BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF	)	
	)	
PROPOSED AMENDMENTS TO PART 309	)	
SUBPART A - 35 Ill. Adm. Code 309.105,	)	R03-19
309.7. 309.8, 309.117, 309.119, 309.143	)	
309.147; AND PROPOSED 35 Ill. Adm. Code	)	
309.120 through 122 – NPDES PERMITS AND	)	
PERMITTING PROCEDURES	)	

Pc#11

NOTICE OF FILING

PLEASE TAKE NOTICE that on this date, June 16, 2003, I filed with Dorothy Gunn, Clerk of the Illinois Pollution Control Board, James R. Thompson Center, 100 West Randolph, Suite 11-500, Chicago, IL 60601, the enclosed Petitioners' Post-Hearing Comments of Environmental Law and Policy Center, Prairie Rivers Network and Sierra Club.

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	RECEIVED CLERK'S OFFICE
	)	
PROPOSED AMENDMENTS TO:	)	R03-19
PART 309 SUBPART A -	)	JUN 16 2003
35 Ill. Adm. Code 309.105, 309.7, 309.8	)	
309.117, 309.119, 309.143, 309.147; and	)	STATE OF ILLINOIS
PROPOSED 35 Ill. Adm. Code 309.120 through	)	*Pollution Control Board*
122 – NPDES PERMITS AND PERMITTING	)	
PROCEDURES		

PETITIONERS' POST-HEARING COMMENTS

Petitioners Environmental Law and Policy Center of the Midwest, Illinois Chapter of the Sierra Club and Prairie Rivers Network (collectively "Petitioners") hereby present post-hearing comments in support of their petition, offer revised proposals based on discussions held by petitioners with the Illinois Environmental Protection Agency ("Agency" or "IEPA") and various business interests, and respond to various comments that have been made in opposition to the petition.

I. Post-Hearing Developments

After the March 17 and April 2, 2003 hearings, the Agency, Petitioners, and industrial and municipal dischargers held a series of discussions on this matter. As to a number of Petitioners' proposals, the Agency fashioned alternative language that it found acceptable. These discussions and Agency alternative proposals led to an April 18 meeting in Chicago at which the Agency reached its current position on the petition after receiving input from Petitioners and representatives of industrial and municipal NPDES permit holders. At that meeting, Petitioners, seeking to reach as much agreement as

possible with the Agency and the dischargers, agreed to alter portions of their proposal. As to several of Petitioners' proposals, however, it was not possible to reach agreements.

Accordingly, the Board now has before it proposed regulatory language for Sections 309.107(c), 309.108(c) and (e), 309.109(b), 309.113(a)(5)- (8), 309.114(c), 309.119, 309.121, 309.143 (a) and 309.146(a)(2) and (d) that Petitioners and the Agency agree should be adopted. This language is discussed in the Agency's Comments, filed April 29, 2003, and is presented in large print in Exhibit A to these comments. Representatives of industrial and municipal permit holders had considerable impact in shaping the language that is now contained in the Agency/Petitioner proposal.

The Board also has before it language proposed by Petitioners to which the Agency has not agreed. This language is proposed as provisions to be adopted as 309.105 (f) and (g), 309.112, 309.113(5), 309.119 and 309.120 and appears in Exhibit A to these comments in large, bold print. While most of this language appeared in the original petition as filed in January, some of it was rewritten after the hearings to meet objections posed by the Agency and representatives of municipal and industrial NPDES permit holders. Petitioners believe that the Agency's unwillingness to agree to this language is largely the result of the Agency's failure to appreciate fully the potential constraints that the existing rules place on its discretion to take steps it deems necessary to allow public comment and comply with the Clean Water Act.

II. The Board should adopt language requiring that the public have a fair chance to comment on all substantial terms of a permit and that the procedures used be consistent with federal law.

The Board should adopt Petitioners' proposal for new subsections 309.105 (f) and (g) that would state that no NPDES permit may be issued in any case in which:

f) The public has not had a fair opportunity to comment on all substantial terms of the permit,

g) The permit, permit conditions or procedures used to draft or issue the permit are not consistent with any applicable federal law.

Petitioners' purpose in offering this language is to create catch-all language to ensure that Board regulations require that NPDES permits may be issued only after there has been a fair opportunity to comment on all substantial terms of the permit and only in compliance with federal law.

Petitioners offer this language in response to decisions of the Board and the Appellate Court regarding the appeal by the Prairie Rivers Network of the Agency's decision to grant a certain NPDES permit to the Black Beauty Coal Company ("Black Beauty decisions"). Prior to the Black Beauty decisions, Petitioners had thought it clear that the existing IPCB rules required that the public be given a fair opportunity to comment on all substantive terms of a permit and that the Agency comply with federal rules in issuing permits. The Black Beauty decisions, however, can be read to state that it really does not matter if the procedures used in issuing a permit were unfair or violated federal law as long as they comply with the IPCB rules. In particular, the Appellate Court made clear that if Prairie Rivers did not think the Board rules were fair or properly incorporated federal procedural requirements, it should take the matter up with the Board (or U.S. EPA). Prairie Rivers Network v. Illinois Pollution Control Board, 335 Ill. App. 3d 391, 403, 406-07, 781 N.E. 2d 372 (4th Dist. 2002).

Following the Appellate Court's suggestion, Petitioners have proposed language to the Board that both addresses the specific questions that arose with regard to the Black Beauty permit and the general problem of assuring public participation rights and

compliance with federal law. Petitioners do not believe that these provisions if adopted by the Board, will affect many permits, but they provide a safety net against improper issuance of NPDES permits occurring as a result of procedural mishaps that have not been specifically anticipated in the rules.

The use of broad, general provisions to supplement specific regulatory language in particular circumstances is not unusual. In fact, unless a drafter is confident that he or she has anticipated all of the issues that may arise regarding a particular subject, there is hardly any alternative to combining general language with specific provisions that cover issues that are expected to arise. If this approach is a bad way to draft laws, then the drafters of the U.S. Constitution have been overrated. See e.g., U.S. Constitution, Art. I Sec. 8 (listing of specific powers of Congress supplemented with "necessary and proper" clause).

Indeed, recognizing that it cannot set down specific provisions to govern all necessary procedures and permit provisions, the Board has frequently set forth rules that provide general principles along with specific procedures for addressing particular issues. For example, Section 309.109 supplements its numerous particular public notice requirements with the general provision that notice should meet "any other requirements necessary to meet the requirements of the [Environmental Protection] Act and the [Clean Water Act]". Similarly, Section 309.146 provides the Agency with the authority to require permit holders to supply particular types of information and to "provide such other information as may be reasonably required."

No party to this proceeding has argued that permits should be issued even if the public did not have a fair opportunity to comment on all substantial terms of the permit or

if the permit or the procedures used to draft the permit violate federal law. The objections to Petitioner's proposals for 309.105 (f) and (g) that have been argued are not well grounded.

A. The Agency's objections to Proposed 309.105 (f) and (g) are apparently due to its failure to appreciate fully the current state of Illinois and federal law.

1. The Agency does not fully appreciate the implications of the Black Beauty decisions.

The Agency's first objection, made in its April 29 Comments, to Petitioners' proposal for Section 309.105, is essentially that the Petitioners' proposal is unnecessary because it has the inherent authority to ensure that opportunities for public participation are adequate. In particular, the Agency claims that, "the proper remedy for a case where the public participation was not adequate is to reopen the public comment period." (Agency's Comments p. 4).

The Agency's suggestion reflects a misunderstanding of the state of Illinois law after the Black Beauty decisions. Given those decisions, unless Petitioners' 309.105(f) proposal, or something else to similar effect, is adopted, the Agency and the Board are arguably without power to redress any failures in the public participation process unless the failure resulted from a violation of a Board rule. Therefore, the Agency should not assume that it has the inherent authority to reopen public comment in a case where it may be necessary to ensure the public a fair opportunity to comment.

The Agency, however, has apparently not yet managed to process the implications of its "victory" in the Black Beauty case. For example, in rejecting Petitioners' 309.105(f) proposal, the Agency is proceeding on the assumption that it does have

inherent authority that Black Beauty and similar dischargers would certainly deny the Agency has. At the May 17 hearing in this case, Mr. Frevert testified:

> I believe we have the authority, the right, to go back, do another round of public commenting, another round of public hearing. I'm hoping that's not what the debate is over. I thought the debate was over under what circumstances we have an obligation to exercise that authority and the extent to which determination of that it's the discretion of my director. (Tr. 76-77)

The Agency took a similar position during the Black Beauty proceedings. For example, during the hearing on the permit, counsel for Black Beauty asked IEPA's Toby Frevert:

> Q. And so to the extent Prairie Rivers wants another public hearing and another comment period like the one they had on the draft permit, they're asking for something that is not authorized by the applicable process, right?
>
> Frevert Answered:
>
> A. There may be an occasional circumstance in operating a permit program with over 3,000 registered permits that one could envision a scenario where some issue – some unique issue or some other circumstance came up that may justify the agency going to a second hearing. It's not a matter of practice. I don't believe that is a prohibition against our having a second hearing, but as a matter of normal operation we do not do that. (Ex. B)

Agreeing with the Frevert on this point, Prairie Rivers argued in its appeal that IEPA abused its discretion in not holding a second hearing in that case. Black Beauty's reply was:

> PRN cites no authority for the proposition that the State Regulations merely establish a floor for IEPA permitting procedures and that the agency has the inherent authority to afford the public an opportunity to participate in the processing of any particular NPDES permit application in any way it deems necessary, reasonable, appropriate or otherwise desirable. ... IEPA would have acted illegally under Illinois law had it conducted the second round of public comments sought by PRN. (BBCC Answer to Petition for Leave to Appeal p. 11, Ex. C)[1]

[1] The Illinois Environmental Regulatory Group in its amicus briefs essentially supported this position.

While the Board and the Appellate Court did not adopt all of Black Beauty's reasoning in their opinions, those opinions can be read to hold that the Agency does not have any inherent authority or other discretion that is not spelled out in the Board rules. Of course, it might be possible to persuade the Illinois courts that the Black Beauty decisions should be interpreted narrowly, limited, or overruled. Still, it would be extremely unwise for the Agency or the Board to assume that the Agency now has any discretion to remedy failures in the public participation process no matter how severe and no matter how necessary the Agency feels it is to do so, unless that discretion is explicitly provided in a Board rule.

In addition, while the specific rule proposed for Section 309.121 by the Agency and Petitioners addresses a few potential failures in the public participation process, the Agency may not be free to exercise discretion to address any other problems that may develop. It would be reckless to presume there are no other ways that problems could arise that are not currently provided for specifically in the rules or the proposed rules. For example, what if the Agency does everything in its power to conduct a fair hearing but a mob or an act of God prevents any permit opponents from testifying? Or, what if due to a mailroom error or other problem the Agency officials deciding on the permit are never made aware of public comments or testimony? While one could argue that the issuance of a permit after such a mishap is improper under current rules, it is far from clear that such an argument would prevail. Under the Black Beauty decisions, the Agency arguably would have no inherent discretion to remedy those problems unless it is provided for in the IPCB rules.

The point here is not that any particular unforeseen problem in the permitting process is likely to happen, but rather that there is no way to foresee every potential problem. It is no more sensible to try to provide for each specific type of potential breakdown in the permitting process than it is to try to specify every kind of information than it might be "reasonably necessary" for IEPA to require NPDES permit holders to provide or to try to spell out in advance every way that a police search might be unreasonable. Therefore, the Board should adopt 309.105(f) in part to give the Agency the discretion that it thinks that it has to fix unforeseen problems in the rare case in which it is necessary.

2. The Agency is wrong to suggest that a fair opportunity to comment on all substantive permit terms is not required by the Clean Water Act.

The Agency notes that federal law does not require verbatim adoption of the precise language offered by Petitioners for 309.105(f). Petitioners have never suggested otherwise. The Agency is incorrect, however, if it means to suggest that granting the public the opportunity to comment on all substantial terms is optional for a state wishing to maintain a delegated NPDES program.

Numerous cases have held that the public is entitled to an opportunity to comment on all substantial terms of a permit. In addition to the authority cited in Petitioners' Statement of Reasons (pp. 2-4), two new cases decided since the filing of the petition make clear that it is simply not permissible under federal law to allow discharges of pollutants unless the public has been given an opportunity to comment on all the substantial terms of the permit to discharge. In Environmental Defense Center, Inc. v. U.S. Environmental Protection Agency, 319 F.3d 398, 427 (9th Cir. 2003), the U.S. Court of Appeals held that discharges of municipal stormwater could not be permitted unless

the public was allowed an opportunity to comment on the Notices of Intent (NOIs) that contained key terms that governed the discharges. The Ninth Circuit struck down rules that would have allowed the NOIs to be effective without an opportunity for public comment stating:

> The Clean Water Act requires that "[a] copy of each permit application and each permit issued under [the NPDES permitting program] shall be available to the public," *33 U.S.C. § 1342*(j), and that the public shall have an opportunity for a hearing before a permit application is approved, *33 U.S.C. § 1342*(a)(1). Congress identified public participation rights as a critical means of advancing the goals of the Clean Water Act[**70] in its primary statement of the Act's approach and philosophy. See *33 U.S.C. § 1251*(e); see also *Costle v. Pacific Legal Found., 445 U.S. 198, 216, 63 L. Ed. 2d 329, 100 S. Ct. 1095 (1980)* (noting the "general policy of encouraging public participation is applicable to the administration of the NPDES permit program"). EPA has acknowledged that technical issues relating to the issuance of NPDES permits should be decided in "the most open, accessible forum possible, and at a stage where the [permitting authority] has the greatest flexibility to make appropriate modifications to the permit." *44 Fed. Reg. 32,854, 32,885* (Jun. 7, 1979).
>
> As we noted above, under the Phase II Rule it is the NOIs, and not the general permits, that contain the substantive information about how the operator of a small MS4 will reduce discharges to the maximum extent practicable. Under the Phase II Rule, NOIs are functionally equivalent to the permit applications Congress envisioned when it created the Clean Water Act's public availability and public hearing requirements. Thus, if the Phase II Rule does not make NOIs "available to the public," and does[**71] not provide for public hearings on NOIs, the Phase II Rule violates the clear intent of Congress. EPA's first argument--that NOIs are not subject to the public availability and public hearings requirements of the Clean Water Act--therefore fails.

Similarly, it was held in Minnesota Center for Environmental Advocacy v. Minnesota Pollution Control Agency, 660 N.W. 2d 427 (Minn. Ct. App. 2003), that under

the Clean Water Act the public has to be allowed to comment on the substantive terms governing permitted discharges.

In any event, whether or not proposed subsection 309.105(f) or something like it is federally required, the Board should adopt the proposed language because it is the right thing to do.

3. To administer the delegated NPDES program, Illinois and the Agency must comply with federal substantive and procedural requirements.

The Agency makes a handful of objections to Petitioners' proposed Section 309.105(g). First, the Agency states, more or less correctly, that existing Section 309.141 already requires that Illinois NPDES permits have terms and conditions that comply with federal law. (Agency's Comments p.4) The fact that the proposed Section 309.105(g) is in some part redundant of existing Section 309.141 does not show, however, that it should not be adopted. For example, existing 309.105 (a) through (d) are redundant in some sense but serve to make clear certain circumstances in which an NPDES permit should not be issued. That a permit should not be issued if it would conflict with federal law should also be spelled out in this section containing prohibitions on issuance of permits under certain general circumstances.

Next, the Agency suggests that federal law does not set forth any procedural requirements, which apparently would lead to the conclusion that proposed Section 309.105(g) is unnecessary. (Agency's Comments p.4) In making this suggestion, the Agency improperly leaps from the fact that federal law does not prescribe specific language to the conclusion that there are no federal rules that must be followed. In doing this, the Agency cites a case, N.R.D.C. v. U.S. EPA, 859 F.2d 156 (D.C. Cir. 1988), that

actually has to do with the procedures applicable to enforcement actions brought against permit violators in state courts, rather than the permitting process.

Contrary to the Agency's contention, there are a host of federal procedural requirements that are set forth in the Code of Federal Regulations. See 40 C.F.R. part 123 and part 124 *passim*. In addition, federal law establishes a number of general principles that must be applied by the states, while allowing the states to decide the specifics of how they will incorporate these principles into their NPDES programs. As has been seen, one of these principles is a requirement that the public be allowed to comment on the terms of NPDES permits.[2]

In fact, the Board in drafting the existing rules to some extent has already found merit in incorporating federal procedural requirements by reference. For example, Section 309.109(a)(2)(D) provides that public notice shall be given as "necessary to meet the requirements of the Act and the CWA." Petitioners proposed 309.105(g) simply incorporates other federal procedural requirements into Illinois rules by reference.

The Agency's other scruples against proposed 309.105(g) are very difficult to understand. The Agency complains that language is borrowed from Section 28.1 of the Act, which has "no direct bearing" on permit issuance, and states that this will create "confusion and incompatibility." It is not at all apparent from whence such confusion would arise and it is not suggested by the Agency that the numerous other references to federal law in the rules have created confusion or incompatibility.

[2] If law relevant to the procedures regarding enforcement actions in state forums is relevant in this case, it may be noted that failure of a state to allow public participation in settlements of state enforcement actions can result in citizens suits not being precluded under 33 U.S.C. §1365(b). McAbee v. City of Fort Payne, 318 F.3d 1248 (11th Cir. 2003).

Finally, the Agency somewhat cryptically states that, "As the proposed [309.105(g)] section imposes a question of law, pursuant to the Illinois statutory scheme, the Illinois PCB and not the Illinois EPA must determine it." (Agency's Comments p. 4) However, the rules in numerous places already impose on the Agency the duty in the first instance of acting in compliance with federal law. See e.g., 35 Ill. Admin. Code §§ 309.105(c), 309.108(b)(2), 309.109(a)(2)(D), 309.113(a)(2)(c), 309.141(a)-(f). It is incomprehensible why the Agency would have any more trouble following federal law (subject to review by the Board) with regard to Petitioners' proposal than it does with regard to these numerous other provisions.

B. The objections to proposed 309.105(f) and (g) made by certain industrial and municipal interests are without merit.

It is difficult to know whether many of the objections made by some of the industrial and municipal discharges that have participated in these proceedings are to be taken seriously. The Board has been told a tale that NIMBY environmental groups, awash in grant money, are poised to bring frivolous appeals of NPDES permits to extort unnecessary permit conditions from municipal dischargers and cause the wheels of industry to grind to a halt. The reality is that IEPA does not have enough resources to assure that NPDES permits that will harm the environment are not granted. In addition, the individuals and groups concerned with water quality do not have the staff and other resources necessary to review any more than a small fraction of IEPA's permit actions. Objections are pressed to permits that are believed to violate the law and threaten the environment only a handful of times a year. As shown by the Agency's Comments (p.3), there are few NPDES permit hearing a year. Further, to Petitioners' knowledge, there

have been less than a half dozen NPDES permit appeals to the Board by parties other than the applicant in the history of the program.

Not counting the various slurs against Petitioners, the arguments made by the municipal and industrial parties basically amount to two claims. First, it is claimed that the Petitioners' proposed rules are vague and that this vagueness will make them impossible for the Agency to follow. Second, it has been claimed that the existing rules have served Illinois well and need no revisions.

1. Petitioners' proposed rules are not improperly vague.

Proposed 309.105(f) and (g) are designed to be general and cover a broad range of potential problems that cannot be anticipated with specific rules. There is nothing wrong with this. Terms like "unreasonable," "significant," "substantial" and "fair," although they are general and necessarily imprecise, are used in the United States Constitution, the Illinois Constitution and the Environmental Protection Act. See U.S. Const. Amendment 4; Ill. Const. Art. 1 Sect. 8.1, Art VI Sect. 15(g), Art. IX Sec. 7; 415 ILCS §40.1. The Board itself has frequently used such terms in setting rules for the Agency. See e.g., 35 Ill. Adm. Code 309.103(a)(1), 309.113(a)(2)(C), 309.115(a)(1), (d), 309.117, 309.119, 309.146(a)(5), (b)(5). Similarly, as seen above, the Environmental Protection Act and IPCB rules have frequently incorporated federal substantive and procedural requirements by reference. This was not thought unworkable or improper until it was proposed by Petitioners.

IEPA officials have to make judgment calls as to what is "fair," "reasonable" and in compliance with federal law all the time. If Luddites and NIMBY groups were planning to use Board rules containing such terms to bring frivolous appeals attacking

Agency decisions applying such terms, they have had more than enough ammunition at least since the statute allowing third party appeals became effective in July 1997.

Moreover, the Board is fully capable of dismissing frivolous appeals and appeals, frivolous or not, do not delay the effectiveness of Agency issued permits.

Petitioners believe that the wording of proposed 309.105(f) and (g) will accomplish the intended purpose of giving the IEPA and, if necessary the Board, the opportunity to deny a permits if the permit applicant insists on a decision despite the fact that there have been severe problems in allowing public participation or compliance with federal law.[3] Alternative wordings of 309.105(f) and (g) are naturally possible, but language addressing the problems they address should be adopted.

2. The Rules are broken and need to be fixed.

Many elements of the discharger community are undoubtedly happy with the status quo but that does not mean that there is no problem. Permit applicants naturally are focused on obtaining permits to discharge as quickly and easily as possible, although the Clean Water Act established as a national goal the elimination of discharges by 1985. 33 U.S. C. §1251(a)(1). Ease and speed of permit issuance does not trump allowing public participation in the permitting process. 33 U.S. C. §1251(e). Although it disagrees with some of Petitioners' proposals, Petitioners and the Agency agree that a number of rules need to be amended.

The existing rules, while almost thirty years old, had not been tested regarding their ability to ensure public participation until recently. Whether one thinks that the

[3] The Agency need not, of course, deny a permit if the applicant is willing to allow the Agency to correct the problem. Under current law, however, it appears the Agency may have no discretion to take action it thinks is necessary to allow public participation or compliance with federal procedural requirements unless there has been a violation of a Board rule.

Black Beauty permit was good or bad, it is clear that the Board and Appellate Court decisions regarding that permit revealed at least the potential for serious unfairness in the current permitting process. Moreover, comparison of mandatory U.S. EPA regulations with the current Board 309 rules reveals that there are a number of federally required safeguards that are not fully reflected in the current Board rules. Accordingly, Petitioners proposed specific rules to address areas in which the current Board rules need reform and general rules to assure the right of public participation and compliance with federal law.

III. The Board should adopt the proposed changes to Sections 309.107-09 offered by the Agency and Petitioners.

In the original petition, Petitioners offered numerous proposals for changes to Sections 309.107-10, offering language that was in large part borrowed from federal guidance or taken verbatim from federal requirements. These proposals were designed to assure adequate notice to the public, to eliminate language that suggested that the public comment period could never be more than 30 days long, and to require the preparation of a reviewable record showing that any permit was issued only after "proof by the applicant" that the permit "will not cause a violation of this [Environmental Protection Act] or the regulations hereunder." 415 ILCS 5/39(a).

A number of parties to this proceeding did not like the wording of Petitioners' proposed language for these sections and the Agency proposed alternative language. Petitioners believe that the language now proposed will have approximately the same effect as the language Petitioners originally proposed. We do not know the extent of the opposition to the currently proposed language for Sections 309.107-09, but urge the Board to adopt it.

With the revised proposed language, no change is now proposed to 309.110.

IV. The Board should adopt the changes proposed to 309.112, 309.113, 309.114 and 309.119 that are proposed by Petitioners and those proposed by both the Agency and Petitioners.

The Agency and Petitioners agree on certain changes that should be made to Sections 309.113, 309.114 and 309.119. Petitioners proposed further that certain changes be made to Section 309.112 and believe words should be added to Sections 309.113 and 309.119 that the Agency believes should not be changed.

309.112 – Petitioners believe that it adds clarity to add the words "Subject to Section 309.120 and 309.121" to the beginning of Section 309.112. Addition of this phase would make clear that the Agency should not immediately decide on the permit if the circumstances are such that the record should be reopened.[4]

309.113 – With one exception, Petitioners and the Agency have come to an agreement on the information that should be added to the fact sheets. The difference of opinion relates to 309.113(5) as to which the Agency does not agree that it should briefly summarize any changes in reissued permits.

Illinois NPDES permits are generally issued for 5 years. If during the 5 years the permit lasts it is necessary to modify the permit (generally to allow a greater or different discharge), the Agency gives public notice and an opportunity to comment on the proposed changes. In the public notice now for proposed modifications, the Agency generally makes clear what modifications are being proposed so that the public does not think that the whole permit is at issue.

When a permit is reissued after they end at the end of the five-year period, the terms of the reissued permit are often identical to the terms of the permit for the earlier

[4] The Agency does not agree that Petitioner' proposed Section 309.120 should be adopted.

permit. Sometimes, however, there are substantial changes despite the fact that "reissued" makes it sound as though nothing has changed.

It is rare that members of the public will have any interest in the re-issuance of a permit without change, but it will frequently be the case that the public will be interested in changes in the terms of a re-issued permit. Petitioners believe then that it will save everyone time and possible confusion for the Agency to flag any changes in reissued permits. This will save the public the time of having to go through draft permits where there is no change and will save the Agency the trouble of having to respond to comments and questions in circumstances in which the commenter or questioner is simply confused that there are changes proposed.

309.114(c) – Although this issue has not been discussed, Petitioners presume everyone agrees on the spelling of the word "navigable."

309.119 - As with Petitioners' proposed change to 309.112, it is proposed to add the words "Subject to Sections 309.120 and 309.121" to the beginning of Section 309.119. This proposed language is more critical for clarity as to 309.119 because the existing wording of 309.119 was read in the Black Beauty decisions to preclude the Agency from ever allowing additional public comment after hearing. While language now proposed by the Agency and Petitioners for 309.121 that mandates allowing additional public comment in some circumstance should be read by the courts to override the implication that was drawn for 309.119 in the Black Beauty decisions, there does not seem to be any reason to risk confusion when the risk could be eliminated by adding the proposed language.[5]

[5] Of course, the Board should only add "Subject to Section 309.121" if it chooses to reject Petitioners' proposal as to 309.120.

During the April 18 meeting of representatives of the Agency, Petitioners and various discharger interests, it was pointed out by one of the discharger representatives that the current language regarding the time that permits become effective should be modified to add the terms "unless a different date is specified in the permit." This would take account of circumstances in which the permit holder needs some time after issuance to be ready to comply with the permit. Petitioners believe that everyone agrees to this change and that the Agency's failure to mention it in its comments was an oversight.

VI. The Board should adopt Petitioners revised proposal for a new Section 309.120.

The Agency does not agree with Petitioners proposal for a Section 309.120, either as originally proposed or as revised by Petitioners in an unsuccessful effort to reach a compromise. It is clear, however, that the Agency's opposition is in large part based on its failure to understand Petitioners' proposal and the new landscape created by the Black Beauty decisions.

The Agency objects to Petitioners' revised proposed 309.120, as it was presented in April, because the Agency believes it would preclude putting the Agency's responsiveness summary and response to citizen comments in the record. (Agency's Comments p. 8) The original wording of Petitioners' April proposal was not intended to do that (and actually did not do that if read naturally). However, to make more clear that the Agency itself can add materials to the record after the close of the public comment period, the parenthetical "(other than the Agency)" is added to Petitioners' revised 309.120 proposal.

The balance of the Agency's objection to Petitioners' revised 309.120 proposal reflects its inability to appreciate the implications of the Black Beauty decisions. The

Agency claims that the rule as proposed would "stifle the Agency ability to communicate with the applicant and a concerned citizen" after the close of the comment period. (Agency's Comments p. 8) But where is the authority in the current rules for the Agency to deny a permit based on information submitted after the comment period? One may be certain that at least some permit applicants are not going to accept a permit denial based on information privately obtained from a concerned citizen after the close of the public comment period and, citing the Black Beauty decisions, will argue that the Agency does not have discretion to do such a thing.[6] The current language of Sections 309.112 and 309.119 both speak of the Agency having to make decisions following the close of the public comment period or public hearing. Neither section contemplates that the Agency is to have private discussions with either the applicant or concerned citizens.

Given the Black Beauty decisions, it appears that if the Agency wants discretion to take testimony or receive other materials following the public comment period, a rule allowing such discretion needs to be written into the Board rules. Petitioners have proposed a fair way to do this, to allow the Agency discretion to reopen the record if it feels that doing so would assist the Agency to make an appropriate decision. This puts everything out in the open. If, however, the Board feels that the Agency should be allowed to receive materials from the applicant or concerned citizens after the close of the comment period without extending or reopening the comment period, a sentence should be added to the rules providing that the Agency may do this.

VII. The Board should adopt Section 309.121 as proposed by the Agency and Petitioners.

[6] The Agency under 309.109(b) does have authority to reopen the comment period, but it is hard to see how this provision allows the Agency to take testimony from concerned citizens without reopening the comment period generally.

The language of the proposal for 309.121 was drafted by the Agency and is meant to summarize the case law requiring administrative agencies to allow additional comment under some circumstances. The Agency's proposed language was refined during the April 18 meeting with the comments of lawyers for Petitioners and various dischargers. Petitioners believe that the proposed language addresses an important problem, which will arise infrequently but be very important whenever it arises.

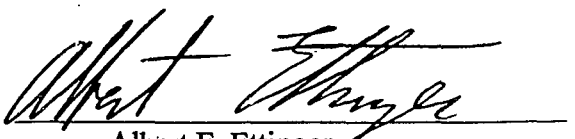
VIII. The Board should adopt Petitioners' proposals, as modified by the Agency, for 309.143 and 309.146.

The proposed language for 309.143 and 309.146 is taken from federal requirements and guidance. The Agency and Petitioners agree on the language as now proposed by the Agency. Basically a wording change is made by the Agency to Petitioners' proposal for 309.146(a)(2) and the Agency moves the placement of Petitioners' language (taken verbatim from a federal requirement) to create a new 309.146(d).

CONCLUSION

The Board should adopt the Petitioners' proposed language as it has been shaped through the post-hearing discussions, including the provisions now proposed by the Agency and Petitioners and Petitioners proposals as modified.

Respectfully submitted,



Albert F. Ettinger
Counsel for Petitioners ELPC, Prairie Rivers Network and Sierra Club

Dated: 6/16/03

Section 309.105 Authority to Deny NPDES Permits

No NPDES Permit may be issued in any case in which:

a) The permit would authorize the discharge of a radiological, chemical or biological warfare agent or high-level radioactive waste;

b) The discharge would, in the judgment of the Secretary of the Army acting through the Chief of Engineers, result in the substantial impairment of anchorage and navigation;

c) The proposed permit is objected to in writing by the Administrator of the U.S. Environmental Protection Agency pursuant to any right to object given to the Administrator under Section 402(d) of the CWA;

d) The permit would authorize a discharge from a point source which is in conflict with a plan approved under Section 208(b) of the CWA; or

e) The applicant has not provided proof to the Agency that he will meet any schedule of compliance which may be established, in accordance with the Act and regulations, as a condition of his permit.

f) The public has not had a fair opportunity to comment on all substantial terms of the permit.

g) The permit, permit conditions or procedures used to draft or issue the permit are not consistent with any applicable federal law.

{Petitioners}

Section 309.107 Distribution of Applications

When the Agency determines that an application for an NPDES Permit is complete, it shall:

a) Unless otherwise agreed, send a copy of the application to the District Engineer of the appropriate district of the U.S. Corps of Engineers with a letter requesting that the District Engineer provide, within 30 days or as otherwise stated in the Agency's letter, his evaluation of the impact of the discharge on anchorage and navigation. If the District Engineer responds that anchorage and navigation of any of the navigation waters

would be substantially impaired by the granting of a permit, the permit will be denied and the Agency shall notify the applicant. If the District Engineer informs the Agency that the imposition of specified conditions upon the NPDES Permit is necessary to avoid any substantial impairment of any of the navigable waters, the Agency shall include in the permit those conditions specified by the District Engineer.

b) Send two copies of the application to the Regional Administrator of the U.S. Environmental Protection Agency with a letter stating that the application is complete.

c) Subject to any memorandum of agreement between the Agency and the Illinois Department of Natural Resources (IDNR), notify the IDNR.

{Agency and Petitioners}

Section 309.108 Tentative Determination and Draft Permit

Following the receipt of a complete application for an NPDES Permit, the Agency shall prepare a tentative determination. Such determination shall include at least the following:

a) A Statement regarding whether an NPDES Permit is to be issued or denied; and

b) If the determination is to issue the permit, a draft permit containing:

1) Proposed effluent limitations, consistent with federal and state requirements;

2) A proposed schedule of compliance, if the applicant is not in compliance with applicable requirements, including interim dates and requirements consistent with the CWA and applicable regulations, for meeting the proposed effluent limitations;

3) A brief description of any other proposed special conditions which will have a significant impact upon the discharge.

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, any relevant statutory or regulatory

provisions and appropriate supporting references.

{Agency and Petitioners}

d) Upon tentative determination to issue or deny an NPDES Permit:

1) If the determination is to issue the permit the Agency shall notify the applicant in writing of the content of the tentative determination and draft permit and of its intent to circulate public notice of issuance in accordance with Sections 309.108 through 309.112;

2) If the determination is to deny the permit, the Agency shall notify the applicant in writing of the tentative determination and of its intent to circulate public notice of denial, in accordance with Sections 309.108 through 309.112. In the case of denial, notice to the applicant shall include a statement of the reasons for denial, as required by Section 39(a) of the Act.

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.

{Agency and Petitioners}

Section 309.109 Public Notice

a) Upon tentative determination to issue or deny an NPDES Permit, completion of the draft permit, if any and not earlier than 10 days following notice to the applicant pursuant to Section 309.108(d), the Agency shall circulate public notice of the completed application for an NPDES Permit in a manner designed to inform interested and potentially interested persons of the discharge or proposed discharge and of the proposed determination to issue or deny an NPDES Permit for the discharge or proposed discharge. Procedures for the circulation of public notice shall include at least the following concurrent actions:

1) Notice shall be mailed to the applicant;

2) Notice shall be circulated within the geographical area of the proposed discharge; such circulation may include any or all of the following:

A) Posting in the post office and public places of the municipality nearest the premises of the applicant in which the effluent source is located;

B) Posting near the entrance to the applicant's premises and in nearby places;

C) Publishing in local newspapers and periodicals, or, if appropriate, in a daily newspaper of general circulation; and

D) Any other notice requirements necessary to meet the requirements of the Act and the CWA;

3) Notice shall be mailed to any person or group upon request;

4) The Agency shall add the name of any person or group upon request to a mailing list to receive copies of notices for all NPDES applications within the State of Illinois or within a certain geographical area.

b) The Agency shall provide a period of not less than 30 days following the date of first publication of the public notice during which time interested persons may submit their written views on the tentative determinations with respect to the NPDES application. All comments shall be submitted to the Agency and to the applicant. All written comments submitted during the ~~30-day~~ comment period shall be retained by the Agency and considered in the formulation of its final determinations with respect to the NPDES application. The period for comment may be extended at the discretion of the Agency by publication as provided in Section 309.109.

{Agency and Petitioners}

Section 309.110 Contents of Public Notice of Application

The contents of public notice of applications for NPDES Permits shall include at least the following:

a) Name, address, and telephone number of the Agency;

b) Name and address of the applicant;

c) Brief description of the applicant's activities or operations which result in the discharge described in the NPDES application (e.g., municipal waste treatment plant, steel manufacturing, drainage from mine activities);

d) Name, if any, of the waterway to which the discharge is made and a short description of the location of the discharge indicating whether it is a new or an existing discharge including the latitude and longitude of the outfalls as well as the river mile of the outfall;

e) A statement of the tentative determination to issue or deny an NPDES Permit for the discharge described in the application;

f) Address and telephone number of Agency premises at which interested persons may obtain further information, request a copy of the fact sheet, and inspect and copy NPDES forms and related documents.

{Petitioners have withdrawn their proposal for changes to this section}

Section 309.112 Agency Action After Comment Period

Subject to Sections 309.120 and 309.121, if, after the comment period provided, no public hearing is held with respect to the permit, the Agency shall, after evaluation of any comments which may have been received, either issue or deny the permit.

{Petitioners}

Section 309.113 Fact Sheets

a) For every discharge which has a total volume of more than 500,000 gallons (1.9 megaliters) on any day of the year, the Agency shall prepare and, following public notice, shall send upon request to any person a fact sheet with respect to the application described in the public notice. The contents of such fact sheets shall include at least the following information:

1) A sketch or detailed description of the location of the discharge described in the application;

2) A quantitative description of the proposed discharge described in the application which includes at least the following:

A) The rate or frequency of the proposed discharge; if the discharge is continuous, the average daily flow;

B) For thermal discharges subject to limitation under the Act, the average monthly temperatures for the discharge;

C) The average daily mass discharged and average concentration in milligrams per liter, or other applicable units of measurement, of any contaminants which are present in significant quantities or which are subject to limitations or prohibitions under applicable provisions of the CWA or the Act or regulations adopted thereunder;

3) The tentative determinations required under Section 309.108;

4) A brief citation, including an identification of the uses for which the receiving waters have been classified, of the water quality standards and effluent standards and limitations applicable to the proposed discharge;

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

{Agency and Petitioners except for "and reissued"}

6) A brief summary of any antidegradation analysis, including characterization of the receiving waters and the existing uses of the receiving waters;

{Agency and Petitioners}

7) 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.

{Agency and Petitioners}

B) Procedures for requesting a public hearing and the nature thereof; and

C) Any other procedures by which the public may participate in the formulation of the final determination and

8) Information on how to obtain the Agency record.

{Agency and Petitioners}

b) The Agency shall add the name of any person or group, upon request, to a mailing list to receive copies of fact sheets.

Section 309.114 Notice to Other Governmental Agencies

At the time of issuance of public notice pursuant to Sections 309.109 through 309.112, the Agency shall:

a) Send a fact sheet, if one has been prepared, to any other States whose waters may be affected by the issuance of the proposed permit and, upon request, provide such States with a copy of the application and a copy of the draft permit. Each affected State shall be afforded an opportunity to submit written recommendations within a stated number of days to the Agency and to the Regional Administrator of the U.S. Environmental Protection Agency, which the Agency may incorporate into the permit if issued. Should the Agency decline to incorporate any written recommendations thus received, it shall provide to the affected State or States (and to the Regional Administrator) a written explanation of its reasons for declining to accept any of the written recommendations.

b) Following the procedure set forth in (a) above, notify and receive recommendations from any interstate agency having water quality control authority over waters which may be affected by the permit.

c) Unless otherwise agreed, in accordance with 40 CFR 124.34(c), send a copy of the fact sheet, if one has been prepared, to the appropriate District Engineer of the Army Corps of Engineers for discharges (other than minor discharges) into navigable waters.

{Agency and Petitioners}

d) Upon request, send a copy of the public notice and a copy of the fact sheet for NPDES Permit applications to any other Federal, state, or local agency, or any affected country, and provide such agencies an opportunity to respond, comment, or request a public hearing pursuant to Sections 309.115-309.119. Such agencies shall include at least the following:

1) The agency responsible for the preparation of an approved plan pursuant to Section 208(b) of the CWA; and

2) The State or interstate agency responsible for the preparation of a plan pursuant to an approved continuous planning process under Section 303(e) of the CWA.

e) Send notice to, and coordinate with, appropriate public health agencies for the purpose of assisting the applicant in integrating the relevant provisions of the CWA with any applicable requirements of such public health agencies.

Section 309.117 Agency Hearing

The applicant or any person shall be permitted to submit oral or written statements and data concerning the proposed permit or group of permits. The Chairman shall have authority to fix reasonable limits upon the time allowed for oral statements, and may require statements in writing

Section 309.119 Agency Action After Hearing

Subject to Sections 309.120 and 309.121, 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 a different date is specified in the permit.

{"Subject to Sections 309.120 and 309.121" Petitioners. The "unless a different date is specified in the permit" language is proposed by the Agency and Petitioners.}

Section 309.120 Submissions by the Applicant and Other Interested Parties to the Agency Record

To be included in the Agency record, all submissions by the applicant and other persons (other than the Agency) 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.

{Petitioners}

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.

{Agency and Petitioners}

SUBPART A: NPDES PERMITS

Section 309.143 Effluent Limitations

a) Effluent limitations must control all pollutant or pollutant parameters (either conventional, nonconventional, or toxic pollutants) which the Agency determines are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality.

{Agency and Petitioners}

b) In the application of effluent standards and limitations, water quality standards and other applicable requirements, the Agency shall, for each permit, specify average and maximum daily quantitative limitations for the level of pollutants in the authorized discharge in terms of weight (except pH, temperature, radiation, and any other pollutants not appropriately expressed by weight, and except for discharges whose constituents cannot be appropriately expressed by weight). The Agency may, in its discretion, in addition to specification of daily quantitative limitations by weight, specify other limitations, such as average or maximum concentration limits, for the level of pollutants in the authorized discharge. Effluent limitations for multiproduct operations

shall provide for appropriate waste variations from such plants. Where a schedule of compliance is included as a condition in a permit, effluent limitations shall be included for the interim period as well as for the period following the final compliance date.

Section 309.146 Authority to Establish Recording, Reporting, Monitoring and Sampling Requirements

a) The Agency shall require every holder of an NPDES Permit, as a condition of the NPDES Permit issued to the holder, to:

1) Establish, maintain and retain records;

2) Make reports adequate to determine the compliance or lack of compliance with all effluent limits and special conditions in the permit.

{Agency and Petitioners}

3) Install, calibrate, use and maintain monitoring equipment or methods (including where appropriate biological monitoring methods);

4) Take samples of effluents (in accordance with such methods, at such locations, at such intervals, and in such a manner as may be prescribed; and

5) Provide such other information as may reasonably be required.

b) The Agency may require every holder of an NPDES Permit for a publicly owned and publicly regulated treatment works, as a condition of the NPDES Permit, to require industrial users of such a treatment works to:

1) Establish, maintain and retain records;

2) Make reports;

3) Install, calibrate, use and maintain monitoring equipment or methods (including where appropriate biological monitoring methods);

4) Take samples of effluents (in accordance with such methods, at such locations, at such intervals, and in such a manner as may be prescribed); and

5) Provide such other information as may reasonably be required.

c) All such requirements shall be included as conditions of the NPDES Permit issued to the discharger, and shall be at least as stringent as those required by applicable federal regulations when these become effective.

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.

{Agency and Petitioners}

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	
PRAIRIE RIVERS NETWORK,	)	
	)	
Petitioner,	)	
	)	
-vs-	)	PCB 01-112
	)	VOLUME I
ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY AND	)	
BLACK BEAUTY COAL COMPANY,	)	
	)	
Respondents.	)	

The following is the transcript of a hearing held in the above-entitled matter, taken stenographically by Jennifer E. Johnson, CSR, before John Knittle, Hearing Officer, at 6 North Vermilion Road, 2nd Floor Conference Room, Danville, Illinois, on the 1st day of May, 2001 A.D., commencing at the hour of approximately 9:28 a.m.

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permit had been issued and they had a chance to participate in that; they have essentially asked for a further review and like -- they want a further -- as I understand their position, they want a further review of the final permit very similar to the one that they had on the draft permit.

A. Isn't that what we're doing today?

Q. Well, that's --

A. I'm sorry. I'm not supposed to ask questions.

Q. You explained the process in response to Mr. Sofat that the regulations and the applicable law for the processing of these permits in Illinois provides for public hearing after a draft permit is issued, right?

A. That's correct.

Q. And it does not provide for public hearing in the same sense after the final permit is issued, does it?

A. It provides an appeal process, not an additional review process; that is correct.

Q. And so to the extent Prairie Rivers wants another public hearing and another comment period like the one they had on the draft permit, they're asking for something that is not authorized by the applicable process, right?

A. There may be an occasional circumstance in operating a permit program with over 3,000 registered permits that one could envision a scenario where some issue -- some unique issue or some other circumstance came up that may justify the agency going to a second hearing. It's not a matter of practice. I don't believe there is a prohibition against our having a second hearing, but as a matter of normal operation we do not do that. We review the process, as I explained it earlier.

Q. And Prairie Rivers' remedy is what we're doing today?

A. I don't know if it's Prairie Rivers' remedy or if it's the remedy that's created by the procedural rules or our regulatory process.

Q. As I understand what you described as a joint permit between the state and federal authorities and what you've said about your role as coordinating, as I understand it, there are numerous agencies who have agreed to the terms of this and related permits so those

permits could all be issued at the same time, at the end of 2000, right?

A. That is correct.

Q. Who are the agencies, federal and state, who have agreed to the terms of this and related permits?

A. There may be a number of them. The specific

IN THE
SUPREME COURT OF ILLINOIS

PRAIRIE RIVERS NETWORK,	)	
	)	**Petition for Leave to Appeal**
Petitioner,	)	**From the Appellate Court of**
v.	)	**Illinois, Fourth District,**
	)	**No. 4-01-0801**
ILLINOIS POLLUTION CONTROL BOARD, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, and BLACK BEAUTY COAL COMPANY,	)	
	)	**There Heard on Appeal of an**
	)	**Order of the Illinois Pollution Control**
	)	**Board in PCB 01-112**
Respondents.	)	

BLACK BEAUTY COAL COMPANY'S ANSWER TO PRAIRIE RIVERS NETWORK'S PETITION FOR LEAVE TO APPEAL

W. C. Blanton
BLACKWELL SANDERS PEPER MARTIN LLP
2300 Main Street, Suite 1000
Kansas City, MO 64108
Telephone: (816) 983-8151
Facsimile: (816) 983-8080

FOR RESPONDENT BLACK BEAUTY COAL COMPANY

EXHIBIT C

shall briefly indicate any significant changes which were made from terms and conditions set forth in the draft permit." Id. § 309.119 (emphasis added). It did so. (R. at 000557)

PRN cites no authority for the proposition that the State Regulations merely establish a floor for IEPA permitting procedures and that the agency has the inherent authority to afford the public the opportunity to participate in the processing of any particular NPDES permit application any way it deems necessary, reasonable, appropriate, or otherwise desirable. In contrast, BBCC was entitled to have IEPA process its Permit Application in accordance with the duly promulgated procedural rules that establish uniform, consistent processes for the agency's consideration of every permit application. Panhandle Eastern Pipe Line Co., 314 Ill. App. 3d 296, 734 N.E.2d at 24 ("Administrative agencies are required to apply their rules as written, without making ad hoc exceptions in adjudication."); Mattoon Community Unit Sch. Dist. No. 2 v. Illinois Educ. Labor Relations Bd., 193 Ill. App. 3d 875, 550 N.E.2d 610, 614 (4th Dist. 1990). Consequently, IEPA would have acted unlawfully under Illinois law had it conducted the second round of public comments sought by PRN.

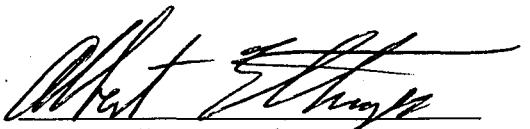
B. Illinois Case Law Does Not Compel a Second Round of Comments.

PRN cites Village of Sauget v. Illinois Pollution Control Board, 207 Ill. App. 3d 974, 566 N.E.2d 724 (5th Dist. 1990), ("Sauget") in support of its contention that the Permit must be remanded to IEPA. Sauget, however, is inapposite here.

In Sauget, the Village applied for an NPDES permit for its AB Facility. IEPA issued a final permit and the Village appealed, as did Monsanto Company, whose plant was a major industrial facility served by the AB Facility. Id. at 726. Village of Sauget v. Illinois Environmental Protection Agency, PCB 90-181, at 2 (Ill. Pol. Control Bd., Jan. 24, 1991). USEPA commented on the revised draft permit after the close of the public comment period. In its final comment letter dated February 14, 1986, USEPA stated that it would not object to the

CERTIFICATE OF SERVICE

I, Albert F. Ettinger, certify that I have filed the above Notice of Filing together with an original and 11 copies of the Petitioner's Post-Hearing Comments, on recycled paper, with the Illinois Pollution Control Board, James R. Thompson Center, 100 West Randolph, Suite 11-500, Chicago, IL 60601, and served all the parties on the attached Service List by depositing a copy in a properly addressed, sealed envelope with the U.S. Post Office, Chicago, Illinois, with proper postage prepaid on June 16, 2003.



Albert F. Ettinger

Albert F. Ettinger, Senior Attorney
Environmental Law and Policy Center
35 East Wacker Drive, Suite 1300
Chicago, IL 60601

I:/Wild & Natural Places/Black Beauty Coal/certificate of service 6-16-03

Prairie Rivers/Black Beauty Coal
R03-19 Service List
June 16, 2003

W. C. Blanton	Blackwell Sanders Peper Martin, LLP	2300 Main, Ste 1000	Kansas City MO 64108
Larry Cox	Downers Grove Sanitary District	2710 Curtiss Street	Downers Grove, IL 60515
James Daugherty	Thorn Creek Sanitary District	700 West End Ave.	Chicago Heights, IL 60411
John Donahue	City of Geneva	1800 South Street	Geneva, IL 60134
Albert Ettinger	Environmental Law & Policy Center	35 E. Wacker Dr., Ste 1300	Chicago, IL 60601-2110
Susan M. Franzetti	Sonnenschein Nath & Rosenthal	8000 Sears Tower	Chicago, IL 60606
Lisa M. Frede	Chemical Industry Council	250 E. Devon Ave. Ste 239	Des Plaines, IL 60018
Dorothy Gunn	Clerk, Illinois Pollution Control Board	100 W.Randolph, Ste 11-500	Chicago, IL 60601
James T. Harrington	Ross & Hardies	150 N. Michigan, Ste 2500	Chicago, IL 60601
Roy M. Harsch	Gardner, Carton & Douglas	191 N. Wacker Dr., Ste 3700	Chicago, IL 60606
Ron Hill	Metropolitan Water Reclamation District	100 E. Erie	Chicago, IL 60611
Katherine Hodge	Hodge Dwyer Zeman	3150 Roland Ave., PO Box 5776	Springfield, IL 62705-5776
Fred L. Hubbard	Attorney at Law	415 N. Gilbert St., PO Box 12	Danville, IL 61834-0012
Frederick D. Keady	Vermilion Coal Company	1979 Johns Dr., PO Box 688	Glenview, IL 60025-0688
Vicky McKinley	Evanston Environment Board	223 Grey Ave.	Evanston, IL 60202
Robert Messina	Illinois Environmental Regulatory Group	215 East Adams St.	Springfield, IL 62701
Irwin Polls	Metropolitan Water Reclamation District	6001 W. Pershing Rd.	Cicero, IL 60650
Erika K. Powers	Barnes & Thornburg	10 S. LaSalle, Ste 2600	Chicago, IL 60603
Michael G. Rosenberg	Metropolitan Water Reclamation District	100 E. Erie	Chicago, IL 60611
Sue A. Schulz	General & Associate Corporate Counsel	300 N. Water Works Dr.	Belleville, L 62223-9040
Mary G. Sullivan	Illinois-American Water Company	2105 NE Jefferson St.	Peoria, IL 61603
Sanjay Sofat	Illinois Environmental Protection Agency	1031 N. Grand Ave. East	Springfield, IL 62794-9276
Connie Tonsor			
Joel Sternstein	Assistant Attorney General	188 W. Randolph St., 20th Fl.	Chicago, IL 60601
Marie Tipsord	Attorney, Illinois Pollution Control Board	100 W. Randolph, Suite 11-500	Chicago, IL 60601
Charles Wesselhoft	Ross & Hardies	150 N. Michigan Ave., Ste 2500	Chicago, IL 60601

I:\Wild & Natural Places/Black Beauty Coal/Service List