a stream segment as an ORW is well beyond protecting biological and recreational values of unique waters; it is land use regulation.

Accordingly, IERG has proposed revisions to clarify the process by which an ORW designation would occur.

First, IERG has proposed a revision to proposed Section 303.205 to clarify that the process by which a person may petition the Board for designation of a water body as an ORW is the adjusted standard procedure contained in Section 28.1 of the Act (415 ILCS 5/28.1) and Subpart D of Part 104 of Title 35 of the Illinois Administrative Code. (35 Ill. Admin. Code Part 104.Subpart D) IERG proposes this clarification because of the analogy between ORWs and Class III Groundwater, the designation of which takes place through the adjusted standard procedure. Further, clarifying that a person seeking to designate a water body as an ORW must follow the adjusted standard procedure provides a clearer framework for those seeking such designation, and those who would be affected by such designation, than the Agency's current proposal.

Second, IERG has proposed further revisions to proposed Section 303.205 to clarify that the burden of proof in a proceeding to designate a water body as an ORW is on the person seeking such a designation, and to clarify what information a person seeking an ORW designation must submit in support of that designation. Again, the designation of a water body as an ORW has the potential for profound economic impact and environmental restriction. Due process mandates that a person seeking to create such an impact has the burden of establishing that such impact is justified, and further mandates that property owners' rights not be taken away from them without a consideration of all relevant information. Mr. Bill Compton will provide further testimony in support of IERG's proposed revisions to Part 303.

Clarity

Finally, as noted in my December 6, 2000, testimony, IERG has identified several primary areas of concern that it feels require clarification in the proposed rule. IERG has proposed revisions to the rule to effect the necessary clarification. Most significantly, IERG has proposed a revision in proposed Section 302.105(c)(2) to clarify that the minimum threshold to trigger an antidegradation review is "an increase in pollutant loading that necessitates a new, renewed, or modified NPDES permit, with a new or increased permit limit" (or a CWA Section 401 certification). Specifically, IERG has proposed a revision to proposed Section 302.105 to make clear that the requirements for an antidegradation review do not apply to all loadings "subject" to an NPDES permit, but only to any permit application for a new, renewed or modified NPDES permit that requires a new or increased limit. This proposed revision is consistent with the testimony of Mr. Frevert at the November 17, 2000, hearing in this matter that the Agency's proposed rule would not apply "were there is no proposed increase in any pollutant parameter activity." November 17, 2000, Transcript at p. 45, ll. 1-2.

Also, IERG believes that revisions to the Agency's Part 354 are necessary. IERG of course understands that Part 354 is not before the Board in this proceeding. But, the Agency has submitted its proposed Part 354 to the Board in this proceeding, and this provision is relevant to this proceeding, as it demonstrates the Agency's intended approach for implementing proposed Sections 302.105 and 303.205. While we intend to provide our proposed revisions to Part 354 to the Agency, we believe the most significant revision to Part 354 should be to provide that a permit applicant for a new, renewed or modified NPDES permit must only submit that information that is necessary for the

Agency to determine whether any increase in pollutant loading or other proposed activity would result in degradation of the receiving water. IERG intends to request that Section 354.103 be revised to provide that the Agency may request additional information from an applicant to assist the Agency in its antidegradation review, as well.

Additionally, IERG has proposed further revisions to the Agency's proposal for Parts 302 and 303 to clarify our understanding of the Agency's intent, based on the testimony offered at the prior hearings.

Conclusion

As noted above, in addition to my testimony, representatives of two IERG member companies, and attorney Fred Andes, are presenting testimony today in support of IERG's proposed revisions to the Agency's proposal. Specifically,

- Mr. Jeffrey Smith, of Abbott Laboratories, located in North Chicago, Illinois, will present testimony regarding the general requirement proposed by the Agency that the burden for providing all information necessary for the Agency to conduct an antidegradation assessment be placed entirely on the permittee when, in fact, some or all of the required information may already reside within the Agency, and in support of IERG's proposal to include additional categories of activities as exceptions in proposed Section 302.105(d).
- Mr. Fred Andes, of the law firm of Barnes & Thornburg, will also present testimony in support of IERG's proposed process for significance determination and additional exceptions from further antidegradation review,

and will present testimony regarding the experience of other states located in USEPA's Region V with such exceptions; and,

- Mr. Bill Compton, of Caterpillar Inc., located in Peoria, Illinois, will offer testimony in support of reviewing petitions to designate ORWs through the adjusted standard process already provided for in the Board's rules.

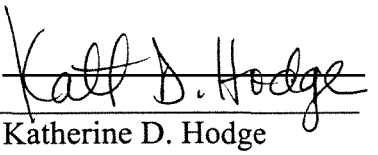
IERG urges the Board to consider these persons' testimony as well as IERG's proposed revisions to the Agency's proposal and my testimony here today.

Thank you for the opportunity to testify today; I would be pleased to answer any questions the Board may have at this time.

* * *

IERG reserves the right to supplement or modify this pre-filed testimony.

Respectfully submitted,

By: 
Katherine D. Hodge

Dated: January 18, 2001

Katherine D. Hodge
HODGE & DWYER
3150 Roland Avenue
Post Office Box 5776
Springfield, Illinois 62705-5776
(217) 523-4900

IERG:001/R Dockets/Fil/R01-13/Pre-filed Testimony of D. K. Hirner 1.18.01

EXHIBIT A

IERG'S PROPOSED REVISIONS TO THE AGENCY'S PROPOSAL FOR PART 302

TITLE 35: ENVIRONMENTAL PROTECTION
SUBTITLE C: WATER POLLUTION
CHAPTER I: POLLUTION CONTROL BOARD

PART 302
WATER QUALITY STANDARDS

Section 302.105 Antidegradation

The purpose of this Section is to maintain high quality waters and to prevent unnecessary deterioration of waters of the State.

a) Existing Uses

Uses actually attained in the surface water body or surface water body segment on or after November 28, 1975, whether or not they are included in the water quality standards, must be maintained and protected. Examples of degradation of existing uses of the waters of the State include but are not limited to:

1) an action that would result in the deterioration of the existing aquatic community, such as a shift from a community of predominantly pollutant-sensitive species to pollutant-tolerant species or a loss of species diversity; ~~or~~ and

2) an action that would result in a loss of a resident or indigenous species whose presence is necessary to sustain commercial or recreational activities.

b) Outstanding Resource Waters

1) Waters ~~that are classified~~ designated as ~~an~~ Outstanding Resource Waters (ORWs) ~~pursuant to~~ and listed in 35 Ill. Adm. Code 303.20~~5~~6 must not be lowered in quality ~~except as provided below:~~, provided, however, that the follow activities and discharges may be allowed if the Agency determines that the requirements for High Quality Waters, set forth in subsection (c) of this Section, have been met, and that all existing uses of the ORW water will be fully protected:

A) ~~An activity~~ Activities that results in short-term, temporary (i.e., weeks or months) lowering of water quality in an ORW; ~~or~~

B) Existing site stormwater discharges into an ORW that comply with applicable federal and state ~~storm water~~ stormwater management regulations and that do not result in a violation of any water quality standards; and

C) Activities that result in an increase in pollutant loading into an ORW that necessitates the issuance of a new, renewed, or modified ~~The proponent of any activity requiring a~~ National Pollutant Discharge Elimination System (NPDES) permit, with a new or increased permit limit, or a Clean Water Act (CWA) Section 401 certification, is required, provided that the proposed increase in pollutant loading is necessary for an activity that will improve water quality in the ORW and that such water quality improvement could not be practicably achieved without the proposed increase in pollutant loading. ~~must also submit a demonstration to the Agency meeting the requirements of subsections b(2) and c(2) of this Section~~.

~~2) The activities referenced in subsection (b)(1) or proposed increase in pollutant loading must also meet the following requirements:~~

~~A) All existing uses of the ORW water will be fully protected;~~

~~B) The proposed increase in pollutant loading is necessary for an activity that will improve water quality in the ORW; and~~

~~C) The improvement could not be practicably achieved without the proposed increase in pollutant loading.~~

~~3) Any proposed increase in pollutant loading requiring an NPDES permit or a CWA 401 certification for an ORW must be assessed pursuant to 35 Ill. Adm. Code Part 354 to determine compliance with this Section.~~

c) High Quality Waters

1) Except as otherwise provided in subsection (d) of this Section, waters of the State whose existing quality exceed~~s~~ established standards of this Part must be maintained in their present high quality, unless the Agency determines, ~~the proponent can demonstrate~~ pursuant to subsection (c)(2) of this Section, that allowing the lowering of water quality~~,~~ is necessary to accommodate important economic or social development.

2) Any proposed increase in pollutant loading that necessitates a new, renewed, or modified ~~subject to a~~ NPDES permit, with a new or increased permit limit, or a CWA Section 401 certification, must be assessed by the Agency ~~pursuant to 35 Ill. Adm. Code Part 354~~ to determine ~~compliance~~

~~with this Section.~~ whether allowing the lowering of water quality is necessary to accommodate important economic or social development.

A) In making its assessment, the Agency shall determine, upon a request by an applicant pursuant to subsection (c)(2)(A)(i) of this Section, and in accordance with subsections (c)(2)(A)(i) through (vi) of this Section, whether the proposed increase in pollutant loading will have a significant impact upon the overall water quality, or the existing uses, of the receiving water. If the Agency determines that the proposed increase in pollutant loading will not have a significant impact upon the overall water quality or the existing uses of the receiving water, such increase in pollutant loading shall be deemed to comply with the provisions of subsection (c)(2)(B) of this Section.

i) Any applicant for a new, renewed, or modified NPDES permit or CWA Section 401 certification may file with the Agency, as part of its application, a request for a determination that the proposed increase in pollutant loading (or other activity or discharge) will not have a significant impact upon the overall water quality, or the existing uses, of the receiving water.

ii) Such request shall set forth, as necessary, information on the proposed increase in pollutant loading, the nature of the discharge in general, including timing, location and physical characteristics, and may also include any other information which may assist the Agency in making its determination.

iii) In making its significance determination, the Agency may consider:

a) the volume, constituents, and concentrations of parameters in the proposed increase in pollutant loading;

b) the nature of the proposed increase in pollutant loading, including location of the discharge, and timing and physical characteristics of the discharge; and

c) the nature and condition of the receiving water, including existing water quality characteristics, the chemical and physical characteristics of the water

and of the water body, and any relevant biological, chemical, or physical characteristics of the water which will affect the impact of the proposed increase in pollutant loading upon the waterway.

Or, alternatively the Agency may consider whether the applicable numeric or narrative water quality standard will not be exceeded as a result of the proposed activity and whether all existing uses will be fully protected.

iv) In making its significance determination, the Agency may utilize the information sources set forth in subsection (c)(2)(B)(iii) of this Section.

vi) The Agency shall make significance determinations in accordance with its antidegradation implementation procedures.

vi) If the Agency determines that the proposed increase in pollutant loading is significant, it shall so inform the applicant, in which case, the applicant then may comply with the provisions of subsection (c)(2)(B) of this Section or may appeal the Agency's determination to the Board in accordance with 35 Ill. Adm. Code 105.Subpart B.

B) If the Agency determines that the proposed increase in pollutant loading will have a significant impact upon the overall water quality or the existing uses of the receiving water, such proposed increase in pollutant loading shall be assessed by the Agency in accordance with its antidegradation implementation procedures. In making its assessment:

i) The Agency shall consider the fate and effect of any parameters proposed for an increased pollutant loading~~.~~;

ii) ~~The proponent of an increased pollutant loading shall demonstrate the following:~~ The Agency shall determine whether:

a) The applicable numeric or narrative water quality standard ~~must~~ will not be exceeded as a result of the proposed activity;

b) All existing uses ~~must~~ will be fully protected;

c) All technically and economically reasonable measures to avoid or minimize the extent of the proposed increase in pollutant loading ~~load increase~~ have been incorporated into the proposed activity; and

d) The activity that results in ~~an~~ the increase~~d~~ in pollutant loading ~~must~~ will benefit the community at large.

iii) In making its assessment, the Agency may utilize the following information sources:

a) Information, data or reports available to the Agency from its own sources;

b) Information, data or reports supplied by the applicant;

c) Agency experience with factually similar permitting scenarios; and/or

d) Any other valid information available to the Agency.

d) Activities Not Subject to a Further Antidegradation ~~Demonstration~~ Assessment

The following activities shall be deemed to comply with the provisions of this Section and shall not be subject to ~~an~~ a further antidegradation ~~demonstration~~ assessment pursuant to subsection (c) of this Section.

1) Short-term, temporary (i.e., weeks or months) lowering of water quality;

2) Bypasses that are not prohibited at 40 CFR 122.41(m);

3) Response actions pursuant to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), as amended, or corrective actions pursuant to the Resource Conservation and Recovery Act (RCRA), as amended, or similar federal or State authority, taken to alleviate a release into the environment of hazardous substances, pollutants or contaminants which may pose a danger to public health or welfare;

4) Thermal discharges that ~~has~~ have been approved through a CWA Section 316(a) demonstration;

5) New or increased discharges of ~~a~~ non-contact cooling water~~, without additives,~~ returned to the same body of water from which it was taken, as defined by 35 Ill. Adm. Code 352.104, provided that the discharge complies with applicable Illinois thermal standards, and that the Agency has approved the use of any additives present in specific discharge;

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

7) Changes to or inclusion of a new permit limitation that does not result in an actual increase of a pollutant loading, such as those stemming from improved monitoring data, new analytical testing methods, new or revised technology or water quality based effluent limits (WQBELs);

8) Site stormwater discharges covered by a Stormwater Pollution Prevention Plan, as required in an individual NPDES permit, provided that the discharge will not cause or contribute to a violation of Illinois water quality standards;

9) New or increased discharges of a pollutant where the permit applicant has made a contemporaneous and enforceable decrease in the actual loading of that pollutant at the source such that there is no net increase in the loading of that pollutant into the same surface water body or surface water body segment;

10) Discharges authorized by a site-specific regulation, adjusted standard, or variance issued by the Board;

11) Discharges authorized by a Consent Order or Consent Decree entered by a court of competent jurisdiction;

12) An increase in pollutant loading that results in a lowering of water quality that is less than a de minimis lowering of water quality. As used in this provision, a "de minimis lowering of water quality" occurs if all of the following are satisfied for the constituent under consideration and such a determination is consistent with any other applicable requirements and limitations in this Part:

A) The proposed increase in mass discharged is less than ten percent (10%) of the unused loading capacity. The proposed increase in mass discharged shall be determined as follows:

$M_P - M_E$ = Proposed increase in mass discharged

~~Where~~ : M_p = ~~Monthly average mass effluent limitation for the parameter in the~~ proposed discharge.

M_E = Monthly average mass effluent limitation for the parameter in the existing permit. If the existing permit does not contain a monthly average mass effluent limitation for the parameter, but does contain a weekly average or daily maximum mass limit, the existing weekly average or daily maximum permit limit shall be converted into a monthly average value to be used in this equation. If the existing permit does not contain a mass limit for the parameter, but does contain a concentration limit, this concentration limit shall be converted into a mass value, using the discharge flow rate, to be used in this equation. If the existing permit does not contain an effluent limit for the parameter, the actual monthly average mass discharged shall be used in this equation.

B) For the purposes of this subsection, "Total loading capacity" means the product of the applicable water quality criterion times the sum of the existing effluent flow and the stream design flow for the water body in the area where the water quality is proposed to be lowered, expressed as a mass loading rate; and "Unused loading capacity" means that amount of the total loading capacity not utilized by point source and nonpoint source discharges. The unused loading capacity is established at the time the request to lower water quality is considered.

e) Lake Michigan Basin

Waters in the Lake Michigan basin as identified in 35 Ill. Adm. Code 303.443 are also subject to the requirements applicable to bioaccumulative chemicals of concern found at Section 302.521 of this Part.

IERG:001/R Dockets/Fil/R01-13/Part 302 1.18.01

EXHIBIT B

IERG'S PROPOSED REVISIONS TO THE AGENCY'S PROPOSAL FOR PART 303

TITLE 35: ENVIRONMENTAL PROTECTION
SUBTITLE C: WATER POLLUTION
CHAPTER I: POLLUTION CONTROL BOARD

PART 303
WATER USE DESIGNATIONS AND SITE SPECIFIC WATER QUALITY STANDARDS

Section 303.205 Outstanding Resource Waters

An Outstanding Resource Water (ORW) is a surface water body or surface water body segment that is of uniquely high biological or recreational quality. ~~and shall be designated by the Board pursuant to 35 Ill. Adm. Code 106, Subpart L.~~ The Board shall make ORW designations in accordance with the procedures for adjusted standards in Section 28.1 of the Act and 35 Ill. Adm. Code 104.Subpart D, and the procedures set forth below:

~~e~~a) ~~A petition to designate a water or water segment as an ORW must be submitted to the Illinois Pollution Control Board pursuant to the procedural rules found in 35 Ill. Adm. Code 106, Subpart L.~~ Any person may petition the Board to designate an ORW. In any ~~such~~ proceeding to designate an ORW, in addition to the requirements of Section 28.1 of the Act and 35 Ill. Adm. Code 104.Subpart D, the petition shall contain, at a minimum, the following information:

1) The identity of the surface water body or surface water body segment for which the ORW designation is requested;

2) A detailed description of the specific surface water body or surface water body segment for which the ORW designation is requested, and that surface water body's or surface water body segment's present designation;

3) A detailed description of the area in which the specific surface water body or surface water body segment exists including, but not limited to:

A) the existence of wetlands or natural areas;

B) the life contained within that area, including endangered or threatened species of plants, aquatic life or wildlife listed pursuant to the Endangered Species Act, 16 USC 1531 et seq. or the Illinois Endangered Species Protection Act, 41 ILCS 10;

4) Documentation in support of the proposed ORW designation including, but not limited to, documentation relating to the health, environmental, recreational, aesthetic or economic benefits of the proposed ORW designation;

5) A statement identifying and detailing the anticipated impact of the ORW designation on economic and social development. This statement must be supported by current, verifiable information, and must address at least the following issues:

A) impacts on the regional economy;

B) impacts on regional employment;

C) impacts on the community; and

D) a comparison of the health and environmental impacts of the proposed ORW designation to the economic impact of the proposed ORW designation;

6) A detailed description of the existing and anticipated uses of the specific surface water body or surface water body segment for which the ORW designation is requested;

7) A detailed description of the existing and anticipated quality of the specific surface water body or surface water body segment warranting the ORW designation;

8) A synopsis of all testimony to be presented by the proponent at hearing;

9) Copies of any material to be incorporated by reference within the proposed designation pursuant to Section 5-75 of the Illinois Administrative Procedure Act (5 ILCS 100/5-75);

10) Unless the proponent is the Agency or the Illinois Department of Natural Resources (IDNR), or the proponent receives a waiver from the Board, a petition in support of the request for ORW designation signed by at least 200 persons;

11) Proof that the proponent has complied with the notice requirements of 35 Ill. Adm. Code 104.408; and,

12) Proof that the proponent served copies of the petition upon the Agency, the IDNR, the Illinois Attorney General, the States Attorney of each county in which the surface water body or surface water body segment

runs, the chairman of the County Board of each county in which the surface water body or surface water body segment runs, each member of the General Assembly from the legislative district in which the surface water body or surface water body segment runs, current NPDES permittees and NPDES permit applicants for discharges into the surface water body or surface water body segment, applicants for federally permitted activities that require a certification from the Agency pursuant to Section 401 of the Clean Water Act for the surface water body or surface water body segment, all owners of real property which is located adjacent or contiguous to the surface water body or surface water body segment, and to other persons as required by law.

~~11~~b) Where a proponent of an ORW designation concludes that any information required by subsection (a) of this Section is inapplicable or unavailable, the proponent must provide a complete justification for such inapplicability or unavailability.

c) When considering a petition for ORW designation, the Board shall consider all information submitted by the proponent of that designation pursuant to Subsections (a) and (b) of this Section and all information submitted by any party in response to the submission(s) of the proponent.

d) The Board may only designate a surface water body or surface water body segment as an ORW when the Board determines, after consideration of all of information and argument submitted by all parties to the proceeding, that the proponent of the ORW designation has demonstrated that the benefits of protection of the surface water body or surface water body segment from future degradation substantially outweigh the benefits of economic or social opportunities that will be lost as a result of the designation.

~~a~~e) ORWs shall be listed in Section 303.206 of this Part. In addition to all other applicable use designations and water quality standards contained in this Subtitle, an ORW is subject to the antidegradation provisions of Section 302.105~~(b)~~.

~~b~~f) Stream segments that have a 7Q10 low flow of zero ~~will~~ generally will not be considered a candidate for ~~this~~ ORW designation.

g) For purposes of this Part, the term "Surface Water Body" means a natural body of water on the ground surface including, but not limited to, lakes, ponds, reservoirs, retention ponds, rivers, streams, creeks and drainage ditches. "Surface Water Body" does not include puddles or other accumulations of precipitation, run-off or groundwater.

Section 303.206 List of Outstanding Resource Waters (Reserved)

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

PRE-FILED TESTIMONY OF JEFFREY P. SMITH

NOW COMES the ILLINOIS ENVIRONMENTAL REGULATORY GROUP ("IERG"), by one of its attorneys, Katherine D. Hodge of HODGE & DWYER, and submits the following Pre-Filed Testimony of Jeffrey P. Smith for presentation at the February 6, 2001, hearing scheduled in the above-referenced matter:

Testimony of Jeffrey P. Smith

My name is Jeffrey P. Smith. I am employed by Abbott Laboratories ("Abbott") as the manager of Lake County Environmental Water Compliance, a position I have held for just over three years. Before joining Abbott, I was employed by Commonwealth Edison ("Edison") for approximately 21 years. Much of my experience while at Edison was in its Environmental Services Department as a supervisor of the water permitting section. In my current position, I am responsible for water and wastewater compliance matters concerning Abbott's Lake County, Illinois facilities. In this capacity, I regularly interact with the Illinois Environmental Protection Agency ("Agency") concerning a variety of NPDES permit issues, including permit negotiations and the implementation of federal and state water pollution regulations. I hold a Bachelor's Degree in Civil Engineering and a Master's Degree in Sanitary Engineering. I also possess an MBA degree.

I very much appreciate the opportunity to provide testimony to the Illinois Pollution Control Board ("Board") on this important rulemaking. My testimony is being offered on behalf of the Illinois Environmental Regulatory Group ("IERG"), of which Abbott Laboratories is a member.

Before proceeding with my testimony, I want to both acknowledge and compliment the Agency for its efforts in shepherding this extremely important, but somewhat controversial, rulemaking to its present status as a proposed rule. I was an active participant on the Agency's antidegradation advisory group. When the group first met over two years ago, there was little agreement on how an antidegradation regulation should look, or even on whether amendments to Section 302.105 were necessary. However, through a series of meetings and discussions over various "straw man" regulatory proposals, the advisory group achieved some consensus on the overall format of the present proposal and on several important elements contained in today's proposal. Without the Agency's perseverance and skills in promoting a constructive dialogue, I'm certain the Board's task would have been significantly more difficult than the present situation in which the Board will be contemplating a proposal that has been developed and refined with much input by interested stakeholders.

Introduction to Testimony

My testimony today will address four topics. First, I will address the general requirement proposed by the Agency that the burden for providing all information necessary for the Agency to conduct an antidegradation assessment be placed entirely on the permittee when, in fact, some or all of the required information may already reside within the Agency. Second, I will address IERG's proposal to include an additional

category of activities under Section 302.105(d) that would not be subject to an antidegradation assessment, namely activities that do not result in additional pollutant loading. Third, I will discuss including an "offsetting" provision as an additional permitting situation not subject to an antidegradation assessment under Section 302.105(d). Lastly, I will discuss including an exception, again under Section 302.105(d), for stormwater discharges covered under an individual NPDES permit.

Section 302.105(c): Required Information for Antidegradation Review

Proposed Section 302.105(c) specifies the procedure by which the Agency must conduct an antidegradation review. This includes a reference to the Agency's proposed Part 354, which contains criteria for the kinds of information that the Agency must consider when conducting such a review.

As proposed by the Agency, Section 302.105(c), coupled with proposed Part 354, mandates that the applicant for a new or modified NPDES permit proposing a pollutant loading increase or seeking a Section 401 certification must submit all information required for the antidegradation review. This requirement does not take into account the fact that the Agency already possesses much of this information, particularly as relating to water quality data.

Arbitrarily requiring an applicant to provide all the information required for an antidegradation review would result in duplicative and wasteful efforts. For example, the Agency may already have at its disposal an extensive database of chemical or biological data for the water segment of interest. This most likely will be true for larger waterways. If the permittee were to be required to provide such information without consideration of whether the Agency already possesses it, this would at a minimum delay the application

from going forward until the information was obtained through other sources, such as a literature review or an actual sampling study of the receiving water. In either case, the ensuing effort would be wasteful; an extensive chemical or biological sampling study can easily cost from several thousand to several hundreds of thousands of dollars and take weeks or months to complete. Under some situations, it is conceivable that such additional expense or delay could even undermine the project's viability.

Additionally, any sampling investigation may only provide a "snapshot" of current conditions as opposed to characterizing long-term trends or seasonal variations which may, in fact, be possible using water quality databases maintained by the Agency or the Illinois Department of Natural Resources ("IDNR").

IERG recommends amending the Agency's proposal to include new subsection 302.105(c)(2)(B)(iii), to clarify that the applicant is responsible for assuring that the Agency has at its disposal all information necessary for conducting an antidegradation review, without requiring the applicant to necessarily provide all of that information. This approach is consistent with the Agency's proposed Section 354.104, which promotes early communications between the permittee and Agency to "help assure the adequacy of information necessary to constitute an antidegradation demonstration . . . ."

Section 302.105(d) Activities Not Subject to an Antidegradation Demonstration: No Increase in Pollutant Loading

IERG also recommends adding additional situations to the list of activities not subject to an antidegradation demonstration, which list is contained in proposed Section 302.105(d). One such situation would be where a new permit limit is applied, or an existing limit is revised, yet here is no actual increase in the loading of a pollutant. Such circumstances may arise due to the availability of improved monitoring data, new

analytical testing methods, or imposition of new or revised technology or water quality-based effluent limitations.

This proposed exemption surfaced at several meetings of the Agency's antidegradation advisory group, and was modeled after similar provisions contained in the GLI's antidegradation regulation and other states' antidegradation rules. However, the provision was not included in the Agency's final antidegradation proposal, as the Agency believes that it is evident that such situations do not involve pollutant loading increases, and therefore are not subject to the antidegradation rule at Section 302.105.

Nonetheless, for clarification purposes and to avoid possible future misunderstandings, IERG believes it is beneficial to include the following provision in Section 302.105(d):

> 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 effluents ("WQBEL's").

IERG's proposed Section 302.105(d)(7).

Section 302.105(d) Activities Not Subject to an Antidegradation Demonstration: Internal Facility Offsets

IERG also believes it is necessary to include a provision in Section 302.105(d) which exempts new or increased pollutant loadings from the antidegradation demonstration requirement in those instances where there is an internal offsetting reduction of the pollutant made by the permittee, and the discharges involve the same body of water.

Such a provision would be highly desirable where a permittee has two permitted outfalls discharging to the same water body. Suppose, for example, that due to

equipment problems, the facility needed to shift manufacturing between two production buildings each of which discharges to a different outfall. Assuming in this example that there is no net increase in the overall pollutant loading from the facility, under the Agency's proposed antidegradation rules, the facility would still be subject to the antidegradation demonstration requirement in addition to possibly being required to modify its NPDES permit. In this example, subjecting the facility to the antidegradation demonstration requirement seriously impacts the facility's operating flexibility. Such an outcome seemingly goes beyond the intent and purpose of the antidegradation concept, which is to maintain and protect surface water bodies at their existing level of quality.

Therefore, IERG recommends that Section 302.105(d) be amended to include the following new provision:

> New or increased discharges of a pollutant where the permit applicant has made a contemporaneous and enforceable decrease in the actual loading of that pollutant at the source such that there is no net increase in the loading of that pollutant into the same surface water body or surface water body segment;

Section 302.105(d) Activities Not Subject to an Antidegradation Demonstration: Stormwater Discharges Covered by An Individual NPDES Permit

Finally, many industrial facilities have stormwater discharges which are permitted under an individual NPDES permit. Such situations are commonly found at facilities which discharge non-stormwater waste streams together with stormwater that is subject to contamination from outdoor industrial activities. The Agency's practice is to regulate the stormwater discharges by including a Stormwater Pollution Prevention Plan ("SWPPP") requirement in the facility's individual NPDES permit.

As proposed, Section 302.105(c)(2) could be construed to require an antidegradation review for outdoor plant modifications or construction at facilities operating with an individual NPDES permit for their stormwater discharge(s). For example, the construction of a new building, lay-down area or plant roadway may have the affect of increasing the volume of stormwater runoff if the amount of impervious surface area increased. Additionally, certain kinds of development or construction may inherently increase the potential for stormwater discharge. In either situation, even though such changes would be regulated by the SWPPP requirement in the facility's individual NPDES permit, it could be argued that under proposed Section 302.105 (c)(2), an antidegradation review is still necessary.

It is important to note that the proposed exemption in Section 302.105(d)(6) would not be applicable to the above scenarios as this exemption applies only to discharges covered by a general NPDES permit.

At the Board's December 6th hearing, when questioned about such hypothetical situations, Mr. Toby Frevert indicated that the Agency would take the position that such modifications or construction would not be subject to an antidegradation review provided the plant was not expanding to a new property not already covered by the SWPPP requirement in its current permit. However, as proposed, Section 302.105(c)(2) does not specifically provide the Agency with the discretion to make this exemption.

Industrial facilities possessing an individual NPDES permit for their stormwater discharges may face another unintended dilemma under Section

302.105 when they apply for a renewal of their NPDES permit. Specifically, some individual NPDES permits impose loading limits on specific pollutants present in a stormwater discharge. When these permits are renewed, the facility is required to provide updated precipitation data in its permit renewal application. The Agency, in turn, considers the updated precipitation information when establishing pollutant-loading limits for the new permit. Should precipitation levels happen to increase during the intervening years since the previous permit application, the Agency likely would propose a higher loading limit in the new permit because of the improved, broader precipitation data base. Consequently, although nothing at the facility has changed, the permittee may find itself facing an antidegradation review requirement through no fault of its own.

To remedy these very real, but unintended problems, IERG recommends that Section 302.105(d) be amended to include the following new provision:

> Site stormwater discharges covered by a Stormwater Pollution Prevention Plan, as required in an individual NPDES permit, provided that the discharge will not cause or contribute to a violation of Illinois water quality standards;

Conclusion

On behalf of IERG, I very much appreciate the Board's consideration of these comments and would be happy to answer any questions you may have.

* * *

IERG reserves the right to supplement or modify this pre-filed testimony.

Respectfully submitted,

By: Katherine D. Hodge
Katherine D. Hodge

Dated: January 18, 2001

Katherine D. Hodge
HODGE & DWYER
3150 Roland Avenue
Post Office Box 5776
Springfield, Illinois 62705-5776
(217) 523-4900

IERG:001/R Dockets/Fil/R01-13/Pre-filed Testimony of Jeffrey P. Smith

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

PRE-FILED TESTIMONY OF FREDRIC P. ANDES

NOW COMES the ILLINOIS ENVIRONMENTAL REGULATORY GROUP ("IERG"), by one of its attorneys, Katherine D. Hodge of HODGE & DWYER, and submits the following Pre-Filed Testimony of Fredric P. Andes for presentation at the February 6, 2001, hearing scheduled in the above-referenced matter:

Testimony of Fredric P. Andes

My name is Fredric P. Andes. I am an environmental lawyer, Of Counsel in the Chicago and Washington, D.C. offices of Barnes & Thornburg. I have been practicing environmental law for over 20 years and for the last eight years, have focused particularly on regulatory issues arising under the Clean Water Act ("CWA"). I am currently serving as Coordinator of the Federal Water Quality Coalition, which is a group of industrial, municipal, and agricultural parties that seek to influence rulemaking and other actions of the United States Environmental Protection Agency ("USEPA") under the CWA. Also, I was selected by USEPA to serve on the Federal Advisory Committee ("FACA") regarding the Total Maximum Daily Load ("TMDL") program. In addition to these federal activities, I have been very involved in clean water issues being dealt with by the Midwest States. I have served since 1993 as counsel for the Great Lakes Water Quality Coalition ("GLWQC"), an association of regulated companies and municipalities that has been very active in USEPA's rulemaking process to adopt the Great Lakes

Initiative ("GLI") requirements. Also, I have been involved in the individual states' efforts to adopt their own rules to implement the GLI program, representing affected dischargers in those states. In addition, I have served on state advisory groups regarding antidegradation regulations in Indiana, Ohio, and Illinois, and state advisory groups regarding the TMDL program in Ohio and Indiana.

In 1995, USEPA issued the GLI rules, which directed each of the Great Lakes States to adopt certain requirements concerning water quality standards, procedures to implement those standards in permits and antidegradation provisions. The antidegradation requirements in the GLI rule covered only a limited class of 22 compounds, called "bioaccumulative chemicals of concern" or "BCCs." The BCCs include mercury, dioxin, PCBs and a number of pesticides that have been banned for use in the United States. States were allowed some latitude in determining the specific requirements to adopt as to these substances, as long as the state procedures were "consistent with (as protective as)" the provisions specified by USEPA in the GLI rule. In developing these antidegradation rules, some of the states decided to adopt requirements for non-BCCs as well.

All of the Great Lakes States already had general antidegradation standards that covered all regulated substances, but few had developed specific procedures to implement those general standards, and USEPA Region V had been telling the states that, under the federal antidegradation policy, contained in 40 C.F.R. § 131.12, they needed to have antidegradation implementation procedures in place. Therefore, the other Region V states ended up adopting detailed, specific antidegradation implementation rules as to both BCCs and non-BCCs. In the course of doing so, these states carefully considered

and made decisions on the appropriate scope and nature of their antidegradation programs, including the specification of exceptions to antidegradation review and the use of de minimis levels. Those decisions can, we think, be very instructive to this Illinois Pollution Control Board ("Board") in making decisions as to the specifics of the Illinois antidegradation program.

As an initial matter, it is important to note that, except for BCC discharges in the Great Lakes Basin (as to which this Board has already adopted a set of requirements), USEPA has always allowed states across the country a great deal of latitude in determining the appropriate procedures to implement their antidegradation standards. The federal policy, located at 40 C.F.R. § 131.12, contain no specific directions as to what state procedures should look like, and USEPA's Water Quality Standards Handbook provides little specific direction. In practice, USEPA has allowed states to determine the particular procedures that they feel to be most appropriate for their individual situations. USEPA has not required states to subject every single new or increased discharge, no matter how small, to antidegradation review, and USEPA has not kept states from determining that certain types of activities automatically satisfy some or all of the antidegradation requirements.

Working within that federal system, states in the Midwest have included exceptions and de minimis levels in their antidegradation rules. For example, Indiana has adopted some thirteen (13) exceptions to antidegradation review, plus a de minimis level. Michigan has included ten (10) exceptions in its program, in addition to a de minimis level. Wisconsin has a very broad class of discharges that are classified as de minimis, and therefore are exempt from review, but also has a specific exemption for noncontact

cooling water. Many of the exceptions in these rules have also been included in the proposed rules that are currently before the Board, and we encourage the Board to include those exceptions in these rules when they are adopted. However, some of the exceptions and de minimis levels that other states have adopted are not included in the Illinois rules as proposed by the Illinois Environmental Protection Agency ("Agency" or "IEPA"), and we urge the Board to seriously consider those provisions for inclusion in the adopted rules.

It is important to recognize, in considering these issues, that each of the states that I mention has decided to put its exceptions and de minimis levels into its detailed Board-approved rules. (In Michigan, there is no Board, so there is only one set of Agency-issued rules, and the exceptions and de minimis levels are included in those rules.) It is not appropriate to include general requirements in the Board rules, and then put the exceptions and de minimis levels in separate Agency-adopted rules. This would raise the possibility that the Board rules would be interpreted, because of their broad scope and lack of exceptions or de minimis levels, to cover all new or increased discharges, raising questions as to whether the Agency rules could even include exceptions or de minimis levels. To avoid these problems, the specific exceptions and de minimis levels need to be included in the Board rules.

In the testimony provided today by Ms. Hirner and Mr. Smith, the Illinois Environmental Regulatory Group ("IERG") has explained why it is important for the State's antidegradation program to include appropriate exceptions and de minimis levels. Without these provisions, the State could be forced to conduct a full antidegradation review for every new or increased discharge, no matter how minor. This is in addition; it

should be stressed, to the review of water quality issues that is already performed whenever a facility seeks to modify the effluent limits in its permit. Antidegradation review requires the IEPA to evaluate the social/economic worth of a project. This is a task that is not related to the Agency's environmental focus, and the Agency is not well equipped to perform this function, particularly if it must do so for every small new or increased discharge. Antidegradation review has always been intended to be conducted for major new activities that have potential for significant impacts on water quality. Any broadening of that scope will result in substantial extra work for IEPA, less focus on the major activities that really need the review, and a great deal of delay and additional costs for the many small changes in facility operations that take place on a daily basis across the State. In order to avoid that result, the Board's antidegradation rules need to be very focused. Appropriate exceptions and de minimis levels are critical in attaining that goal.

In addition to the provisions discussed by Mr. Smith, IERG has included in its proposal a number of other exceptions and de minimis-related provisions. Most of them cover situations that have also been addressed by other states in their antidegradation rules, while a few (such as one relating to adjusted standards) deal with Illinois-specific circumstances. Some of these provisions cover minor discharges that should not have to be covered by antidegradation review. Other provisions address situations that clearly have significant social/economic benefit, so that there is no need to evaluate these factors again in the antidegradation process. Inclusion of these provisions in the Illinois antidegradation rules would help substantially in creating a program that protects water quality without adversely affecting economic development in the State.

Finally, IERG proposes that an increase in pollutant loading be considered "de minimis," and thus not subject to the comprehensive antidegradation review, if it uses less than ten percent (10%) of the assimilative capacity of the surface water body at issue. IERG believes that this proposed test for what constitutes a "de minimis" increase in pollutant loading represents a reasonable balance between the need of IEPA to limit the number of pollutant loading increases that are subjected to the detailed antidegradation demonstration requirements and the need to protect and maintain water quality.

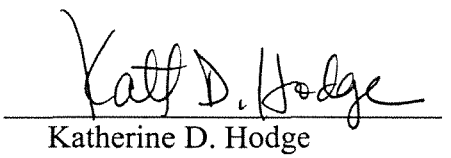
Conclusion

On behalf of IERG, I appreciate the Board's attention to the issues raised in this testimony. I would be happy to answer any questions.

* * *

IERG reserves the right to supplement or modify this pre-filed testimony.

Respectfully submitted,

By: 
Katherine D. Hodge

Dated: January 18, 2001

Katherine D. Hodge
HODGE & DWYER
3150 Roland Avenue
Post Office Box 5776
Springfield, Illinois 62705-5776
(217) 523-4900

IERG:001/R Dockets/Fil/R01-13/Prefiled Testimony of Fredric P. Andes

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

PRE-FILED TESTIMONY OF BILL COMPTON

NOW COMES the ILLINOIS ENVIRONMENTAL REGULATORY GROUP ("IERG"), by one of its attorneys, Katherine D. Hodge of HODGE & DWYER, and submits the following Pre-Filed Testimony of Bill Compton for presentation at the February 6, 2001, hearing scheduled in the above-referenced matter.

Testimony of Bill Compton

Good Morning. My name is Bill Compton, and I am presenting testimony today in support of the revisions to the Illinois Environmental Protection Agency's ("Agency" or "IEPA") proposal filed by the Illinois Environmental Regulatory Group ("IERG"). My testimony today is specifically offered in support of IERG's proposed revision that would clarify the procedure by which the designation of a surface water body as an Outstanding Resource Water ("ORW") would occur.

By way of personal introduction, I have been with Caterpillar Inc. ("Caterpillar"), a founding member of IERG, for over twenty-six years, and am a member of the Corporate Environmental Affairs Department of Caterpillar's Corporate Auditing and Compliance Division. I have broad corporate-wide responsibilities at Caterpillar in the area of facility environmental management systems program development, administration and performance assessment. One of my areas of special concentration is oversight of Caterpillar facilities worldwide that are classified as public water supplies.

Prior to my employment by Caterpillar, I was employed for two years as the Laboratory Director of the Occupational Health Studies Group in the Department of Environmental Sciences and Engineering, School of Public Health, University of North Carolina at Chapel Hill. Before that, I was the Manager of the Air and Water Pollution Laboratory in the Life Sciences Division, Syracuse University Research Corporation, specializing in surface water quality field and laboratory studies.

I have been involved in a variety of environmental initiatives in Illinois related to water issues. Presently, I am a citizen/business member of the Governor's Groundwater Advisory Council and serve as its Chairman. Also, I am a citizen/business member and Chairman of the Central Regional Groundwater Protection Planning Committee, one of the first three priority region committees established under the Illinois Groundwater Protection Act. Additionally, I am a founding Trustee of the Groveland Township Water District in Tazewell County and have served as the Chairman of its Board of Trustees since 1986. Further, I serve as a member, in an environmental capacity, on the Governor's State Government Accountability Council.

I am also involved as a member of the IEPA Citizens and Technical Source Water Advisory Committee, and have served as a member of the IEPA Antidegradation Workgroup, whose efforts have led to these proceedings.

Use of Adjusted Standard Procedure for ORW Designation

Caterpillar and IERG support the inclusion in Illinois' antidegradation regulations of a procedure by which water bodies can be designated as ORWs. If a surface water body truly has a sufficiently unique high biological or recreational quality, that surface water body should be preserved for the use of all citizens of the State of Illinois.

Both Caterpillar and IERG are concerned, however, that the Agency's proposal does not clearly specify the procedure by which persons should seek the designation of a surface water body as an ORW. When IERG addressed this issue to the Agency's witness, Mr. Toby Frevert, at the November 17, 2000, hearing in this matter, Mr. Frevert indicated that the Agency "want[ed] to adhere to a fairly open regulatory process." November 17, 2000, Transcript at p. 88, ll. 9-10. Mr. Frevert further testified, however, that:

> the ramifications of [a] decision [to designate a surface water body as an ORW] are fundamentally more significant than the ramifications of a typical adjusted standard or even a statewide standard in that we are not setting a target to protect an environmental use here. We are setting an absolute prohibition on some activities. And that has greater ramifications on property owners and other citizens in the community than changing the water quality standard from No. A to No. B.
>
> * * *
>
> You are not only talking about surface property rights, but even mineral rights[,] and [with] an outstanding resource water other than a very few things you are almost precluded in any development.

November 17, 2000, Transcript at p. 88, ll. 11-19. And, Mr. Frevert continued by stating that in light of the ramifications of the designation of a surface water body as an ORW, the Agency's goal is "to make sure that the people that have something at stake and are effected [sic] have a better chance of getting notice early on so they can participate." November 17, 2000, Transcript at p. 89, ll. 12-15.

In response to this testimony, IERG inquired of Mr. Frevert whether the Agency saw any similarity between the designation of special resource groundwaters, which currently takes place through the adjusted standard procedure contained in the Board's regulations, and the designation of ORWs. November 17, 2000, Transcript at pp. 93 to

94. Mr. Frevert acknowledged that the designation of a special resource groundwater and the designation of an ORW would both impose "significant . . . restrictions" on property owners. November 17, 2000, Transcript at p. 94, ll. 2-8. In fact, Mr. Frevert testified that it was his understanding that the limitations associated with the designation of an ORW "may be even more restrictive for outstanding resource waters than the limitations placed on groundwaters." November 17, 2000, Transcript at p. 94, ll. 9-12.

Caterpillar and IERG agree with Mr. Frevert that the ramifications of the designation of a surface water body as an ORW on property owners would be great, even greater than those imposed on property owners in connection with special resource groundwaters. We further agree with Mr. Frevert that those persons whose rights would be affected by the designation of a surface water body as an ORW must be protected as the process of such a designation goes forward. With these concerns in mind, we submit that the adjusted standard procedure currently contained in the Board's regulations should be the procedure by which persons seek designation of a surface water body as an ORW.

First, the Agency's proposal does not sufficiently designate the process by which ORW designations should be sought. As Mr. Frevert noted in his testimony, the Agency contemplates that the mechanism by which such designations would be sought would be a "fairly open regulatory process." However, Mr. Frevert acknowledged that the process would take away the rights of specific property owners, which implies the need for an adjudicatory process.

The Agency's proposal comes out somewhere in between, providing for some sort of quasi-regulatory, quasi-adjudicatory proceeding. We feel that specifying that the procedure to be used is the adjusted standard procedure already provided for by the

Board's regulations would provide much more clarity to those persons seeking ORW designations and to parties interested in such proceedings as to how the proceedings are to take place. This will promote smoother proceedings and will make the jobs of the proponent of ORW designation, interested parties and of the Board easier.

Second, given the Agency's acknowledgement that the designation of a surface water body as an ORW would have tremendous impact on the rights of owners of property adjacent to that surface water body, an adjudicatory process such as the current adjusted standard procedure is the only fair way to consider an application for ORW designation. Unlike the regulatory process, an adjudicatory process provides a formal mechanism by which the Board can consider and weigh the rights and positions of all interested parties when making its decision. And, an adjudicatory process such as the adjusted standard procedure would provide all affected property owners and other interested parties with an opportunity to participate in a fair and open process.

Third, the Board has acknowledged that the adjusted standard procedure is appropriate for ORW designation by adopting that procedure as the mechanism by which special resource groundwaters are designated. As the Board is aware, "special resource groundwater" is:

a) [g]roundwater that is determined by the Board . . . to be:

   1) Demonstrably unique (e.g., irreplaceable sources of groundwater) and suitable for application of a water quality standard more stringent than the otherwise applicable water quality standard specified in Subpart D; or

   2) Vital for a particularly sensitive ecological system; or

b) Groundwater that contributes to a dedicated nature preserve.

35 Ill. Admin. Code § 620.230. Similarly, the Agency proposes to define "ORWs" as "a water body or water body segment that is of uniquely high biological or recreational quality." Proposed Section 303.205.

As noted above, I am Chairman of the Central Regional Groundwater Protection Planning Committee, Chair of the Governor's Groundwater Advisory Council, and Chairman of the Board of Trustees of the Groveland Township Water District in Tazewell County, Illinois. I participated on the committee that considered the revisions to the Board's regulations that resulted in Section 620.230 and the application of the adjusted standard procedure to the designation of special resource groundwaters. I can represent to the Board that that committee on which I served concluded that, in light of the effect of such a designation on the uses of real property that contains special resource groundwaters, the procedures of the adjusted standard process were necessary to assure that the rights and interests of all parties were represented before the Board in proceedings to designate special resource groundwaters.

Further, as Mr. Frevert acknowledged in his November 17, 2000, testimony, owners of real property that contains special resource groundwater must observe special rules relating to that groundwater, which rules limit the use of their property. See, e.g., 35 Ill. Admin. Code § 620.430. Similarly, as Mr. Frevert acknowledged, the designation of a surface water body as an ORW would significantly limit the uses of property surrounding the surface water body.

In fact, again, Mr. Frevert acknowledged that the restrictions placed on the owner of property adjacent to an ORW would likely be greater than those placed on the owner of property that contained a special resource groundwater. The Board decided that

property owners that would be impacted by the designation of a special resource groundwater needed the protection of the adjusted standard. See 35 Ill. Admin. Code § 620.260. In light of the greater burdens that would be imposed by ORW designation, property owners that would be impacted by such a designation need such protection as well. Accordingly, IERG has proposed a revision to the Agency's proposed Section 303.205 to clarify that proceedings to designate water bodies as ORWs shall take place pursuant to the adjusted standard procedures specified in Section 28.1 of the Act (415 ILCS 5/28.1) and 35 Ill. Admin. Code 104.Subpart D.

Support Necessary for ORW Designation

In addition, IERG has proposed further revisions to the Agency's proposed Section 303.205 to clarify what information persons who seek an ORW designation would need to submit to the Board in support of such a designation. IERG modeled these further revisions on the Agency's proposed revisions to what was formerly Part 106 of the Board's regulations, but which is now codified as Part 104 of those regulations.

Under IERG's proposed revisions, the information that persons who seek an ORW designation would be required to submit includes: a description of the surface water body at issue, including whether any wetlands are connected to the surface water body and whether any endangered or threatened plant or animal life is present; information on the reasons for the proposed designation (e.g., the health, environmental, recreational, aesthetic or economic benefits of the designation); a statement of the impact of the designation on economic and social development; information on the present and anticipated uses of the surface water body; and, information on the present and anticipated quality of the surface water body. All of this information is necessary for a

complete review of a request for an ORW designation and a determination by the Board of whether that designation is proper. Further, like the use of an adjudicatory proceeding, consideration by the Board of all relevant information will help ensure that ORW designations are made in a fair and open process.

Other than clarifying the Agency's proposed revisions to former Part 106 to fit the context of the antidegradation regulations, IERG has proposed only three changes to the Agency's language. First, IERG has proposed amending the Agency's proposed Section 303.205 to provide that the Board may only designate a surface water body as an ORW when the benefits of that designation will "substantially" outweigh the benefits of economic or social opportunities that will be lost as a result of the designation. In light of the significant burden that the Agency acknowledges an ORW designation would place on owners of property surrounding a surface water body, IERG believes that requiring the Board to find that the benefits of an ORW designation would "substantially" outweigh lost economic and social benefits before granting an ORW designation is justified.

Second, IERG has proposed amending the Agency's proposed Section 303.205 to provide that, in support of a petition for an ORW designation, the proponent of such designation must submit proof that it has served a copy of its petition on specified interested parties. These include current NPDES permittees who discharge into the surface water body at issue and owners of real property located adjacent to the surface water body at issue. Again, an ORW designation would profoundly affect the rights of these parties to use their land, and due process dictates that they be given proper notice of any effort to secure an ORW designation.

Third, IERG has proposed adding a definition of the term "surface water body." IERG's proposed definition is for the most part identical to the definition of "surface water body" contained in 35 Ill. Admin. Code § 732.103, and makes clear that the term "surface water body" does not include groundwater, which may be protected under the Special Resource Groundwater designation procedure discussed above.

Conclusion

In conclusion, Caterpillar and IERG believe that the Agency's proposal must be clarified to specify the procedure by which ORW designations are made. Further, for the reasons stated above, we submit that the most appropriate mechanism for making ORW designations is the adjusted standard procedure already provided for in Section 104 of the Board's rules and already utilized by the Board to consider petitions for designation of special resource groundwaters. Finally, we submit that the Agency's proposal should be amended to clarify what information persons seeking an ORW designation must submit in support of that designation.

Thank you for the opportunity to testify today; I would be pleased to answer any questions the Board may have at this time.

* * *

IERG reserves the right to supplement or modify this pre-filed testimony.

Respectfully submitted,

By: Katherine D. Hodge

Dated: January 18, 2001

Katherine D. Hodge
HODGE & DWYER
3150 Roland Avenue
Post Office Box 5776
Springfield, Illinois 62705-5776
(217) 523-4900

IERG:001/R Dockets/Fil/R01-13/Pre-filed Testimony of Bill Compton2