

ILLINOIS POLLUTION CONTROL BOARD
January 24, 2002

IN THE MATTER OF:)
)
REVISION TO ANTIDegradation) R01-13
RULES: 35 ILL. ADM. CODE 302.105,) (Rulemaking - Water)
303.205, 303.206, and 102.800-102.830)

ORDER OF THE BOARD (by G.T. Girard, R.C. Flemal, N.J. Melas):

On January 7, 2002, the Board received two motions for reconsideration in this proceeding. Specifically, the Illinois Environmental Regulatory Group (IERG) and the Illinois Association of Wastewater Agencies (IAWA) filed motions asking the Board to reconsider the December 6, 2001 opinion and order sending this matter to second notice. On January 18, 2001, the Board received two responses to the motion to reconsider filed by the Environmental Groups¹ and the Illinois Environmental Protection Agency (Agency). On January 22, 2002, IERG filed a motion for leave to file a reply to the Agency's response. The Board denies the motion for leave to file reply, as the reply is not necessary to prevent material prejudice. *See* 35 Ill. Adm. Code 101.500(d).

The Board's procedural rules set forth the standard the Board uses in ruling on a motion for reconsideration. Section 101.902 provides: "[i]n ruling upon a motion for reconsideration, the 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 the context of adjudicatory cases the Board has also 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." *Citizens Against Regional Landfill v. County Board of Whiteside*, PCB 93-156 (Mar. 11, 1993), citing *Korogluyan v. Chicago Title & Trust Co.*, 213 Ill. App. 3d 622, 627, 572 N.E.2d 1154, 1158 (1st Dist. 1992). Although generally the Board finds nothing in the motions to warrant reconsideration of the December 6, 2001 opinion and order, the Board will grant IERG's motion to in part to address Section 302.105(b) as discussed below. The Board also believes it is prudent to comment on the some of the other issues raised and does so below.

DISCUSSION

Before addressing the substance of the two motions to reconsider and the responses, the Board notes that IERG moved that the Board notify the legislative Joint Committee on

¹ The Prairie Rivers Network, the Environmental Law & Policy Center, Friends of the Fox River, McHenry County Defenders and the Sierra Club all participated both individually and as a group. Therefore, when referring to their joint comments and testimony, they will be collectively called "Environmental Groups."

Administrative Rules (JCAR)² prior to January 9, 2002, that the Board would agree to an extension of the second-notice period. The Board's first scheduled meeting after receiving IERG's motion was January 10, 2002; therefore, the Board could not rule on the motion prior to January 9, 2002. However, at JCAR's request, the Board agreed to an extension of the second-notice period pursuant to Section 5-40 (c) of the Administrative Procedure Act (5 ILCS 100/5-40(c)). Therefore, IERG's motion is moot. Before addressing the specific substantive arguments in the motions to reconsider, the Board will briefly discuss the Agency's general response to the motions. Next the Board will discuss the substantive arguments in IERG's motion and follow with a discussion of IAWA's motion.

Agency's Response to the Motion to Reconsider

The Agency generally responds to both motions by pointing out the standard of review articulated in the Board's procedural rules at 35 Ill. Adm. Code 101.902. The Agency maintains that IERG raises no new factual issues, changes in the law or misapplication of existing law to justify the grant of IERG's motion. Agency Resp. at 2. The Agency points out that each of the five issues raised in IERG's motion were raised in at least one of the four public hearings held on the proposal or in written comments filed with the Board. Agency Resp. at 2. The Agency asserts that the Board's failure to adopt IERG's suggestions is not a basis for reconsideration. *Id.*

IERG'S Motion to Reconsider

In IERG's motion to reconsider, IERG asks that the Board reconsider the December 6, 2001 opinion and order and moves that the Board withdraw the second-notice opinion and reissue the Board's antidegradation regulations for first notice. IERG presents five arguments for reconsideration. First IERG opposes the Board's decision regarding notice of petitions for a rule designating an outstanding resource water (ORW). Second IERG disagrees with the Board's decision not to include a burden of proof in the rulemaking proceedings designating ORWs. Third, IERG also believes that the Board should have adopted IERG's suggested revisions in Section 302.105(b). Fourth, IERG argues that the Board was incorrect in not adding language in Section 302.105(c) recommended by IERG. Fifth, IERG disagrees with the Board's decision to continue using the phrase "waters of particular biological significance" in Section 302.105(d)(6). The Board will discuss each of these below.

Notice of Petitions for Rulemaking Designating ORWs

In the motion to reconsider, IERG reasserts the idea from IERG's final comments (PC 52) that a petition for ORW designation should be served on "any and all potentially affected persons" along the proposed stream segment. IERG Mot. at 2. In response to IERG's argument, the Agency notes that IERG raised this issue prior to the adoption of the Board's first-notice opinion and order and again during the first-notice period. Agency Resp. at 3. The Agency notes that the Board considered IERG's position and declined to adopt the suggestion. *Id.* The

² JCAR is a legislative committee authorized by the Administrative Procedure Act (5 ILCS 100/1-1 *et seq.*) to review all rulemakings in the State.

Environmental Groups assert that IERG continues to seek prohibitively burdensome requirements on petitions for ORWs and the change should again be rejected. Groups Resp. at 3.

The Board extensively addressed IERG's concerns regarding notice of ORW petitions in the first-notice opinion and order (Revision to Antidegradation Rules: 35 Ill. Adm. Code 302.105, 303.205, 303.206, and 102.800-102.830 R01-13 slip. op. at 20-24 (June 21, 2001)) and again in the second-notice opinion and order (Revision to Antidegradation Rules: 35 Ill. Adm. Code 302.105, 303.205, 303.206, and 102.800-102.830 R01-13 slip. op. at 10-11 (Dec. 6, 2001)). In both instances the Board pointed out that notice of Board rulemakings are provided in several forums including notice of hearings in newspapers in the area affected and *Illinois Register* publication. Furthermore, the Board's website includes texts of proposed rules. In the second-notice opinion the Board agreed to "ask the Agency to provide information such as the names of NPDES permit holders and applicants along the proposed water body or water body segment. The Board will send copies of Board opinion and orders to those persons on the notice list." Revision to Antidegradation Rules: 35 Ill. Adm. Code 302.105, 303.205, 303.206, and 102.800-102.830 R01-13 slip. op. at 11-12 (Dec. 6, 2001). The Board believes that this extensive commitment as well as other rulemaking notice requirements will place property holders and interested persons on notice of any potential proposal for ORW designation. Furthermore, the Board believes that it would be inappropriate to require a petitioner to serve copies of petitions, which could be quite lengthy, on the extensive list of persons proposed by IERG.

Burden of Proof in rulemakings designating ORWs

IERG asks the Board to reconsider the Board's decision not to include a burden of proof in the requirements for petitions for ORWs. IERG Mot. at 6. The Agency again notes that this issue was raised previously and the Board rejected IERG's position. Agency Resp. at 3. The Environmental Groups also argue that IERG's position should be rejected. Groups Resp. at 5. The Environmental Groups argue that the petitions for ORW designations will need to be supported at hearing and that should be sufficient. Groups Resp. at 4-5.

The Board extensively addressed IERG's concerns regarding a burden of proof in rulemaking proceedings to designate ORWs in the first-notice opinion and order (Revision to Antidegradation Rules: 35 Ill. Adm. Code 302.105, 303.205, 303.206, and 102.800-102.830 R01-13 slip. op. at 20-23 (June 21, 2001)) and again in the second-notice opinion and order (Revision to Antidegradation Rules: 35 Ill. Adm. Code 302.105, 303.205, 303.206, and 102.800-102.830 R01-13 slip. op. at 11 (Dec. 6, 2001)). IERG has withdrawn the request that ORWs be designated through an adjudicatory process but still asserts that a burden of proof should be included in the rulemaking process. The Board disagrees. The rulemaking process is one of information gathering where any interested person may present relevant information. The Board's responsibility in the rulemaking process is to weigh the information and determine if the provisions of the Environmental Protection Act (Act) allow the rule to be adopted. The Board will not require that a proponent in any rulemaking meet a burden of proof. By rule the proponent must present certain information or the rulemaking will be dismissed (*see generally* 35 Ill. Adm. Code 102) and that is a sufficient burden.

Section 302.105

IERG maintains that the provisions of subsection 302.105(b)(3)(B) are inconsistent with the intent of Section 302.105(b)(1) and the Board should have adopted the language agreed upon by the Environmental Groups and IERG. IERG Mot. at 9, 10. As proposed at second notice, Section 302.105(b)(1) provides:

- 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:
 - A) Activities that result in short-term, temporary (i.e., weeks or months) lowering of water quality in an ORW; or
 - B) Existing site stormwater discharges that comply with applicable federal and State stormwater management regulations and do not result in a violation of any water quality standards.

As proposed at second notice, Section 302.105(b)(3) provides:

- 3) Any activity listed in subsection (b)(1) 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
 - C) The improvement could not be practicably achieved without the proposed increase in pollutant loading.

IERG suggests that Section 302.105(b)(3) be amended as follows:

- 3) Any activity listed in subsection (b)(1) or any other proposed increase in pollutant loading to an ORW must also meet the following requirements:
 - A) All existing uses of the water will be fully protected; and
 - B) Except for activities falling under one of the exceptions provided in subsection (b)(1)(A) or (B) above,
 - i) The proposed increase in pollutant loading is necessary for an activity that will improve water quality in the ORW; and

- €ii) The improvement could not be practicably achieved without the proposed increase in pollutant loading.

The Agency states that regardless of the merits of IERG's language proposed prior to the Board's adoption of second notice and repropose here, the Board has already considered the arguments and declined to make the change. Agency Resp. at 3. The Environmental Groups indicate that the Board's opinion and order "makes clear that there is no substantial issue relating to [Section] 302.105(b)." Groups Resp. at 5. The Environmental Groups state "however, the rule language could be clearer" and the Environmental Groups continue to support the language change proposed prior to second notice. Groups Resp. at 5-6.

The Board is persuaded that the language change suggested by IERG and supported by the Environmental Groups clarifies the intent of the rule. The Board agrees that this is a minor technical change. Therefore, the Board will proceed with the change as suggested by IERG and supported by the Environmental Groups.

Section 302.105(c)

IERG disagrees with the Board's decision not to include language in the rule to clarify when an antidegradation review will take place. IERG asserts that permit applicants are entitled to details determining when the Agency will conduct an antidegradation review. The Agency again points out that the Board considered IERG's arguments in the second-notice opinion and order and the Board rejected the arguments. Agency Resp. at 3. The Environmental Groups indicate that the Environmental Groups had overlooked the language proposed by IERG prior to second notice. Groups Resp. at 6. The Environmental Groups assert that the Board should reject the language again. *Id.*

The Board appreciates IERG's position. However, IERG, in the comments which originally suggested the language at issue be added, noted that IERG's intent was to explicitly state that which was implicit in the rule. PC 52 at 8. The Board declined to make the change because the Board found the rule to be clear and additional clarification in the rule would lead to repetition in the rule. Nothing in IERG's current argument alters the Board's finding that Section 302.105(c) is clear.

Section 302.105(d)(6)

IERG objects to the inclusion of the phrase "waters of particular biological significance" in the rule. IERG incorporates the arguments from its public comment 52 and adds some additional arguments regarding economic impact because of the phrase. The Agency again points out that the Board considered IERG's arguments in the second-notice opinion and order and the Board rejected the arguments. Agency Resp. at 3. The Agency maintains that the Board's failure to adopt IERG's suggestion is not a basis for reconsideration. Agency Resp. at 4. The Agency further indicates that the Agency also disagrees with the Board's decision to reject some of the language suggested by the Agency in this rulemaking; however that is not a basis to reconsider the second-notice opinion and order. *Id.*

The Environmental Groups assert that the language IERG opposes represents a compromise. Groups Resp. at 8. The Environmental Groups point out that the language does not determine when new pollution affecting waters of biological significance can be permitted, but instead indicates that such pollution cannot be permitted through the general permitting process. *Id.* The Environmental Groups opines that a finding by the Agency that new pollution cannot be allowed under a general permit does not mean the pollution cannot be permitted, only that the public notice and other protections afforded for normal permitting is required. Groups Resp. at 8-9.

The Board sees nothing new in IERG's arguments. The Board weighed the comments of IERG with those of the Environmental Groups (who wanted to keep the phrase "waters of particular biological significance") in an attempt to reach a compromise on this issue. With the change to the rule and the Board's discussion in the second-notice opinion and order, the Board did indeed reach a compromise by clarifying the phrase "waters of particular biological significance".

Conclusion

As stated above, in ruling on a motion for reconsideration, the 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. IERG's motion has persuaded the Board that the language suggested in Section 302.105(b) will clarify the rule. Therefore, the Board grants the motion to reconsider as to Section 302.105(b). However, IERG has not presented the Board with new evidence or a change in the law. Therefore, as to the remaining issues in the motion to reconsider the motion is denied.

IAWA's Motion to Reconsider

IAWA indicates that it shares IERG's concerns but in addition has concerns that an economic impact analysis was not performed. IAWA moves that the Board withdraw the second-notice opinion and return to first notice and require that an economic impact analysis be performed. In support of this IAWA points to testimony at the final hearing.

The Agency and the Environmental Groups both state that the Board complied with all the procedural requirements for economic impact analysis in this rule. Agency Resp. at 5, Groups Resp. at 10. The Environmental Groups maintain that an economic impact analysis was not necessary for this rule because there is a preexisting section in the Board's rules which already requires an antidegradation review, thus there should be no new economic burdens on permit applicants. Groups Resp. at 10.

Although an economic impact analysis was not conducted on this rulemaking, the Board did consider economic information prior to proceeding with the rule proposal. In the first-notice opinion and order the Board noted that Agency's position on the economic reasonableness of the proposal. Revision to Antidegradation Rules: 35 Ill. Adm. Code 302.105, 303.205, 303.206, and 102.800-102.830 R01-13 slip. op. at 5 (June 21, 2001). In addition, the Board stated that using the rulemaking process for the designations of ORWs would allow participants to

comment on the economic reasonableness of ORW designations. *Id.* at 21. Furthermore, the Board specifically discussed economics and concluded:

In this proceeding the Board has received 52 public comments and held four hearings. The only issue of economic concern has been the impact of declaring a water an Outstanding Resource Water. As the Board will be using rulemaking procedures for those designations, the economic impact of such a designation will be examined with each proposal. The remaining evidence in this record indicates that the rule is economically feasible and technically reasonable and the Board so finds. Revision to Antidegradation Rules: 35 Ill. Adm. Code 302.105, 303.205, 303.206, and 102.800-102.830 R01-13 *slip. op.* at 12-13 (Dec. 6, 2001).

The Board will now address the specific arguments of the IAWA and begins with the testimony at the final hearing. The Board reviewed the testimony cited by IAWA and notes that the concerns are generally about economic impact and designating ORW's. As stated above, this rulemaking does not designate an ORW; rather the rule merely puts in place the rulemaking procedures for designating an ORW. The economic impact from designating a stream as an ORW will depend on the characteristics of each individual stream. For example, the economic impact of ORW designation for a headwater stream running through the Shawnee National Forest may be economically positive because of increased recreational activity. However, if a segment of the Illinois River were proposed for ORW status, the economic impact may be overwhelmingly negative. In either case, the economic impact could only be determined by examining the economic activities along each stream segment individually. The Board's rules adopted at second notice anticipate that all ORW proposals will consider economic impacts for each stream segment individually. Thus, the legitimate concerns regarding the economic impact of designating an ORW are premature.

As required by Section 27(b) of the Act, the Board requested that the Department of Commerce and Community Affairs (DCCA) conduct an economic impact study on the proposed rule. Section 27(b) of the Act provides, in part, that:

Except as provided below and in Section 28.2 [federally required rules], before the adoption of any proposed rules not relating to administrative procedures within the Agency or the Board, or . . . the Board shall:

1. request 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. ***
2. conduct a least one public hearing on the economic impact of those new rules. 415 ILCS 5/27(b) (2000).

Section 27(b) of the Act allows DCCA to choose to perform an economic impact analysis. DCCA notified the Board that DCCA would not be performing an economic impact analysis on this rulemaking.

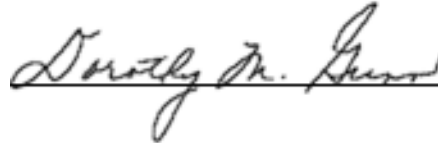
IAWA asserts that the Act requires that an economic impact study be performed prior to adoption of the rule. IAWA Mot. at 2. Pursuant to Section 27(b) of the Act the Board shall request an economic impact study and DCCA may produce a study. However, the Board cannot require DCCA to perform an economic impact analysis. The Board requested that a study be done, and held a hearing on DCCA's decision. Thus, the Board has proceeded with the statutory requirements for economic impact studies and the Board may proceed with the rule. Furthermore as noted above, the Board did consider economics in developing the proposed rule and found the rule was economically reasonable. Therefore, the Board denies the IAWA motion to reconsider.

CONCLUSION

After reviewing the motions and responses in this proceeding, the Board grants IERG's motion to reconsider in part and will proceed with the suggested language change offered by IERG to Section 302.105(b)(3). However, the Board denies IERG's remaining motion to reconsider and denies IAWA's motion to reconsider the December 6, 2001 opinion and order. The further denies IERG's motion for leave to file a reply as a reply is not necessary to prevent material prejudice.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the Board adopted the above order on January 24, 2002, by a vote of 7-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", is written over a horizontal line.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board