

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

RECEIVED  
CLERK'S OFFICE

MAY 01 2003

STATE OF ILLINOIS  
Pollution Control Board

IN THE MATTER OF: )  
)  
PROPOSED AMENDMENTS TO: )  
PART 309 SUBPART A- )  
35 Ill. Adm. Code 309.105, 309.107, 309.108, )  
309.109, 309.110, 309.112, 309.113, 309.114, )  
309.117, 309.119, 309.143, 309.146; and )  
PROPOSED 35 Ill. Adm. Code 120 through 122- )  
NPDES PERMITS AND PERMITTING PROCEDURES )

R03-19  
(Rulemaking-Water)

NOTICE OF FILING

Dorothy Gunn, Clerk  
Pollution Control Board  
100 West Randolph Street  
Suite 11-500  
Chicago, Illinois 60601

Marie E. Tipsord  
Illinois Pollution Control Board  
James R. Thompson Center  
100 West Randolph Street, Suite 11-500  
Chicago, Illinois 60601

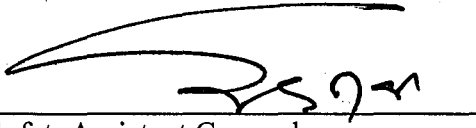
Mathew Dunn  
Illinois Attorney General's Office  
James R. Thompson Center  
100 West Randolph Street  
Chicago, Illinois 60601

Legal Service  
Illinois Department of Natural Resources  
524 South Second Street  
Springfield, Illinois 62701-1787

Attached Service List

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board the Illinois Environmental Protection Agency's COMMENTS, a copy of which is herewith served upon you.

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

By:   
Sanjay K Sofat, Assistant Counsel  
Division of Legal Counsel  
Dated: April 29, 2003  
Illinois Environmental Protection Agency  
1021 North Grand Avenue East  
Springfield, Illinois 62794-9276  
(217) 782-5544

**RECEIVED**  
CLERK'S OFFICE

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

MAY 01 2003

STATE OF ILLINOIS  
*Pollution Control Board*

IN THE MATTER OF: )  
)  
PROPOSED AMENDMENTS TO: ) R03-19  
PART 309 SUBPART A- ) (Rulemaking-Water)  
35 Ill. Adm. Code 309.105, 309.107, 309.108, )  
309.109, 309.110, 309.112, 309.113, 309.114, )  
309.117, 309.119, 309.143, 309.146; and )  
PROPOSED 35 Ill. Adm. Code 120 through 122- )  
NPDES PERMITS AND PERMITTING PROCEDURES )

AGENCY'S COMMENTS

THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY ("Agency") respectfully submits its comments in the above-entitled matter to the Illinois Pollution Control Board ("Board").

At the April 2, 2003 hearing, the Agency offered its assistance to meet with the various stakeholders to identify the issues of concern and the possibility of resolving some of the issues, if possible. On April 18, 2003, the Agency met with the representative(s) of the Illinois Environmental regulatory Group, the Illinois Association of Waste Water Agencies, Illinois Coal Association, Vermilion Coal Company, and Proponents. The objective of this meeting was to allow the stakeholders openly explore their issues of concern and resolve them to the extent possible. The Agency informed the stakeholders that based on the input from the April 2 meeting, the Agency will submit its comments to the Board as the Agency's recommended changes to the original proposal. The stakeholders were advised to submit their comments separately and independently to the Board as the Agency comments may not fully resolve their issues of concern.

The Agency appreciates the opportunity to meet with various stakeholders to resolve the issues to the extent possible. The Agency's comments include request for additional information made at the

April 2, 2003 Hearing and the Agency's specific position regarding various provisions of the proposal. The Agency's specific recommendations are based on the Agency's desire to accommodate the comments made during this rulemaking and to keep the NPDES program manageable and consistent with the applicable state and federal law.

## I. ADDITIONAL INFORMATION

### Number of Public Hearings During The Last Four Years:

Roy Harsch of the Illinois Association of Waste Water Agencies requested the following information: the number of requested public hearings, the number of public hearings actually granted, the total cost for the public hearings, expense of engineers, attorney fees, court reporter, travel, public notice for the last four years. *See* Transcript for April 2, 2003 Hearing ("Tr."), p.32.

The Agency made its best efforts to gather the requested information. After diligent research, the Agency found that the request is too burdensome and that the Agency may not have all the requested information. The Agency apologizes for not being able to fulfill Mr. Harsch's request. As the requested information is not readily available in the Agency's database system, the Agency had to make approximations to provide the information:

YEAR	# Of Hearings Held
2002	4
2001	4
2000	9
1999	4

In Mid-90s, the Agency estimated the cost of an NPDES hearing to be around \$15,000. Note that the cost was calculated approximately seven to ten years ago. The cost, to the best of the Agency's knowledge, includes expenses related to publishing the notice in the newspaper, travel and accommodation of the Agency employees, and the salaries of the employees involved in the hearing process. The Agency hopes that the provided information satisfies Mr. Harsch's request.

## II. PROPONENTS' PROPOSAL

The following is a detailed summary of the Agency's comments regarding the Proponents' proposal. Where necessary, the Agency has provided suggested changes by modifying the original language proposed by the Proponent.

Section: 309.105(f)

Agency Recommendation:

The Board's existing regulations at 35 Ill. Adm. Code 309.115 requires the Agency to hold a public hearing on the issuance or denial of an NPDES permit if the Agency determines that a significant degree of interest exists. The Agency is required by both the state and federal law to provide adequate opportunity for the public to comment on the draft permit. The Agency believes that the proper remedy for a case where the public participation was not adequate is to reopen the public comment period, rather than deny the permit, as proposed by the Petitioners. The alternate language for Section 309.121 would require the Agency to reopen the public comment period where the public participation was not complete. Therefore, the Agency recommends deleting this proposed provision as the alternate language of Section 309.121 now addresses the envisioned safeguard by this provision.

Additionally, the Agency is concerned that the Board not be misled into a belief that this section, as proposed, is required by the state or federal law. It is not. Rather the permitting system is established to facilitate an opportunity for public participation.

Section: 309.105(g)

Agency Recommendation:

The proposed provision is duplicative as the existing Section 309.141 of the Board regulations already covers the proposed requirements. Section 309.141, however, does not require that an NPDES permit be denied if the federal procedural requirements are not followed in drafting or issuing the permit. As the Agency considers Part 309 to meet the minimum requirements of the applicable federal law, the proposed Section 309.105(g) is unnecessary. Further, the law does not require that the state program be identical to the federal program. The court in *Natural Resources Defense Council v. US EPA*, 859 F.2d 156 stated that, "If Congress wanted the states to simply copy the federal minimum public participation requirements, it would limit the elaborate regulatory system to definition of federal level public participation, and leave the specifications of the minimum acceptable state level public participation for an exercise of the Administrator's rulemaking authority."

Also, the proposed language is borrowed from Section 28.1(c)(4) of the Act, which applies to a petition for an adjusted standard. Section 28.1(c)(4) has no direct bearing on the issuance of an NPDES permit, as it only applies when an applicant requests for an adjusted standard from one of the applicable Board requirements. As the proposed section attempts to mingle two separate and independent Clean Water Act mechanisms, it would create confusion and incompatibility with the rest of Section 309.105. Further, the federal regulations parallel to Section 309.105 have no such language or requirement. Additionally, as the proposed section imposes a question of law, pursuant to the Illinois statutory scheme, the Illinois PCB and not the Illinois EPA must determine it.

Section: 309.107(c)

Agency Recommendation:

The proposed provision would require a notification of an NPDES permit application to the Illinois Department of Natural Resources ("IDNR"). As this provision would only document what the

Agency is already in the process of accomplishing through a memorandum of agreement with IDNR, the Agency supports the adoption of this provision.

Section: 309.108(c)

Agency Recommendation:

The Agency supports the proposed provision, however, makes some minor changes to clarify the proposed language. Note that the Agency has incorporated the proposed Section 309.113(a)(7) language into this Section.

Suggested Language:

Section 309.108

- c) A brief description statement of the basis for each of the permit conditions listed in Section 309.108(b), including a brief description of any mixing zone, how the conditions of the draft permit were derived, and as well as the statutory or regulatory provisions and appropriate supporting references.

Section: 309.108(e)

Agency Recommendation:

The Agency offers an alternate language to the Proponents' proposed language. As the new language states, all documents related to the Agency's tentative decision to issue or deny an NPDES permit become part of the Agency record. The Agency could either identify the document or provide it in order for the document to become part of the Agency record.

Suggested Language:

Section 309.108

- e) For the purposes of Title X, Permits, of the Act, the documents supporting the Agency's tentative decision to issue or deny an NPDES permit under this section shall be either identified in or made part of the Agency record.

Section: 309.109(a)

Agency Recommendation:

The Agency suggests deleting the proposed amendment as it is no longer necessary. The Agency's recommended language for Section 309.121 contains the concept proposed by this amendment.

Section: 309.110(f)

Agency Recommendation:

The Agency suggests deleting the proposed subsection as it is repetitive. The Board's existing

regulations at 35 Ill. Adm. Code 309.113(a)(5) contain the same requirements. To provide further clarity, the proposed language of 309.110(f)(1) was incorporated into the existing language of Section 309.113(a)(5)(A).

Section: 309.112

Agency Recommendation:

See Section 309.119 discussion.

Section: 309.113(a)(5)

Agency Recommendation:

The Agency suggests deleting the proposed subsection as it is repetitive. The existing Section 309.113(a)(3) mandates the same information to be made part of the fact sheet. The adoption of this provision would only create confusion.

Section: 309.113(a)(6)

Agency Recommendation:

The Agency believes the recommended changes to Section 309.113(a)(7) address the proposed requirement. Thus, the proposed amendment is not necessary.

Section: 309.113(a)(7)

Agency Recommendation:

The Agency supports the proposed provision, however, suggests moving the language under the existing Section 309.108(c).

Suggested Language:

See Section 309.108(c)

Section: 309.113(a)(8)

Agency Recommendation:

The Agency supports the proposed provision's requirement to seek a summary of the changes between the public noticed permit and the previous permit for a modified permit. The Agency currently lists all draft revisions to a permit in the public noticed fact sheet for modified permits. However, a similar requirement for reissuance of expired permit would only impose extra burden on the Bureau resources without any significant benefit to the public. This is especially true as the reissued permits are considered as stand alone permits, i.e., the Agency reviews the request as if it were a request for a new permit.

Suggested Language:

Section 309.113(a)

8) In the case of modified and reissued permits, a brief summary of changes between the public noticed permit and the previous permit;

Section: 309.113(a)(9)

Agency Recommendation:

The Agency supports the proposed language, however, makes minor changes to provide additional clarity to the proposed language.

Suggested Language:

Section 309.113(a)

9) A brief summary of any the Agency's antidegradation analysis, including and characterization of the receiving waters and including the existing uses of the receiving waters;

Section: 309.113(a)(10)(A)

Agency Recommendation:

See Section 309.110(f) discussion.

Suggested Language:

Section 309.113(a)

10) A more detailed description of the procedures for the formulation of final determinations than that given in the public notice, including:

- A) The beginning and ending dates of the comment period and the address where comments will be received ~~The 30-day comment period;~~

Section: 309.113(a)(11)

Agency Recommendation:

The Agency supports the proposed language, however, makes minor changes to provide additional clarity to the proposed language.

Suggested Language:

Section 309.113(a)

11) Information on how to obtain the complete draft permit administrative Agency record supporting the tentative determination.

Section: 309.119

Agency Recommendation:

The amendment is not necessary as the Agency's alternate language in 309.121 covers this requirement.

Section: 309.120

After the April 18<sup>th</sup> meeting, the Proponent proposed the following language:

309.120 Submissions by the applicant and others interested parties to the agency record- To be included in the Agency record, all submissions by the applicant and other persons must be made by the close of the public comment period (including any public hearing and post hearing comment period). The Agency may reopen the public comment period to receive further comments, arguments, evidence or other submissions whenever it believes that further submissions may assist the Agency to reach an appropriate decision. In reopening the record, the Agency may restrict the scope for submissions to one or more issues.

Agency Recommendation:

The Proponents attempt one more time to define "record before the Agency." A similar attempt is made under Section 309.123 of the original petition. As stated under Section 309.123 discussion, the Agency favors the Board's existing definition of "record before the Agency" that is provided at 35 Ill. Adm. Code 105.212. The Agency believes that the Board existing definition is more precise and comprehensive than the definition proposed by the Proponents. Further, the Agency views the proposed language as in direct conflict with Section 105.212 of the Board regulations. The proposed language is too restrictive in its scope and would require the Agency to reopen the comment period for non-substantive documents. Also, under the proposed language, the Agency would have to reopen the comment period to accept documents such as responsiveness summary, Agency's response to a private citizen's comments, and EPA comments as part of the Agency record. Clearly, this will stifle the Agency's ability to communicate with the applicant and a concerned citizen. The Agency believes that the Agency record is not closed at the end of the comment period, but only when all the issues raised during the comment period have been addressed through relevant documents. If in resolving these issues additional documents are generated, these documents must become part of the Agency record. As the proposed language would only lead to waste of resources and would seriously impair the Agency's ability to perform its duties under the Act, the Agency opposes the proposed provision.

Section: 309.121 And 309.122

Agency Recommendation:

The Agency offers an alternate language to accomplish the purposes of the Proponents' proposed Sections 309.121 and 309.122. The concept presented in the alternate language originates from a Ninth Circuit Court of Appeals case, *Natural Resources Defense Council v. US EPA*, 279 F.3d 1180 (Feb 13, 2002). Under the proposed language, the Agency must reopen the public comment period



to receive additional comments if it makes the determination that the draft permit has been significantly modified and also that the final permit is not a logical growth of the draft permit. To help ascertain whether the final permit is a logical outgrowth of the draft permit, the Agency must examine the four inquiries specified in the language. If any of the inquiry indicates that the final permit is not a logical outgrowth of the draft permit, the Agency must reopen the public comment period to receive additional comments on the issues of first impression. The Agency must follow the public notice requirements of Section 309.109 to receive additional comments. Under the proposed section, the Agency is required to identify the issue or issues for which the comment period is being opened. Further, the commenters are required to limit their comments to the issue(s) identified in the notice.

Suggested Language:

Section 309.121 Reopening the Record to Receive Additional Written Comment

- a) The Agency shall order the public comment period reopened to receive additional written comments where the Agency significantly modifies the draft permit and the final permit is not a logical outgrowth of the proposed draft permit. In determining if the final permit is a logical outgrowth of the draft permit, the Agency shall consider the following:
  - 1) Whether the interested parties could not have reasonably anticipated the final permit from the draft permit;
  - 2) Whether a new round of notice and comment would provide interested parties the first opportunity to offer comments on the issue;
  - 3) Whether the provisions in the final permit deviate sharply from the concepts included in the draft permit or suggested by the commenters; or
  - 4) Whether the changes made in the final permit represent an attempt by the Agency to respond to suggestions made by commenters.
- b) The public notice of any comment period extended under this section shall identify the issues as to which the public comment period is being reopened. Comments filed during the reopened comment period shall be limited to the substantial new issues that caused its reopening.
- c) For the notification purposes, the Agency shall follow the public notice requirements of Section 309.109.

Section: 309.123

Agency Recommendation:

The Agency favors the Board's existing definition of "record before the Agency" that is provided at 35 Ill. Adm. Code 105.212. The Proponents attempt to define an existing definition that would only create confusion and produce absurd results. Further, the Agency believes that the Board existing definition is more precise and comprehensive than the definition proposed by the Proponents.

Section: 309.143(a)

Agency Recommendation:

The Agency supports the proposed language without any changes.

Section: 309.146(a)(2)

Agency Recommendation:

The Agency supports the proposed language with minor changes. The minor changes are suggested to eliminate redundancy in the proposed language.

Suggested Language:

Section 309.146(a)(2):

Make reports adequate to determine the compliance or lack of compliance by the permit holder with all effluent limits and, as appropriate, special conditions in the permit.

Section: 309.146(a)(5)

Agency Recommendation:

The Agency supports the proposed language without any changes, however, recommends that the proposed language be moved under a new subsection, Section 309.146(d). The concept proposed in the proposed Section 309.146(a)(5) does not coincide with the concept contained in the existing 309.146(a). The requirements of Section 309.146(a) are applicable to an NPDES permit holder, whereas the proposed Section 309.146(a)(5) addresses what must be contained in all NPDES permits. The Agency suggests the following changes to the Proponents' proposed subsection:

Suggested Language:

Section 309.146(d):

All permits shall specify requirements concerning the proper use, maintenance, and installation, when appropriate, of monitoring equipment or methods (including biological monitoring methods when appropriate); required monitoring including type, intervals, and frequency sufficient to yield data which are representative of the monitored activity including, when appropriate, continuous monitoring.

Respectfully Submitted

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

By: 

Sanjay K Sofat, Assistant Counsel

Division of Legal Counsel

DATED: April 29, 2003  
Illinois Environmental Protection Agency  
1021 North Grand Avenue East  
P.O. Box 19276  
Springfield, Illinois 62794-9276  
(217) 782-5544

STATE OF ILLINOIS )  
 )  
 ) SS  
COUNTY OF SANGAMON )  
 )

**PROOF OF SERVICE**

I, the undersigned, on oath state that I have served the attached Agency's COMMENTS upon the person to whom it is directed, by placing a copy in an envelope addressed to:

Dorothy Gunn, Clerk  
Pollution Control Board  
100 West Randolph Street  
Suite 11-500  
Chicago, Illinois 60601

**(OVERNIGHT MAIL)**

Mathew Dunn  
Illinois Attorney General's Office  
Environmental Control Division  
James R. Thompson Center  
100 West Randolph Street  
Chicago, Illinois 60601

**(OVERNIGHT MAIL)**

Attached Service List  
**(FIRST CLASS)**

Marie E. Tipsord  
Illinois Pollution Control Board  
James R. Thompson Center  
100 West Randolph Street, Suite 11-500  
Chicago, Illinois 60601

**(OVERNIGHT MAIL)**

Legal Service  
Illinois Department of Natural Resources  
524 South Second Street  
Springfield, Illinois 62701-1787

**(OVERNIGHT MAIL)**

and mailing it from Springfield, Illinois on April 29, 2003, with sufficient postage affixed as indicated above.

*Nancy J. D. Lampert*

**SUBSCRIBED AND SWORN TO BEFORE ME**

this day of April 29, 2003.

*Brenda Boehner*  
Notary Public



THIS FILING PRINTED ON RECYCLED PAPER

Vickey McKinley  
Evanston Environmental Board  
223 Grey Ave  
Evanston, Illinois 60202

Sonjay Sofat  
IEPA  
1021 N. Grand Ave. East (Mail Code #21)  
Springfield, Illinois 62794-9276

Robert Messina  
L. Environ. Regulatory Group  
15 E. Adams  
Springfield, Illinois 62701

Connie Tonsor  
IEPA  
1021 N. Grand Ave. East (Mail Code #21)  
Springfield, Illinois 62794-9276

Irwin Polls  
Metro Water Reclamation, Dist. of Chicago  
6001 West  
Cicero, Illinois 60804

Joel Sternstein  
Assistant Attorney General  
188 West Randolph Street, 20<sup>th</sup> Floor  
Chicago, Illinois 60601

Erika Powers  
Barnes & Thornburg  
10 S. LaSalle, Ste. 2600  
Chicago, Illinois 60201

Marie Tipsord  
Attorney, Pollution Control Board  
100 West Randolph, Suite 11-500  
Chicago, Illinois 60601

Michael Rosenberg  
Metro Water Reclamation Dist.  
100 E. Erie St.  
Chicago, Illinois 60611

Charles Wesselhoft  
Ross & Hardies  
150 North Michigan  
Chicago, Illinois 60601

Sue A. Schulz  
General & Associate Corporate Counsel  
300 N. Waterworks Drive  
Belleville, Illinois 62223-9040

Mary Sullivan  
Illinois-American Water Company  
PO Box 24040  
Belleville, Illinois 62223-9040

W.C. Blanton  
Blackwell, Sanders, Peper, Martin, LLP  
2300 Main, Ste. 1000  
Kansas City, MO 64108

Larry Cox  
Downers Grove Sanitary Dist.  
2710 Curtiss Street  
Downers Grove, Illinois 60515

James Daughtery  
Thorn Creek Sanitary Dist.  
700 West End Ave.  
Chicago Heights, Illinois 60411

John Donahue  
City of Geneva  
800 South street  
Geneva, Illinois 60134

Albert Ettinger  
Environ. Law & Policy center  
55 E. Wacker Dr. Ste. 1300  
Chicago, Illinois 60601-2110

Susan Franzetti  
Sonnenschein Nath & Rosenthal  
8000 Sears Tower  
Chicago, Illinois 60606

Lisa Frede  
Chemical Industry Council  
250 E. Devon Ave. Ste. 239  
Des Plaines, Illinois 60018

Dorothy Gunn  
Pollution Control Board  
100 West Randolph Suite 11-500  
Chicago, Illinois 60601

James Harrington  
Ross & Hardies  
150 N. Michigan, Suite 2500  
Chicago, Illinois 60601

Roy M. Harsch  
Gardner, Carton & Douglas  
191 North Wacker Drive, Suite 3700  
Chicago, Illinois 60606

Ron Hill  
Metropolitan Water Reclamation District  
100 East Erie  
Chicago, Illinois 60611

Katherine Hodge  
Hodge, Dwyer, Zeman  
3150 Roland Ave.  
P.O. Box 5776  
Springfield, Illinois 62705-5776

Fred L. Hubbard  
415. North Gilbert Street  
PO Box 12  
Danville, Illinois 61834-0012

Frederick Keady  
Vermillion Coal Co.  
PO Box 688  
Glenview, Illinois 60025-0688