

ILLINOIS POLLUTION CONTROL BOARD
May 30, 2019

IN THE MATTER OF:)
)
AMENDMENTS TO 35 ILL. ADM. CODE) R18-30
SUBTITLE O: RIGHT TO KNOW) (Rulemaking – Right to Know)

Proposed Rule. First Notice.

OPINION AND ORDER OF THE BOARD (by B.K. Carter):

The Board opened this docket to make non-substantive, clarifying amendments to its Right-to-Know rules (35 Ill. Adm. Code 1600). After adopting a proposal for public comment and conducting two public hearings, the Board proposes amendments for first-notice publication. Publication of the proposal in the *Illinois Register* will begin a period of 45 days during which any person may file a public comment with the Board.

In this opinion, the Board first provides background on the objectives of this rulemaking followed by a description of the rulemaking’s procedural history. Next, the Board discusses the proposed amendments and requests comment generally and on three specific issues. The Board then proposes the first-notice amendments and issues its order. The proposed amendments themselves, all of which are intended to be non-substantive and clarifying, appear in the addendum to this opinion and order.

BACKGROUND

In the summer of 2016, the Board began reviewing its rules to identify obsolete, repetitive, unclear, or otherwise unnecessary language. On October 17, 2016, the Governor issued Executive Order 16-13. The order directed State agencies to review their regulations; identify those that are outdated, repetitive, confusing, unnecessary, or harmful to Illinois’ economy; and amend or repeal those regulations as necessary.

On January 10, 2018, the Illinois Environmental Protection Agency (IEPA or Agency) filed a rulemaking proposal responding to Executive Order 16-13. Although IEPA proposed to amend numerous Board rules, its proposal did not include amendments to the Board’s Right-to-Know (RTK) rules. Clean-Up Amendments to 35 Ill. Adm. Code Parts 201, 211, 212, 214, 215, 216, 217, 218, 219, 225, 228, 232, 237, 301, 302, 303, 304, 306, 309, 401, 402, 403, 404, 405, 501, 611, 615, 616, 617, 722, 811, 813, 855, and 1000, R18-21, slip op. at 2, 24-26 (Jan. 10, 2018).

PROCEDURAL HISTORY

On March 22, 2018, the Board opened this rulemaking docket on its own motion. On June 21, 2018, the Board adopted a proposal for public comment. The proposal consisted of the Board’s opinion and order (Brd. Ord.) addressing the proposed amendments and an addendum

(Add.) containing those amendments. In its opinion and order, the Board requested comment both generally and on eight specific issues.

On August 22, 2018, IEPA filed comments on the Board's proposal (IEPA Cmt.). Included with its comment was an appendix (IEPA App.) of proposed changes to the RTK rules.

On October 24, 2018, the Board requested that the Department of Commerce and Economic Opportunity (DCEO) perform an economic impact study of the Board's proposal and respond to the request by November 30, 2018. *See* 415 ILCS 5/27(b) (2016). The Board did not receive a response.

On November 8, 2018, the hearing officer scheduled two hearings to be conducted by videoconference between the Board's Chicago and Springfield offices, the first on December 6, 2018, and the second on December 19, 2018.

The first hearing took place as scheduled, and the Board received the transcript (Tr.1) on December 12, 2018. The second hearing took place as scheduled, and the Board received the transcript (Tr.2) on December 21, 2018. On January 2, 2019, the hearing officer issued an order setting a deadline of February 1, 2019, for post-hearing comments. *See* Tr.2 at 7-8. On February 1, 2019, IEPA filed a post-hearing comment (IEPA Post-Hrg. Cmt.).

DISCUSSION OF FIRST-NOTICE PROPOSAL

The Board's RTK rules are contained within a single part, Part 1600, of the Illinois Administrative Code's Title 35: Subtitle O (35 Ill. Adm. Code 1600). Generally, the RTK rules address soil, soil gas, and groundwater contamination threatening potable water supply wells and the response action required in handling these threats. The rules include definitions; standards for performing potable water supply well surveys; and standards for performing community relations activities.

Today the Board proposes amendments to remove redundant or unnecessary language, replace outdated language, update statutory references, and reorganize provisions for clarity. In this discussion, the Board first addresses a phrase of rule text that appears throughout Part 1600—"including, but not limited to." Then, for Part 1600's subparts (A, B, and C) and Appendix A, the Board analyzes proposed amendments that generated comments or questions in the record. Finally, the Board discusses the technical feasibility and economic reasonableness of its first-notice amendments. Many amendments proposed in IEPA's appendix to its public comment are incorporated in today's proposal and warrant no further discussion.

Including, But Not Limited To

Throughout Subtitle O, the phrase "including, but not limited to" appears before a list of examples. *See, e.g.*, 35 Ill. Adm. Code 1600.315(b)(2)(D). In its proposal for public comment, the Board struck all instances of the phrase "but not limited to." IEPA argues that removing this phrase is a substantive change. IEPA Cmt. at 3. "[W]ithout this language, the lists are exhaustive, and the Agency will be unable to ask for additional information." *Id.*

The Board recently decided this issue in a similar rulemaking. *See Amendments to 35 Ill. Adm. Code Subtitle D: Mine Related Water Pollution*, R18-24, slip op. at 2-3 (Mar. 28, 2019). Consistent with its opinion in R18-24, the Board strikes “but not limited to” from its proposal for the reasons stated below.

Statutory terms such as “including” that are not defined in an act or regulation are given their plain and ordinary meaning. *IEPA v. Darrel Slager*, PCB 78-28, slip op. at 2 (Feb. 7, 1980); *see also People v. Perry*, 224 Ill. 2d 312, 330-332 (2007). “In determining the plain meaning of a statutory term, it is entirely appropriate to look to the dictionary for a definition.” *Perry*, 224 Ill. 2d at 300. Black’s Law Dictionary defines the verb “include” as follows:

To contain as a part of something. The participle *including* typically indicates a partial list <the plaintiff asserted five tort claims, including slander and libel>. But some drafters use phrases such as *including without limitation* and *including but not limited to* — which mean the same thing. *Include*, Black’s Law Dictionary (10th ed. 2014).

The word “including” indicates that items listed in a regulation “are not meant to be exclusive.” *See Gem Electronics of Monmouth v. Dept. of Revenue*, 286 Ill. App. 3d 660, 666 (4th Dist. 1997) (citing *Paxson v. Bd. of Educ. of Sch. Dist. No. 87*, 276 Ill. App. 3d 912, 920 (1st Dist. 1995)). It is instead the term “namely” which “indicates what is to be included by name.” *Namely*, Black’s Law Dictionary (10th ed. 2014). Comparing the two terms, Black’s Law Dictionary states that “*including* implies a partial list and indicates that something is not listed.” *Id.*

The Board concludes that the phrase “but not limited to” is unnecessary. Striking the phrase does not alter the meaning of the rules and does not limit IEPA to the examples listed. If, for example, IEPA needs information beyond the examples after “including,” it is not foreclosed from doing so. The Board declines to follow IEPA’s recommendation and continues to strike the phrase “but not limited to” at first notice.

Subpart A: General

Sections 1600.100 Purpose and Scope

Section 1600.100 sets forth the purpose and scope of the RTK rules. The Board proposed separating the rule text into smaller subsections for clarity and striking redundant language. Brd. Ord. at 2, Add. at 2-3. IEPA comments that this section is unnecessary and should be repealed because Subparts B and C each include a section covering the subpart’s purpose and scope. IEPA Cmt. at 4.

The Board agrees with IEPA that Sections 1600.200 and 1600.300 separately provide the purpose and scope of those subparts, making this section unnecessary. The Board proposes to repeal this section.

Section 1600.110 Definitions

IEPA proposes adding a definition of notice under this Section: “‘Notice’ means an Agency approved notification conducted to inform affected parties or potentially affected parties of risk pursuant to Section 25d-3 of the [Environmental Protection] Act [(Act)415 ILCS 5/25d-3 (2016)] or to inform parties of the results of sampling activities previously conducted pursuant to a signed access agreement.” IEPA Cmt. at 5, IEPA App. at 3. At hearing, the Attorney General’s Office questioned whether adding this definition is a substantive change, noting that the term is not defined in the Act. Tr.1 at 8-9. In its post-hearing comment, IEPA states that the definition “augments its proposal” and “even if the definition is a ‘substantive’ change, the Board has complied with all requirements” to include this definition. IEPA Post-Hrg. Cmt.

The Board finds that adding IEPA’s definition of “notice”—without IEPA explaining why the addition is not substantive—risks going beyond the scope of this rulemaking. The Board therefore declines to follow IEPA’s recommendation.

Subpart B: Standards and Requirements for Potable Water Supply Well Surveys

Section 1600.210 Procedures for Potable Water Supply Well Surveys

In its proposal for public comment, the Board asked IEPA to comment on whether any of the proposed amendments would change the rules’ meaning or application. Brd. Ord. at 3. IEPA comments that revisions proposed in Sections 1600.210(c)(1), (c)(2)(B), and (e) may be substantive. IEPA Cmt. at 3. IEPA does not identify the changes that concern it or why they might be substantive. At first notice, the Board retains existing rule text where any changes proposed for public comment are conceivably substantive.

Subpart C: Standards and Requirements for Community Relations Activities

Section 1600.305 Applicability

In Section 1600.305(b), the Board proposed amendments to clarify when an authorized party is required to provide a potential contamination notice and implement community relations activities. Brd. Ord. at 2-3, Add. at 10. The Board proposed referring to IEPA’s written notice as a “letter” throughout subsection (b) to eliminate using different words for the same thing. *Id.* The Board requested IEPA to comment on two aspects of this subsection. First, the Board asked whether an IEPA-issued notification to an authorized party is provided electronically or by U.S. Mail or third-party carrier. Second, the Board asked whether using the proposed term “letter” is appropriate to address both paper and electronic notifications, as applicable. Brd. Ord. at 4.

IEPA indicates that an offer letter to perform notification is sent by certified mail, return receipt requested. IEPA Cmt. at 1-2. IEPA explains that it rarely has email addresses for the responsible party and that paper notice by U.S. Mail is appropriate. *Id.* IEPA also comments that using the proposed term “letter” is confusing and that the changes to this section might be substantive. *Id.* at 2, 3. At first notice, the Board omits the term “letter” and proposes only non-substantive, clarifying revisions to Section 1600.305.

Section 1600.310 and 1600.315 Community Relations Activities

Sections 1600.310 and 1600.315 contain requirements for notices, fact sheets, and community relations activities. Section 1600.310 covers *limited* community relations activities that apply when the total number of impacted offsite properties and potable supply wells is five or fewer. Section 1600.315 covers *expanded* community relations activities that apply when one or more community water supply wells is impacted or when a total of more than five offsite properties or potable private, semi-private, or non-community water supply wells are impacted by soil, groundwater, or soil gas contamination. Due to the similar nature of these two sections, many of the proposed changes to Section 1600.310 were also proposed in Section 1600.315. Brd. Ord. at 3, Add. at 10-20. The Board addresses specific comments on these sections below.

Subsection (a). Sections 1600.310(a) and 1600.315(a) provide parameters to determine which section’s requirements apply. In both subsections, the Board proposed minor revisions. Independent of the Board’s proposed revisions, IEPA comments that the existing language is “unclear and that a credible argument could be made in opposition to the Agency’s intent and current practice” in determining which notice requirements apply. IEPA Cmt. at 4-5, IEPA App. at 10, 13-14. IEPA indicates that, “[a]s currently drafted, when contamination is in more than one form (soil, soil gas, and groundwater), the cumulative number of wells and properties impacted could be greater than five, but the expanded notification requirements of Section 1600.315 would not apply.” *Id.* To eliminate this ambiguity, IEPA proposes moving the quantification language—that triggers Section 1600.310 requirements—from subsections (a)(1)-(4) to subsection (a).

Similarly, in Section 1600.315(a), this same language is moved from subsections (a)(1)-(4) to subsections (a)(1) and (a)(2). The addition of a new subsection (a)(2) further clarifies Section 1600.315’s applicability when one or more community water supply wells is impacted by soil, groundwater, or soil gas contamination. Reorganizing this language in both sections ensures consistency and emphasizes which type of notice requirements apply to a soil, soil gas, or groundwater contamination event. With only slight deviation, IEPA’s suggested changes are reflected in today’s proposal.

Subsection (b). The Board proposed similar changes to Sections 1600.310(b) and 1600.315(b). In these sections, the Board proposed largely organizational revisions including grouping like requirements together and separating large blocks of text into smaller subsections. Brd. Ord. at 2-3, Add. at 11-14, 15-20. IEPA comments that proposed changes to Sections 1600.315(b)(3)(A)(iii), (v), and (ix) might be substantive. IEPA Cmt. at 3-4. IEPA does not identify which changes or why they might be substantive. The Board incorporates many of IEPA’s suggested revisions (IEPA App. at 10-18) and proposes clarifying revisions. The Board does not propose renumbering or reorganizing Sections 1600.310(b) and 1600.315(b), maintaining the current regulatory structure.

Lastly, the Board asked IEPA to comment on Section 1600.315(b)(2)(D)(ix): whether the parenthetical examples following the phrase “affected and potentially affected properties” were necessary. Brd. Ord. at 2. The Board questioned whether it’s appropriate to add a

definition of “affected or potentially affected properties” under Section 1600.110 and remove the parenthetical examples from Section 1600.315(b)(2)(D)(ix). *Id.* IEPA comments that the parenthetical examples do not describe affected or potentially affected properties but instead identify potential citizens, businesses, or entities to include in a Section 1600.315 contact list. IEPA Cmt. at 2. Thus, adding a definition containing these examples is not appropriate. *Id.* The Board agrees. However, to avoid potential confusion, the Board proposes listing examples as a separate sentence without using parentheses.

Section 1600.320 Establishment of Document Repository

In response to the Board’s question whether any of the proposed revisions change the rule’s meaning or application (Brd. Ord. at 3), IEPA comments, without explanation, that changes to Section 1600.320(a)(2) might be substantive. IEPA Cmt. at 3-4. The Board does not propose to amend this section.

Section 1600.330 IEPA Reviews

Section 1600.330(c) provides that IEPA notification approving, approving with modifications, or disapproving an authorized party’s submitted documents must be made by certified mail or registered mail. The Board asked IEPA to comment on whether these notifications may also be sent electronically. Brd. Ord. at 4. IEPA indicates that the notifications are currently sent by the United States Postal Service, using certified mail, with return receipt requested. IEPA Cmt. at 3. IEPA proposes adding an email option for receiving IEPA notification approving or disapproving notices, contact lists, community relations plans (CRP), and related documents, but only with the recipient’s consent. *Id.* The Board agrees with IEPA and proposes a corresponding rule change for first notice.

Appendix A: Contents of a Model Community Relations Plan

Appendix A includes the contents of a model CRP to aid an authorized party in creating a CRP under Section 1600.315. Much of the Appendix reiterates the RTK rules without providing an example of a plan. This prompted the Board to ask IEPA whether an example of a CRP could be included in Appendix A to further aid authorized parties creating a CRP. Brd. Ord. at 4. IEPA indicates that Appendix A is satisfactory. IEPA Cmt. at 3. IEPA notes that because “the contact list contains private information not releasable under the Freedom of Information Act” it is “not appropriate for inclusion in a Board rule.” *Id.* The Board reiterates its request and asks that IEPA redact an approved CRP as necessary to comply with the law. The Board proposes clarifying amendments to Appendix A at first notice.

The Board also inquired whether CRPs are publicly accessible and, if so, how to locate them. Brd. Ord. at 4. IEPA comments that fact sheets created under Section 1600.310(b) for limited community relations activities can be found on IEPA’s website. IEPA Cmt. at 3. IEPA explained that the contact list (the other component of a Section 1600.310(b) CRP) is not made public because it contains private information. *Id.* CRPs for expanded community relations activities under Section 1600.315(b) are uncommon because “the Agency has provided the [RTK] notice when a community water supply well is potentially contaminated” and these

notices are no longer available online. *Id.* IEPA indicates that filing a Freedom of Information Act request (5 ILCS 140 (2016)) will provide complete but redacted CRPs under either section.

Technical Feasibility and Economic Reasonableness

As noted above under “Procedural History,” the Board on October 24, 2018, requested that DCEO perform an economic impact study of the Board’s proposal for public comment and respond to the request by November 30, 2018. *See* 415 ILCS 5/27(b) (2016). The Board did not receive a response from DCEO. At the second hearing, no person testified or commented on the Board’s request or the absence of a response. *See* Tr.2 at 6-7.

The Board intends to propose only non-substantive amendments that clarify the language of existing rules. The Board has carefully considered the record, including IEPA’s comments on the Board’s proposal for public comment and IEPA’s proposed amendments outlined in the appendix to its public comment. As indicated above, the Board responds to those comments by amending numerous sections of its proposal. The Board specifically requested comment to clarify eight issues before proceeding to first notice. Based on the record now before it, the Board concludes that its first-notice proposal does not make substantive revisions that affect complying with existing rules. Accordingly, the Board finds that the proposal is both technically feasible and economically reasonable. *See* 415 ILCS 5/27(a) (2016). The Board further finds that these proposed amendments would not have any adverse economic impact on the people of the State of Illinois. *See* 415 ILCS 5/27(b) (2016).

FILING PUBLIC COMMENTS

Illinois Register publication of the Board’s first-notice proposal will start a period of 45 days during which any person may file a public comment with the Board, regardless of whether the person has already filed a public comment. *See* 5 ILCS 100/5-40(b) (2016) (Illinois Administrative Procedure Act).

The Board encourages persons to file public comments on all aspects of these proposed amendments. The Board also requests that IEPA comment on the following three issues:

1. The Board’s proposal amends Sections 1600.210(c)(1), (c)(2)(B), and (e). Are any of these proposed amendments substantive and why?
2. The RTK rules contain notice requirements in Section 1600.310 for limited community relations activities and in Section 1600.315 for expanded community relations activities. To further distinguish these sections, would including a brief explanation of limited and expanded community relations activities in Section 1600.305 (Applicability) be appropriate? If so, please propose rule text for the brief explanation.
3. Lastly, is there any proposed revision that would change the rule’s meaning or application? If so, please identify those changes.

Public comments must be filed electronically through the Clerk's Office On-Line (COOL) at pcb.illinois.gov and indicate this rulemaking's docket number, R18-30. Questions about electronic filing should be directed to the Board's Clerk at 312-814-3461.

CONCLUSION

The Board proposes these amendments to the RTK rules for first-notice publication in the *Illinois Register*. The proposed amendments appear in the addendum to this opinion and order. The Board invites public comments on all aspects of the proposal, particularly the three issues listed above.

ORDER

The Board directs the Clerk to cause *Illinois Register* publication of the proposed first-notice amendments that appear in the addendum to this opinion and order.

IT IS SO ORDERED.

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on May 30, 2019, by a vote of 4-0.



Don A. Brown, Clerk
Illinois Pollution Control Board