BEFORE THE ILLINOIS POLLUTION CONTROL BOARD



PC#12

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| **IN THE MATTER OF:** | ) | |
| | ) | |
| **PROPOSED AMENDMENTS TO** | ) | |
| **PART 309 SUBPART A-** | ) | |
| **35 Ill. Adm. Code 309.105, 309.7, 309.8,** | ) | **R03-19** |
| **309.9, 309.10, 309.12, 309.13, 309.14** | ) | **(NPDES Rulemaking)** |
| **309.117, 109.119, 309.143, 309.147; and** | ) | |
| **PROPOSED 35 Ill. Adm. Code 120 through** | ) | |
| **122–NPDES PERMITS AND PERMITTING** | ) | |
| **PROCEDURES** | ) | |

## NOTICE OF FILING

**TO:** SEE ATTACHED SERVICE LIST

**PLEASE TAKE NOTICE** that on **Monday, June 16, 2003,** we filed the attached **Joint Comments Of The Attainable Housing Alliance and The Home Builders Association of Illinois** with the Clerk of the Illinois Pollution Control Board, a copy of which is herewith served upon you.

Respectfully submitted,

ATTAINABLE HOUSING ALLIANCE AND
HOME BUILDERS ASSOCIATION OF ILLINOIS

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| PROCEDURES | ) | |

**JOINT COMMENTS OF THE ATTAINABLE HOUSING ALLIANCE AND THE HOME BUILDERS ASSOCIATION OF ILLINOIS**

The Attainable Housing Alliance ("AHA") and the Home Builders Association of Illinois ("HBAI") submit the following comments on the rulemaking proposal filed in this docket by the Environmental Law and Policy Center of the Midwest and its co-petitioners ("Petitioners") proposing revisions to public participation rules governing the issuance of NPDES permits by the Illinois Environmental Protection Agency ("IEPA").

HBAI is comprised of thousands of member firms from local associations in every geographic region of the State and is affiliated with the National Association of Home Builders. Member firms of HBAI include homebuilders, developers, remodelers, suppliers, subcontractors, and other affiliated businesses. HBAI advocates the concept of attainable quality housing for all residents of the State of Illinois.

AHA presently represents over 800 members of the Northern Illinois Home Builders Association, the Home Builders Association of the Greater Fox Valley and the Home Builders Association of Greater Chicago. AHA was formed to provide a unified voice for the building industry in the eight-county metro area, including Chicago. The goal of AHA is to represent

the housing industry on public policy issues that affect the attainability and ownership of housing. AHA believes that the subject of this rulemaking is one such issue.

HBAI and AHA understand that various parties have been involved with Petitioners in discussions concerning these rules. Neither HBAI nor AHA had the opportunity to become involved in these discussions. AHA's and HBAI's members are directly affected by this rulemaking in two ways: first, homebuilders are required to obtain NPDES permits for discharges of stormwater from construction activities. This permit is typically a general permit, which is subject to rules concerning public notice at the time the general permit is issued by IEPA; second, homebuilders are required to obtain services from the publicly owned wastewater treatment facilities that themselves obtain NPDES permits.

HBAI and AHA strongly support public participation in a transparent decision-making process by the Illinois EPA, so long as the requirements to be applied during that decision-making process are transparent and authorized by law, and so long as participation is not used as a means to delay or thwart the decision-making process, to impede growth, or to impose burdensome new requirements that are not required by law. HBAI and AHA are, however, familiar with the use of environmental rules to stymie growth or for NIMBY purposes, including in the current Facility Planning Area process, and HBAI and AHA are extremely concerned that the rules proposed by Petitioners are directed not at allowing effective public participation but at facilitating the same types of frivolous challenges aimed at limiting or thwarting permittees and their users.

Part of the purpose of promulgating rules governing public participation is to balance the interests of the regulated party in continuing to perform legal activities with the interest of the public in receiving information on the rules and regulations applicable to proposed

activities. The rules proposed by Petitioners would shift this balance, resulting in an unfair burden and delay on regulated parties and their activities, with no justification or identification of any deficiency in the existing rules. Petitioners point to the public's interest in reviewing effluent limits and monitoring provisions as the reason for these rules. It is important to remember that the substantive provisions in NPDES permits are derived from regulations that are themselves subject to public notice and comment, and where the public believes that a permit has been issued in violation of a legal requirement, it has ample opportunity to challenge that permit.

The existing procedural rules are routinely abused by Petitioners. HBAI and AHA concur with other commenters that the proponents of this proceeding have utilized procedural rules and the threat of objections to proposed NPDES permits and requests for public hearings, as well as the actual public hearing process itself, to negotiate monitoring requirements, effluent limitations, load restrictions, flow diversions and other requirements not presently required by the Clean Water Act, the Illinois Environmental Protection Act or existing Board regulations. This tactic has been most successful when a POTW is faced with an urgent need to begin construction because of new significant development in its service area. By in essence holding the permit hostage, environmental groups have attempted to extract concessions not required by existing regulations. The Petitioners now seek to strengthen their arsenal with unending public comment periods and requests for public hearings in order to further stymie expansion of POTWs. These proposed rules are not required by rules allowing public participation nor are they necessary to fulfill the requirements of public notice. These requirements would involve a substantial cost to the State of Illinois at a time of severe budget crisis and a cost to permittees in a poor economy, as well as a negative impact on the regulated

community by delaying the construction of needed new treatment facilities to accommodate growth.

HBAI and AHA concur with other commenters that vague and unclear standards and guidance documents of U.S. EPA are not an appropriate basis for a regulatory standard. These guidance documents have not themselves been adopted by U.S. EPA and are not intended to bind states issuing NPDES permits. Further, U.S. EPA's approval of the existing NPDES procedural rules shows that there is no deficiency in the current rules, as claimed by the Petitioners. Indeed, the hearings in this matter are replete with statements by Petitioners that IEPA is already providing the information that Petitioners believe to be necessary. Petitioners routinely comment on NPDES permits and have a current mechanism available to allow for public hearings, which are routinely granted by the IEPA. HBAI and AHA believe that Petitioners have received ample opportunity to obtain information on proposed permits and participate in the permit issuance process. That Petitioners now have an opportunity to pursue third-party challenges, which enlarges their powers with respect to permits, does not justify making the public hearing process more burdensome, costly, and subject to abuse.

Although HBAI and AHA object to this rulemaking as a whole as wholly unwarranted and not justified by Petitioners, HBAI and AHA specifically object to the following provisions:

**Sections 309.105(f) and (g)**

HBAI and AHA concurs with the IEPA that these sections are repetitive and unnecessary and provide little in the way of substantive legal guidance and HBAI and AHA object to providing regulations that do not themselves identify substantive requirements. The most these provisions do is provide Petitioners with the opportunity to add procedural roadblocks and thereby delay or challenge issuance of a permit with argument about whether

they have had a fair opportunity to comment on a permit or the consistency of the permit with applicable federal law. Petitioners admitted as much in their characterization of these sections at the hearing as intended for the purpose of providing a "handle" for the Board to overturn rulings, which Petitioners believe to be the reason for the adverse decision in the *Black Beauty* case. Further, HBAI and AHA believe that the examples provided at the hearing of legitimate things that can "go wrong" in a permit proceeding can be easily addressed using current regulations and existing principles of administrative review.

**Section 309.107**

HBAI and AHA believe that this provision is unnecessary and does not know what interest Petitioners have in the Illinois Department of Natural Resources' (IDNR) notification or what role IDNR has to play in the NPDES permit process. Petitioners testified that IEPA should call upon all of the "biological expertise" that is available to it. Like IEPA, IDNR is a creation of statute and cannot exercise any power not granted by the legislature. To the extent IDNR has an interest authorized by statute in the subject of an NPDES permit, it should have its own authority to impose requirements on that activity directly. In the alternative, the interest of IDNR in commenting on a proposed permit should be clearly stated, just as the interest of the Army Corps of Engineers is clearly stated in subdivision (a) of this same section. To the extent IDNR does not have a legal interest in the subject of an activity, it is not legally entitled to specific notification pursuant to Board rules.

Further, as to the wording proposed by the IEPA, the language is unclear in the reference to a memorandum of agreement between IDNR and IEPA. Clarification is necessary as to whether a separate memorandum of agreement is a condition to the notification requirement, is intended to limit the notification requirement, or is intended to further define

coordination between the agencies. HBAI and AHA further note that to the extent further coordination imposes any requirements on the applicant or purports to allow IDNR to comment on any aspect of an NPDES permit, this requirement must be authorized by statute and subject to notice and comment.

**Section 309.108(e)**

HBAI and AHA believe that this provision is substantially burdensome and not required by law. This language has been recognized by many commenters as an attempt to shift the burden of proof in a permit challenge from the Petitioners and other permit challengers to IEPA and, as a practical matter, the permittee. This is a result to which HBAI and AHA strongly object. The Agency is already obligated to compile an administrative record.

Further, while HBAI and AHA have no objection to the counter-provision in IEPA's comments, HBAI and AHA believe this provision is not necessary and does not support the need for a rulemaking. The administrative record is typically made up of everything before the IEPA (or any other administrative agency), including those documents relied on by the IEPA.

**Section 309.110(f)**

HBAI and AHA concur with the comments of other parties that the information that purported to be solicited by this provision is generally included in the Agency's public notices. Notwithstanding, the provision drafted by Petitioners goes beyond the federal requirements that Petitioners purport require the proposed language. Further, HBAI and AHA believe that clear requirements of statute and regulations applied in a transparent manner should govern issuance of permits, and not public comments or procedures. Further, HBAI and AHA with other commenters that these comments are vague as written and appear likely to be a basis for further procedural challenges and delays on issuance of permits.

**Section 309.113**

The Petitioners have added six new requirements to this subsection. HBAI and AHA believe they are not required by law or are not necessary for procedural rules. HBAI and AHA concur with the IEPA that proposed section (a)(5) is repetitive and unnecessary. Subdivisions (a)(6) through (a)(9) appear intended to impose burdensome procedural requirements on IEPA and, consequently, on permittees.

**Section 309.117**

HBAI and AHA believe this section is not necessary, as the administrative record is defined by law, not the IEPA or the public, and already includes every document identified in this section.

**Section 309.120**

Petitioners propose to require the public commenter as well as permit applicants to "raise all reasonably ascertainable issues and submit all reasonably available arguments supporting their position by the close of the public comment period." Like many of the other proposed changes, this section is not necessary, as the burden on applicants and commenters for purposes of the administrative record is defined by law, not the IEPA or the public. Further, HBAI and AHA concur with other commenters that there is a fundamental difference between the permittee and commenters both during the permitting process and administrative review, and HBAI and AHA note that these rules are intended to govern public participation, not the permittee, who cannot reasonably be termed a member of the public for its own application. Finally, HBAI and AHA strongly object to the provision allowing extension of the public comment period and the particularly lenient standard that is sought to govern requested extensions, which would be easily manipulated and likely to lead to unacceptable delays.

**Sections 309.121 and 309.122**

These sections proposed by Petitioners are intended to reopen the public comment period allowing a new series of public comments and responses. HBAI and AHA strongly object to these sections, which are overly broad and confusing, and will result in turning the process of issuance of an NPDES permit into a public negotiation rather than a process governed by substantive regulations that have themselves been issued with public notice and comment. Public participation requirements are intended primarily to provide the public with information and to ensure that the public has a reasonable opportunity to comment, but the requirements should not allow this participation to the detriment of the rights of applicants to proceed with their activities in a reasonable time. These proposed sections would infringe on the rights of permittees by causing undue delay in permit issuance and expense to both the IEPA and permittees.

**Section 309.143**

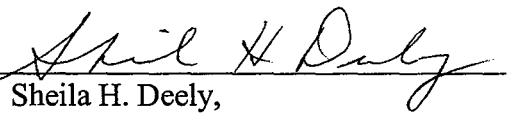
HBAI and AHA believe that this provision is unnecessary in light of the current provision found at 309.141(d)(1). HBAI and AHA concur with other commenters that Petitioners appear to be proposing this language for the purpose of bolstering likely future challenges to NPDES permits rather than facilitating effective public participation.

**Section 309.146**

HBAI and AHA concur with other commenters that these provisions have not been justified by the Petitioners and are not warranted by existing law. Petitioners have not provided any context or real deficiencies to support their claims that the current procedural rules are insufficient for purposes of compliance. These provisions appear again to be proposed for the purpose of bolstering likely future challenges to NPDES permits.

Respectfully submitted,

ATTAINABLE HOUSING ALLIANCE AND
HOME BUILDERS ASSOCIATION OF ILLINOIS

By: 

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## CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing **Notice of Filing – Joint Comments Of The Attainable Housing Alliance and The Home Builders Association of Illinois** were filed by hand delivery with the Clerk of the Illinois Pollution Control Board and served upon the parties to whom said Notice is directed by first class mail, postage prepaid, by depositing in the U.S. Mail at 191 North Wacker Drive, Chicago, Illinois on Monday, June 16, 2003.

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CH01/12295040.1

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