

JAN 18 2002

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

STATE OF ILLINOIS
Pollution Control Board

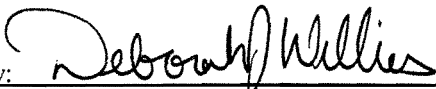
IN THE MATTER OF:)	
)	
REVISIONS TO ANTIDegradation Rules:)	R01-13
35 ILL. ADM. CODE 302.105, 303.205, 303.206,)	(Rulemaking)
AND 106.990-106.995)	
)	

NOTICE OF FILING

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board the **APPEARANCE AND RESPONSE BY THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY TO MOTIONS FOR RECONSIDERATION OF THE ILLINOIS ENVIRONMENTAL REGULATORY GROUP AND THE ILLINOIS ASSOCIATION OF WASTEWATER AGENCIES**, a copy of which is herewith served upon you.

SEE ATTACHED SERVICE LIST

ENVIRONMENTAL PROTECTION AGENCY
OF THE STATE OF ILLINOIS

By: 

Deborah J. Williams
Assistant Counsel
Division of Legal Counsel

DATED: January 17, 2002

Illinois Environmental Protection Agency
1021 North Grand Avenue East
Post Office Box 19276
Springfield, Illinois 62794-9276
(217) 782-5544

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CLERK'S OFFICE

JAN 18 2002

STATE OF ILLINOIS
Pollution Control Board

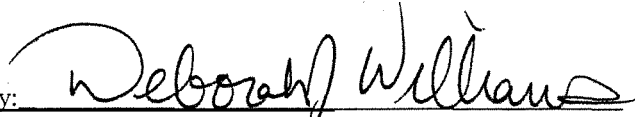
ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
)
REVISIONS TO ANTIDEGRADATION RULES:) R01-13
35 ILL. ADM. CODE 302.105, 303.205, 303.206,) (Rulemaking)
AND 106.990-106.995)

APPEARANCE

The undersigned, as one of its attorneys, hereby enters an **APPEARANCE** on behalf of Respondent,
Illinois Environmental Protection Agency.

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

By: 
Deborah J. Williams
Assistant Counsel
Division of Legal Counsel

DATED: **January 17, 2002**

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THIS FILING IS SUBMITTED ON RECYCLED PAPER

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD JAN 18 2002

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)

**RESPONSE BY THE ILLINOIS ENVIRONMENTAL PROTECTION
AGENCY TO MOTIONS FOR RECONSIDERATION OF THE
ILLINOIS ENVIRONMENTAL REGULATORY GROUP AND
THE ILLINOIS ASSOCIATION OF WASTEWATER AGENCIES**

The Illinois Environmental Protection Agency (“Illinois EPA”), by one of its attorneys, Deborah J. Williams, and pursuant to 35 Ill. Adm. Code 101.520, hereby responds to the motions for reconsideration of the Illinois Pollution Control Board’s (“Board”) Second Notice Opinion and Order in the above captioned matter filed by Illinois Environmental Regulatory Group (“IERG”) and Illinois Association of Wastewater Agencies (“IAWA”), and in support thereof states as follows:

INTRODUCTION

1. On August 30, 2000, the Illinois EPA filed the regulatory proposal titled Revisions to Antidegradation Rules and docketed as R01-13. The Board’s First Notice Opinion and Order was published on June 21, 2001. After holding another hearing on August 24, 2001 in Chicago, the Board published its Second Notice Opinion and Order in this matter on December 6, 2001.

2. On January 7, 2002, IERG and IAWA filed separate Motions for Reconsideration of the Board’s Second Notice Opinion and Order.

3. On January 8, 2002, Hearing Officer Tipsord ordered responses to these Motions for Reconsideration to be filed at the Board's Chicago office by January 18, 2002.

RESPONSE TO IERG's MOTION FOR RECONSIDERATION

The Board has articulated the standard of review for ruling on a motion for reconsideration as follows:

[T]he Board will consider factors including new evidence, or a change in the law, to conclude that the Board's decision was in error. 35 Ill. Adm. Code 101.902. In Citizens Against Regional Landfill v. County Board of Whiteside (March 11, 1993), PCB 93-156, we observed that "the intended purpose of a motion for reconsideration is to bring to the court's attention newly discovered evidence which was not available at the time of hearing, changes in the law or errors in the court's previous application of the existing law." Korogluyan v. Chicago Title & Trust Co., 213 Ill. App. 3d 622, 627, 572 N.E. 2d 1154, 1158 (1st Dist. 1992).

Broderick Teaming Company v. Illinois EPA, PCB 00-187 (June 21, 2001). *See also*, People v. Community Landfill Company, PCB 97-193 (July 26, 2001) slip. op. at 3.

In its Motion for Reconsideration, IERG has pointed to five aspects of the Board's Second Notice Opinion and Order it would like to see changed. Each of these issues was raised in at least one of the four public hearings held on this proposal or in the written comments filed with the Board. The Board's failure to adopt a Second Notice rulemaking that conforms to IERG's wish list for an Antidegradation rulemaking is not a basis for granting a Motion for Reconsideration. IERG raises no new factual issues, changes in the law, or misapplication of existing law to justify grant of its motion.

IERG outlines five concerns it has with the Board's Second Notice Opinion and Order. The first concern IERG raises is with regard to the notice provisions contained in

the Outstanding Resource Water (“ORW”) designation process which IERG wants expanded to include all potentially effected property owners and other citizens. With regard to the notice provisions, as IERG states in its motion, IERG raised this issue prior to issuance of the First Notice Opinion and during the First Notice Period. Memorandum in Support of IERG’s Motion to Reconsider (“Mem.”) at 3-4. In its Second Notice Opinion, the Board considered IERG’s comments and declined to adopt them. Second Notice Opinion (“Op.”) at 11.

Second, IERG asks the Board to reconsider its decision not to adopt IERG’s changes to the information requirements of ORW petitions. Mem. at 6. As IERG states, it has argued unsuccessfully that ORW proceedings are adjudicatory rather than regulatory and, in the alternative, that ORW petitioners should have the burden of proof in support of their proposal. The Board rejected these arguments in its First and Second Notice Opinions. Op. at 11.

Third, IERG expresses concern that the Board failed to use the language it proposed to clarify the activities that may lower the quality of ORWs. Regardless of the merits of IERG’s proposed language or the support it had from environmental groups, the Board considered the proposal and declined to adopt it in its Second Notice Opinion and Order. Op. at 5-6, 19.

Fourth, in post-hearing comments, IERG asked the Board to make changes to the language establishing when an antidegradation review is triggered. Mem. at 13. Again, the Board considered and rejected IERG’s proposal on this issue as unnecessary. Op. at 6, 20. Finally, IERG reiterated its objection to the approach taken by the Board in its First Notice Opinion and Order regarding “waters of particular biological significance.”

Mem. at 14. Again, IERG admits it raised its objection to this concept in four pages of post-hearing comments. *Id.* IERG also objects to the changes that were made by the Board in its Second Notice Opinion and Order in response to these comments. Mem. at 15. The Board's failure to adopt IERG's proposal in its Second Notice Opinion is not a basis for the Board to reconsider that opinion at this time. Op. at 9.

Like IERG, the Illinois EPA disagrees with the Board's decision to reject some of Illinois EPA's proposed changes to the First Notice version of this rulemaking, but that is not a basis to reconsider the Second Notice Opinion and Order.

RESPONSE TO IAWA's MOTION FOR RECONSIDERATION

IAWA's Motion for Reconsideration incorporates the arguments raised by IERG's motion and includes one additional legal argument. IAWA argues that the Board must withdraw its Second Notice Opinion and Order because the Department of Commerce and Community Affairs ("DCCA") did not perform an economic impact study.

IAWA states that that there is no dispute that this rulemaking has not been certified as a federally mandated rule making. Motion for Reconsideration at ¶4. A "required rule" is defined in Section 28(a) of the Environmental Protection Act ("Act") as "a rule that is needed to meet the requirements of the federal Clean Water Act, Safe Drinking Water Act, Clean Air Act (including required submission of a State Implementation Plan), or Resource Conservation and Recovery Act, other than a rule required to be adopted under subsection (c) of Section 13, Section 13.3, Section 17.5,

subsection (a) or (d) of Section 22.4, or subsection (a) of Section 22.7, or subsection (a) of Section 22.40.” 415 ILCS 5/28(a)(2000).

When the Illinois EPA files a rulemaking proposal that it believes to contain a required rule, Section 28.2(b) of the Act provides that “the Agency shall so certify in its proposal, identifying the federal law to which the proposed rule will respond and the rationale upon which the certification is based.” 415 ILCS 5/28.2(b)(2000). Under the Board’s procedural rules that were in effect prior to January 1, 2001, no specific format was established for certifying the Illinois EPA’s position that a rulemaking was federally required. The Illinois EPA was simply required, under former Section 102.121(e) to cite to the specific section of the specific federal act.¹ In its Statement of Reasons, the Illinois EPA did identify provisions in the Clean Water Act that require an antidegradation program. Statement of Reasons, pages 1 – 3 (Statutory Basis). No formal finding was ever made by the Board that the proposed changes to the existing antidegradation program regulations were or were not federally required. The Act further provides that the Board shall either accept or reject the Illinois EPA’s certification within 45 days and “if the Board fails to act within the requisite 45 day period, the certification shall be deemed granted.” 415 ILCS 5/28.2(b).

Even assuming that the regulatory proposal is not a federally required one, the Board has met all of the procedural requirements of the Act regarding an economic impact analysis. IAWA incorrectly states both that no economic impact analysis has

¹The Board’s new procedural rules more clearly identify the manner in which the Illinois EPA is expected to certify that a rulemaking proposal is federally required. *See*, 35 Ill. Adm. Code 102.202(g). With the new section 102.502, the Board also provides clear procedures for challenges to the Illinois EPA’s certification.

been done and that one is required because this is not a federally required rulemaking.

Instead, Section 27(b) of the Act provides, in relevant part:

Except as provided below and in Section 28.2, before the adoption of any proposed rules not relating to administrative procedures within the Agency or the Board, the Board shall: (1) request that the Department of Commerce and Community Affairs conduct a study of the economic impact of the proposed rules. The Department may within 30 to 45 days of such request produce a study of the economic impact of the proposed rules. . . and (2) conduct at least one public hearing on the economic impact of those new rules. At least 20 days before the hearing, the Board shall notify the public of the hearing and make the economic impact study, or the Department of Commerce and Community Affairs' explanation for not producing an economic impact study, available to the public. Such public hearing may be held simultaneously or as a part of any Board hearing considering such new rules.

In adopting any such new rule, the Board shall, in its written opinion, make a determination, based upon the evidence in the public hearing record, including but not limited to the economic impact study, as to whether the proposed rule has any adverse economic impact on the people of the State of Illinois.

415 ILCS 5/27(b).

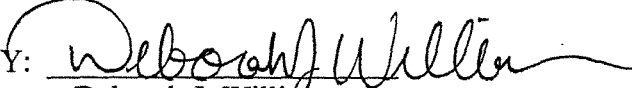
The Board met its requirement to provide a hearing on the economic impact of this rulemaking proposal and to provide, in its written opinion, a determination whether the proposed rule has any adverse economic impact on the State of Illinois. IAWA seems to conclude that since no economic impact study was performed by DCCA in this case, that this requirement has not been met. The Board met its requirement to ask for such a study to be conducted and DCCA declined (as it has done consistently since this requirement was established) and the Board also made available DCCA's explanation for not producing such a study. The Board can not be blamed for DCCA's failure to perform

such a study in this case. In addition, the Act provides DCCA the discretion to determine whether or not to perform and economic impact study.

WHEREFORE the reasons stated above, the proponent of this rulemaking proposal, Illinois Environmental Protection Agency, respectfully requests that the Motions for Reconsideration filed by Illinois Environmental Regulatory Group and Illinois Association of Wastewater Agencies be denied.

Respectfully Submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

BY: 
Deborah J. Williams
Assistant Counsel
Division of Legal Counsel

DATED: January 17, 2002

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STATE OF ILLINOIS

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) SS
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COUNTY OF SANGAMON

PROOF OF SERVICE

I, the undersigned, on oath state that I have served the attached **APPEARANCE AND RESPONSE** upon the person to whom it is directed, by placing a copy in an envelope addressed to: **SEE ATTACHED SERVICE LIST**

and mailing it from Springfield, Illinois on **January 17, 2002** with sufficient postage affixed as indicated.

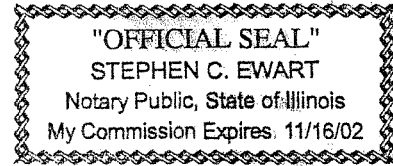
Nancy J D Lampert

SUBSCRIBED AND SWORN TO BEFORE ME

this 17th day of January 2002.

Stephen C. Ewart

Notary Public



SERVICE LIST
R01-13
JANUARY 17, 2002

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