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JUN 16 2003

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

STATE OF ILLINOIS
Pollution Control Board

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

pc#8

NOTICE OF FILING

TO: Dorothy M. Gunn
Clerk of the Board
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601
(VIA FEDERAL EXPRESS)

Marie Tipsord
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601
(VIA FIRST CLASS MAIL)

(PERSONS ON ATTACHED SERVICE LIST)

PLEASE TAKE NOTICE that I have filed today with the Clerk of the Illinois Pollution Control Board an original and nine copies of the COMMENTS OF THE ILLINOIS ENVIRONMENTAL REGULATORY GROUP, copies of which are herewith served upon you.

Respectfully submitted,
ILLINOIS ENVIRONMENTAL
REGULATORY GROUP,

By: *Robert A. Messina*
ROBERT A. MESSINA

Dated: June 13, 2003

Robert A. Messina
General Counsel
Illinois Environmental Regulatory Group
3150 Roland Avenue
Springfield, Illinois 62703
(217) 523-4942

CERTIFICATE OF SERVICE

I, Robert A. Messina, the undersigned, certify that I have served a copy of the

COMMENTS OF THE ILLINOIS ENVIRONMENTAL REGULATORY GROUP upon:

Dorothy M. Gunn
Clerk of the Board
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601

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

SEE ATTACHED SERVICE LIST.

by depositing said documents in Federal Express and in the United States Mail in
Springfield, Illinois on June 13, 2003.



Robert A. Messina

R03-19 Service List
 Amendments to Part 309 Subpart A
 June 12, 2003

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Daugherty	James	Thorn Creek Sanitary District	700 West End Ave.	Chicago Heights, IL	60411
Donahue	John	City of Geneva	1800 South Street	Geneva, Illinois	60134
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Powers	Erika K.	Barnes & Thornburg	10 South LaSalle, Suite 2600	Chicago, Illinois	60201
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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD
STATE OF ILLINOIS

IN THE MATTER OF: *Pollution Control Board*

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

COMMENTS OF THE
ILLINOIS ENVIRONMENTAL REGULATORY GROUP

NOW COMES the ILLINOIS ENVIRONMENTAL REGULATORY GROUP ("IERG"), by one of its attorneys, Robert A. Messina, and submits the following comments in the above-referenced matter to the Illinois Pollution Control Board ("Board"), stating as follows:

IERG submits the following comments in response to the proposed rulemaking entitled "Proposed Amendments to: Public Participation Rules in 35 Ill. Adm. Code Part 309 NPDES Permits and Permitting Procedures (R03-19)." IERG thanks the Illinois Pollution Control Board for the opportunity to submit these comments today. IERG reserves the right to supplement or modify these comments at the close of testimony.

IERG is a not-for-profit Illinois corporation comprised of 67 member companies engaged in industry, commerce, agriculture, and other related activities, that are regulated by governmental agencies that promulgate, administer or enforce environmental laws and regulations. IERG was organized to promote and advance the interests of its members before governmental agencies, such as the Illinois Environmental Protection Agency ("Illinois EPA" or "Agency") and Illinois Pollution Control Board ("Board"), and before judicial bodies, such as the Illinois Courts. Moreover, IERG is an affiliate of the Illinois

State Chamber of Commerce, which has more than 5,000 members in the State. Finally, a great number of IERG's members would be affected by this rule.

IERG first became involved in this matter in the fall of 2002, at which time the proponents began to circulate drafts of the proposal to various interested parties, including representatives of the Illinois EPA and members of the regulated community. IERG has reviewed the proposal, as well as the comments prepared by the Illinois EPA, and shared it with our members. We believe, for the reasons detailed below, that the proposal developed by the proponents is unnecessary and potentially very problematic for the continued operation of the NPDES program implemented by the Illinois EPA. In short, IERG urges the Board to not adopt the proponents' proposal or, in the alternative, to adopt certain provisions submitted by the Illinois EPA in comments filed on April 29, 2003.

A. The Proponents Have Not Sufficiently Justified the Proposal

IERG does not believe that the proponents have provided any support sufficient to justify the adoption of its proposal. Briefly, the proponents have argued in their various filings that their changes are necessary to remedy the supposed inadequacies in Illinois' regulations concerning public participation in the NPDES permitting process. In considering this argument, there are several points that need be made. First, the public participation provisions which are the subject of this rulemaking were adopted by this Board nearly thirty years ago to comply with the public participation requirements found within the Clean Water Act (CWA). Further, these same regulations were both reviewed and approved by the United States Environmental Protection Agency, making it very clear that USEPA believes Illinois' regulations are sufficient and consistent with the

CWA. Since this program's delegation, there have been no changes in the federal requirements or objection or comment by the USEPA that have necessitated any changes to the Board's public participation regulations.

Second, the proponents have argued that many of the provisions are either required by the CWA or are necessitated by language in the Permit Writer's Manual. This simply is not the case. The Clean Water Act makes clear that states, within certain parameters, may draft their own regulations governing the issuance of NPDES permits. This is why USEPA approved Illinois' regulations even though they were not identical to the federal regulations; USEPA deferred to Illinois' decisions regarding Illinois' NPDES program, including Illinois' decision regarding public participation. Likewise, states are not required to copy the federal permit writer's manual. Illinois has included in its regulations all provisions that are required by federal law, and Illinois is free to make its own decision with regard to other provisions that are not required by federal law.

Considering that the current NPDES permitting program has served the State, public, and regulated community well for nearly thirty years, the Board should be loathe to make changes when the justification for such changes is minimal, at best. Further, when the potential harm to a program – in the form of significant time delay, IEPA staff demands and increased cost to both the Agency and applicant – would likely exacerbate a situation where the Agency already has more than a thousand NPDES permits awaiting action, IERG urges the Board to proceed with great hesitation when being asked to adopt language where sufficient justification has not been shown.

B. Section by Section Analysis

Section 309.105(f): This provision is unnecessary, vague, and dangerously broad. First, as the Agency has pointed out in its comments, the provisions contained in Part 309 as it currently exists were adopted to assure a fair opportunity for public comment. A vague restatement of this fairness notion is not necessary. Second, the use of "fair opportunity" is an invitation to delay the permitting process even further through litigation of what may or may not be fair. If there is a specific concern, it should be addressed through specific language.

Section 309.105(g): This provision is both unnecessary and vague. Illinois' NPDES program has been delegated to it by the United States Environmental Protection Agency. As several commenters have pointed out, and as delegation clearly implies, the Clean Water Act does not require delegated programs to be identical to the federal program. This is evident upon examination of the different requirements contained in the Code of Federal Regulations for both delegated and non-delegated programs.

Section 309.107(c): While it is certainly unnecessary to include this provision in the regulations, IERG is not concerned with this provision.

Section 309.108(c): This provision was the subject of some discussion between all of the various stakeholders at a meeting following the second hearing. IERG concurs with the language as modified by the Agency in its April 29, 2003 comments. It is IERG's understanding that this language is merely a codification of the Agency's current practice, and does not place any additional requirements upon the Agency.

Sections 309.108(e), 309.117, and 309.123: These three sections concern the same issue – the Agency record. IERG is concerned that this language creates an

additional requirement upon the Agency to create a third file, besides its main file and permit file, and make that third file available to the public. First, this is a redundant exercise. Second, the time and expense of undertaking this effort will only delay a process that is already a lengthy one. IERG therefore concurs with the Agency's comments for both sections, that its alternative language for subsection (e) be adopted and that Section 309.123 be stricken. Further, IERG urges the Board to not adopt the language proposed by the proponents in Section 309.117. IERG has discussed this issue with the Agency following the filing of its comments, and understands that the Agency intended to urge the Board to strike this language as well.

Sections 309.109(a), 309.112, 309.119, 309.121, 309.122: All of these sections concern the same issue – the opportunity for allowing further public comment in certain circumstances. IERG has very significant concerns with the way the key provisions, namely those in Section 309.121, are drafted. It is our position that this language is vague, could cause confusion, and would impose an administrative hardship upon the Agency. IERG does believe, however, that the Agency has provided a potentially acceptable alternative to the language proposed by the proponents. IERG still has questions it would like to ask the Agency at hearing as to the specifics of this language, but in the meantime, it believes its proposal provides a vastly superior alternative to that proposed by the proponents. IERG therefore concurs with the Agency's comments for these sections, that proposed language in Section 309.109(a), 309.112, 309.119, and 309.122 be stricken and its alternative language for Section 309.121 be adopted.

There is one other issue present, beyond the one discussed above. At the stakeholder meeting following the second hearing, the parties discussed the last sentence

of Section 309.119. Specifically, the parties discussed possible confusion in those instances where the Agency sets a specific effective date for a permit. Therefore, IERG urges the Board to adopt the following change to that section:

Following the public hearing, the Agency may make such modifications in the terms and conditions of proposed permits as may be appropriate and shall transmit to the Regional Administrator for his approval a copy of the permit proposed to be issued unless the Regional Administrator has waived his right to receive and review permits of its class. The Agency shall provide a notice of such transmission to the applicant, to any person who participates in the public hearing, to any person who requested a public hearing, and to appropriate persons on the mailing list established under Sections 309.109 through 309.112. Such notice shall briefly indicate any significant changes which were made from terms and conditions set forth in the draft permit. All permits become effective when issued, unless an effective date is specified in the permit.

It is IERG's understanding that this change was inadvertently omitted by the Agency in its April 29, 2003, comments, but that it does support this change.

Section 309.109(b): This change is acceptable. It is IERG's understanding that the Agency already has the authority to extend the comment period when it deems necessary.

Section 309.110(f): IERG concurs with the comments filed by the Agency, and urges the Board to move the language to Section 309.113 as suggested by the Agency.

Section 309.113(a)(5-9): IERG concurs with comments filed by other stakeholders that the language in these new paragraphs is both not required and potentially costly and burdensome to the Agency. This is a concern due to the time and expense of undertaking the NPDES permit writing effort, and will only delay a process which already takes a great deal of time now. However, if the Board believes that the current language is not sufficient, a view apparently not taken by the USEPA, then IERG would urge the Board to adopt those changes submitted by the Agency.

Section 309.113(a)(11): IERG concurs with this language as modified by the Agency in its April 29, 2003, comments. It is IERG's understanding that this language would constitute a codification of the Agency's current practice, and would not place any additional burden upon the Agency.

Section 309.114(c): This is, of course, acceptable.

Section 309.120: Again, this language concerns the Agency record and, as discussed above, IERG opposes the adoption of this provision, both for the reasons discussed above and for the reasons given by the Agency in its April 29, 2003, comments.

Section 309.143(a): IERG initially had several concerns with this language. After having met with all of the stakeholders following the second hearing, IERG had its questions and concerns addressed by both the Agency and the proponents. Because of the understanding reached at that meeting, IERG can now support the language proposed by the proponents.

Section 309.146(a)(2 and 5): Again, as discussed immediately above, this language was the subject of some discussion at the stakeholder meeting after the second hearing. Again, IERG believes its concerns were addressed and can support the language proposed by the proponents as modified by the Agency in its April 29, 2003, comments.

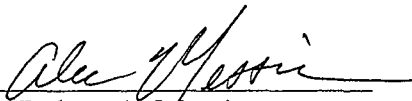
C. Conclusion

In conclusion, the Illinois Environmental Regulatory Group submits that the proponents have not justified their proposal and that the Board should not adopt any revisions to Part 309. However, in the event that the Board does adopt any amendments

to the Part 309 regulations, IERG requests that they be consistent with the above comments.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
REGULATORY GROUP,

By: 
Robert A. Messina

Dated: June 13, 2003

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