

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	
REGULATORY RELIEF	)	
MECHANISMS: PROPOSED NEW	)	R18-18
35 ILL. ADM. CODE PART 104,	)	(Rulemaking – Procedural)
SUBPART E	)	

**NOTICE OF FILING**

TO: Don Brown	Marie E. Tipsord
Clerk of the Board	Hearing Officer
Illinois Pollution Control Board	Illinois Pollution Control Board
100 W. Randolph Street, Suite 11-500	100 W. Randolph Street, Suite 11-500
Chicago, Illinois 60601	Chicago, Illinois 60601
<b>(VIA ELECTRONIC MAIL)</b>	<b>(VIA ELECTRONIC MAIL)</b>

**(SEE PERSONS ON ATTACHED SERVICE LIST)**

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board, **ILLINOIS ENVIRONMENTAL REGULATORY GROUP'S RESPONSE TO POST-HEARING COMMENTS**, a copy of which is herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL  
REGULATORY GROUP

Dated: December 19, 2017

By:           /s/ Katherine D. Hodge            
One of Its Attorneys

Katherine D. Hodge  
Joshua J. Houser  
HEPLERBROOM, LLC  
4340 Acer Grove Drive  
Springfield, Illinois 62711  
[Katherine.Hodge@heplerbroom.com](mailto:Katherine.Hodge@heplerbroom.com)  
[Joshua.Houser@heplerbroom.com](mailto:Joshua.Houser@heplerbroom.com)  
(217) 528-3674

**CERTIFICATE OF SERVICE**

I, Joshua J. Houser, the undersigned, on oath state the following:

That I have served the attached **ILLINOIS ENVIRONMENTAL REGULATORY GROUP'S RESPONSE TO POST-HEARING COMMENTS**, via electronic mail upon:

Don Brown  
Clerk of the Board  
Illinois Pollution Control Board  
100 W. Randolph Street, Suite 11-500  
Chicago, Illinois 60601  
[Don.Brown@illinois.gov](mailto:Don.Brown@illinois.gov)

Marie E. Tipsord  
Hearing Officer  
Illinois Pollution Control Board  
100 W. Randolph Street, Suite 11-500  
Chicago, Illinois 60601  
[Marie.Tipsord@illinois.gov](mailto:Marie.Tipsord@illinois.gov)

Gerald T. Karr  
Kathryn A. Pamenter  
Office of the Attorney General  
69 West Washington Street, Ste. 1800  
Chicago, Illinois 60602  
[GKarr@atg.state.il.us](mailto:GKarr@atg.state.il.us)  
[KPamenter@atg.state.il.us](mailto:KPamenter@atg.state.il.us)

Sara Terranova  
Stefanie N. Diers  
Illinois Environmental Protection Agency  
1021 N. Grand Avenue East  
Post Office Box 19276  
Springfield, Illinois 62794-9276  
[Sara.Terranova@illinois.gov](mailto:Sara.Terranova@illinois.gov)  
[Stefanie.Diers@illinois.gov](mailto:Stefanie.Diers@illinois.gov)

Katy Khayyat  
Dept. of Commerce & Economic Opportunity  
Small Business Office  
500 East Monroe Street  
Springfield, Illinois 62701  
[Katy.Khayyat@illinois.gov](mailto:Katy.Khayyat@illinois.gov)

Ashley E. Parr  
Fredric P. Andes  
Paul M. Drucker  
Barnes & Thornburg  
1 North Wacker Drive, Ste. 4400  
Chicago, Illinois 60606  
[Ashley.parr@btlaw.com](mailto:Ashley.parr@btlaw.com)  
[fandes@btlaw.com](mailto:fandes@btlaw.com)  
[pdrucker@btlaw.com](mailto:pdrucker@btlaw.com)

Eric Lohrenz  
Virginia Yang  
Illinois Department of Natural Resources  
One Natural Resource Way  
Springfield, Illinois 62702-1271  
[Eric.Lohrenz@illinois.gov](mailto:Eric.Lohrenz@illinois.gov)  
[Virginia.Yang@illinois.gov](mailto:Virginia.Yang@illinois.gov)

Jared Policicchio  
Mort P. Ames  
Chicago Department of Law  
30 N. LaSalle Street, Ste. 1400  
Chicago, Illinois 60602  
[jared.policicchio@cityofchicago.org](mailto:jared.policicchio@cityofchicago.org)  
[Mort.ames@cityofchicago.org](mailto:Mort.ames@cityofchicago.org)

Susan M. Franzetti  
Vincent R. Angermeier  
Nijman Franzetti LLP  
10 South LaSalle Street, Ste. 3600  
Chicago, Illinois 60603  
[sf@nijmanfranzetti.com](mailto:sf@nijmanfranzetti.com)  
[va@nijmanfranzetti.com](mailto:va@nijmanfranzetti.com)

Eric Boyd  
Thompson Coburn LLP  
55 East Monroe Street  
Chicago, Illinois 60603  
[eboyd@thompsoncoburn.com](mailto:eboyd@thompsoncoburn.com)

That my email address is [Katherine.Hodge@heplerbroom.com](mailto:Katherine.Hodge@heplerbroom.com).

That the number of pages in the email transmission is 9.

That the email transmission took place before 5:00 p.m. on the date of December 19, 2017.

/s/ Katherine D. Hodge

Katherine D. Hodge

Date: December 19, 2017

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF: )  
 )  
REGULATORY RELIEF )  
MECHANISMS: PROPOSED NEW ) R18-18  
35 ILL. ADM. CODE PART 104, ) (Rulemaking – Procedural)  
SUBPART E )

**ILLINOIS ENVIRONMENTAL REGULATORY GROUP'S**  
**RESPONSE TO POST-HEARING COMMENTS**

The ILLINOIS ENVIRONMENTAL REGULATORY GROUP (“IERG”), by and through its attorneys, HEPLERBROOM, LLC, and pursuant to the October 13, 2017 Hearing Officer Order, hereby submits its Response to Post-Hearing Comments in the above captioned matter.

IERG appreciates the opportunity to provide these responses to post-hearing comments submitted in this rulemaking proceeding for the Illinois Pollution Control Board’s (“Board”) consideration. IERG submitted its post-hearing comments on December 5, 2017, as did a number of other participants. IERG generally supports the post-hearing comments filed by Midwest Generation, LLC and the Metropolitan Water Reclamation District of Greater Chicago. However, IERG offers the following responses specifically to certain comments submitted on December 5, 2017 by the Illinois Chapter of the Sierra Club, Natural Resources Defense Council, Prairie Rivers Network, Openlands, Friends of Chicago River, Recovery on Water and Little Village Environmental Justice Organization (collectively the “Environmental Groups”) (hereafter the “Environmental Groups’ Comments”). IERG also provides additional information below to its own post-hearing comments relating to Best Management Practices.

**I. Response to Environmental Groups' Comments**

a. Environmental Groups' Example

The Environmental Groups offer an example of how, in their view, the time-limited water quality standards (“TLWQS”) and associated permit compliance schedule might work under the federal rules established by the United States Environmental Protection Agency (“U.S. EPA”) at 40 C.F.R. § 131.14. *See* Environmental Groups’ Comments, at 2-3. The Environmental Groups characterize their illustration as a “somewhat complicated example (nonetheless simpler than real life).” *Id.* at 2. IERG agrees that this example is simpler than real life and notes for the Board that the example, although intended to be illustrative, is of limited practical usefulness because it is narrow in scope (e.g., single discharger, all the species-specific toxicity thresholds are well known for the pollutant of interest, pollutant control technologies and their control efficiencies are well known, no non-point sources to address, etc.), whereas many real-world situations involving TLWQS are more complex (e.g., multi-dischargers, non-point source load contributions, diverging or inconclusive technical information, etc.).

b. Provision Clarifying Time Restraints

The Environment Groups propose that the Board add an additional provision, a proposed new Section 104.565, entitled Clarification of Certain Time Limits.<sup>1</sup> *Id.* at 3-4. While IERG acknowledges the benefits of establishing clear time requirements in certain regulatory contexts, IERG submits that this is not such an appropriate context. Environmental Groups admit as much by noting that the absence of specificity in the Illinois Environmental Protection Agency’s (“Illinois EPA” or “Agency”) proposed rule arises due to a similar absence of specificity in the

---

<sup>1</sup> IERG notes that the proposed rule already has a proposed Section 104.565, entitled Opinion and Order. IERG recommends that the Board not adopt the Environmental Groups’ proposed language, but in the event that the Board deems an additional provision is warranted, a renumbering of sections will be necessary.

U.S. EPA's corresponding regulation at 40 C.F.R. § 131.14. *See id.* at 4. And where, as here, U.S. EPA reviews and approves any TLWQS granted by the Board before it can take effect, it serves no purpose to establish arbitrary state time constraints when no such constraints are required, or even contemplated, by U.S. EPA.

IERG recommends against adding the Environmental Groups' language. First, Environmental Groups' proposed language is itself non-specific and unclear and would only create additional confusion. For example, their proposed subsection (b) ("Improvements to water quality are expected to be achieved as soon as they are attainable") on its face could be read to allow no time for implementing measures to meaningfully work and improve water quality because the improvement would be expected at the very moment that it is technically "able to be attained." In other words, does the language mean that the improvement to water quality is expected as soon as the technology for its improvement is first created? Obviously, that would lead to an absurd result. Or does the language imply when it is first proven effective by any user of the technology? That would be similarly unreasonable, as the application of a given technology or other measure at any location would, by necessity, require a site specific determination. Obviously, such interpretations would be unworkable and could impose an unreasonable regulatory burden on a regulated entity and expose it to potential enforcement.

Similarly, Environmental Groups' proposed subsection (c) ("The highest attainable condition shall be achieved as soon as it is attainable.") is vague and uses the term "attainable" in two contexts: "highest attainable" and "attainable," thereby introducing the concept of degrees of attainability and requiring that the highest degree be attained at the same moment as it is technically possible to attain the result. Again, a requirement such as this would be confusing, impossible to achieve, and potentially subject an entity to unreasonable enforcement.

Finally, IERG submits that the language proposed by the Agency, as is and without more, provides sufficient flexibility to the Board, to the Agency, to the regulated community, and to U.S. EPA to accomplish the objectives of TLWQSs consistent with federal law. As noted above, U.S. EPA's provisions relating to water quality standards, 40 C.F.R. § 131.14, do not establish limits for TLWQS, but rather require that they "only be as long as necessary to achieve the highest attainable condition...." *See* 40 C.F.R. § 131.14(b)(1)(iv). Further, TLWQSs may be issued for periods longer than five years. *See* 40 C.F.R. § 131.14(b)(1)(v). The Agency's proposed Section 104.560(c) reflects these federal provisions and requires that "The petitioner must demonstrate that the term of the time-limited water quality standard is only as long as necessary to achieve the highest attainable condition." *See* page 16 of the revised draft regulations included in Illinois EPA's Responses to Questions, PCB No. R18-18 (Ill.Pol.Control.Bd. Nov. 14, 2017). Such requirements allow flexibility for Board and U.S. EPA determinations made under the particular circumstances of each case and provide administrative efficiency for the Board, the Agency, and U.S. EPA in managing their workload and in not having to unnecessarily duplicate or repeat proceedings.

Thus, IERG recommends no additional regulatory language relating to time limits beyond what the Agency has proposed.

c. Filings for Delay

The Environmental Groups urge the Board to assure that petitions for TLWQS do not serve as a method to delay implementation of water quality standards through the filing of petitions filed "largely for purposes of delay." *See* Environmental Groups' Comments, at 4-5. Speculating that a discharger "could file an utterly meritless petition ... fully expecting that the Board would find that the petition is not in substantial compliance with the requirements,"

Environmental Groups encourage the Board to “make every effort to rule expeditiously on petitions” and “set very strict timelines” for filing corrections. *Id.*

IERG objects to the Environmental Groups’ insinuation that TLWQS petitions may be used “largely for purposes of delay” via “utterly meritless petitions,” and further that the Board would not typically act expeditiously and with all due diligence in such matters. As with variance requests, significant cost and effort goes into the preparation and filing of a petition for a TLWQS by an applicant, and significant resources and effort are expended by the Agency and the Board in responding to such petitions. The Board has a long history of wise and effective management of its resources in accomplishing the many and various requirements imposed upon it by statute, such that any thought of “utterly meritless” filings made “largely for delay” would be recognized and met with Board action, thereby providing adequate deterrent from the outset. Thus, the Board’s diligent management of its proceedings more than adequately addresses the Environmental Groups’ unreasonable and unjustified comment regarding petitions filed for delay.

## **II. Best Management Practices – IERG Additional Information**

In its post-hearing comments, IERG addressed the subject of “Best Management Practices” or “BMPs,” and provided the Board with an example of a federal definition for the term that encompasses non-point source controls. IERG offers the following additional information in support and clarification of those comments.

In particular, subsequent to IERG’s filing of its post-hearing comments, IERG became aware of an in-effect NPDES permit that includes a special condition that allows the permittee to determine the specific practices that would be most effective as BMPs. IERG does not intend to suggest that the Board define BMPs to preclude their use at point source facilities.

Surface water runoff at regulated facilities, including snow melt runoff, may be discharged through a specific point source, or surface water runoff may flow over land and be discharged as a non-point source. And, such surface water runoff, including snow melt runoff, may contain contaminants. The measures to reduce contaminants in such runoff could include the very same activities for both point source and non-point source discharges. Thus, there is no basis for limiting the use of BMPs to either point source or non-point source discharges. IERG recommends that the Board not limit the meaning of BMP to a specific definition that would apply only to point source discharges or non-point source discharges. A regulated facility should be able to identify and implement the most effective and practical tools as BMPs.

**III. Conclusion**

IERG appreciates the opportunity to provide these responses to post-hearing comments in this rulemaking proceeding. Thank you for your consideration of these responses.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL  
REGULATORY GROUP,

Dated: December 19, 2017

By: /s/ Katherine D. Hodge  
One of Its Attorneys

Katherine D. Hodge  
Joshua J. Houser  
HEPLERBROOM, LLC  
4340 Acer Grove Dr.  
Springfield, Illinois 62711  
[Katherine.Hodge@heplerbroom.com](mailto:Katherine.Hodge@heplerbroom.com)  
[Joshua.Houser@heplerbroom.com](mailto:Joshua.Houser@heplerbroom.com)