ILLINOIS POLLUTION CONTROL BOARD
December 2, 1982

IN THE MATTER OF:	)	
	)	
REVIEW OF EXISTING REGULATIONS,	)	R81-17
35 ILL. ADM. CODE 306.103 [RULE 602	)	
OF CHAPTER 3: WATER POLLUTION	)	
(COMBINED SEWER OVERFLOW)]	)	

Proposed Rule. Second Notice.

PROPOSED OPINION OF THE BOARD (by J. Anderson):

This proposed opinion accompanies the proposed second notice rules adopted on this date, December 2, 1982, by the Board.

This regulatory proceeding was the first initiated by the Department of Energy and Natural Resources (ENR) under a statutory provision which requires the ENR, through its Economic Technical Advisory Committee (ETAC), to prepare an economic impact review of Board rules in existence prior to the time economic impact studies were first required (Ill. Rev. Stat., ch. 96½, §7404(a)). The Board held five inquiry hearings, which focused on the economic impact study submitted to the Board on April 17, 1981, titled "Economic Impact of Combined Sewer Overflow Regulation [Rule 602] in ... Illinois IINR Doc. No. 81/18 (EcIS).

On April 1, 1982, the Board adopted a First Notice Proposed Rule and an Initial Opinion of the Board. This action was taken pursuant to Ill. Rev. Stat., Ch. 96½, §7404(c).

The 18 page Initial Opinion discussed the Board's findings and conclusions and explained the proposed "exception procedure", containing new criteria and procedural modifications of Rule 602 (Ill. Adm. Code Subtitle C: Ch. I).

The facts as outlined in the Initial Opinion are complex. Generally, there was agreement that Rule 602 was too inflexible, the factors affecting CSO's, which are uncontrolled and unpredictible events, defied classification, the data needed to determine acceptable alternatives generally is not available,

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The Board appreciates the efforts of administrative assistant Kathleen Crowley, who acted as hearing officer during these extensive proceedings and provided invaluable assistance in developing these rules.

and the Board's "site-specific" approach was too cumbersome, costly, and time taking. As the Initial Opinion pointed out,

> "It was apparent however that the stumbling block was how to establish procedures to resolve the problems in a cost-effective, timely manner and, at the same time, how not to undermine the overall pollution abatement commitment and the public participation in each process." (Initial Opinion p. 6)

The novel Exception Procedure was proposed by the Board as a mechanism for resolving the dilemmas outlined in the Initial Opinion and referred to above.

First Notice of the proposed rules was published in Ill. Reg. 5742, May 7, 1982. Five more hearings were held in 1982: On May 24 and August 13 in Chicago, on June 4 in Alton, on July 27 in Peoria; and on July 29 in Decatur. In contrast to the earlier inquiry hearings, there were few hearing participants and few written public comments submitted. The Environmental Protection Agency (Agency) attended and participated in all hearings.

This Second Notice Opinion incorporates the First Notice Initial Opinion and explains the changes in the Proposed Rule resulting from testimony gathered at the five hearings and separate public comments following First Notice.

The following proposed changes are primarily in response to a few Agency administrative concerns. Additionally, an inadvertent codification oversight has been corrected by the creation of subparts within Part 306, and the related renumbering of the affected sections; these changes are self-evident in the body of the proposed rule, second notice. Grammatical and other non-substantive changes will not be discussed.

CHANGES SINCE FIRST NOTICE

Section 306.350 Preamble

The words "evaluation and justification of and" are deleted solely for clarity. On further review, the Board feels that the words "petitions for exceptions" clearly reflect a process, and does not require any preamble enunciation of the various steps in the process.

Section 306.351 Notification and Submittals by Discharger

This section, at first notice titled Categories of Dischargers, had originally been proposed to require the Agency, by a date certain, to establish various preliminary categories of dischargers based on certain basic stream and side land use information.

As the Board stated in its initial opinion, it wished to have established as quickly as possible an Agency mechanism to assure all concerned of consistency of approach in the justification process, and early notification to those dischargers who the Agency feels should not get an exception (Board Initial Opinion, p. 16). The Board's obvious concerns were a) that a statewide program to implement a CSO pollution control strategy "get off the ground" finally and promptly and b) that there be a way to avoid the potential problem that dischargers would not be able to begin the exception process without information but did not have the information to begin the process (see Initial Opinion, generally).

The Agency, while generally strongly supporting the environmental emphasis as well as the form and direction embodied in the development of exception petitions, equally strongly recommended that the 306.351 categorization requirements be deleted. The Agency stated that a) it had insufficient information on local conditions to devise such categories, b) it could not make a meaningful decision within a year, and c) quick and insufficiently informed decisions could prejudice the entire process, thus thwarting the Board's goal of administrative fairness.

The Agency submitted a draft technical paper outlining its intended phased approach (Ex. 3). The Agency stated several times that it intended to initiate a notification to the dischargers of the exception procedure, to encourage them to submit preliminary information, to assist in defining scope, to offer technical expertise in information development and, in general, to provide a leadership role. It felt that the categorization requirement would hinder rather than help in this process. All of these issues were extensively discussed in proceedings (see for example Agency Ex. 2 and 3, final Agency comments, p. 3-5, R. 692-695, 718-726, 744-758, 827-836, 872, 881-901, 926-963).

Regarding the difficulties of "up-front" categorization, the Agency's arguments were convincing. However, the Board remains concerned that the process begin expeditiously and that the problem of consistency of review be kept in focus, especially since by Agency estimate, they may be communicating with 175-180 dischargers (R. 738, 764).

Therefore, Section 306.301 has been rewritten to delete the classification requirement and deadline date. It now requires dischargers to indicate to the Agency their interest in initiating an exception procedure. It places a time limit first on a discharger's notification of interest, and then on submittal to the Agency of relevant information in its possession. In addition, the stream use parameters originally listed in Section 306.351 have been deleted, but have been included in Section 306.361(a).

Section 306.352 Notification by Agency

A sentence has been added to Section 306.352 expressing the need for consistency of review.

Section 306.361 Justification of Joint Petition

The transfer of stream use parameters to Section 306.361(a) from Section 306.301 was made in order to have all technical information parameters included in the same section.

The Agency was concerned that the rule as proposed could be construed as requiring in every case an evaluation of all the parameters listed in this section. It felt that evaluation for all parameters should not be required when circumstances were such that some were inapplicable, as being unnecessary, or would result in expenditure of time and expense unreasonable in relation to the value of the data gathered (IEPA Ex. 2). Subsection (d) was added to allow for such situations, but at the same time requires that the reasons for the inapplicability be given.

Section 306.362 Justification of Single Petition

This section has been changed to add reference to Section 306.361(d).

Section 306.373 Final Date for Petitions

The Board is proposing extending the deadline only for 12 months, to January 1, 1986. The Agency suggested that the date be extended 18 to 24 months because of its workload, feeling that all dischargers would be motivated to act expeditiously because of the changing aspects of the grant program. The Agency considers the grant program as it affects CSO's to be still viable, and intends to keep CSO in the state priority system (Ex. 4, R. 914-921). While it shares the Board's concern that the CSO program be stabilized as quickly as possible, the Agency feels that there are communities that, apart from the grant program, would not be able to make the deadline (R. 921, 922).

The Board feels that some easing of the deadline, combined with its ability to grant variances from it (see also Section 306.351), will balance the need for timely formulation of these programs with some flexibility for hardship cases. Of course, in the event that the deadline proves to be too tight for a large number of dischargers, the deadline can be extended in a subsequent rulemaking.

Section 306.374 Other Proceedings

The reference to Section 306.351 in the last sentence has been deleted because that section no longer includes Agency determinations.

OTHER CONCERNS

Section 301.255 Combined Sewer

The Agency recommended that the definition of Sanitary Sewer (Section 301.375) be amended to allow sanitary sewers to be classified as combined sewers in those limited number of systems where deterioration has progressed to the point where "storm and groundwater access points are so prolific that separation would dictate an entirely new system, both public and private (non-grant eligible) portions" (R. 682, Agency Ex. 2). The Agency did not propose specific wording. Unfortunately, the Board will have to address the "irretrievably deteriorated" problem in another proceeding, (possibly by amending the definition of combined sewer instead, i.e. Section 301.255), since no definitional changes were proposed at first notice.

The Agency expressed concern particularly about Sections 306.352 and 306.361 insofar as the language might imply that the exception procedure requires the Agency to design treatment or to write exemption language for the discharger. There was extensive discussion concerning the Agency's expected and intended role (Ex. 2, 3 R. 717-726, 829, 896-900, 957-963, Agency final comments).

The Board recognizes that the nature of the "back and forth" communications between the Agency and the discharger will, and should, be informal during many steps in the process. The exception procedure, and indeed the Agency's draft technical policy statement, anticipates a voluntary process.

The exception procedure language nowhere requires the Agency to provide technical services per se to the discharger. However, in Section 306.352, the Board expects the Agency ultimately to formally notify the discharger a) of its determination to accept an exception "package", including specific conditions and modification language or b) that it will not join the discharger in a joint petition.

The Board, as well as the Agency, recognizes that there might be prior formal communications during critical turning points in the informational development and negotiation process. The exception procedure language, except in Section 306.351, intentionally does not specify who is to be the source of or who is to gather the information upon which the Agency and the discharger ultimately rely, or who in a joint filing "takes the lead" at hearing. The Board anticipates that the Agency will,

as it stated at hearing, initially notify the dischargers of the availability of the exception process. The Board requires that, ultimately, the discharger will commence the exception proceeding (see Section 306.360) since, obviously, it is the discharger who needs the exception.

Finally, Section 306.361 does appear to "track" the phased approach that the Agency intends to use (see Ex. 3, R. 957-963). However, the purpose of Sections 306.361 and 306.363 is to assure the submission of sufficient information for public review and Board determination, not to dictate the nature of the Agency's and the discharger's interaction.

There were some concerns and comments made by others that are summarized below.

The City of Peoria, while approving of the new, more flexible approach that will accommodate river studies and allow a non-adversarial format, still doesn't like Rule 602 itself and felt the process was still too cumbersome, noting that even the new procedure can take two years. Peoria also feels that non-point source remedies should be better addressed. Additionally, the City cautioned that, if grant funding stops, other states that have hardly begun to address CSO problems should not be permitted to gain economic advantage by ignoring the problem (R. 784-796). For reasons expressed in this and the Initial Opinion, the Board declines to delete Rule 602 or to truncate the participatory process.

The Great Lakes Chapter of the Sierra Club expressed great concern that the procedure was too flexible, the criteria too vague, and that the procedure might turn out to be an easy way to cut costs at the expense of the environment. It was pointed out that the water quality standards are the bedrock of the state's water pollution regulations. However, the Sierra Club recognized that the present site-specific approach has no environmental criteria, that there can be legitimate reasons for relief from Rule 602, (Sierra Club Ex. 1, R. 800-824) and had no better suggestions.

Mr. A. Karaca expressed the concerns of the City of Belleville. He felt the Board should do more than just propose the rule change. In particular, he requested that the Board spearhead an effort to congregate the Agency personnel, project engineers and community representatives in a technical seminar. The attendees should share information and experiences, and start a preliminary classification process. He stated that Illinois has the most combined sewers in the country, that there are many community records to be exchanged, and that, while specific problems are related to the locale, the implementation of the rule should start (R. 770-773). The Board shares Mr. Karaca's concern about the "starting point" for implementing the rule, but will defer to the Agency's intent to exercise the leadership initiative.

Finally, the Board notes that, although comments were requested (see Initial Opinion p. 14-15), there appears to be tacit acceptance of its analysis of its legal authority to promulgate its proposed "living rule".

CONCLUSION

The hearing participants generally, and in some cases enthusiastically, perceived the possibilities of using the exception procedure approach to solve many of the problems of dealing with combined sewer overflows. They agreed that, apart from providing a less cumbersome, less costly, and less adversarial procedure, it establishes a framework for gathering and using environmental data for determining CSO treatment programs, rather than being solely restricted to a basic treatment requirement for what is "coming out of pipes".

What was not as often addressed, but is essential from the Board's view, is that the process takes great care to insure that all affected by CSO's have access to the proceedings and can be heard.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion was adopted on the 21st day of December, 1982 by a vote of 4-0.

Christan L. Moffett, Clerk
Illinois Pollution Control Board