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BEFORE THE
ILLINOIS POLLUTION CONTROL BOARD

STATE OF ILLINOIS
Pollution Control Board

IN THE MATTER OF:

REVISIONS TO ANTIDegradation
RULES: 35 ILL. ADM. CODE 302.105,
303.205, 303.206, and 102.800-102.830

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R01-13
(Rulemaking-Water)

P.c. #49

COMMENT OF ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

NOW COMES the ILLINOIS ENVIRONMENTAL PROTECTION AGENCY (Illinois EPA), by its attorney, Connie L. Tonsor, and hereby submits comments in the above rulemaking.

GENERAL COMMENT

1) The Illinois EPA appreciates the Illinois Pollution Control Board's ("Board") efforts in this rulemaking to amend the water quality standard, Section 302.105, antidegradation. The Board's attention and efforts have facilitated an amended antidegradation standard that the Illinois EPA believes will continue to assure protection of the waters of the State of Illinois while recognizing the need for continued development and utilization of the water resources of the State. As a result, the Illinois EPA has very few substantive comments or concerns with regard to Section 302.105 (a) through (e) of the rulemaking.

Although the Illinois EPA did not propose the Part 354 implementation regulations to be a part of the Board's water quality standard but proposed them as the process that the Illinois EPA would follow in interacting with proposal applicants, the inclusion of the draft Part 354 agency rules as they relate to the

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NPDES permitting process is, as it testified at hearing, acceptable to the Illinois
EPA.

However, the new subsection 302.105(f) is applicable to the permit process as well as to the review of activities requiring a Section 401 of the Clean Water Act ("Section 401"), 33 U.S.C § 1341, water quality certification prior to federal permit issuance. In contrast to the NPDES permitting program, the Illinois EPA is not the delegated permitting agency for federal permits but must work with several federal permitting agencies in the Section 401 certification process. The Illinois EPA needs to coordinate the procedural aspects of the antidegradation review and the public notice aspects of the review with the U. S. Army Corps of Engineers, the Federal Energy Regulatory Commission, and Nuclear Regulatory Commission. The review and coordination with the federal regulatory processes is not complete. Therefore, it is important that the implementation procedures for the Section 401 certification remain Agency rules. Adoption by the Board of Section 401 certification procedures as a part of the water quality standard prior to full coordination with the federal agencies may cause conflicts with the federal process.

The Agency notes that it has developed agency procedural rules for the Section 401 certification process pursuant to Section 4(m) of the Act, 415 ILCS 5/4(m), and Section 401(e) of the CWA, 33 U.S.C. § 1341. It will work toward the adoption of antidegradation assessment rules as part of the revision of Part 395.

2) Many of the proposed agency regulations, now Section 302.105(f) address day-to-day communication between the permit applicant and the Illinois

EPA. The substantive requirements of the antidegradation water quality standard are contained within Section 302.105 (a) through (e) of the first notice document. Several of the aspects of the day-to-day operation, such as how the Illinois EPA will respond to informal inquiries, seem inappropriate to be contained within the water quality standard for the State. These are the operational aspects reaching a decision with regard to a permit. The Illinois EPA would suggest that the communicational aspects not be a part of the Board's regulations. Additionally, the Illinois EPA, with regard to the National Pollutant Discharge Elimination System ("NPDES") portion of Section 302.105(f), urges the Board to place the permitting procedures in 35 Ill. Adm. Code 309, which addresses procedures for permit issuance.

SPECIFIC COMMENTS

1) Section 302.105(b)(4)

The new subsection reference "must be assessed pursuant to subsection (f)" is applicable to the permit process as well as to the review of activities requiring a Section 401, water quality certification prior to federal permit issuance. The Illinois EPA must work with several federal agencies in the Section 401 certification process. The Illinois EPA needs to coordinate the procedural aspects of the antidegradation review with those agencies. Therefore, it is important that the implementation process of the Section 401 of review remain Agency rules. The Agency notes that it has developed agency procedural rules for the Section 401 certification process pursuant to Section 4(m) of the Act, 415

ILCS 5/4(m), and Section 401(e) of the CWA, 33 U.S.C. §1341 for the CWA certification.

Recommended language:

- 4) "Any proposed increase in pollutant loading requiring an NPDES permit or a CWA 401 certification for an ORW must be assessed pursuant to a subsection (f) to determine compliance with this Section.
- 5) "Any activity requiring a CWA Section 401 certification for an ORW must be assessed during the Section 401 certification process to determine compliance with this section."

2) Section 302.105(d)(6)

The Section 401 certification process does not use the phrase "general" Section 401 certification. In order to eliminate any potential confusion, the Illinois EPA suggests that the term "general" be replaced with the phrase: "for nationwide or regional Section 404 permits."

Recommended language:

"Discharges permitted under a current general NPDES permit as provided by 415 ILCS 5/39(b) or a general CWA, Section 401 certification for nationwide or regional Section 404 permits are not subject to facility-specific antidegradation review; however, the Agency must assure that individual permits or certifications are required prior to all new pollutant loadings or hydrological modifications that necessitate a new, renewed or

modified NPDES permit or CWA, Section 401 certification that affect waters of particular biological significance; or”

3) Section 302.105(f)

The Illinois EPA has three overall comments with regard to Section 302.105(f).

A) The Illinois EPA strongly urges the Board to delete references to the Section 401 certification process from the new Section 302.105(f) for the reasons stated in the testimony of Toby Frevert and incorporated into this comment by reference and for the reasons stated in the General Comments.

B) The Illinois EPA is currently reviewing the language of first notice 302.105(f) for the purpose of streamlining the language and placing the portions that concern the substantive review process into 35 Ill. Adm. Code 309. The Illinois EPA has not yet completed this process but will have language available at the hearing in this matter. Preliminarily, the Illinois EPA believes that the communicational aspects of Section 302.105(f), 302.105(f)(2)(A) and (C), should be removed from Board regulations. Therefore, the Board regulations would address reviews that are a part of the formal permit process.

However, the Illinois EPA notes that a lack of clarity in the language may have occurred in the draft implementation rules, which are now Section 302.105(f) of the water quality standard. It offers language corrections to address the lack of clarity in this comment. The “demonstration review” language developed when the proponent of the activity was required to provide information that demonstrated that its proposal would meet the requirements of the Section

302.105. During the rulemaking process and hearing process, the Illinois EPA generally agreed that the "demonstration by the proponent" concept should be replaced with an "assessment of the proposed activity" by the Illinois EPA concept. The Part 354 language was not changed to reflect this agreement, and the language in Section 302.105(f) should be modified to reflect this change.

C) During the formulation of the antidegradation regulations, concerns arose that the Agency not create a situation in which several appeals of parts of a permit decision or certification decision could occur. However, the workgroup and the Agency agreed that a need existed for the Agency to review projects in a preliminary stage and prior to the filing of an application. This would facilitate planning for the regulated community. The Agency made a commitment to the regulated community to conduct this preliminary review.

Therefore, in the Proposed Part 354 rules, the Agency set out a two-tiered review and stated that it would initiate the review process based on an informal inquiry. However, the Agency emphasized that no appeal of the decision on a preliminary inquiry could occur outside of the permit denial or certification process and the formality of its response would depend upon the formality of the inquiry.

This two-tiered process has become mingled in Section 302.105(f)(2)(B). Currently, Section 302.105(f)(2)(B), the cross-reference is to subsection (f)(2)(A)(i). Therefore, no immediate appeal is available of the decision after receipt of an application. However, an immediate appeal arguably could be brought after the Agency's assessment of an informal or preliminary inquiry

pursuant to Section 302.105(f)(2)(A)(i). Originally, the Agency intended that no separate appeal of an assessment decision, based on a request for a review of a project prior to the submission of a permit application or Section 401 certification application or the formal permit application was available. The proponent could appeal the decision only in the context of a permit denial or certification denial. This prevented multiple appeals of issues in a permit.

Therefore, the Agency suggests that the Board change the cross-reference in Section 302.105(f)(2)(B) to "(f)(2)(A)". The Agency further suggests that a cross-reference be added in Section 302.105(f)(2)(D) to subsection (f)(2)(A)(ii). The language would read: "After its review, pursuant to subsection (f)(2)(A)(ii), the Agency must produce a written analysis addressing the requirements of this Section and provide a decision yielding one of the following results:"

Recommended language:

- f) In conducting an antidegradation assessment pursuant to this Section, the Agency, must comply with the following procedures.
 - 1) A permit application for any proposed increase in pollutant loading that necessitates a new, renewed, or modified NPDES permit, with a new or increased permit limiter ~~a~~ CWA Section 401 certification, must include, to the extent necessary for the Agency to determine that the proposed activity permit application meets the requirements of Section 302.105, the following information:...

D) Assessments of alternatives to proposed increases in pollutant loading ~~or activities subject to Agency certification pursuant to Section 401 of the CWA~~ that result in less of a load increase, no load increase or minimal environmental degradation. Such alternatives include...

2) The Agency must complete an antidegradation assessment ~~demonstration review~~ in accordance with the provisions of this Section.

A) The antidegradation assessment pursuant to this Section is a part of the NPDES permitting process ~~or the CWA Section 401 certification process~~. However, applicants may initiate communication with the Agency, preferably during the planning stage for any load increase. Communication will help assure the adequacy of information necessary to ~~complete an~~ constitute an antidegradation assessment ~~demonstration~~ and avoid or minimize delays and requests for supplemental information during the permitting stage. The Agency assessment ~~review~~ process must be initiated by:

i)....

- ii) receipt of application for an NPDES permit issuance, renewal or modification ~~or a CWA Section 401 certification.~~
- B) A proponent seeking an immediate review of the results of the Agency's assessment ~~review~~ pursuant to subsection (f)(2)(A) must do so within the NPDES permit process ~~or the CWA Section 401 certification process.~~
- C) After an assessment ~~review~~ pursuant to subsection (f)(2)(A)(i), the Agency must consult with the proponent and respond:
 - i) in writing to written requests. The written response will include a statement by the Agency indicating whether the proposed activity ~~demonstration~~, based upon the information provided or information acquired by the Agency during the review process, meets the criteria of this Section.
 - ii)....
 - iii)...
- D) After its assessment ~~review~~ pursuant to subsection (f)(2)(A)(ii) ~~review~~, the Agency must produce a written analysis addressing the requirements of this Section and provide a decision yielding one of the following results.
 - i) If the proposed activity ~~demonstration~~ meets the requirements of this Section, then the Agency must

- proceed with public notice of the NPDES permit ~~or~~
~~CWA Section 401 certification~~ and include the written
analysis as a part of the fact sheet accompanying the
public notice;
- ii) If the ~~proposed activity demonstration~~ does not meet
the requirements of this Section, then the Agency
must provide a written analysis to the applicant and
must be available to discuss the deficiencies that led
to the disapproval. The Agency may suggest
methods to remedy the conflicts with the requirements
of this Section.
- iii) If the ~~proposed activity demonstration~~ does not meet
the requirements of this Section, but some lowering of
water quality is allowable, then the Agency will
contact the applicant with the results of the review. If
the reduced loading increase is acceptable to the
applicant, upon the receipt of an amended
~~application demonstration~~, the Agency will proceed to
public notice; or if the reduced loading increase is not
acceptable to the applicant, the Agency will transmit
its written ~~analysis review~~ to the applicant in the
context of a NPDES permit denial ~~or a CWA Section~~
~~401 certification denial~~.

- 3) The Agency will conduct public notice and public participation through the public notice procedures found in 35 Ill. Adm. Code 309.109 or CWA Section 401 certification.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: 
Connie L. Tonsor

August 10, 2001

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STATE OF ILLINOIS

COUNTY OF SANGAMON

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PROOF OF SERVICE

I, the undersigned, on oath state that I have served the attached **TESTIMONY OF TOBY FREVERT AND COMMENT OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY** upon the person to whom it is directed, by placing a copy in an envelope addressed to:

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**AND THE ATTACHED SERVICE LIST
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and mailing it from Springfield, Illinois on 8/10, 2001 with sufficient postage affixed as indicated above.

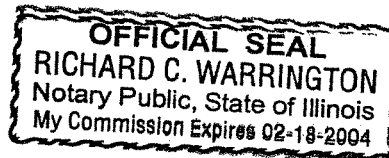
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SUBSCRIBED AND SWORN TO BEFORE ME

this 10 day of August, 2001

[Signature]

Notary Public



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