

ILLINOIS POLLUTION CONTROL BOARD
March 2, 2023

IN THE MATTER OF:)
)
AMENDMENTS TO 35 ILL. ADM. CODE) R18-26
SUBTITLE F: PUBLIC WATER SUPPLY) (Rulemaking – Public Water Supply)

Proposed Rule. Second Notice.

OPINION AND ORDER OF THE BOARD (By B. F. Currie):

The Board opened this docket to amend its public water supply rules; determine which of them may be obsolete, repetitive, confusing, or unnecessary; and propose non-substantive clarifications. Today, the Board proposes amended public water supply rules for second-notice review by the Joint Committee on Administrative Rules (JCAR).

In this opinion and order, the Board first provides background on the objectives of this rulemaking and its procedural history. Next, the Board discusses Part-by-Part the revisions to its first-notice proposal. The Board then discusses technical feasibility and economic reasonableness before concluding to submit amended rules to second-notice review. Finally, the Board directs its Clerk to submit the proposed amendments to JCAR. The proposed amendments appear in the addendum to this opinion and order.

BACKGROUND

In 2016, the Board began reviewing its rules to identify obsolete, unclear, or otherwise unnecessary language. On January 10, 2018, the Illinois Environmental Protection Agency (IEPA or Agency) filed a proposal to amend numerous Board rules, including Parts 611, 615, 616, and 617 of the Board’s public water supply regulations. 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 (Jan. 10, 2018). IEPA’s proposal cited Executive Order 2016-13, which required agencies to review existing regulations to identify provisions that are outdated, repetitive, confusing, or unnecessary and then revise or repeal them as appropriate.

The Board’s first-notice proposal included both amendments proposed by IEPA in its original proposals and additional revisions identified by the Board in its own review. Both IEPA and the Board intend proposed amendments to be non-substantive in nature.

PROCEDURAL HISTORY

On January 10, 2018, IEPA filed a proposal to make non-substantive revisions to Board rules including provisions of Subtitle F. On February 8, 2018, the Board opened this rulemaking docket to address public water supply regulations in Subtitle F of its rules. On June 17, 2021, the

Board adopted a proposal for public comment (Board Prop.). The proposal included both amendments originally proposed by IEPA and amendments proposed by the Board. In its order, the Board requested comment generally and directed seven questions to IEPA on specific matters.

In a letter dated September 17, 2021, 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 1, 2021. *See* 415 ILCS 5/27(b) (2020). In a letter dated October 22, 2021, (DCEO Letter) DCEO declined the Board's request, saying "[t]he proposed rule changes are administrative in nature, with no meaningful economic impact." DCEO Letter at 1.

On November 16, 2021, IEPA filed responses to the Board's questions and requests for comments (PC 1).

The first hearing was held in Chicago on October 12, 2021, and the Board received the transcript (Tr. 1) on October 18, 2021. The second hearing took place in Springfield on January 6, 2022, and the Board received the transcript (Tr. 2) on January 14, 2022.

On December 28, 2021, IEPA filed an updated response to the Board's question number 7. (IEPA Resp.) On January 28, 2022, IEPA filed post-hearing comments (PC 2).

On May 12, 2022, the Board adopted a first-notice opinion and order (First Notice). Proposed amendments to Parts 601, 602, 603, 604, 611, 615, 616, 617, 618 appeared in the *Illinois Register* on May 27, 2022. 46 Ill. Reg. 8604, 8628, 8699, 8676, 8724, 8748, 8794, 8840, 8864 (May 27, 2022).

On June 27, 2022, the Board docketed as public comment an email between the staff of JCAR and the Board (PC 3) regarding changes suggested by JCAR to Parts 601, 602, 603, 604, 611, 615, 616, 617, and 618.

On July 8, 2022, IEPA filed its first-notice comments (PC 4).

On July 11, 2022, the Board docketed as public comment an email between the staff of JCAR and the Board (PC 5) regarding changes suggested by JCAR to Part 611.

On February 27, 2023, the Board filed as public comments its Part-by-Part responses to JCAR's suggested changes. The Board filed its response for Part 601 as PC 7; Part 602 as PC 8; Part 603 as PC 9; Part 604 as PC 10; Part 611 as PC 11; Part 615 as PC 12; Part 616 as PC 13; Part 617 as PC 14; and Part 618 as PC 15.

SUMMARY OF PROPOSED AMENDMENTS

The Board's public water supply rules contain the requirements necessary for owners and official custodians of public water supplies in the State to provide, "continuous operation and maintenance of public water supply facilities to assure that the water is safe in quality, clean,

adequate in quantity, and of satisfactory mineral characteristics for ordinary domestic consumption.” 35 Ill. Adm. Code 601.101(a). The Board proposes to amend the public water supply rules by removing redundant or unnecessary language, replacing outdated language, updating statutory references, and providing other non-substantive clarifications.

The Board’s first-notice proposal included non-substantive amendments originally proposed both by the Board and IEPA. The first-notice opinion includes a Part-by-Part discussion of the proposed amendments. While the Board does not repeat the entire opinion here, it can be viewed on the Board’s website (pcb.illinois.gov) under this docket number, R18-26. See Amendments to 35 Ill. Adm. Code Subtitle F: Public Water Supply, R18-23 (May 12, 2022).

In the following subsections, the Board first addresses a general comment made by IEPA then addresses specific revisions to its first-notice proposal on a Part-by-Part basis.

“But Is Not Limited To” Language

In its public comment, IEPA makes a general request of the Board as to “but is not limited to” language. In this and other rulemakings, the Board has changed all “but is not limited to” phrases to either “including” or “include.” IEPA argues, “the Agency still contends that ‘but is not limited to’ should remain in the Sections outlined in the Agency’s previous comments to the Board.” PC 4 at 5. IEPA argues that changing “but is not limited to” to “including” is a substantive change. *Id.* The Board does not agree with this interpretation. As the Board has explained in previous rulemakings, the term “including” offers some examples of what might fit in that category. It does not proscribe anything beyond those specific examples. See Amendments To 35 Ill. Adm. Code Subtitle D: Mine Related Water Pollution, R18-24 slip op. at 3-4 (Mar. 28, 2019). Executive Order 2016-13 requires the Board to identify and modify provisions that are repetitive and unnecessary. Therefore, in this and other rulemakings, the Board has regularly changed the phrase “but is not limited to” as it is surplusage and unnecessary.

Part 601

Part 601 contains the general requirements, applicability of the Part, definitions, and a list of the materials incorporated by reference. In a public comment, IEPA requests that the reference to secondary maximum contaminant levels (SMCL) be removed from Section 601.101(b)(3). IEPA says, “since this rulemaking is limited to non-substantive, clarifying changes, the adoption of required compliance with [SMCLs] is beyond the scope of this review and changes to Part [601.101(b)(3)] should not be pursued by the Board at this time.” PC 4 at 4. Secondary MCLs are not health-based, but are intended to improve the aesthetic quality of the water. *Id.* at 2. IEPA argues that “[r]equiring Public Water Supply compliance with [SMCLs] will have a significant financial impact and move potential resources from treating health-based risks to controlling the aesthetic issues associated with [SMCLs].” *Id.* IEPA requests that original language of Section 601.101(b)(3) be restored at second notice as follows:

Section 601.101(b)(3)

- 3) Concentrations of constituents ~~in finished water must not exceed the secondary MCLs~~ listed in the following chart should not be exceeded in the finished water: ~~should not be exceeded in the finished water.~~

The Board agrees with the change and will restore the original language of Section 601.101(b)(3) at second notice.

JCAR suggested 40 changes to the Board's first-notice proposal for Part 601. PC 3. In numerous cases, JCAR suggested non-substantive changes that, for example, simplify language, add or delete commas, add or delete hyphens, and correct addresses. The Board accepts these suggestions and includes them in its second-notice proposal. When reviewing JCAR's suggestions, the Board made a small number of conforming changes and additional clarifying changes consistent with those in its first-notice proposal. The Board does not provide additional discussion of these changes in its opinion.

In a small number of cases, the Board respectfully declines JCAR's suggested changes to its first-notice proposal. In some of these cases, the Board was not persuaded that the suggested change genuinely clarified the rule. In others, the Board wished not to have an unintended substantive effect. The Board explains its reason for declining these items in its responses filed as PC 7.

Part 602

Part 602 establishes the minimum standards for permitting community water supplies. JCAR suggested 116 changes to the Board's first-notice proposal. PC 3. In numerous cases, JCAR suggested non-substantive changes that, for example, simplify language, modify citations, and add or delete hyphens. The Board accepts these suggestions and includes them in its second-notice proposal. When reviewing JCAR's suggestions, the Board made a small number of conforming changes and additional clarifying changes consistent with those in its first-notice proposal. The Board does not provide additional discussion of these changes in its opinion.

In a small number of cases, the Board respectfully declines JCAR's suggested changes to its first-notice proposal. In three instances, JCAR requested specification of the term "additional information" as used in the Part. The Board responded to JCAR, generally, by saying that no examples of "other information" were provided in the record of this non-substantive rulemaking and that none are necessary for the rule. PC 8. In other instances, the Board declined JCAR's suggested changes as the Board was not persuaded that the suggested changes genuinely clarified the rule. In others, the Board wished not to propose suggestions that may have an unintended substantive effect. The Board explains its reason for declining suggestions in its responses filed as PC 8.

Part 603

Part 603 contains requirements for ownership responsibilities to assure the continued maintenance and operation of community water supplies. JCAR suggested three changes to the Board's first-notice proposal. PC 3. The Board accepts the three changes and includes them in its second-notice proposal. When reviewing JCAR's suggestions, the Board made three additional conforming changes consistent with those in its first-notice proposal.

Part 604

Part 604 includes the design, operation, and maintenance criteria for owners, operators, and official custodians of community water supplies. JCAR suggested 103 changes to the Board's first-notice proposal. PC 3. In numerous cases, JCAR suggested non-substantive changes that, for example, add or delete commas, add or delete hyphens and simplify language. The Board accepts these changes and includes them in its second-notice proposal. When reviewing JCAR's suggestions, the Board made a small number of conforming changes and additional clarifying changes consistent with those in its first-notice proposal. The Board does not provide additional discussion of these changes in its opinion.

In six cases, the Board respectfully declines JCAR's suggested changes to its first-notice proposal. In these instances, the Board was not persuaded that the suggested changes genuinely clarified the rule. The Board explains its reason for declining these items in its responses filed as PC 10.

Part 611

Part 611 contains regulations that are identical in substance to federal regulations that establish primary drinking water regulations under the Safe Drinking Water Act. JCAR suggested 17 changes to the Board's first-notice proposal. PC 3. These suggestions included adding clarifying language, and correcting punctuation. The Board accepts these suggestions and includes them in its second-notice proposal. When reviewing JCAR's suggestions, the Board made one clarifying change consistent with the changes in its first-notice proposal. The Board does not provide any additional discussion of these changes in its opinion.

In one case, the Board respectfully declines JCAR's suggested change to its first-notice proposal. In this instance, the Board was not persuaded that the suggested change genuinely clarified the rule. The Board explains its reason for declining this item in its responses filed as PC 11.

Part 615

Part 615 contains the requirements and standards to protect groundwater for certain facilities located within a setback zone or a recharge area. In PC 4, IEPA requests that changes be made to the definition of "method detection limit" in Section 615.102 as follows:

"Method Detection Limit" or "MDL", means the minimum measured concentration of a substance that can be ~~measured as reported~~ with 99 percent confidence that the ~~true value is greater than zero~~ measured concentration is distinguishable from the method blank results, pursuant to 40 CFR 136, appendix B (2017) ~~56 Fed. Reg. 3526-3597~~; incorporated by reference at Section 615.103.

The Board will accept IEPA's suggested changes as they mirror the definition of "MDL" under 40 CFR 136, Appendix B. However, the definition language or the base text used by IEPA differs from the Board's proposed first notice definition of "MDL" within the definition of "Detection" in Section 615.102. At first notice, the Board proposed the following changes to definition of "Detection":

"Detection" means the identification of a contaminant in a sample at a value equal to or greater than the:

"Method Detection Limit" or "MDL", ~~which~~ means the minimum concentration of a substance that can be measured as reported with 99 percent confidence that the true value is greater than zero under 40 CFR 136, Appendix B, ~~pursuant to 56 Fed. Reg. 3526-3597~~; incorporated by reference at Section 615.103; or

"Method Quantitation Limit" or "MQL", which means the minimum concentration of a substance that can be measured and reported pursuant to "Test Methods for Evaluating Solid Wastes, Physical/ Chemical Methods", incorporated by reference at Section 615.103.

Therefore, the Board will incorporate the changes suggested by IEPA under the proposed first notice definition of "Detection" as follows:

"Detection" means the identification of a contaminant in a sample at a value equal to or greater than the:

"Method Detection Limit" or "MDL", which means the minimum measured concentration of a substance that can be ~~measured as reported~~ with 99 percent confidence that the ~~true value is greater than zero~~ measured concentration is distinguishable from the method blank results under 40 CFR 136, Appendix B, ~~pursuant to 56 Fed. Reg. 3526-3597~~; incorporated by reference at Section 615.103; or

"Method Quantitation Limit" or "MQL", which means the minimum concentration of a substance that can be measured and reported according ~~pursuant~~ to "Test Methods for Evaluating Solid Wastes, Physical/ Chemical Methods", incorporated by reference at Section 615.103.

Additionally, JCAR suggested 72 changes to the Board's first-notice proposal. PC 3. In numerous cases, JCAR suggested non-substantive changes that add commas, simplify language, and correct punctuation. The Board accepts these suggestions and includes them in its second-

notice proposal. When reviewing JCAR's suggestions, the Board made a small number of conforming changes and additional clarifying changes consistent with those in its first-notice proposal. The Board does not provide additional discussion of these changes in its opinion.

Part 616

Part 616 contains the requirements and standards for new facilities located within a setback zone or regulated recharge area. JCAR suggested 69 changes to the Board's first-notice proposal. PC 3. These suggestions included adding clarifying language, and correcting punctuation and syntax. The Board accepts these suggestions and includes them in its second-notice proposal.

When reviewing JCAR's suggestions, the Board identified a scrivener's error in Section 616.209(b) dating to a 1991 rulemaking. During that earlier rulemaking, the Board intended Section 616.209(b) to "closely parallel[]" Section 620.305(b). *See Groundwater Protection: Regulations of Existing and New Activities Within Setback Zones and Regulated Recharge Areas; Groundwater Technical Standards: 35 Ill. Adm. Code 601, 615, 616, and 617, R89-5, slip op. at 42 (Dec. 6, 1991).* However, the Board inadvertently omitted 620.305(b)'s notification requirement from 616.209(b), resulting in 616.209(b)'s merger of the 30-day and 90-day language for resampling, as well as 616.209(c)'s reference to a notification requirement under 616.209(b) that is not reflected in the current rule language. Therefore, the Board proposes the following change to the Sections 616.209(b), (c), and (d) to correct the error:

Section 616.209(b), (c), and (d)

- b) Whenever preventive notification is required under subsection (a), the owner or operator of the unit must ~~shall~~ confirm the detection by resampling the monitoring well or wells. This resampling must ~~shall~~ be analyzed for each parameter found to be present in the first sample and be performed within 30 days after the date on which the first sample analyses are received. The owner or operator must provide preventative notification of the results of the resampling analyses within 30 days after the date on which those analyses are received, but no later than 90 days after the results of the first sample are received.
- c) If preventive notification is provided under subsection ~~(a)~~(b) by the owner or operator and the applicable standard has not been exceeded, the Agency must ~~shall~~ determine whether the levels for each parameter as set forth in 35 Ill. Adm. Code 620.310(a)(3)(A) are exceeded. If an exceedance ~~exceedence~~ is determined, the Agency must ~~shall~~ notify the owner or operator in writing regarding the ~~such~~ finding.
- d) Within 60 days after receiving a notification from the Agency ~~of its~~ under subsection (c), ~~Upon receipt of a finding that an exceedance has occurred,~~ the owner or operator must ~~shall~~ submit to the Agency ~~within 60 days~~ a report that includes, at a minimum, shall include the degree and extent of contamination and the measures that are being taken to minimize or eliminate ~~the~~ this contamination,

in compliance~~accordance~~ with a prescribed schedule. The owner or operator may also provide a demonstration that:

When reviewing JCAR's suggestions, the Board made several additional clarifying changes consistent with the changes in its first-notice proposal. PC 13. The Board does not provide any additional discussion of these changes in its opinion.

In six cases, the Board respectfully declines JCAR's suggested changes to its first-notice proposal. The Board explains its reason for declining these items in its responses filed as PC 13.

Part 617

Part 617 establishes the requirements and standards for regulated recharge areas. JCAR suggested 56 changes to the Board's first-notice proposal. PC 3. These suggestions included adding clarifying language, adding hyphens, and correcting punctuation. The Board accepts these suggestions and includes them in its second-notice proposal. When reviewing JCAR's suggestions, the Board made several clarifying changes consistent with the changes in its first-notice proposal. The Board does not provide any additional discussion of these changes in its opinion.

In four cases, the Board respectfully declines JCAR's suggested changes to its first-notice proposal. In these instances, the Board was not persuaded that the suggested changes genuinely clarified the rule. The Board explains its reason for declining these items in its responses filed as PC 14.

Part 618

Part 618 applies to all properties located wholly or partially within a maximum setback zone, generally, and also describes specific maximum setback zones for two community water supply wells. JCAR suggested four changes to the Board's first-notice proposal. PC 3. These suggestions included correcting punctuation and syntax. The Board accepts three of these changes and includes them in its second-notice proposal. In one case, the Board respectfully declines JCAR's suggested change to its first-notice proposal. In this instance, the Board was not persuaded that the suggested change genuinely clarified the rule. The Board explains its reason for declining this item in its responses filed as PC 15.

When reviewing JCAR's suggestions, the Board made several clarifying changes consistent with the changes in its first-notice proposal. The Board does not provide any additional discussion of these changes in its opinion.

TECHNICAL FEASIBILITY AND ECONOMIC REASONABLENESS

As noted above under "Procedural History," on September 17, 2021, the Board requested that DCEO perform an economic impact study of the Board's proposal. *See* 415 ILCS 5/27(b)

(2020). In a letter dated October 22, 2021, DCEO respectfully declined the Board's request to perform a study. No participant at either hearing testified or commented on the Board's request or DCEO's response.

In this proceeding, the Board intends to propose only non-substantive amendments that clarify the language of existing rules. The Board has carefully considered the record, particularly IEPA's responses to the Board's questions and IEPA's public comments. Based on the record then before it, the Board concluded that its first-notice proposal did not make substantive revisions that affect complying with existing rules. Accordingly, the Board found that the first-notice proposal was both technically feasible and economically reasonable. *See* 415 ILCS 5/27(a) (2020). The Board further found that these proposed non-substantive amendments would not have any adverse economic impact on the people of the State of Illinois. *See* 415 ILCS 5/27(b) (2020).

Since the Board made those findings and adopted its first-notice proposal, no addition to the record has altered those conclusions. Based on its review of the record now before it, the Board concludes that its second-notice proposal is both technically feasible and economically reasonable. The Board also again finds that these proposed non-substantive amendments would not have any adverse economic impact on the people of the State of Illinois. *See* 415 ILCS 5/27(b) (2020).

CONCLUSION

The Board concludes to propose non-substantive amendments to its public water supply rules for second-notice review by JCAR. The proposed amendments appear in the addendum to this opinion.

ORDER

The Board directs the Clerk to submit to second-notice review by JCAR the proposed amendments to its Subtitle F water pollution rules that appear in the addendum to this opinion.

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 March 2, by a vote of 4-0.



Don A. Brown, Clerk
Illinois Pollution Control Board