ILLINOIS POLLUTION CONTROL BOARD
April 4, 1996

IN THE MATTER OF:	)	
	)	
PROPOSED AMENDMENTS TO 35 ILL.	)	R92-8
ADM. CODE SUBTITLE C (WATER	)	(Rulemaking - Water)
TOXICS AND BIOACCUMULATION)	)	

Proposed Rule. Dismissal Order.

OPINION AND ORDER OF THE BOARD (by R.C. Flemal):

On July 21, 1992 the Illinois Chapter of the Sierra Club, Citizens for a Better Environment, Lake Michigan Federation, and the McHenry County Defenders (Joint Proponents) filed a proposal in which they asked this Board to consider adoption of a series of amendments intended to improve the water quality of the State of Illinois. An amended proposal was filed on June 25, 1993.

This matter has now been through several public hearings and a "negotiation" phase. In addition, it has engendered an unusually large number of motion pleadings. Since August, 1995 this record has been under consideration by this Board.

After substantial consideration, and for the reasons given below, the Board today declines to proceed with this proposal. The docket will accordingly be closed.

OVERVIEW

The Joint Proponents have presented a proposal that contains a range of water quality management elements, including modification of the State's allowed mixing and site-specific rule policies, greater focus on controlling bioaccumulative pollutants and management of nonpoint water pollution, and promotion of pollution prevention and watershed planning. The expressed intent is to reduce the discharge of toxic and persistent pollutants from point sources, establish water quality standards for pollutants associated with nonpoint sources, and develop effective plans for limiting pollution in watersheds seriously affected by nonpoint water pollution. (Joint Proponents 6/8/94 at 2.)[1] To this end, adoption of the proposal would

[1] Citation to the various pleadings in this record are in the form: author, date of filing with the Board, and (where appropriate) page number.

significantly amend the Board's existing water quality regulations at 35 Ill. Adm. Code 301, 302, 304, 306, and also would open a new Part 313 to address watershed planning.

During the first phase of this proceeding, which occurred during the first half of 1993, the Board held five hearings[2], at which the Joint Proponents explained the intent of their proposal. Two additional days of hearing devoted to the economic impact of the proposal were held in the fall of 1994. Much of the intervening period was devoted to informal meetings organized by the Illinois Environmental Protection Agency (Agency) for the purpose of exploring areas of possible common ground between the Joint Proponents and the many other interested persons.

In the ordinary course of events, the hearings at which the Joint Proponents presented their position would have been followed by other hearings at which the Agency, plus other interested persons, would have made a record of their views of the proposal. Instead, the Board has received motions from the Agency and several other participants requesting that parts or all of this proposal be dismissed without additional hearings. These motions, and the Joint Proponents response, are currently pending before the Board, and serve, along with the Board's own perspective and expertise, as the basis for today's action.

PROCEDURAL HISTORY

The Joint Proponents filed their initial proposal on July 21, 1992. The Board issued an order accepting the proposal for hearing on September 3, 1992 after the Joint Proponents had addressed certain deficiencies identified in an earlier Board order dated August 13, 1992. On December 1, 1992 the hearing officer issued an order scheduling hearings on January 22, March 4, and March 5, 1993. The order also established deadlines for prefiling testimony and questions.

The first hearing was held on January 22, 1993. After the completion of the first hearing, the following participants filed motions requesting that the Board stay proceedings: Acme Steel Co, et al. (2/3/93); Illinois Environmental Regulatory Group (IERG) (2/22/93); and GE Chemicals, Inc. (2/24/93). Responses to these motions were filed by the Joint Proponents (2/16/93 and 2/23/93) and the Agency (2/24/93). On February 25, 1993 the Board issued an order noting its intent to proceed with the hearings as scheduled, but the Board withheld ruling on the motions to stay proceedings. The remaining two previously-scheduled hearings and two additional hearings were held on March 4 and 5, and April 14 and 15, 1993, respectively.

On June 6, 1993 the Joint Proponents filed a motion for extension of time to file an amended proposal and answers to questions not addressed at hearings. The Joint Proponents submitted an amended proposal, statement of reasons, written answers to questions, and a motion for leave to file instanter on June 25, 1993.

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[2] The Board wishes to extend its appreciation to the hearing officer in this matter, Senior Attorney Kathleen Crowley, for her many efforts in guiding this proceeding.

The Joint Proponents filed motions: to postpone the hearing schedule (8/11/93) and for continuance of the hearing schedule (11/9/93). The hearing officer granted the Joint Proponents' motion to defer hearings by an order dated December 10, 1993. On January 27, 1994 the Joint Proponents filed another motion for continuance of hearing until March 15, 1994. This motion was granted by hearing officer order dated February 25, 1994.

On March 15, 1994 the Joint Proponents filed a status report noting that meetings with the Agency and other interested persons had not resulted in agreement, and accordingly requested that hearings before the Board resume. By the same filing, the Joint Proponents moved for extension of time to file economic testimony and suggested hearing dates. This motion was granted by the hearing officer on March 25, 1994. The Agency filed a motion for clarification of record on April 4, 1994.

The Joint Proponents filed economic testimony and a motion for leave to file instanter on April 11, 1994. They also filed a response to the Agency's motion for clarification, and a motion for leave to file instanter on April 22, 1994. The Board issued an order granting the Agency's motion for clarification on May 5, 1994. On the same day, the hearing officer granted Joint Proponents' motion to resume hearing. On June 16, 1994 Joint Proponents filed technical feasibility testimony and a motion for leave to file instanter. The hearing officer issued an order on September 2, 1994 scheduling a hearing for September 28, 1994 to consider the technical feasibility and economic reasonableness of the proposed amendments.

On September 9, 1994 IERG filed a motion for continuance of hearing "for a minimum of 90 days". The Joint Proponents filed a response in opposition on September 14, 1994. Motions in support of IERG's request for continuance were filed on September 14, 1994 by the Chemical Industry Council of Illinois (CICI), the Illinois Fertilizer and Chemical Association (IFCA), and the Illinois Steel Group (ISG). On September 12, 1994 the Agency filed a statement that it was prepared to proceed to hearings. However, the Agency did not specifically object to a continuance of hearings. On September 15, 1994 the Board denied the motion for continuance of hearing. Hearings on economic and technical feasibility were held on September 28 and 29, 1994.

In order to provide the Joint Proponents an opportunity to address certain unresolved issues, the hearing officer issued an order on October 3, 1994 setting deadlines for the participants to file written questions, and the Joint Proponents to provide written answers. The order also established December 23, 1994 as the deadline for written request for hearing. Written questions were submitted by IFCA (10/21/94), the Illinois Farm Bureau (IFB) (11/1/94), GROWMARK, Inc. (11/1/94), IERG (11/1/94), and Gardner, Carton and Douglas (GCD) (11/1/94). The Joint Proponents submitted answers to written questions on December 5, 1994. IERG filed a request for hearing on December 22, 1994 based on the contention that the Joint Proponents' answers were not responsive to many of the questions posed by the hearing participants. On December 27, 1994 IFCA and CICI also filed requests for hearing. The Joint Proponents filed their response on January 17, 1995. On January 26, 1995 the Board denied the participants' request for hearing to address unresolved issues and directed the hearing officer to

expeditiously schedule hearings at which the participants in the rulemaking other than the proponents could present testimony in response to the record made by the Joint Proponents.

Before the hearing officer could schedule any hearings pursuant to its order of January 26, 1995, the Board received a number of filings requesting additional time to prepare for hearing and moving the Board to strike or otherwise rule on various aspects of the proposal in advance of any additional hearings. The filings include: IFCA's Motion to Conform Rule to Record and Law prior to first notice (2/24/95); IERG's Motion to Strike (3/7/95); CICI's Motion to Strike (3/8/95); IFCA's Statement in Support of Motion to Strike (3/13/95); Agency's Motion to Strike (3/16/95); IERG's Motion to Dismiss (5/5/95); CICI's Motion to Dismiss (5/9/95); ISG's Statement in Support of IERG and IEPA Motions to Strike and IERG Motion to Dismiss (5/9/95); IERG Motion to Supplement Record (5/11/95); GCD Statement in Support of IERG 5/11/95 Motion (5/23/95); Joint Proponents' Response to Motions to Strike/Dismiss (6/8/95); IERG Reply to 6/8/95 Response (6/22/95); ISG Reply (6/22/95); IFCA Reply (6/28/95); Joint Proponents' Motion to File Instanter & Motion to Correct Misrepresentations (7/3/95); ISG Response to Joint Proponents' 7/3 Motion (7/11/95); Agency Response to 7/3 Motion & Motion to File Instanter (7/17/95); GCD Response to 7/3 Motion and Motion to File Instanter (7/21/95); and IERG Response to 7/3 Motion & Motion to File Instanter (7/24/95). It is these filings that constitute the pending motions before the Board[3].

ANALYSIS

The record in this case occupies roughly eight feet of shelf space (including hearing transcripts and 94 exhibits and group exhibits), making an exhaustive summary of the record and arguments here impractical.

To avoid burdensome repetition, we will not follow our usual practice of presenting a detailed outline of the proposal, followed by a detailed outline of all arguments, followed by our analysis on each point. Instead, we will generally discuss each of the topic areas in the proposal, discuss the various arguments for and against continuing with that component of the proceeding, and explain the reasons for our decisions.

Moreover, before looking at each topic area, it is instructive to review several general considerations within which the Board must frame today's decision. Among these are:

(1) The Board is, as are the Joint Proponents, heedful of our need to keep moving forward with our efforts to maintain and foster an improved environment. The Board, and the State as a whole, is constantly reviewing strategies to this end, and pursuing those which have the best promise. Axiomatic is that a decision to not move forward with a particular strategy is a decision only against that particular strategy at this time, and not a decision against achieving environmental progress.

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[3] All outstanding motions to file instanter and to supplement the record associated with these filings are hereby granted.

(2) Many of the initiatives that the Joint Proponents would have the Board mandate under the instant proposal are under way, and in some cases well-advanced, in other arenas. There are, for example, major pollution prevention programs underway at the federal, State, and private levels; the problems associated with bioaccumulative substances and strategies for their management are under continuing review by USEPA and the Agency, as well as many private and government researchers; and Illinois has already in progress a large watershed management program. The Board must be considerate of these efforts, including consideration of whether any proposal before the Board would have the net effect of retarding rather than advancing these initiatives.

(3) In the area of environmental management of water, there is a particular process already in place that works towards assuring that regulations are promulgated when they become justified by new research and technology. This is the triennial review process mandated under the Clean Water Act.

(4) Much of current environmental regulation, including most of the Board's regulations, are of the command and control variety. The Board must be mindful, however, of the strong societal desire to give opportunity, where possible, to incentive-based environmental management.

Pollution Prevention

Proponents' Explanation. Joint Proponents contend that the ability "to restore, maintain and enhance the purity of the waters of this State [Act at Section 11(b)]" can be attained only if a search for alternatives to discharges of toxic pollutants becomes the standard practice. (Joint Proponents 6/8/94 at 4.) Moreover, the Joint Proponents assert that preventing pollution at the source instead of attempting to deal with it after it has been created is the only way to actually solve the State's environmental problems. (Testimony of K. Greene at 4.) To this end, Joint Proponents propose requiring that dischargers evaluate pollution prevention alternatives as a prelude to obtaining discharge permits. Moreover, Joint Proponents propose that dischargers to surface waters and certain pretreaters be required to file a summary of pollution prevention findings with the NPDES permit or pretreatment approval application.

Suggested Dismissal Grounds. All moving participants argue that the pollution prevention mandate advocated by the Joint Proponents is in conflict with existing legislation: the 1989 Toxic Pollution Prevention Act (TPP Act) (415 ILCS 85/1 *et seq.*) and the 1992 Illinois Pollution Prevention Act (IPP Act) (415 ILCS 115/1 *et seq.*). IERG also alternatively argues that, if the Board should find that it does have authority to regulate notwithstanding these provisions, that we should "refrain from promulgation of regulations in the area of pollution prevention until such time as the General Assembly has reviewed the findings of the [IPP Act - established Pollution Prevention Advisory] Council and indicated its belief that action in the area was warranted". (IERG 3/7/95 at 25-26.)

The Board also notes that a significant portion of the discussion regarding the merits of the Joint Proponents' pollution prevention proposal is directed to the circumstances under which the "best degree of treatment" (BDT) standard applies to dischargers. (Agency 3/16/95 at 10-11 and 7/17/95 at 1-2; IERG 3/7/95 at 18-26 and 6/22/95 at 5-8; CICI 5/9/95; ISG 5/9/95; GCD 5/23/95 and 7/3/95 at 1-4; and Joint Proponents 7/3/95 at 1-3.) Joint Proponents postulate that BDT does or should apply to all persons currently discharging contaminants directly or indirectly into the waters of the state. The Agency and the other moving participants parse the existing rules as requiring BDT only when a permitted discharger requests a mixing zone or ZID from the Agency pursuant to Section 302.201, or when a permitted discharger requests to integrate its waste streams pursuant to Section 304.102 (see, e.g., Agency 7/17/95 at 1). The difference in interpretation is critical if the proposal is to be adopted, since the Joint Proponents' interpretation would place a much larger number of dischargers under the pollution prevention mandate.

Decision. The issue before the Board is not whether pollution prevention is good or bad. Pollution prevention is undisputedly one of the most essential elements in maintaining environmental quality. Rather, the issue is whether the particular pollution prevention program advocated by the Joint Proponents constitutes the best, most effective way to maximize the magnitude and consequences of pollution prevention.

Two pollution prevention acts, the TPP Act and the IPP Act, that are already in existence establish a broad philosophical and operational framework for promoting pollution prevention in Illinois. The 1989 TPP Act has as its stated purpose:

> To reduce the disposal and release of toxic substances which may have adverse and serious health and environmental effects, to promote toxic pollution prevention as the preferred means for achieving compliance with environmental laws and regulations, to establish State programs that provide high-level attention to toxic pollution prevention policy initiatives, to integrate existing regulatory programs to promote toxic pollution prevention, and to stimulate toxic pollution prevention strategies by industry.

The TPP Act also created a Toxic Pollution Prevention Fund to finance activities mandated for the Agency (Toxic Pollution Prevention Program) and the Hazardous Waste Research and Information Center (Toxic Pollution Prevention Assistance Program). The TPP Act further created a voluntary program whereby any person could seek Agency approval of a toxic prevention innovation plan utilizing innovative production processes.

Among other matters, the IPP Act enumerates findings of the General Assembly as regards the prevention of pollution. The findings include statements regarding the values of pollution prevention (*i.e.*, "that such pollution prevention opportunities may offer significant savings through reduced raw materials, insurance and pollution control costs, ..."). The findings also note various directives to the State to help promote pollution prevention and to look for pollution prevention alternatives. The IPP Act also articulates the policy of the State as embracing the concept of reducing pollution and describes a hierarchy for different means of

implementing prevention techniques; it does not, however, mandate the performance of pollution prevention.

The IPP Act goes on to establish the Pollution Prevention Advisory Council (Council). The Council is charged with evaluating the adequacy of pollution prevention programs, to consider other approaches to pollution prevention, and to report its findings and recommendations to the Governor and General Assembly. The Council is now in the process of finalizing its recommendations, which it expects to deliver to the Governor and General Assembly within the next two to three months. Because the IPP specifically directs the Council to propose its recommendations for pollution prevention programs first to the General Assembly and the Governor, the Board believes that the IPP Act clearly envisions that the General Assembly and Governor will decide which, if any, of the recommendations of the Council will be proposed into law.

Given the active pollution prevention programs already present in the State, plus reasonable expectation that the recommendations of the Council will provide for additional State pollution prevention initiatives, we believe that it would be inappropriate at this time for this Board to entertain an independent and uncoordinated pollution prevention mandate.

Since the Board does not intend today to adopt the Joint Proponents' mandatory pollution prevention program, the issue of whether that program applies to dischargers subject to BDT requirements, or to some other group, need not be addressed.

Allowed Mixing, Zone of Initial Dilution (ZID), and Bioaccumulation

Proponents Explanation. Joint Proponents would disallow the use of mixing where effluents contain bioaccumulative chemicals, and entirely prohibit the establishment of ZIDs in permits. Joint Proponents assert that allowed mixing may be appropriate for chemicals that degrade, but is not appropriate for chemicals that persist in the environment or build up in the food chain. When bioaccumulative and persistent toxicants are included in an effluent, the contention is that their adverse effects on the ecosystem are not abated by mere dilution.

Regarding ZIDs, the Joint Proponents observe that the existing rules allow exceedence of acute aquatic toxicity standards within a ZID. Thus, they contend that the ZID provision permits "dead zones" within the stream. The Joint Proponents believe that prohibition of ZIDs is necessary to protect aquatic life in Illinois waters.

As to Section 302.663, bioaccumulation is a process by which organisms in the food chain, up to the top avian and terrestrial predators, absorb and retain water-borne chemicals in their tissues at greater concentrations than found in their environment. In deriving wildlife protection and human health criteria, the Joint Proponents have proposed the use of a bioaccumulation factor (BAF) for a substance as a replacement for a bioconcentration factor (BCF). The existing regulations for deriving water quality criteria at 35 Ill. Adm. Code 302.Subpart F prescribe the use of BCF, which accounts for uptake of pollutants into an aquatic organism only through absorption. The Joint Proponents contend that use of BAF, which also

accounts for uptake from food and other ingested sediment, will provide a more accurate indication of the impact of a pollutant in an ecosystem. (Testimony of R. Ginsberg at 5.) The proposal also includes procedures for deriving BAFs.

Suggested Dismissal Grounds. IERG, CICI, ISG, and GCD essentially argue that the proposal is an improper "post-hoc" attack on the allowed mixing rules adopted in Docket R88-21 Dockets A & B In the Matter of Amendments to Title 35 Subtitle C (Toxics Control) (January 25, 1990 and June 21, 1990). These participants cite to the extensive record developed in R88-21 on these points, and suggest that the testimony of Dr. Robert Ginsberg and Glenda Daniels presented in this proceeding by Joint Proponents simply does not justify revision of the recently adopted rules. (IERG 5/5/95 at 9-31; CICI 5/9/95; ISG 5/9/95 at 2-4; GCD 5/23/95).

Decision. The Board finds nothing improper in revisiting even recently adopted rules to keep pace with new research and technology. The information presented by the Joint Proponents certainly indicates that concern has heightened over time about the effect of bioaccumulative pollutants (see, e.g. Exh. 35-40), and as the Joint Proponents point out, the USEPA guidance document (Technical Support Documents for Water Quality Based Toxics Control, September, 1995) upon which the R88-21 rules were based, expressed some concerns about bioaccumulative pollutants (Joint Proponents 6/8/95 at 4). USEPA has itself updated this technical support document (TSD), issuing a revision in 1991. The March, 1991 TSD continues to reflect USEPA concerns about bioaccumulation, as it continues to advise states to consider this as a factor in considering whether to allow mixing.

However, as IERG points out, USEPA does continue to support use of mixing and ZIDs and water quality management tools. In this instance, the Board finds that the Joint Proponents' general concerns have outpaced the availability of scientific evidence to support their suggested approach of an outright ban on ZIDs. Any specific concerns can be expressed on a case-by-case, site-by-site basis under our existing rules. Moreover, while we will not proceed to additional hearings with this portion of the proposal now, Joint Proponents are reminded that all new research, emerging issues, and technological developments regarding control of water pollution are routinely revisited in the context of the state's federally-mandated triennial review of its water rules. This process will continue, and will certainly keep in focus the issues of both allowed mixing and bioaccumulation.

Biological Integrity or Biological Standards

Proponents' Explanation. The Joint Proponents believe that Illinois' management programs addressing nonpoint source contamination are inadequate. They contend that the State's regulatory programs lack in-stream water quality standards for the various methods of managing nonpoint water pollution. (Testimony of S. Apfelbaum at 2.) To address this deficiency, the Joint Proponents have proposed a new Section at 35 Ill. Adm. Code 302.313, which would set forth biological integrity standards. Joint Proponents believe that such standards are an important addition to the water quality standards as an indicator of long-term or

ecosystemic effects on a water system. (See Joint Proponents 6/8/95 at 5, and Ex. 1-Attach. C, L, M, and F, and Ex. 22).

Joint Proponents would also add to the Board's water quality regulations a narrative standard stating that water resources of the State must be preserved, protected and restored in their most ecologically achievable condition. They would also require that the Agency propose to the Board within two years of the effective date of the proposed amendments numeric biological standards for Illinois water resources. The narrative standard at Section 302.313(a) requires the Agency to determine the condition of the State's water resources using the combined measures of physical, chemical, and biological characteristics of each surface water type. The Joint Proponents believe that the information regarding the State's water resources will be useful to the Agency in developing numeric biological standards. (Testimony of M. Ross at 10.)

Suggested Dismissal Grounds. Only the Agency has moved to strike this portion of the proposal. The Agency's challenge does not go to lack of statutory authority, but instead goes to the timing of enactment of any mandate for biocriteria. The Agency believes that mandatory biocriteria are:

> . . . premature, considering the Agency's obligations to USEPA under the Clean Water Act. They also call upon the Board to mandate that the Agency devote considerable resources to aspects of the biological standards development that may prove inconsistent with program requirements established pursuant to the Clean Water Act.
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> The federally mandated triennial review of water quality standards has been discussed with USEPA and it was agreed that narrative biocriteria as Illinois standards would constitute one of the goals for the next triennial review proposal (following the pending triennial review proposal that has been designated by the Board as R94-1). The biocriteria would be based in part on guidance documents distributed by USEPA to aid states in establishing both biocriteria standards and the necessary monitoring programs supportive of biocriteria. Monitoring programs are essential in enabling the Agency to assess compliance with a biocriteria standard as well as to establish a baseline of ecosystem quality information. Unlike conventional standards, biocriteria require a strong understanding of current conditions as well as what are considered the best reference conditions in existence for a particular region.
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> Subpart (a) of proposed Section 302.313 could be interpreted as directing the Agency as to what type of numeric standards are intended under the mandate of subpart (b). It could also be interpreted as directing the Agency to gather data rather than to regulate a certain attribute in the waters of the State. Since other obligations such as the triennial review process are in place to assure that Illinois has biocriteria in place in the near future, the Joint Proponents' rule would serve only to provide a cumbersome model to follow in the proposed

narrative standard and to set an unrealistic and perhaps unnecessary deadline for numeric biocriteria.

(Agency 3/16/95 at 6-7).

Decision. Clearly, the Agency's objection is one of resource prioritization. The Agency has committed to USEPA that it will work towards narrative biocriteria as a part of the triennial review process. As a result of the passage of time since the Joint Proponents' 1992 filing, the time for the Agency to honor its federal commitment is nearly upon us. Under these circumstances, the Board agrees that it would be unwise for all concerned to proceed with this portion of the proposal in this docket at this time. The Board expects to see an Agency regulatory proposal made in a timely fashion, and welcomes the Joint Proponents' participation in such proceeding.

Watershed Planning

Proponents' Explanation. Joint Proponents believe that watershed planning is essential for reducing nonpoint water pollution. The petitioners base their conclusion on the 1990-91 Illinois Water Quality Report. Overall, the intent of the proposal is to require the Agency "to take the lead in developing watershed plans, [and to] involve other interested parties [and local governments] to the greatest extent possible" in voluntary watershed planning. (Statement of Reasons 6/25/93 at 6.)

The proposed planning requirements require watershed plans for those watersheds found to exceed water quality standards or biological standards. The watershed plan is intended to identify existing and potential problems and opportunities for protection and management of water and related land resources, and then to develop objectives to carry out an appropriate plan of action. Once an adversely-affected water body is identified, the proposal requires the Agency to determine a total maximum daily load (TMDL) for the watershed. The Agency is required to use the TMDL to determine and allocate the maximum amount of pollutants that may be present in the watershed and still assure compliance with water quality standards.

In addition to determining TMDL, the proposal assigns a number of tasks to the Agency. First, the Agency is required to issue a public notice in the affected counties; the Joint Proponents envision that such notice will stimulate a discussion among local governments and various public interest groups regarding reduction of nonpoint water pollution. Second, the Agency is required to develop guidelines for the preparation of watershed plans, and provide technical assistance and approval of plans developed by local units of government. Third, the Agency is required to meet with units of local government, state and federal agencies, and the public to facilitate their participation in the planning process. Last, the proposed amendments assign the Agency the ultimate responsibility to ensure that appropriate actions are taken in a timely manner to maintain quality of the State's water resources.

Suggested Dismissal Grounds. The Agency, IFCA, IERG, ISG, CICI, and GCD each challenge the Board's statutory authority to adopt the ambitious planning system which the Joint Proponents advocate (Agency 3/16/95 at 3-5; IFCA 2/24/95 at 1-13; IERG 3/7/95 at 27-31; ISG 5/9/95 at 4; CICI 5/9/95; GCD 5/23/95). This challenge does not differ in its particulars among filings. The first ground for challenge involves the perceived inter-relationship between watershed planning and the Illinois Water Quality Management Plan (IWQMP), which plan falls within the Agency's statutory purview. The second involves past case precedent involving invalidation of the Board's attempt, made during its early years, to mandate regional wastewater treatment in DuPage County. (Village of South Lombard v. PCB, 66 Ill. 2d 503, 363 N.E. 2d 814 (1977).)

The IWQMP argument flows from the Act's separation of functions in Sections 4 and 5 between the Agency and the Board. Among other things, Section 4(l) designates the Agency as "the water pollution Agency for the state for all purposes of the Federal Water Pollution Control Act", the predecessor title for the Clean Water Act. Under the Clean Water Act, the Agency is required to develop a continuing planning process, subject to review and approval by the USEPA, that integrates operating policies, procedures, and practices that comprise the functional and planning elements of the Agency's water quality management program. (33 U.S.C. § 1313.) As part of that process, the Agency is required to develop a Water Quality Management Plan containing the elements specified in Sections 208 and 303 of the Clean Water Act. (33 U.S.C. §§ 1288 and 1313.) Those elements include procedures for controlling point and nonpoint sources of pollution, as well as development of TMDLs for pollutants in certain waters. (33 U.S.C. § 1313(e).)

The Agency is accordingly vested with the authority to create, revise, and administer the IWQMP. (Citizens Utilities Company of Illinois and Village of Plainfield v. Illinois Pollution Control Board, Illinois Environmental Protection Agency , and Village of Bolingbrook , 265 Ill. Aat 3d 773, 639 N.E.2d 1306, 1307 (1994).) That authority is granted to the Agency alone, and the Board has been held to lack jurisdiction to mandate or review provisions of the Water Quality Management Plan. (Jurcak, 513 N.E.2d at 1009-1010.)

The Agency and the others who forward this argument believe that:

> The provisions proposed by the Joint Proponents for Part 313 are the subject matter of the continuing planning process and the Water Quality Management Plan provided by the Clean Water Act. The Joint Proponents would have the Board, inter alia, direct the Agency on what circumstances require preparation of watershed plans, specify what is to be included in those plans, direct the Agency on when to prepare TMDLs, and mandate that the Agency ensure timely and sufficient development or implementing those plans. Clearly, the Board would be outside of its jurisdiction in imposing such requirements on the Agency. A Board mandate that the Agency somehow "ensure" the cooperation of units of local government in the water shed planning process is much like the effort to adopt regulations mandating regional water treatment in a county that was struck down by the Illinois Supreme Court in Village of Lombard v.

Pollution Control Board , 66 Ill. 2d 503, 363 N.E.2d 814 (1977). As the Supreme Court noted in that case the legislative intent behind adoption of the Act did not include "an intent to permit the Board to compel independent governmental entities to cooperate with one another." (Lombard , 363 N.E.2d at 816.) (Agency 3/16/95 at 4-5)

Decision. Watershed planning, like pollution prevention, is an environmental management program already under substantial development under aegis apart from Board regulation. In particular, both the USEPA and the Agency, under authority of both the Clean Water Act and the Safe Drinking Water Act, have major watershed planning initiatives in progress[4].

The Board is particularly aware, as are the Joint Proponents and all persons who have been involved in the water quality management effort, that to date most of that effort has been directed towards control of point source pollution. Moreover, it is also general knowledge that nonpoint water pollution is both a significant and historically intractable part of the pollution control equation.

In spite of the problems that control of nonpoint water pollution have presented, the Board believes that the current USEPA and Agency initiatives offer some of the greatest promise to date, and accordingly that they should be encouraged. In these circumstances, the Board believes that it would be unwise and unfruitful to impose a separate, and not necessarily complimentary, watershed planning program on top of these current initiatives.

Expiration Dates for Site-specific Rules (Sections 304.101 & 306.350)

Proponents' Explanation. The Joint Proponents propose that all of the Board's site-specific rules, both current and future rules, have a maximum term of five years. In this regard, the Joint Proponents maintain that unlimited exemption from attainment of water quality standards is not appropriate in water quality regulations.

Suggested Dismissal Grounds The arguments of the proponents for the striking of this portion of the proposal are summed up by the Agency:

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[4] Several of the important documents detailing the progress of both USEPA and the Agency in the watershed planning arena postdate the last hearing in this matter. Because the Board believes that evidence of the progress made is best detailed in these recent documents, the Board both takes judicial notice of them and today enters them into the record of this proceedings as Board exhibits. The documents are: Exibit 95, "Region 5 Water Division Watershed Protection Approach, December 1995, 11 pages; Exhibit 96, "Mobilizing the Watershed Community", Agency document, Fall 1995, 11 pages; and Exhibit 97, "Watershed Management Program", Agency newsletter, Winter 1966, 16 pages.

If the General Assembly intended all site-specific rules and exemptions to be of limited duration, it could have easily established such a limit as it did with respect to variance relief. The fact that the Act instead provides for the same sorts of considerations to apply to site-specific rules and exemptions as for rules of general applicability indicates that the General Assembly intended that the Board consider whether each such individual rulemaking warrants a termination date based on consideration of the facts pertaining to that particular rulemaking.

To require all specific rules and exemptions to expire in five years would, in essence, convert them into variances that would not have a specific compliance plan and that would carry the burden of having to be re-justified every five years. The impact of the Joint Proponents' proposal would be to:

a) penalize dischargers that have already demonstrated that compliance with the general rule is economically unreasonable and/or technically infeasible;

b) require the Agency to expend resources on the review of repetitive regulatory proposals that have been previously reviewed and found to be valid, thereby diverting Agency staff away from actions potentially having more impact on the environment such as enforcement actions and the review of existing standards; and

c) require the Board to spend more of its time dealing with potentially frivolous matters, and would, as a result, leave the Board with less time to devote to the more important issues of enforcement and promulgating general rules.

(Agency 3/16/95 at 9-10).

While IERG, supported by ISG and GCD, cites to caselaw establishing general principles of administrative law and statutory construction (IERG 3/7/95 at 4-17 and IERG 6/22/95 at 1-5), it can point to no specific caselaw which would prevent the Board from adopting the proposed limitation.

Decision. The Board finds itself in significant agreement with the position of the Agency, as quoted above. The Board believes that there are good purposes for site-specific rules, and that it would be damaging to the environment, rather than constructive, to exclude the site-specific rule from the tools used in environmental management.

We do not accept, as seems implicit in the Joint Proponents' challenge to site-specific rules, the assumption that a site-specific rule is by its character a lesser rule or a "pass". A site-specific rule is only a rule tailored to the specific circumstances faced by a discharger, and therefore different from the rule applicable under other circumstances. The whole principle

underlying site-specific rules is that there will be circumstances where "one-size doesn't fit all". We continue to believe this is a legitimate principle, and that discretionate use of site-specific rules is beneficial.

Since we do not intend to eliminate all of our adopted site-specific rules, there is no need to address the issue of whether the Board possesses the authority to so do. Suffice it to say, we believe that the Board is vested with substantial rulemaking authority. We also note that any person has the authority to 1) propose limitations on any site-specific rule now in force, and to provide support for specific termination dates, and 2) suggest specific termination dates in site-specific rules proposed to the Board by others. The merits of any site-specific rule are thus reviewable at all times at the instigation of interested persons generally.

CONCLUSION

For the reasons stated above, the Board will not proceed with the amendments to the Illinois water quality regulations proposed by the Joint Proponents in this docket.

The Board emphasizes that ongoing programs of the State agencies, such as the IEPA, DNR, and DCCA, plus the overview of the Natural Resources Coordinating Council, are designed to address many of the concerns brought forth in the instant proposal. While the Board today concludes it is unwise to move forward with this proposal, the Board nevertheless recognizes that it may well be necessary to reassess this position after sufficient time and opportunity have been given to these various programs to prove their merit. Should regulatory processes or structures or even mandates need to be developed in the future in any of these areas, the Board, as always, stands ready to entertain proposals for such from any of the State agencies, from any interest group, or on the Board's own motion.

ORDER

This docket is hereby closed.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 4th day of April, 1996, by a vote of 7-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board