

AUG 10 2001

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

STATE OF 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

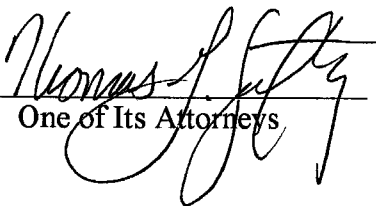
TO: Ms. Dorothy M. Gunn	Marie E. Tipsord, Esq.
Clerk of the Board	Hearing Officer
Illinois Pollution Control Board	Illinois Pollution Control Board
James R. Thompson Center	James R. Thompson Center
100 West Randolph Street	100 West Randolph Street
Suite 11-500	Suite 11-500
Chicago, Illinois 60601	Chicago, Illinois 60601
(VIA AIRBORNE EXPRESS)	(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 the **PRE-FILED TESTIMONY OF DEIRDRE K. HIRNER** and **ENTRY OF APPEARANCE OF THOMAS G. SAFLEY**, copies of which are herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
REGULATORY GROUP,

By: 
One of Its Attorneys

Dated: August 9, 2001

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STATE OF ILLINOIS
Pollution Control Board

ENTRY OF APPEARANCE OF THOMAS G. SAFLEY

NOW COMES THOMAS G. SAFLEY, of the law firm of HODGE DWYER
ZEMAN, and hereby enters his appearance in this matter on behalf of the Illinois
Environmental Regulatory Group.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
REGULATORY GROUP,

By: 

Thomas G. Safley

Dated: August 9, 2001

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IERG:001/Fil/R01-13 TGS Appearance1

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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 ZEMAN, and submits the following Pre-Filed Testimony of Deirdre K. Hirner for presentation at the August 24, 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 IERG. 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 the Board is aware, the regulations at issue in this rulemaking have been developed through a cooperative process involving the Illinois Environmental Protection Agency (“Agency”), various environmental groups, IERG and other representatives of the regulated community, and other interested parties. These parties held numerous meetings over a period of two years to develop the proposed regulations, and the Board held three hearings to receive information regarding the proposed regulations.

On June 21, 2001, the Board published its Opinion and Order (“Board’s Opinion”) proposing amendments to the Board’s antidegradation regulations for first notice. IERG and its members are pleased with many of the regulatory provisions proposed by the Board in its Opinion. IERG and its members are also pleased with many

of the statements made by the Board in its Opinion in support of those proposed regulatory provisions. As set forth below, however, IERG believes the Board's proposal needs additional revisions. IERG has submitted proposed regulatory language reflecting these revisions for the Board's review as Exhibit A to this prefiled testimony.

Again, IERG appreciates the opportunity to present this testimony to the Board today. IERG requests that the Board consider this testimony and IERG's submission of proposed revised regulatory language as the Board moves forward with this rulemaking.

I. THE BOARD SHOULD TAKE FURTHER STEPS TO REACH ITS STATED GOAL OF FLEXIBILITY IN THE ANTIDegradation ASSESSMENT PROCESS.

One issue to which all parties to this proceeding, as well as the Board, have agreed is that all increases in loading to waters of the State of Illinois should not be subject to the same level of antidegradation review by the Agency. To assure that this goal was reached, IERG proposed several revisions to the Agency's proposed antidegradation regulations, including provisions providing for a "significance determination" for proposed increases, a "de minimis" exemption and other exemptions from the antidegradation assessment requirement, and other clarifications of the Agency's proposed regulations.

The Board chose not to include many of IERG's proposals in the Board's first notice regarding the antidegradation regulations. As set forth below, IERG respectfully requests that the Board reconsider its decision.

A. IERG's Proposed Significance Determination

The Board has properly identified two of IERG's intended outcomes in proposing a significance determination as providing the regulated community some degree of

certainty as to how the Agency will implement the antidegradation regulations, and targeting the Agency's resources to those loadings that are "truly" significant. Board Order at 13. Of equal importance to IERG, however, is that all increases in loading not be subjected to the same depth and degree of antidegradation review, but rather that the Agency assess each increase on a "case by case" basis. IERG maintains that, as written, the Board's proposed regulatory language does not afford the Agency such flexibility in conducting antidegradation assessments.

In rejecting IERG's proposed significance determination, the Board stated that IERG's proposal would require the comparison of the impact of pollutant loading on the quality of a water body as a whole rather than on a parameter-by-parameter basis. Board Opinion at 13. While IERG concedes that the language it proposed may be read to so infer, that was not our intent. IERG concurs with the Board that an antidegradation assessment should be made on the basis of individual water quality parameters.

The Board also expressed concern that IERG's proposal would not allow for public participation in the significance determination process. *Id.* at 13-14. IERG believes that because the Agency performs an antidegradation assessment in the context of a review of an application for an NPDES permit or CWA Section 401 certification, the public has the opportunity to make its concerns known and to take issue with reliance on the significance test at the time the permit is released for public review and comment, as is the case with any other point of contention as to an NPDES permit or Section 401 certification. However, IERG does acknowledge the Board's concerns and agrees that public participation is a most essential aspect of the antidegradation review process.

Finally, the Board's primary concern with IERG's significance determination proposal was that it appeared to limit the Agency's ability to identify and implement alternatives that reduce or eliminate loading increases, which the Board saw as the antidegradation regulations' main objective. Board Opinion at 14. IERG concedes that its proposal put forth a tiered approach. IERG did not believe, however, that its proposed significance determination process precluded the Agency from making recommendations regarding economically reasonable or no cost alternatives available to reduce or eliminate proposed increased loadings. IERG anticipated that discussions relative to such matters would occur in the context of the Agency's implementation procedures now included in the Board's proposal at Section 302.105(f), and more specifically under Section 302.105(f)(2)(A), which references applicant communication with the Agency during the planning stage for any load increase.

IERG continues to maintain that it is not appropriate to subject every increase in pollutant loading to the same depth and degree of antidegradation review. As the Board noted in its Opinion, "[t]he Agency has testified that while all potential increases in pollutant loading would be subject to antidegradation review on a case-by-case basis, the level of review would depend upon the relative significance of the pollutant loadings." Board Opinion at 8. IERG submits that its proposed significance determination process would be one way to ensure that the Agency has the regulatory authority to conduct antidegradation reviews on a case-by-case basis dependant upon the characteristics of the individual discharges and receiving streams at issue.

Nevertheless, IERG is willing to concede its proposed significance determination process if it can be clearly demonstrated that the Board's "proposed antidegradation

review criteria [otherwise] provide[] the Agency **flexibility** to perform on a case-by-case basis the appropriate level of review without placing any undue limitations on its ability to ensure compliance with the proposed antidegradation standard.” Board Opinion at 15 (emphasis added). IERG submits that such flexibility can be achieved through adoption of a modified de minimis exemption and through other revisions to the Board’s proposed rules, as follows.

B. The Board Should Adopt a Modified De Minimis Exemption to the Antidegradation Assessment Requirement.

IERG’s proposal for a “de minimis” exemption in the Board’s antidegradation regulations was motivated by two primary concerns, both of which IERG continues to believe need to be addressed: (1) the risk that lengthy, time-consuming antidegradation reviews will create substantial delay in the process of issuing and revising NPDES permits; and (2) the risk that requiring the Agency to make subjective socioeconomic decisions as to the value of proposed facility projects will introduce substantial uncertainty into municipal and business planning, even for projects that have little or no impact on water quality. In response to those concerns, IERG sought a mechanism that would allow projects that do not have a significant water quality impact not to go through an antidegradation review. That mechanism was the proposed “de minimis” exemption.

The Board concluded that IERG’s proposed de minimis exemption “may be helpful in focusing the Agency’s resources on only those increased loadings that pose a significant threat to water quality.” Board Opinion at 16. Nevertheless, the Board decided not to include IERG’s de minimis exemption proposal in the Board’s first notice proposal. See Board Opinion at 15-16. After reviewing the Board’s Opinion, IERG believes that the Board can address its concerns regarding IERG’s proposal and achieve

the goal of flexibility through proposal of a modified, simplified de minimis provision, the details of which are as follow.

1. Increases in Bioaccumulatives

The Board's first concern regarding IERG's proposed de minimis exemption was that small increases in bioaccumulative discharges would have been exempt from antidegradation review, even though small amounts of those substances could have significant impacts. Board Opinion at 16. IERG believes that under its earlier proposal, the concerns posed by bioaccumulative chemicals of concern ("BCCs") would have been taken into account in determining the requirements that would apply, but we understand the need to make that concept clearer. Regarding the area of the State covered by the Great Lakes Initiative requirements, the Board's rules provide that there is no de minimis level for BCCs, in other words, that all increased BCC loadings are subject to antidegradation review (unless covered by another exemption). IERG proposes revising the new state-wide rules to be consistent with that requirement, so that even small increases in BCCs are subject to antidegradation review (including both the review of alternatives and the "community at large" test). That is, IERG proposes adopting a de minimis exemption here that does not apply to discharges of BCCs.

2. Effort Required to Make De Minimis Decisions

The Board's second concern was that it will take too much effort on the part of the Agency to determine whether an increased loading exceeds a specified de minimis level. Board Opinion at 16. IERG agrees that it would not make sense to have a de minimis exemption that requires the Agency or anyone else to spend enormous amounts of time and effort in making determinations as to whether increases are subject to review.

However, IERG believes that the Agency can address this concern by use of a simple, “bright line” test and application of existing Agency procedures.

IERG’s proposed de minimis exemption would simply provide that increased loadings of non-BCC chemicals are subject to antidegradation review (again, including the “community at large” test) if they equal or exceed 10% of the available assimilative capacity of the receiving water body, determined at the time that the request for the increased loading is submitted. In making this decision, the Agency would use the process that it already uses to decide whether discharges require permit limits. When making a permitting determination, the Agency must decide if a proposed discharge has “reasonable potential” to cause or contribute to a violation of a water quality standard. 35 Ill. Adm. Code § 309.141(h)(4). If there is “reasonable potential,” a limit must be imposed. 35 Ill. Admin. Code § 309.141(h)(4)(B). To make this “reasonable potential” decision, the Agency applies a calculation method that has been specified by the United States Environmental Protection Agency (“USEPA”) in its Technical Support Document for Water Quality-Based Toxics Control (“TSD”) (1991). Id. To use that method, the Agency must collect and review several items of information, including the background level of the substance in the water body. Using that information and the formulas in USEPA’s TSD, the Agency reaches a conclusion as to the level of assimilative capacity that remains in the water body.

It is important to note that this information should always be available to the Agency when the antidegradation rules may apply, since those rules are triggered by increased loadings, which the Agency must evaluate for “reasonable potential.” Therefore, whenever the antidegradation assessment requirement may apply, the Agency

will have the information needed to readily decide if the proposed increase exceeds 10% of the remaining assimilative capacity. In those cases where the information is not readily available to the Agency for some reason, the burden to provide the necessary data would be on the applicant. Thus, IERG's proposed amended de minimis exemption would impose no burden on the Agency to generate new data. To clarify this point, it might be worthwhile to specify in the antidegradation regulations that in making the "10%" decision, the Agency must use the "reasonable potential" procedures that are already applied in permitting decisions.

Accordingly, IERG believes that its proposed de minimis test – with the proposed revisions outlined above – provides a workable means by which the Agency can allocate its resources while protecting the environment. As IERG has noted in its previous submissions to the Board, the USEPA has sanctioned the use of a de minimis exemption, and most other states in the Midwest include a de minimis exemption in their antidegradation rules. IERG urges the Board to act consistently with the guidance of the USEPA and the practice of these other states and to reconsider its decision not to propose a de minimis exemption in Illinois' antidegradation regulations.

C. The Board Should Otherwise Amend its Proposal to Provide the Agency Flexibility in Conducting Antidegradation Assessments.

IERG appreciates and agrees with the Board's recognition that "all proposed increases in pollutant loadings should not require the same level of review to demonstrate compliance with the proposed antidegradation standard" and that the antidegradation "implementation procedures should allow the Agency to decide on a case-specific basis what level of review is appropriate." First Notice Order and Opinion, page 14. The Agency has made clear its position that all potential increases in pollutant loading should

be subject to the proposed comprehensive review requirements at Section 302.105(c)(2), and that it will perform the reviews based on fate and effect, technology, and economic considerations. And throughout these proceedings, the Agency has consistently held “that the complexity of the review would be highly dependent upon the nature of the activity, the pollutant and the character of the receiving stream.” Board Opinion at 10-11. This position is consistent with the direction of the USEPA that “States and Tribes should tailor the level of detail and documentation in antidegradation reviews, to the specific circumstances encountered.” 40 C.F.R. Part 132, Appendix E, Section III.

In declining to adopt IERG’s proposed significance determination, the Board appeared to rely on and agree with the Agency’s assessment that, as written, proposed Section 302.105(c)(2) “allows the Agency to decide on a case-specific basis what level of review is necessary,” and gives the Agency the flexibility it needs to determine the depth and degree of analysis to be completed for individual antidegradation assessments. Board Order at 14. IERG respectfully disagrees.

IERG appreciates the Board’s adoption of proposed Section 302.105(c)(2)(C), which expands the universe of information on which the Agency may rely in making an antidegradation assessment. However, IERG believes that the remaining language of 302.105(c) is drafted in such manner as to place undue restriction on the Agency’s ability to exercise flexibility in the review process. Accordingly, IERG offers the following revision to the Board’s proposed Section 302.105(c)(2) in an effort to ensure the Agency discretion to conduct an antidegradation review and assessment for each permit application on a case-by-case basis:

The Agency must on a case-by-case basis, and to the extent that it deems necessary, assess any proposed increase in pollutant loading that

necessitates a new, renewed or modified NPDES Permit with a new or increased permit limit¹, or any activity requiring a CWA Section 401 certification, to determine compliance with this Section 302.105. In making this assessment, the Agency must:

* * *

- B) To the extent that it deems necessary, and on a case by case basis, Assure some or all of the following

IERG's Proposed Revised Section 302.105(c)(2) (see Exhibit A).

The Board's adoption of this proposed clarification and similar language in proposed Section 302.105(f)(1) (see Exhibit A) will give the regulated community a degree of comfort with conceding the need for specific language regarding a significance determination process. Additionally, IERG strongly urges the Board to clearly articulate, in its Final Opinion and Order in this matter, that the antidegradation regulations have been developed to allow the Agency the flexibility necessary to establish the level of review required to demonstrate compliance with the antidegradation standard on a case-by-case basis rather than to provide that every proposed increase in loading must undergo a comprehensive antidegradation assessment.

II. THE BOARD SHOULD ADOPT FURTHER EXEMPTIONS TO THE ANTIDEGRADATION ASSESSMENT REQUIREMENT.

In addition to the significance test and de minimis exemption discussed above, IERG proposed several exemptions to the antidegradation assessment requirement in addition to those exemptions proposed by the Agency. As IERG has maintained consistently throughout the process of development of the antidegradation regulations, exemptions to the antidegradation review requirements allow the Agency to avoid the

¹ See discussion of this proposed amendment to the Board's proposed Section 302.105(c)(2) below.

review of permits that have virtually no environmental impact, and, thus, to expend its resources where they are truly needed. IERG commends the Board for supporting the addition of an exemption for those changes to a new permit limitation that do not result in an actual increase of a pollutant loading. (Board's proposed Section 302.105(d)(7)). However, IERG believes the antidegradation review process would further benefit if the Board would reconsider adopting the following exemptions proposed by IERG in its Post-Hearing Comments, dated March 19, 2001.

A. **Non-Contact Cooling Water Discharges (Board Proposed Section 302.105(d)(5))**

The Board's proposed Section 302.105(d)(5) provides an exemption from the antidegradation assessment requirement for discharges of noncontact cooling water "without additives." IERG suggested that the words "without additives" be removed from this exemption and replaced with a reference to Agency approved additives. IERG's rationale for this suggestion was that the Agency would have determined that an additive had no potential to adversely impact water quality, thus making an antidegradation assessment at the time it approved the additive.

The Agency stated its position regarding this suggestion as follows:

the addition of additives to a discharge or the change in additives should be subject to an antidegradation assessment. . . . The Illinois EPA's position is that there may be benefit in reviewing the additive to determine if it is the best additive and whether there are toxic ramifications in the receiving stream for that additive.

Agency Closing Comments, filed March 20, 2001 ("Agency Closing Comments"), at 13.

IERG believes that this argument against an exemption for increases in discharges of cooling water containing Agency approved additives is essentially the same as IERG's

argument in favor of the exemption. IERG does not propose that the addition of new additives to a discharge or a change in the additives in a discharge be exempt from antidegradation review. Rather, IERG proposes that increases in cooling water discharges containing an additive that the Agency has already approved be exempt from further review. IERG maintains that, once an additive has been approved, a new or increased discharge of non-contact cooling water containing that approved additive should not be subject to further antidegradation review. IERG therefore respectfully requests the Board's reconsideration of this exemption. If the Board decides again not to include this exemption in its first notice, IERG respectfully requests that the Board explain the basis for rejecting the exemption.

B. Stormwater Discharges (IERG's Proposed Section 302.105(d)(8))

IERG also urges the Board to reconsider adoption of IERG's proposed exemption to cover instances where site development or construction could increase stormwater on a site regulated by an industrial facility's individual NPDES permit through the facility's Stormwater Pollution Prevention Plan (SWPPP). IERG maintains that plant modification or construction activity would have been taken into account at the time the SWPPP was initially developed. IERG believes inclusion of the following exemption would avoid the need for duplicative review each time changes are made on-site:

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.

IERG's proposed Section 302.105(d)(8).

In its Closing Comments, the Agency stated its position that "it would need to make an individual assessment of an increase[d] loading caused by an additional service

area or increased stormwater.” Agency Closing Comments at 14. However, in response to questions at the November 17, 2000, Hearing held in this matter, the Agency’s witness Toby Frevert testified that if a permittee adheres to the management requirements for stormwater in a permit as new or expanded facilities are added, no additional authorization is needed from the Agency. November 17, 2000 Hearing Transcript at 199-200. IERG believes these conflicting statements regarding the trigger for stormwater review can be addressed by its proposed exemption.

C. Discharges Authorized by the Board or a Court (IERG’s Proposed Section 302.105(d)(9))

IERG also recommended two exemptions to the antidegradation assessment requirement for discharges authorized outside normal permitting procedures, namely discharges authorized by a site-specific regulation, adjusted standard, or variance issued by the Board, or by a Consent Order, Consent Decree, or other Order entered by a Court of competent jurisdiction. IERG’s proposed Sections 302.105(d)(10) and (11), now IERG’s proposed Section 302.105(d)(9). Regarding discharges authorized by the Board, the Agency has indicated that it will not nullify any provision of a Board Order through the application of the antidegradation regulations, and that a Board Order itself constitutes compliance with or exemption from antidegradation review requirements. Agency Memorandum dated June 14, 2000, Attachment 5, paragraph 6. IERG assumes that, by this statement, the Agency means that if the Board has authorized a discharge through a site-specific regulation, an adjusted standard, or a variance, that discharge is not subject to a further antidegradation assessment by the Agency under the regulations at issue here. IERG agrees with the Agency that this should be the case, and urges the Board to adopt an exemption so providing.

Regarding discharges authorized by the Court, IERG notes the Agency has no authority to review a Court Order authorizing a discharge. Further, IERG notes that the Agency's comments just discussed regarding the approval by the Board of a discharge apply equally to approvals by a Court of a discharge.

Accordingly, in order to avoid any potential ambiguity, IERG recommends explicitly stating the following exemption to avoid unnecessary uncertainty:

Permits incorporating discharges authorized by a site-specific regulation, adjusted standard, or variance issued by the Board, or by a Consent Order, Consent Decree, or other Order entered by a court of competent jurisdiction.

IERG's proposed Section 302.105(d)(9) (see Exhibit A). IERG believes these proposed exemptions cover categories of activities that the Agency has proposed that the Board determine comply with the substance and intent of the antidegradation standard, and for which performance of individual demonstrations is not necessary. Under IERG's proposed exemption, these activities are not exempt from the antidegradation standard; rather they "are essentially subject to similar types of reviews under other [authority], and a separate demonstration would constitute an unnecessary and burdensome redundancy." Pre-filed Testimony of Toby Frevert dated October 27, 2000, at 6.

III. THE BOARD SHOULD CLARIFY WHICH INCREASES IN LOADING ARE SUBJECT TO AN ANTIDEGRADATION ASSESSMENT.

IERG also proposed that the Board clarify its proposed regulations to make clear that the antidegradation assessment requirement applies only to increases in pollutant loading that necessitate a new, renewed, or modified NPDES Permit with a new or

increased permit limit. Prefiled Testimony of D.K. Hirner, Jan. 18, 2001, at 9². The Board included the provision proposed by IERG in the Board's proposed Section 302.105(f)(1) regarding the procedures by which the Agency is to conduct antidegradation assessments. The Board did not include this provision in its proposed Section 302.105(c)(2), however.

This omission appears to be a typographical error. First, the Board revised the Agency's proposed Section 302.105(c)(2) in all other respects to be consistent with the Board's Section 302.105(f)(1). Second, it is IERG's understanding that this clarification accurately reflects the Agency's intent. See November 17, 2000, Hearing Transcript at 45, ll. 1-2 (Testimony of Agency Witness Toby Frevert). Third, requiring such a review would be duplicative, as the Agency will have already conducted an antidegradation review of the increased level of discharge when it initially issued the NPDES Permit. Accordingly, IERG has revised the Board's proposed Section 302.105(c)(2) in IERG's Exhibit A to contain this provision. IERG respectfully asks that the Board so amend its proposed 302.105(c)(2) in second notice as well.

IV. IERG THANKS THE BOARD FOR INCLUDING THE AGENCY'S PROCEDURES FOR CONDUCTING ANTIDEGRADATION ASSESSMENTS IN THE BOARD'S PROPOSED REGULATIONS.

One of IERG's previous suggestions to the Board in this matter was to include the Agency's rules regarding how it conducts antidegradation assessments in the Board's

² The application of this clarification is demonstrated by the following example. A person with an NPDES Permit authorizing a discharge a particular contaminant at a level of 5 micrograms/liter ($\mu\text{g/l}$) is actually discharging at a level of 3 $\mu\text{g/l}$, and wishes to increase the discharge to 4 $\mu\text{g/l}$. This increase would require a modified NPDES Permit to include a new monitoring requirement, but no discharge at an unapproved level would occur, and no "new or increased permit limit" would be included in the modified NPDES Permit. Accordingly, the person would not be required to go through another antidegradation assessment.

antidegradation regulations. IERG's March 19, 2001, Post-Hearing Comments at 9-10. The Board agreed with this suggestion and has included the Agency's rules as the Board's proposed Section 302.105(f). Board Opinion at 34-37. IERG thanks the Board for doing so, and has proposed only minor, non-substantive revisions to the Board's proposed Section 302.105(f). See Exhibit A.

V. **THE BOARD SHOULD AMEND ITS PROPOSED REGULATIONS REGARDING OUTSTANDING RESOURCE WATER DESIGNATIONS.**

Another major issue in this rulemaking has been the process by which the designation of Outstanding Resource Waters ("ORWs") will take place. In general, IERG proposed two changes to the Agency's proposal regarding the designation of ORWs: first, IERG proposed that the designation of ORWs take place through an adjusted standard or other adjudicatory proceeding; second, IERG proposed that the Board clarify the process by which ORW designations will take place.

In its Opinion, the Board proposed that ORW designations be created, amended, and repealed through rulemaking proceedings rather than through adjudicatory proceedings. For the reasons stated to the Board previously, IERG still believes that it would be advantageous to utilize an adjudicatory proceeding to consider ORW designations. However, IERG acknowledges the Board's concerns regarding the use of an adjudicatory proceeding and is willing to concede its request for use of an adjudicatory proceeding.

If a rulemaking proceeding is to be used to consider petitions regarding ORW designations, however, IERG feels that the Board must address two issues. First, IERG is particularly concerned with the Board's decision to limit the notice required by a person seeking the designation of an ORW or the amendment or repeal of such a designation.

As the Board is aware, the Agency's witness, Mr. Toby Frevert, acknowledged in the first hearing held in this matter that:

the ramifications of [a] decision [to designate a water body as an ORW] are fundamentally more significant than the ramifications of a typical adjusted standard or even a statewide standard.

November 17, 2000, Hearing Transcript at 88, ll. 10-14. In light of the significance of the ramifications of a decision to designate a water body as an ORW, Mr. Frevert concluded that there must be "an obligation to disseminate adequate information [regarding a proposal to designate an ORW] to start the process and [to assure] that potentially [a]ffected property owners and other citizens have adequate notice" of a proposal to designate an ORW. Id., p. 88, l. 22 to 89, l. 1.

In accordance with this testimony, the Agency proposed that notice regarding proposals to designate, modify, or appeal ORWs be provided to not only the Agency, the Illinois Department of Natural Resources ("IDNR"), and the Attorney General, but also to the States Attorney, County Board, and Legislators for the area through which the water body at issue runs, and to NPDES Permit holders and permit applicants for the water body. Agency's Proposed Section 106.992. IERG proposed that notice also be provided to property owners who would be affected by the ORW designation. See IERG's proposed Section 303.205(a)(12). In the case of a water body segment, this would include not only those owners of property located adjacent to the water body segment at issue, but also those who may be impacted because of their location in the drainage area of that water body segment.

The Board declined to adopt the Agency or IERG's recommendations, instead providing in its proposed Section 102.810 that notice need only be served on the Agency,

the IDNR, and the Attorney General. Board's Opinion at 25. In support of this decision, the Board stated that publication of the proposal in the *Illinois Register* and on the Board's website, and holding a local hearing regarding the proposal, would provide adequate notice to the public of the proposed ORW designation, and further that "various interest groups already regularly scan [the Illinois Register] for notices that may impact their constituents." Board's Opinion at 23.

IERG must respectfully disagree with this decision by the Board. It may be that the parties participating in this rulemaking will be aware of future proposals to designate water bodies as ORWs, or to modify or repeal such designations. Not all affected parties will be aware of such proposals, however. For example, consider that no representatives of agricultural interests in the State of Illinois are participating in this proceeding. We would imagine that the designation of a water body as an ORW would have a profound impact on persons who produce agricultural products on land that borders that water body. IERG can only assume that groups representing the interests of such persons are unaware of this rulemaking or its potential impact. Therefore, no reason exists to believe that these entities will notify their affected members of future proceedings to designate water bodies as ORWs. Further, property owners who do not belong to groups that represent special environmental, business or industrial interests will have no way of learning of such proceedings except through the *Illinois Register* or the Board's website. IERG questions whether it is reasonable to assume that individual property owners are aware of those resources or scan them regularly to ascertain whether they will be affected by any rulemakings before the Board.

Accordingly, IERG respectfully requests that the Board reconsider its decision not to require notice of a proposal to designate, modify, or repeal ORWs to the parties identified by the Agency and IERG, or to require publication of such notices in the area that would be affected by the proposal. In support of this request, IERG notes that the Board has provided that notice of a petition to designate a special resource groundwater must be given in a newspaper of general circulation in the area that would be affected by the designation. 35 Ill. Admin. Code §§ 620.260 (providing that special resource groundwaters shall be designated through the adjusted standard process), 104.408(a) (requiring notice in a newspaper of general circulation in the area likely to be affected by an adjusted standard). The Agency's witness, Mr. Toby Frevert, has testified that it is his understanding that the limitations associated with the designation of an ORW "may be even more restrictive . . . than the limitations placed on groundwaters" when they are designated as "special resource groundwaters." November 17, 2000, Hearing Transcript, at 94, ll. 9-12. Accordingly, the notice proposed by the Agency and IERG is justified.

It is also instructive that the notice proposed by the Agency and IERG is almost identical to the community outreach requirement proposed by Citizens for a Better Environment ("CBE") in its Petition to Adopt 35 Ill. Admin. Code Section 740.800, filed January 26, 2001, and pending before the Board as Rulemaking R01-29, which IERG is on record as supporting. CBE's proposed Section 740.815 provides that a person proceeding under the Illinois Site Remediation Program ("SRP") must notify "interested persons, public officials and organizations" before filing an SRP application "for a remediation site intended for future use as a school, public park, or playground." *Id.* at 2. In addition, notice would have to be filed "in at least one newspaper of general

circulation in the county where the remediation site is located.” Id. As discussed above, IERG urges the Board to adopt the same notification requirements for ORWs.

Second, IERG is concerned that the Board’s first notice does not make clear that the proponent has the burden in a proceeding considering a proposal to create, amend, or repeal an ORW designation. As IERG noted in its March 19, 2001 post-hearing comments, given the significant restrictions on land use that an ORW designation would impose, the burden to establish that the designation is warranted must be clearly placed on the proponent of the designation. IERG’s March 19, 2001, Post-Hearing Comments at 18-20. Further, patently placing the burden on the proponent would make clear to the proponent what it must establish to support the designation and would enable the Board to judge whether the proponent has carried its burden. Id.

Accordingly, IERG proposes the following modification to the Board’s proposed Section 102.830(b):

Designation of ORW. The Board must designate a water body or water body segment as an ORW and list it in 35 Ill. Adm. Code 303.206 if it finds that the proponent of the designation has established [specified criteria.]

This clarification will assure the regulated community that while it has conceded its request that the Board to utilize an adjudicatory proceeding to consider ORW designations, the proponent of an ORW designation will still have the burden to establish that such a designation is justified, and thus, ORW designations will not occur without a showing that they are justified.

VI. REQUESTS FOR CLARIFICATION

Finally, on review of the Board’s proposed language, IERG believes that certain provisions of the Board’s proposed regulations require clarification to aid industry in

achieving full compliance with environmental laws and regulations. IERG does not believe the following sections raise substantive concerns, but as drafted, they create some confusion.

A. Section 302.105(b)(1)(B)

This section provides an exception for existing site stormwater discharges that comply with regulations and which do not violate water quality standards. IERG presumes this provision was included to allow the continued operation of facilities that were sited prior to the time a water segment was designated an ORW. Therefore, we recommend the following language clarification:

- B) ~~Existing site s~~ Stormwater discharges **at existing sites** that comply with applicable federal and state stormwater management regulations and do not result in a violation of any water quality standards.

See Exhibit A.

B. Section 302.105(b)(3)(B)

This section requires that the short term temporary activities and the stormwater discharges allowed under Section 302.105(b)(1) may be allowed **only** if they also are “necessary for an activity that will improve water quality in the ORW.” This provision does not make sense. According to Mr. Frevert, the section was structured to parallel federal guidance to allow load increases in an ORW only in very few and very limited circumstances, those being the ones identified in Section 302.105(b)(1). November 17, 2000, Hearing Transcript at 87. Placing the added burden of requiring that the exceptions also improve water quality practically assures that these exceptions will never be available for use by a facility located on an ORW. IERG recommends that Section 302.105(b)(3)(B) be deleted.

C. Section 302.105(d)(6)

This section creates an exemption from further antidegradation review for those discharges permitted under a “current” general NPDES permit. IERG finds use of the word “current” confusing, as it could be interpreted to mean a general permit currently in the possession of the permittee, or the Agency’s general permit. When questioned regarding this issue at hearing, Mr. Frevert indicated that reference is to “a permit valid at that time.” November 17, 2000, Hearing Transcript at 198. When queried further as to whether he meant that the Agency’s general permit was current or that the Agency’s permit currently applied to the discharge, Mr. Frevert stated: “it would have to be both. It doesn’t apply to a discharge that has expired.” Id. at 197-198. Mr. Frevert has indicated that the Agency conducts a generic antidegradation review when drafting a general permit. Id. at 183-84. Therefore, IERG presumes that the Board means this exemption to apply to those discharges for which a general permit has been adopted by the Agency and is in effect. Accordingly, IERG recommends deleting the word “current” from this exemption. See Exhibit A.

D. Section 302.105(d)(6)

This section also includes a provision requiring the Agency to “assure that individual permits or certification are required prior to all new pollutant loadings or hydrological modifications that necessitate a new, renewed, or modified NPDES Permit or CWA Section 401 certification that affect waters of particular biological significance.” Board’s proposed Section 302.105(d)(6). IERG is uncertain of the meaning of this provision, as it was never discussed during the course of the Agency’s work group meetings. IERG also is uncertain of the definition of the phrase “waters of particular

biological significance,” unless, as we believe, this is a reference to outstanding resource waters. IERG respectfully requests that the Board clarify these issues.

E. Section 302.105(f)(1)(F)

This section provides that a permit application subject to an antidegradation demonstration must include, if necessary, “[a]ny of the information sources identified in subsection 302.105(d)(3).” Board’s Proposed Section 302.105(f)(1)(F) (emphasis added). Subsection 302.105(d)(3) addresses an exemption from the antidegradation assessment requirement for response actions under environmental laws. See Board Opinion at 33-34. Accordingly, this reference appears to be a typographical error. IERG assumes that the Board meant to refer to Subsection 302.105(c)(2)(C), and has so changed this reference in IERG’s proposed revisions to the Board’s proposed regulatory language attached hereto as Exhibit A.

IERG appreciates the opportunity to bring these issues to the attention of the Board. We look forward to the Board’s insight in clarifying these matters. IERG has also proposed some other minor, non-substantive revisions to the Board’s proposed regulatory language meant to clarify what IERG understands to be the Board’s intent in that language. See Exhibit A.

VII. CONCLUSION

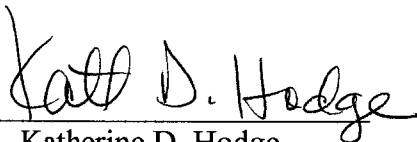
Thank you for the opportunity to testify today. I would be pleased to answer any questions the Board may have at this time.

* * *

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

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
REGULATORY GROUP,

By: 
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Dated: August 9, 2001

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

Exhibit A to
August 10, 2001, Prefiled Testimony of Deirdre K. Hirner
R01-13

IERG's Proposed Revisions to the Board's Proposed Regulatory Language

SUBPART H: OUTSTANDING RESOUCE WATER DESIGNATION

Section 102.800 Applicability

This Subpart applies to any person seeking the adoption, amendment, or repeal of an Outstanding Resource Water (ORW) designation for a surface water body or any water body segment as provided by 35 Ill. Adm. Code 303.205.

Section 102.810 Petition

Any person may submit a petition for the adoption, amendment or repeal of an ORW designation. The original and nine (9) copies of each petition must be filed with the Clerk and one (1) copy each served upon the Agency, the Illinois Department of Natural Resources, and the Attorney General, the States Attorney of each county in which the water body or water body segment runs, the chairperson of the County Board of each county in which the water body or water body segment runs, each member of the General Assembly from the legislative district in which the water body or water body segment runs, current NPDES permittees and NPDES permit applicants for discharges into the water body or 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 water body or water body segment, all owners of real property which is located adjacent or contiguous to the water body or water body segment, and to other persons as required by law. In addition, the notice must be published in a newspaper of general circulation in each county through which the water body or water body segment runs.

Section 102.820 Petition Contents

Each proponent must set forth the following information in its proposal:

- a) The language of the proposed rule, amendment, or repealer identifying the surface waters body or water body segment being proposed for designation as a ORW or for which the proponent proposes that an ORW designation be amended or repealed. Language being added must be indicated by underscoring, and language being deleted must be indicated by strike-outs. The proposed rule must be drafted in accordance with 1 Ill. Adm. Code 100.Subpart C;
- b) A statement describing the specific surface water body or water body segment for which the ORW designation is requested or an amendment or repeal of an

ORW designation is sought and the present designation of the surface water body or water body segment;

- c) A statement describing the area in which the specific surface water body or water body segment exists including:
 - 1) The existence of wetlands or natural areas; and,
 - 2) The living organisms in 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-;
- d) A statement supporting the designation, the amendment of the designation, or the repeal of the designation, including the health, environmental, recreational, aesthetic or economic benefits of the designation or the amendment or repeal thereof;
- e) A statement identifying the ~~ORW designation's~~ anticipated impact of the ORW designation or the amendment or repeal thereof on economic and social development. This statement should include:
 - 1) Impacts on the regional economy;
 - 2) Impacts on regional employment;
 - 3) Impacts on the community;
 - 4) A comparison of the health and environmental impacts of an ORW designation to the economic impact of an ORW designation-;
- f) A statement describing the existing and anticipated uses of the specific surface water body or water body segment for which the ORW designation is requested or is sought to be amended or repealed;
- g) A statement describing the existing quality of the specific surface water body or water body segment warranting the ORW designation or the amendment or repeal of such designation;
- h) A synopsis of all testimony to be presented by the proponent at hearing;
- i) Copies of any material to be incorporated by reference within the proposed designation pursuant to Section 5-75 of the Administrative Procedures Act;

- j) Proof of service upon all persons required to be served pursuant to Section 102.810 of this Part;
- k) Proof of publication required pursuant to Section 102.810 of this Part;
- kl) Unless the proponent is the Agency, or the Illinois Department of Natural Resources, or receives a waiver by the Board, a petition signed by at least 200 persons, pursuant to Section 28 of the Act and Section 102.160(a); and,
- lm) Where any information required by this Section is inapplicable or unavailable, a complete justification for such inapplicability or unavailability.

Section 102.830 Board Action

- a) Dismissal
 - 1) Failure of the proponent to satisfy the content requirements for proposals under this Subpart or failure to respond to Board requests for additional information will render a proposal subject to dismissal for inadequacy.
 - 2) Failure of the proponent to pursue disposition of the petition in a timely manner will render a petition subject to dismissal. In making this determination, the Board may consider factors including the history of the proceeding and the proponent's compliance with any Board or hearing officer orders.
 - 3) Any person may file a motion challenging the sufficiency of the petition pursuant to 35 Ill. Adm. Code 101.Subpart E.
- b) Designation of ORW. The Board ~~must~~may designate a water body or water body segment as an ORW and list it in 35 Ill. Adm. Code 303.206 if it finds that the proponent of the designation has established that:
 - 1) The water body or water body segment is of uniquely high biological or recreational quality; and
 - 2) The benefits of protection of the water body or water body segment from future degradation outweigh the benefits of economic or social opportunities that will be lost if the water body or water body segment is designated as an ORW.

(Added at _____ Ill. Reg. _____, effective _____.)

TITLE 35: ENVIRONMENTAL PROTECTION
SUBTITLE C: WATER POLLUTION
CHAPTER I: POLLUTION CONTROL BOARD
PART 302
WATER QUALITY STANDARDS

SUBPART A: GENERAL WATER QUALITY PROVISIONS

Section	
302.100	Definitions
302.101	Scope and Applicability
302.102	Allowed Mixing, Mixing Zones and ZIDS
302.103	Stream Flows
302.104	Main River Temperatures
302.105	Antidegradation Nondegradation

SUBPART B: GENERAL USE WATER QUALITY STANDARDS

Section	
302.201	Scope and Applicability
302.202	Purpose
302.203	Offensive Conditions
302.204	pH
302.205	Phosphorus
302.206	Dissolved Oxygen
302.207	Radioactivity
302.208	Numeric Standards for Chemical Constituents
302.209	Fecal Coliform
302.210	Other Toxic Substances
302.211	Temperature
302.212	Ammonia Nitrogen and Un-ionized Ammonia
302.213	Effluent Modified Waters (Ammonia)

SUBPART C: PUBLIC AND FOOD PROCESSING WATER SUPPLY STANDARDS

Section	
302.301	Scope and Applicability
302.302	Algicide Permits
302.303	Finished Water Standards
302.304	Chemical Constituents
302.305	Other Contaminants
302.306	Fecal Coliform

**SUBPART D: SECONDARY CONTACT AND INDIGENOUS AQUATIC LIFE
STANDARDS**

Section	
302.401	Scope and Applicability
302.402	Purpose
302.403	Unnatural Sludge
302.404	pH
302.405	Dissolved Oxygen
302.406	Fecal Coliform (Repealed)
302.407	Chemical Constituents
302.408	Temperature
302.409	Cyanide
302.410	Substances Toxic to Aquatic Life

SUBPART E: LAKE MICHIGAN BASIN WATER QUALITY STANDARDS

Section	
302.501	Scope, Applicability, and Definitions
302.502	Dissolved Oxygen
302.503	pH
302.504	Chemical Constituents
302.505	Fecal Coliform
302.506	Temperature
302.507	Thermal Standards for Existing Sources on January 1, 1971
302.508	Thermal Standards for Sources under Construction But Not in Operation on January 1, 1971
302.509	Other Sources
302.510	Incorporations by Reference
302.515	Offensive Conditions
302.520	Regulation and Designation of Bioaccumulative Chemicals of Concern (BCCs)
302.521	Supplemental Antidegradation Provisions for BCCs
302.525	Radioactivity
302.530	Supplemental Mixing Provisions for BCCs
302.535	Ammonia Nitrogen
302.540	Other Toxic Substances
302.545	Data Requirements
302.550	Analytical Testing
302.553	Determining the Lake Michigan Aquatic Toxicity Criteria or Values - General Procedures
302.555	Determining the Tier I Lake Michigan Basin Acute Aquatic Life Toxicity Criterion (LMAATC): Independent of Water Chemistry

- 302.560 Determining the Tier I Lake Michigan Basin Acute Aquatic Life Toxicity Criterion (LMAATC): Dependent on Water Chemistry
- 302.563 Determining the Tier II Lake Michigan Basin Acute Aquatic Life Toxicity Value (LMAATV)
- 302.565 Determining the Lake Michigan Basin Chronic Aquatic Life Toxicity Criterion (LMCATC) or the Lake Michigan Basin Chronic Aquatic Life Toxicity Value (LMCATV)
- 302.570 Procedures for Deriving Bioaccumulation Factors for the Lake Michigan Basin
- 302.575 Procedures for Deriving Tier I Water Quality Criteria in the Lake Michigan Basin to Protect Wildlife
- 302.580 Procedures for Deriving Water Quality Criteria and Values in the Lake Michigan Basin to Protect Human Health – General
- 302.585 Procedures for Determining the Lake Michigan Basin Human Health Threshold Criterion (LMHHTC) and the Lake Michigan Basin Human Health Threshold Value (LMHHTV)
- 302.590 Procedures for Determining the Lake Michigan Basin Human Health Nonthreshold Criterion (LMHHNC) or the Lake Michigan Basin Human Health Nonthreshold Value (LMHHNV)
- 302.595 Listing of Bioaccumulative Chemicals of Concern, Derived Criteria and Values

SUBPART F: PROCEDURES FOR DETERMINING WATER QUALITY CRITERIA

Section

- 302.601 Scope and Applicability
- 302.603 Definitions
- 302.604 Mathematical Abbreviations
- 302.606 Data Requirements
- 302.612 Determining the Acute Aquatic Toxicity Criterion for an Individual Substance – General Procedures
- 302.615 Determining the Acute Aquatic Toxicity Criterion - Toxicity Independent of Water Chemistry
- 302.618 Determining the Acute Aquatic Toxicity Criterion - Toxicity Dependent on Water Chemistry
- 302.621 Determining the Acute Aquatic Toxicity Criterion - Procedures for Combinations of Substances
- 302.627 Determining the Chronic Aquatic Toxicity Criterion for an Individual Substance - General Procedures
- 302.630 Determining the Chronic Aquatic Toxicity Criterion - Procedure for Combination of Substances
- 302.633 The Wild and Domestic Animal Protection Criterion
- 302.642 The Human Threshold Criterion
- 302.645 Determining the Acceptable Daily Intake
- 302.648 Determining the Human Threshold Criterion
- 302.651 The Human Nonthreshold Criterion

- 302.654 Determining the Risk Associated Intake
- 302.657 Determining the Human Nonthreshold Criterion
- 302.658 Stream Flow for Application of Human Nonthreshold Criterion
- 302.660 Bioconcentration Factor
- 302.663 Determination of Bioconcentration Factor
- 302.666 Utilizing the Bioconcentration Factor
- 302.669 Listing of Derived Criteria

APPENDIX A References to Previous Rules

APPENDIX B Sources of Codified Sections

AUTHORITY: Implementing Section 13 and authorized by Sections 11(b) and 27 of the Environmental Protection Act [415 ILCS 5/13 11(b), and 27]

SOURCE: Filed with the Secretary of State January 1, 1978; amended at 2 Ill. Reg. 44, p. 151, effective November 2, 1978; amended at 3 Ill. Reg. 20, p. 95, effective May 17, 1979; amended at 3 Ill. Reg. 25, p. 190, effective June 21, 1979; codified at 6 Ill. Reg. 7818; amended at 6 Ill. Reg. 11161, effective September 7, 1982; amended at 6 Ill. Reg. 13750, effective October 26, 1982; amended at 8 Ill. Reg. 1629, effective January 18, 1984; peremptory amendments at 10 Ill. Reg. 461, effective December 23, 1985; amended at R87-27 at 12 Ill. Reg. 9911, effective May 27, 1988; amended at R85-29 at 12 Ill. Reg. 12082, effective July 11, 1988; amended in R88-1 at 13 Ill. Reg. 5998, effective April 18, 1989; amended in R88-21(A) at 14 Ill. Reg. 2899, effective February 13, 1990; amended in R88-21(B) at 14 Ill. Reg. 11974, effective July 9, 1990; amended in R94-1(A) at 20 Ill. Reg. 7682, effective May 24, 1996; amended in R94-1(B) at 21 Ill. Reg. 370, effective December 23, 1996; expedited correction at 21 Ill. Reg. 6273, effective December 23, 1996; amended in R97-25 at 21 Ill. Reg. 1356, effective December 24, 1997; amended in R01-13 at _____ Ill. Reg. _____, effective _____.

Section 302.105 Antidegradation

The purpose of this Section is to protect existing uses of all waters of the State of Illinois, maintain the quality of waters with quality that is better than water quality standards, and prevent unnecessary deterioration of waters of the State.

a) Existing Uses

Uses actually attained in the water body or 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:

- 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;

- 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; or
- 3) an action that would preclude continued use of a water body or water body segment for a public water supply or for recreational or commercial fishing, swimming, paddling or boating.

b) Outstanding Resource Waters

- 1) Waters that are designated as Outstanding Resource Waters (ORWs) pursuant to 35 Ill. Adm. Code 303.205 and listed in 35 Ill. Adm. Code 303.206 must not be lowered in quality except as ~~provided below~~ by:
 - A) Activities that result in short-term, temporary (i.e., weeks or months) lowering of water quality ~~in an ORW~~; or
 - B) ~~Existing site s~~Stormwater discharges at existing sites that comply with applicable federal and state stormwater management regulations and do not result in a violation of any water quality standards.
- 2) Any activity ~~in~~under subsections (b)(1)(A) or (b)(1)(B) of this Section that requires a National Pollutant Discharge Elimination System (NPDES) or a Clean Water Act (CWA) Section 401 certification must also comply with subsection (c)(2) of this Section.
- 3) Any activity ~~listed in~~under subsection (b)(1) of this Section or proposed increase in pollutant loading must also meet the following requirements:
 - A) All existing uses of the 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~~
 - EB) The improvement could not be practicably achieved without the proposed increase in pollutant loading.
- 4) Any proposed increase in pollutant loading to an ORW requiring an NPDES ~~permit~~Permit or a CWA 401 certification ~~for an ORW~~ must be

assessed pursuant to subsection (f) of this Section 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 is better than any of the established standards of this Part must be maintained in their present high quality, unless the lowering of water quality is necessary to accommodate important economic or social development.

2) The Agency must on a case-by-case basis, and to the extent that it deems necessary, assess any proposed increase in pollutant loading that necessitates a new, renewed or modified NPDES ~~permit~~ Permit with a new or increased permit limit, or any activity requiring a CWA Section 401 certification, to determine compliance with this Section 302.105. In making this assessment, the Agency must:

A) Consider the fate and effect of any parameters proposed for an increased pollutant loading; and

B) In the case of all other discharges subject to review under this subsection, to the extent that it deems necessary, and on a case by case basis, assure some or all of the following:

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

ii) All existing uses will be fully protected;

iii) 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

iv) The activity that results in an increased pollutant loading will benefit the community at large; and,

ED) Utilize the following information sources, when available:

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

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

- iii) Agency experience with factually similar permitting scenarios; or
- iv) Any other valid information available to the Agency.

d) Activities Not Subject to a Further Antidegradation Assessment

The following activities will not be subject to a further antidegradation assessment pursuant to subsection (c) of this Section, except as otherwise set forth below:-

- 1) Short-term, temporary (i.e., weeks or months) lowering of water quality;
- 2) Bypasses that are not prohibited at 40 C.F.R. 122.41(m);
- 3) Response actions-pursuant to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), as amended, corrective actions pursuant to the Resource Conservation and Recovery Act (RCRA), as amended, or response actions or corrective action under similar federal or State authority, taken to alleviate a release or threatened release into the environment of hazardous substances, pollutants or contaminants which may pose a danger to public health or welfare;
- 4) Thermal discharges that 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 in the cooling water;
- 6) Discharges permitted under a ~~current~~ general NPDES permit as provided by 415 ILCS 5/39(b) or a general CWA, Section 401 certification are not subject to facility-specific antidegradation review; however, the Agency must assure that individual permits or certification are required prior to all new pollutant loadings or hydrological modifications that necessitate a new, renewed or modified NPDES permit or CWA, Section 401 certification that affect waters designated as Outstanding Resource Waters pursuant to 35 Ill. Adm. Code 303.205 and listed in 35 Ill. Adm. Code 303.206 ~~waters of particular biological significance;~~ or
- 7) ~~Changes~~ A change to a permit limitation 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-;

- 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) Permits incorporating discharges authorized by a site-specific regulation, adjusted standard, or variance issued by the Board, or by a Consent Order, Consent Decree, or other Order entered by a court of competent jurisdiction;
- 10) Except as set forth below, an increase in loading of a pollutant that is not a bioaccumulative chemical of concern (“BCC”), as that term is defined in Section 301.231 of this Part, that results in only a de minimis lowering of water quality.
 - A) As used in this subsection, a “de minimis lowering of water quality” occurs if the proposed increase in mass discharged is less than ten percent (10%) of the available assimilative capacity of the receiving water for the constituent under consideration, and such a determination is consistent with any other applicable requirements and limitations of this Part.
 - B) The available assimilative capacity of the receiving water for the constituent under consideration shall be determined at the time that the permit application is submitted to the Agency. The remaining assimilative capacity of the receiving water will be determined by the Agency pursuant to the methodology under Section 309.141 of this Part utilized to determine if the discharge has “reasonable potential” to cause or contribute to a violation of water quality standards. In the event that additional information is required for the Agency to determine the available assimilative capacity of the receiving water for the constituent under consideration, the proponent of the loading increase shall have the burden to supply the Agency with such additional information.
 - C) A proposed loading increase resulting in only a de minimis lowering of water quality shall be subject to a review by the Agency to assure that all technically reasonable measures to avoid or minimize the extent of the proposed increase in pollutant loading that are readily available at little or no cost have been incorporated into the proposed activity. The Agency shall have

the authority to require the incorporation of any such measures that have not been incorporated into the proposed activity.

D) The proponent of the loading increase shall have the burden under this Subsection to demonstrate that the proposed loading increase results in only a de minimis lowering of water quality.

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.

f) Antidegradation Assessments

In conducting an antidegradation assessment pursuant to Subsection (c)(2) of this Section, the Agency must comply with the following procedures.

- 1) To the extent that it deems necessary, on a case-by-case basis, the Agency must assure that Aa permit application for any proposed 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, must include, to the extent necessary for the Agency to determine that the permit application meets the requirements of this Section-302.105, the following information:
 - A) Identification and characterization of the waters body affected by the proposed load increase or proposed activity and their water body's existing uses, which- C characterization must address physical, biological and chemical conditions of the waters body;
 - B) Identification and quantification of the proposed load increases for the applicable parameters and of the potential impacts of the proposed activity on the affected waters body;
 - C) The purpose and anticipated benefits of the proposed activity, which anticipated- Such benefits may include, but are not limited to:
 - i) Providing a centralized wastewater collection and treatment system for a previously unsewered community;
 - ii) Expansion to provide wastewater collection and treatment service for anticipated residential or industrial growth consistent with a community's long range urban planning;

- iii) Addition of a new product line or production increase or modification at an industrial facility; or,
 - iv) An increase or the retention of current employment levels at a facility;:-
- D) Assessments of alternatives to proposed increases in pollutant loading or activities subject to Agency certification pursuant to Section 401 of the CWA that would result in a lesser of a load increase, no load increase, or minimal environmental degradation. ~~Such which~~ alternatives may include, but are not limited to:
- i) Additional treatment levels including no discharge alternatives;
 - ii) Discharge of waste to alternate locations including publicly-owned treatment works ~~and or~~ streams with greater assimilative capacity; or
 - iii) Manufacturing practices that incorporate pollution prevention techniques;:-
- E) Any additional information the Agency~~v~~ may request; and/or.
- F) Any of the information sources identified in subsection 302.105(d) (3)(c)(2)(C) of this Section.
- 2) The Agency must complete an antidegradation demonstration review in accordance with the provisions of this Section following requirements:-
- 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 regarding any proposed load increase. Such ~~Communication~~ will help to assure the adequacy of information necessary to ~~constitutes~~ support an antidegradation demonstration and to avoid or minimize delays and requests for supplemental information during the permitting stage. The Agency review process must be initiated by:
 - i) an informal or preliminary request ~~of by~~ a proponent of a project prior to filing of a permit application; or
 - ii) receipt by the Agency of application for an NPDES ~~permit~~

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 review pursuant to subsection (f)(2)(A)(ii) of this Section must do so within the context of the NPDES permit Permit process or the CWA Section 401 certification process.
- C) After a review of any preliminary request made pursuant to subsection (f)(2)(A)(i) of this Section, the Agency must consult with the proponent and respond:
- i) in writing to written requests- (~~The~~ Agency's written response ~~will~~must include a statement by the Agency indicating whether the demonstration, based upon the information provided or information acquired by the Agency during the review process, meets the criteria of this Section);
 - ii) verbally to verbal requests; or
 - iii) in a manner otherwise agreed upon.
- D) After its 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 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 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 demonstration does not meet the requirements of this Section, but some lowering of water quality is allowable, then the Agency ~~will~~must 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 demonstration, the Agency will proceed to

public notice, ~~or if~~ the reduced loading increase is not acceptable to the applicant, the Agency ~~will~~must transmit its written review to the applicant in the ~~context~~form of a NPDES permit denial or a CWA Section 401 certification denial.

- 3) The Agency ~~will~~must conduct public notice and public participation through the public notice procedures found in 35 Ill. Adm. Code 309.109 or CWA Section 401 certifications. The Agency must incorporate the following information into a fact sheet accompanying the public notice:
 - A) A description of the activity, including identification of water quality parameters for which will experience the Agency has approved the increased pollutant loading;
 - B) Identification of the affected water body or water body segment, and any downstream water body or water body segment also expected to experience a lowering of water quality, characterization of the designated and current uses of the affected water body or water body segments, and identification of which those uses that are most sensitive to the proposed load increase;
 - C) A summary of any review comments ~~and/or~~ recommendations provided by the Illinois Department of Natural Resources, local or regional planning commissions, zoning boards, ~~and/or~~ any other entities the Agency consults regarding the proposal;
 - D) An overview of alternatives considered by the applicant and identification of any provisions or alternatives imposed by the Agency to lessen the load increase associated with the proposed activity; and
 - E) The name and telephone number of a contact person at the Agency who can provide additional information regarding the antidegradation assessment.

(Amended at _____ Ill. Reg. _____, effective _____.)

Section 302.105 Nondegradation

~~Except as otherwise provided in Section 302.520, waters whose existing quality is better than the established standards at their date of their adoption will be maintained in their present high quality. Such waters will not be lowered in quality unless and until it is affirmatively demonstrated that such change will not interfere with or become injurious to any appropriate~~

~~beneficial uses made of, or presently possible in, such waters and that such change is justifiable as a result of necessary economic or social development.~~

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

PART 303
WATER USE DESIGNATIONS AND SITE SPECIFIC WATER QUALITY
STANDARDS

SUBPART A: GENERAL PROVISIONS

Section	
303.100	Scope and Applicability
303.101	Multiple Designations
303.102	Rulemaking Required

SUBPART B: NONSPECIFIC WATER USE DESIGNATIONS

Section	
303.200	Scope and Applicability
303.201	General Use Waters
303.202	Public and Food Processing Water Supplies
303.203	Underground Waters
303.204	Secondary Contact and Indigenous Aquatic Life Waters
303.205	Outstanding Resource Waters
303.206	List of Outstanding Resource Waters

SUBPART C: SPECIFIC USE DESIGNATIONS AND SITE
SPECIFIC WATER QUALITY STANDARDS

Section	
303.300	Scope and Applicability
303.301	Organization
303.311	Ohio River Temperature
303.312	Waters Receiving Fluorspar Mine Drainage
303.321	Wabash River Temperature
303.322	Unnamed Tributary of the Vermilion River
303.323	Sugar Creek and Its Unnamed Tributary
303.331	Mississippi River North Temperature
303.341	Mississippi River North Central Temperature
303.351	Mississippi River South Central Temperature
303.352	Unnamed Tributary of Wood River Creek
303.353	Schoenberger Creek; Unnamed Tributary of Cahokia Canal
303.361	Mississippi River South Temperature

CERTIFICATE OF SERVICE

I, Thomas G. Safley, the undersigned, certify that I have served copies of the attached PRE-FILED TESTIMONY OF DEIRDRE K. HIRNER and ENTRY OF APPEARANCE OF THOMAS G. SAFLEY upon:

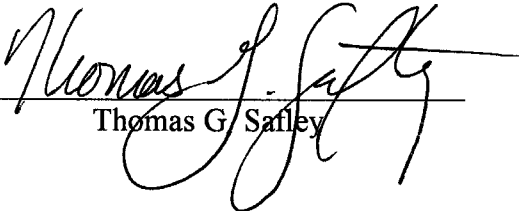
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Clerk of the Board
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601

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

by overnight delivery by depositing said documents in an Airborne Express drop box in Springfield, Illinois, on August 9, 2001, and upon:

SEE ATTACHED SERVICE LIST

by depositing said documents in the United States Mail in Springfield, Illinois on August 9, 2001.



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