

ILLINOIS POLLUTION CONTROL BOARD  
May 15, 2003

IN THE MATTER OF: )  
)  
PROPOSED AMENDMENTS TO: ) R03-19  
PUBLIC PARTICIPATION RULES IN 35 ) (NPDES Rulemaking)  
ILL. ADM. CODE 309 NPDES PERMITS )  
AND PERMITTING PROCEDURES )

ORDER OF THE BOARD (by G.T. Girard, M.E. Tristano, and D.C. Karpel):

There have been several motions filed in this rulemaking. First, on March 31, 2003, the Illinois Environmental Regulatory Group (IERG) filed a motion for a third hearing in this matter. On April 14, 2003, the Environmental Law and Policy Center of the Midwest, Illinois Chapter of the Sierra Club, Prairie Rivers Network, and 225 citizen petitioners (collectively the proponents) filed a response (Resp.) in opposition to the motion for a third hearing. No other responses have been received. Second, on April 29, 2003, the Board received a motion for leave to file a reply from IERG and a reply (Reply). Third, on April 30, 2003, the Illinois Association of Wastewater Agencies (IAWA) filed a motion to file response and reply *instanter* (IAWA Resp.).

The Board will grant IERG's motion for leave to file a reply and IAWA's motion for leave to file a response and reply *instanter*. For the reasons discussed below the Board denies the motion for a third hearing and directs the hearing officer to issue an order specifying the deadline for closing the pre-first notice comment period.

**MOTION**

IERG's motion sets forth three reasons for the request for a third hearing. First, IERG states that the short timeframe between the first hearing (March 17, 2003), and the deadline for prefiled testimony in the second hearing (March 26, 2003) was insufficient to allow IERG to prepare meaningful testimony. Mot. at 2-3. IERG maintains that meaningful testimony could not be prepared because the transcript from the first hearing was unavailable and IERG needed to review and cite to the transcript in any testimony that IERG might present. *Id.*

IERG's second reason for a third hearing involves the prefiled testimony of Toby Frevert of the Illinois Environmental Protection Agency (Agency) to be presented at the second hearing. IERG states that Mr. Frevert's testimony indicates that the Agency was meeting with "stakeholders" to discuss modifications to the proposal. Mot. at 2. IERG asserts that it has not seen the modifications nor met with the Agency to discuss changes. Mot. at 3. IERG argues that reviewing modifications and meeting with Mr. Frevert are necessary before preparing testimony to the Board. Mot. at 2.

Third, IERG asserts that currently IERG is "engaged in representing its members in several pressing matters". Mot. at 2. These matters are taking substantial time and are hindering IERG's ability to file prefiled testimony in this matter. Mot. at 3. In sum, IERG argues that

there was simply insufficient time to prepare detailed testimony for the second hearing and a third hearing should be held. *Id.*

### **RESPONSE**

The proponents oppose the motion for a third hearing. Specifically, the proponents assert that granting the request would delay the “enactment of rules necessary to ensure that citizens seeking to prevent the issuance of improper permits” have a full opportunity for review of the permits. Resp. at 2. Further the proponents argue that IERG did have sufficient opportunity to prepare testimony. Resp. at 2-3. Proponents state that IERG had over two months from the time the proposal was filed to formulate a position and IERG representatives were at the first hearing. Resp. at 2-3. Proponents also state that IERG was involved in meetings and a hearing prior to the proposal being filed with the Board. Also proponents point out that others who share IERG’s concerns were able to formulate a position and testify at the April 2, 2003 hearing. *Id.*

Proponents assert that IERG may still provide written comment on the proposal and any agreements reached on the proposal during on going negotiations with the Agency and “stakeholders” can be presented in written form. Resp. at 3. Proponents also note that IERG will have additional opportunities to comment on any first-notice proposal ultimately adopted by the Board. Resp. at 3.

### **REPLY**

In the reply, IERG concedes that IERG had several months to review the initial proposal. However IERG argues that there were only a few days prior to the second hearing for IERG to review the Agency’s proposal and only a few hours for other stakeholders to review rule language proposed by the Agency. Reply at 2. IERG asserts that the primary concern of IERG is the “possible inclusion of new language drafted” by the Agency which would introduce a “mechanism and concepts that have never been the subject of testimony” by the Agency or cross-examination by interested stakeholders. *Id.* IERG maintains that no material prejudice would result if the Board grants the motion for a third hearing.

### **IAWA’S RESPONSE**

IAWA presents four arguments in support of IERG’s motion for a third hearing. First, IAWA asserts that proponents have not provided any basis for the inadequacy of the current NPDES permit public participation scheme. Second, IAWA states that because these proposed rules concern public participation, “[i]t is inconceivable that the parties opposing the request for a third hearing would advocate cutting off the opportunity for comment on the very regulations” that govern public participation. IAWA Resp. at 1.

Third, IAWA argues that considerable resources have been expended in responding to the proposal and a third hearing is warranted to allow all parties the opportunity to question the Agency regarding the alternative proposal. IAWA Resp. at 2. Finally, IAWA maintains that the proponents have presented no emergency basis for denying the third hearing and further

deliberation on the proposal will not interfere with the opportunity for continued public participation in an NPDES permit process.

### **DISCUSSION**

IERG and IAWA both support a third hearing in order to hear testimony and cross-examine Agency witnesses regarding proposed language changes offered by the Agency in a public comment filed on May 1, 2003. However, the Agency did not state a position on whether or not the Agency supports a third hearing and there is no indication that the Agency would testify at a third hearing. The Agency is not the proponent in this rulemaking and the Agency need not testify regarding the language suggested as possible amendments to the proposal. The Board appreciates the concerns raised by IERG and IAWA, but these concerns do not convince the Board that a third hearing is necessary at this time. Therefore, the Board denies the motion to set a third hearing.

The Board will have one more period for written public comments before the Board proceeds with this matter. The hearing officer is directed to issue an order announcing the deadline for the close of the pre-first notice public comment period and all interested persons including IERG may present written comments during this comment period. The Board notes that the proposal has not been adopted for first notice under the Administrative Procedure Act (5 ILCS 5/100 *et seq.* (2002)) and the Board has not determined whether or not to proceed to first notice.

If the Board does proceed to first notice, the Board may amend the proposal consistent with the comments and testimony the Board has received in this matter. The Board will then schedule additional hearings as necessary to allow for testimony and comment on the first-notice proposal. Proceeding to first notice with the proposal will require publication in the *Illinois Register* and therefore allow broader public notification about the proposal which may lead to additional public participation. A possible third public hearing scheduled after first notice may be more useful in eliciting testimony and public comments than a third hearing prior to first notice.

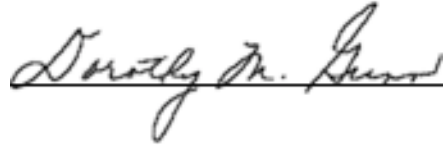
### **CONCLUSION**

The Board denies the motion to set this matter for a third hearing at this time. However, if the Board proceeds to first notice at least one additional hearing will be held prior to moving to second notice with the proposed rule.

IT IS SO ORDERED.

Chairman T.E. Johnson dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on May 15, 2003, by a vote of 6-1.

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

Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board