

ILLINOIS POLLUTION CONTROL BOARD
September 4, 2003

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

Proposed Rule. First Notice.

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

On January 13, 2003, the Environmental Law and Policy Center of the Midwest, Illinois Chapter of the Sierra Club, Prairie Rivers Network, and 225 citizen petitioners (collectively “the proponents”) filed a proposal for rulemaking (Prop.). The petition was filed pursuant to Section 28 of the Environmental Protection Act (Act) (415 ILCS 5/28 (2002)). Proponents advocate amending the Board’s regulations at 35 Ill. Adm. Code 309 for the issuance of National Pollutant Discharge Elimination System (NPDES) permits by the Illinois Environmental Protection Agency (IEPA) pursuant to the Clean Water Act (33 U.S.C. §1251 *et seq.*). Today the Board sends this matter to first notice under the Illinois Administrative Procedure Act (5 ILCS 100/1-1 *et. seq.* (2002) (APA)).

EXECUTIVE SUMMARY

The purpose of this rulemaking is to clarify rules for issuance of NPDES permits by the IEPA, including provisions for public participation. These rules are found in Board rules at 35 Ill. Adm. Code 309. Today, the Board sends this rulemaking to first notice under the APA. The Board’s first-notice rules are based on the proposal filed by various environmental groups and citizens (the proponents). The Board’s first-notice rules incorporate suggestions from testimony and public comments generated in two public hearings and 13 public comments. Testifiers and commenters included: proponents, IEPA, associations representing businesses affected by the proposed rules, individual businesses, and private citizens.

The Board’s first notice rule codifies the IEPA’s existing practice when reviewing and issuing NPDES permits, requires additional information in NPDES permit fact sheets prepared for the public by IEPA, identifies when the public comment period can be reopened, requires control of pollutants and pollutant parameters that may potentially violate water quality standards, and requires reports adequate to determine compliance with monitoring requirements. The following opinion summarizes the procedural background, the proposal on a section-by-section basis, presents public comments and testimony, and explains the Board’s decisions reflected in the first notice rule.

PROCEDURAL BACKGROUND

On January 23, 2003, the Board accepted this matter for hearing. Two hearings were held before Hearing Officer Marie Tipsord: in Chicago on March 17, 2003, and in Springfield on April 2, 2003. On March 17, 2003, representatives for the proponents testified including Beth Wentzel, Cynthia Skrukrud, and Albert Ettinger. In addition, Toby Frevert testified about the IEPA's position on the proposal. On April 2, 2003, Mr. Frevert again testified as did Frederick Hubbard on behalf of the Vermillion Coal Company, Fred Andes on behalf of the Illinois Coal Association (ICA), Mark Johnson on behalf of the Illinois-American Water Company, and Roy Harsch on behalf of the Illinois Association of Wastewater Agencies (IAWA).

The Board received 13 public comments on the proposal including additional comments from the proponents, the IEPA (PC 2), IAWA (PC 5), and ICA (PC 1). The Board also received comments from the Metropolitan Water Reclamation District of Greater Chicago (District) (PC 3), Starved Rock Audubon Society (PC 4), Openlands Project (PC 6), Larry Miller (PC 7), Illinois Environmental Regulatory Group (IERG) (PC 8), Thomas Lindblade (PC 9), Margaret Mitchell (PC 10), the Attainable Housing Alliance and the Home Builders Association of Illinois (AHA/HBAI) (PC 12), and Illinois Stewardship Alliance (PC 13).

PROPOSAL

The discussion that follows will give a general overview of the proposal. Next, the Board will summarize the justification included in the proposal for each proposed change on a section-by-section basis.

Proposal Overview

The proposal seeks to improve the NPDES permitting process, the permits issued by the IEPA and water quality in Illinois. Prop. at 1. In general, the proposal amends the current rules to ensure that the public is properly informed of draft NPDES permits and to provide an opportunity to comment on substantial terms of permits before the permits are issued. *Id.* The proposal also requires that hearings be held to allow for public comment on draft permits and important revisions to draft permits, before the permits are issued. *Id.* The proposal includes requirements that the administrative record demonstrate that permit was properly issued. *Id.* The proposal amends the rules to allow for the inclusion of necessary monitoring of NPDES permits limitations and conditions. *Id.* Finally, the proposal amends rules to ensure compliance with the Clean Water Act (33 U.S.C. §1251 *et seq.*) (Clean Water Act). *Id.*

The proponents seek to amend Sections 309.105, 309.107, 309.108, 309.109, 309.110, 309.112, 309.113, 309.114, 309.117, 309.119, 309.143, and 309.147 of the Board's rules. Prop at 2. Proponents propose to add three entirely new Sections: Sections 309.120, 309.121, and 309.122. *Id.* Descriptions of the amendments or additions including justification from the proposal are detailed below.

Section 309.105(f) and (g)

The proposal adds two new subsections to the existing provisions delineating when an NPDES permit should not be issued. Proposed Section 309.105(f) prohibits issuance of an NPDES permit if the public “has not had a fair opportunity to comment” on all “substantive terms” of the permit. Prop. at 2. In support of this addition the proposal indicates that both the Act and the Clean Water Act “mandate” public participation in the NPDES permitting process. *Id.* The proposal states that public participation must be allowed as to all substantive provisions of the permit. Prop. at 3. The proposal cites to Prairie Rivers Network v. Illinois Pollution Control Board; Illinois Environmental Protection Agency; and Black Beauty Coal Co., 335 Ill. App. 3d 391, 781 N.E.2d 372 (4th Dist. 2002) (Prairie Rivers) and asks that the Board amend the existing rules to prevent the issuance of NPDES permits if the public has not been given the opportunity to comment. Prop. at 4.

The second new subsection prohibits issuance of an NPDES permit when “permit, permit conditions or procedures used to draft or issue the permit are not consistent with any applicable federal law.” Prop. at 4. The proposal indicates that this provision is necessary due to the appellate court’s findings in Prairie Rivers. Specifically, the proposal cites to a finding that any conflicts between Illinois regulations and federal law can only be corrected by the Board changing the regulations or USEPA disapproving the Illinois NPDES program. Prop. at 5, citing Prairie Rivers slip op at 11. The proposal states that the Illinois legislature clearly intended Illinois permits and procedures to comply with federal law and this provision will ensure that happens. *Id.*

Section 309.107(c)

This new Section provides that a copy of a permit application will be provided to the Illinois Department of Natural Resources (IDNR). Prop. at 6. The proposal indicates that such a requirement would be beneficial as IDNR has responsibility for studying and protecting wildlife in Illinois. *Id.* The proposal points out that notice to IDNR is already required if a permit is proposing new or increased discharges and such notice should be done as a matter of course. *Id.*

Section 309.108(c) and 309.108(e)

These revisions elaborate on the matters the IEPA must include in the statement setting forth a tentative determination on the permit and conditions. Prop. at 6. Specifically, the proposal amends Section 309.108(c) to require a description of how the draft permit was derived and the statutory and regulatory provisions related to the permit and conditions. *Id.* The proposal also adds a new subsection (e) that requires the IEPA to create a draft administrative record in support of the IEPA’s tentative decision on the permit. *Id.* The proposal states that Section 39(a) of the Act (415 ILCS 5/39(a) (2002)) provides that permits shall only be issued upon proof by the applicant that the permit will not violate the Act or Board regulations. Prop. at 6. The proposal also states that the Act implicitly requires the IEPA to create a reviewable record pursuant to Section 40 of the Act (415 ILCS 5/40 (2002)). *Id.* A clear record supporting the IEPA’s decision must be created and the proposed language provides for such a record. *Id.*

Section 309.109(a), 309.109(b) and 309.113(a)(10)(A)

The existing language of Section 309.109 requires the IEPA to publicly notice tentative decisions on permits. The proposal amends Section 309.109(a) to also require IEPA to publicly re-notice draft permits, if the draft permit is substantially changed. Prop. at 7. The proposed amendments to Section 309.109(b) and 309.113(a)(10)(A) delete references to a 30-day comment period in order to eliminate inconsistency in the terminology of the regulations. *Id.*

Section 309.110(f)

The proposed amendment to Section 309.110 requires a description of the formulation of the IEPA's final determinations on draft permits including the comment period and procedures for requesting hearings. The proposal indicates that the amendment "further specifies the information that must be contained in the permit notice." Prop. at 7. The proposal states that the information to be added is "useful" and much of the information is already provided to the IEPA. *Id.* Further, 40 C.F.R. § 124.8(b)(6) is applicable to all states and explicitly requires providing all the information included in the proposed language. Prop. at 7; Tr. at 25.

Section 309.113(a) and Section 309.114(c)

The Board's existing rules at Section 309.113 sets forth required content for fact sheets that the IEPA must prepare concerning NPDES applications for dischargers of over 500,000 gallons on any day of the year. 35 Ill. Adm. Code 309.113. The proposal adds several subsections to Section 309.113(a) requiring that additional information necessary to document compliance with Board regulations be added to the facts sheet. Prop. at 8. Specifically, the proposal requires the fact sheet to include: (1) a description of factual, legal, methodological and policy questions considered in preparing the draft permit; (2) the flow of the receiving waters; (3) the mixing zone; (4) a summary of changes between the public noticed permit and the previous permit; and (5) a summary of the antidegradation analysis. *Id.* The proposal states that some of the language proposed for Section 309.113(a) is derived directly from 40 C.F.R. § 124.8 and the remaining language is necessary to inform the public of critical facts regarding the permit. *Id.*

The Board's existing rules at 35 Ill. Adm. Code 309.114 requires the IEPA to provide notice to other governmental agencies of the NPDES permit application. The proposed change to Section 309.114(c) merely corrects a typographical error. Prop. at 8.

Section 309.117

Section 309.117 proposes to require the IEPA to identify the materials the IEPA relied upon in making the tentative decision regarding the permit. Prop. at 8. The proposal states that this information is necessary to allow for a proper review of the IEPA's decision especially as third-party permit appeals are restricted to the record before the IEPA. Prop. at 9.

Section 309.112 and 309.119

The proposal adds a cross-reference in Section 309.112 and 309.119 to new Sections 309.121 and 309.122. Prop. at 9. The proposal states that the language proposed for Sections 309.112 and 309.119 is added to prevent any confusion regarding the applicability of the proposed new Sections 309.121 and 309.122. Prop. at 9. Further, the proposal indicates that the added language in Section 309.119 is necessary to “eliminate the inference drawn by” the Board and the Appellate Court in Prairie Rivers that the “public should never be allowed an opportunity to comment on a revised permit.” *Id.*

Section 309.120

The proposal adds new Section 309.120 to provide that persons wanting to object to permits or permit conditions must raise the issues during the public comment period. Prop. at 9. The new Section is modeled after federal language found at 40 C.F.R. §124.13, which is used by USEPA in states that do not have delegated authority for NPDES permitting. *Id.* The proposal concedes that the language is not federally required. *Id.* However, the proposal states “fairness and administrative economy call for all persons, including applicants, to raise all reasonably ascertainable issues and submit all reasonably available arguments” to the IEPA before the close of the public comment period. *Id.*

Section 309.121 and 309.122

The proposal borrows from non-federally required language for these two new Sections. Prop. at 9-10. Proposed Section 309.121 is from 40 C.F.R. §124.14(a) and sets forth a procedure for reopening the permit record when fairness and necessity dictate. *Id.* Section 309.122 is from 40 C.F.R. §124.14(b) and requires that the record be opened for additional comment if the changes to the permit are significant. Prop. at 10. The proposal states that these changes are necessary because of the Prairie Rivers decision. *Id.* The proposal indicates that the Prairie Rivers opinion held that a second opportunity for comment can never be allowed under Illinois law and these provisions now allow for additional comments under certain circumstances. *Id.*

The proposal indicates that the proposed new Section will not allow or require an infinite number of rounds of public comment. Prop. at 13. Further, the new provisions would not require additional hearings, although the IEPA may decide to hold additional hearings if the IEPA believes it would be useful to do so. Prop. at 14.

Section 309.123 and 309.143(a)

The new Section 309.123 defines the record before the IEPA to include all documents or other materials prepared that are properly placed in the record or identified for the record. Prop. at 14. Section 309.123 is proposed to make clear what constitutes the record before the IEPA, according to the proposal. Prop. at 14. The proposal indicates that the change is necessary to avoid potential confusion before the Board in an NPDES permit appeal. *Id.*

The amendments to Section 309.143(a) require effluent limitations in NPDES permits sufficient to avoid causing or contributing to water quality violations including narrative standards. Prop. at 14. The language proposed is taken verbatim from 40 C.F.R. §122.44 (d)(1)(i), according to the proposal. *Id.* The proposal states that language as stringent as the federal language must be followed by the IEPA and the Board has recognized these requirements in the past. *Id.*

Section 309.146(a)(2) and 309.146(a)(5)

The proposal amends Section 309.146(a)(2) by requiring reports adequate to determine compliance or lack of compliance with all effluent limits and special conditions of the permits. Prop. at 14. The proposal explains that the amendment to Section 309.146(a)(2) makes clear that the effluent limits and conditions in a permit shall be monitored and enforceable by both the IEPA and any private citizen. Prop. at 14. New Section 309.145(a)(5) is again borrowed from 40 C.F.R. §122.48 and requires proper installation and maintenance of monitoring equipment. Prop. at 15.

PUBLIC COMMENTS AND TESTIMONY

The Board will separate the comments into four groups. First the Board will summarize the testimony and comments of the IEPA. Next the Board will discuss the comments and testimony of the proponents. Third, the Board summarizes the comment and testimony of those who oppose the proposal. Last, the Board will summarize the comments in support of the proposal.

IEPA Testimony and Comments

Toby Frevert, IEPA Manager of the Division of Water Pollution Control, testified at the first hearing on March 17, 2003. Mr. Frevert stated that in general the IEPA agrees with the proposal in the areas where the existing rules can be updated and refined. Tr.1 at 69. The IEPA is concerned with the language that requires additional comment periods on a draft permit. Tr.1 at 69. Mr. Frevert stated that the proposed language might place an obligation on the IEPA to go back to public notice a “second and third and fourth time on a draft permit” even though the first public comment period contained full comments on the contested issues. Tr.1 at 69-70. Mr. Frevert also testified that there was some disagreement over the proposed language addressing: (1) special conditions to NPDES permits and; (2) conditions in a permit where some analysis is required and later reporting with follow-up activities. Tr.1 at 71.

The IEPA filed a public comment that indicated that the IEPA met with representatives of IERG, IAWA, ICA, Vermilion Coal Company and proponents on April 18, 2003. PC 2 at 2. The IEPA stated that the objective of the meeting was to allow stakeholders to identify issues of concern and possibly resolve them. *Id.* The IEPA’s comment resulted from that meeting. *Id.* The following discussion will summarize the IEPA’s suggestions for changes to the proposal, section by section.

Section 309.105(f)

As proposed, Section 309.105(f) prohibits issuance of an NPDES permit if the public “has not had a fair opportunity to comment” on all “substantive terms” of the permit. Prop. at 2. The IEPA emphasizes that the proposed language is not required by federal law. PC 2 at 4. However, the IEPA agrees that both state and federal law do require that the IEPA provide adequate opportunity for public comment on a draft NPDES permit. *Id.* The IEPA points to the Board’s existing regulations that require the IEPA to hold a public hearing on the issuance or denial of an NPDES permit if the IEPA determines that a significant degree of interest exists (*see* 35 Ill. Adm. Code 309.115). *Id.*

The IEPA states that reopening the public comment period is the proper remedy if public participation was not adequate. PC 2 at 4. The IEPA has proposed alternative language for proposed Section 309.121 (see below) that requires the IEPA to reopen the public comment period where public participation was not complete. *Id.* Therefore, the IEPA believes that the language proposed by proponents for Section 309.105(f) is no longer necessary. *Id.*

Section 309.105(g)

The proposed language of Section 309.105(g) prohibits issuance of an NPDES permit when “permit, permit conditions or procedures used to draft or issue the permit are not consistent with any applicable federal law.” The IEPA states that the proposed language of Section 309.105(g) is duplicative of the Board’s existing rule at 35 Ill. Adm. Code 309.141. PC 2 at 4. Section 309.141 requires that the IEPA ensure compliance with several provisions of the Clean Water Act including effluent standards, effluent prohibitions, standards of performance, and water quality standards pursuant to Sections 301, 302, 306, and 307 of the Clean Water Act. 35 Ill. Adm. Code 309.141.

The IEPA asserts that the only requirement existing Section 309.141 does not have is that the IEPA must deny a permit, if the federal procedural requirements are not met. PC 2 at 4. The IEPA opines that the existing language of Section 309.141 meets the minimum requirements of the applicable federal law and the proposed language is not necessary for purposes of the Clean Water Act. *Id.*

The IEPA points out that the language proposed for Section 309.105(g) is borrowed from the adjusted standard petition requirements found at Section 28.1(c)(4) of the Act (415 ILCS 5/28.1(c)(4) (2002)). PC 2 at 4. The IEPA believes that the proposed Section mingles two separate and independent Clean Water Act mechanisms and would create confusion and incompatibility with the rest of Section 309.105. *Id.* The IEPA states that the federal equivalent of Section 309.105 does not include a provision like the one proposed for Section 309.105(g).

Section 309.107(c)

The IEPA supports the addition of the requirement to notify IDNR when an application for an NPDES permit has been filed and is complete. PC 2 at 4-5. The IEPA is already in the process of drafting a memorandum of agreement with IDNR to accomplish this process. *Id.*

Section 309.108(c)

The proposed Section 309.108(c) requires a description of how the draft permit was derived and the statutory and regulatory provisions related to the permit and conditions. The IEPA supports the addition of this provision but suggests minor changes to clarify the proposed language. PC 2 at 5. In addition, the language proposed in Section 309.113(a)(7) requires the IEPA to include in the fact sheet for a tentative permit decision information on mixing zones. The IEPA suggests incorporating the proposed language from Section 309.113(a)(7) in this Section. *Id.* Specifically, the IEPA suggests the following language for Section 309.108(c):

A brief description ~~statement~~ of the basis for each of the permit conditions listed in Section 309.108(b), including a brief description of any mixing zones, how the conditions of the draft permit were derived, and the statutory or regulatory provisions and appropriate supporting references. PC 2 at 5.

Section 309.108(e)

As proposed, new subsection (e) requires the IEPA to create a draft administrative record in support of the IEPA's tentative decision on the permit. The IEPA offers an alternative proposal for Section 309.108(e) which provides:

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. PC 2 at 5.

The language proposed by the IEPA provides that all documents related to the IEPA's tentative decision on a permit application become a part of the IEPA's record. PC 2 at 5. The IEPA could either identify the document for the record or include the document in the record. *Id.*

Section 309.109(a)

The proposal amends Section 309.109(a) to require IEPA to publicly re-notice draft permits, if the draft permit is substantially changed, and Section 309.109(b) to delete a references to a 30-day comment period. The IEPA believes that this provision is no longer necessary if the Board adopts the IEPA's proposed language for Section 309.121. PC 2 at 5. The IEPA states that the concepts in the proposal are included in the IEPA's proposed language for Section 309.121, which includes provisions for re-noticing draft permits pursuant to Section 309.109. *Id.*

Section 309.110(f)

The proposed amendment to Section 309.110 requires a description of the formulation of the IEPA's final determinations on draft permits including the comment period and procedures for requesting hearings. The IEPA points out that the Board's existing rules at 35 Ill. Adm. Code 309.113(a)(5) contain the same requirements as proposed in Section 309.110. PC 2 at 5-6. Therefore, the IEPA suggests deleting the language from this proposed Section. *Id.* However, to

provide further clarity, the IEPA recommends adding the following language to existing Section 309.105(a)(5)(A) (Section 309.105(a)(10)(A) in the proposal):

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 address where comments will be received; ~~The 30-day comment period;~~
- 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, PC 2 at 6.

Section 309.112

The proposal would add a cross-reference to Sections 309.121 and 309.122 in Section 309.112. Section 309.112 addresses what action the IEPA takes on a permit after the close of the comment period. The IEPA believes that a cross-reference is no longer necessary if the Board adopts the IEPA's proposed language for Section 309.121. PC 2 at 8.

Section 309.113(a)(5)

The proposal adds several subsections to Section 309.113(a) requiring that additional information necessary to document compliance with Board regulations be added to the facts sheet. Subsection (a)(5) would require a description of factual, legal, methodological and policy questions considered in preparing the draft permit. The IEPA suggests deleting this proposed Section, as the Section is repetitive. PC 2 at 6. The IEPA notes that the existing language in Section 309.113(a)(3) mandates that the same information be included in the fact sheet. *Id.* The IEPA opines that if the Board were to propose this provision, the language would only create confusion. *Id.*

Section 309.113(a)(6)

The proposal adds several subsections to Section 309.113(a) requiring that additional information necessary to document compliance with Board regulations be added to the facts sheet. Subsection (a)(6) would require inclusion of the flow of the receiving waters. The IEPA believes that the recommended changes to Section 309.113(a)(7) dealing with mixing zones address the proposed requirement. PC 2 at 6. The IEPA therefore believes the proposed subsection (a)(6) is not necessary. *Id.*

Section 309.113(a)(7)

The proposal adds several subsections to Section 309.113(a) requiring that additional information necessary to document compliance with Board regulations be added to the facts sheet. Subsection (a)(7) requires the inclusion of a description of the mixing zone or the dilution factor used to calculate the mixing zone. The IEPA supports this provision but recommends that the language be moved to Section 309.108(c). PC 2 at 6. Specifically, the IEPA would have Section 309.108(c) read:

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 zones, how the conditions of the draft permit were derived, and the statutory or regulatory provisions and appropriate supporting references. PC 2 at 5.

Section 309.113(a)(8)

The IEPA supports the proposed language at Section 309.113(a)(8) that requires a summary of the changes between the publicly noticed permit and the previous permit for a modified permit. PC 2 at 6. The IEPA indicates that the IEPA currently lists all draft revisions to a permit in the public noticed fact sheet for modified permits. *Id.* The IEPA does not support the same requirement for the reissuance of an expired permit. *Id.* The IEPA believes that summarizing changes in the reissuance of an expired permit would impose an extra burden on the IEPA's resources without any significant public benefit. *Id.* The IEPA feel this is especially true as the reissued permits are considered as stand alone permits and the IEPA reviews the reissued permit as a new permit. *Id.* Thus, the IEPA would delete "and reissued" from the proposed language. *Id.*

Section 309.113(a)(9)

The proposal adds several subsections to Section 309.113(a) requiring that additional information necessary to document compliance with Board regulations be added to the facts sheet. Subsection (a)(9) requires a summary of the antidegradation analysis performed. The IEPA supports this proposed change but recommends minor changes to provide additional clarity to the rule. PC 2 at 7. The IEPA suggests the following language:

Summary of the antidegradation analysis including characterization of the receiving waters and the existing uses of the receiving waters;

Section 309.113(a)(10)(A)

The IEPA recommends adding the concepts from proposed Section 309.110(f) (see discussion above) to the existing language of this proposed subsection. PC 2 at 7. Thus, the IEPA would have the Board add: "The beginning and ending dates of the comment period and address where comments will be received;" in place of "The 30-day comment period;" in subsection (a)(10)(A). *Id.*

Section 309.113(a)(11)

The proposal adds several subsections to Section 309.113(a) requiring that additional information necessary to document compliance with Board regulations be added to the facts sheet. Subsection (a)(11) requires that information on how to obtain the IEPA record be included. The IEPA supports this proposed change but recommends minor changes to provide additional clarity to the rule. PC 2 at 7. The IEPA suggests that the language be amended to read: “Information on how to obtain the Agency record.”

Section 309.119

The proposal would add a cross-reference to Sections 309.121 and 309.122 to Section 309.119. The IEPA believes that this provision is no longer necessary if the Board adopts the IEPA’s proposed language for Section 309.121. PC 2 at 8.

Section 309.120

Proposed new Section 309.120 provides that persons wanting to object to permits or permit conditions must raise the issues during the public comment period. The IEPA states that proposed new Section 309.120 is an attempt by proponents to define “record before the IEPA”. PC 2 at 8. The IEPA maintains that the existing definition at 35 Ill. Adm. Code 105.212 is favored by the IEPA. *Id.* The IEPA believes the existing definition is more precise and comprehensive and the proposed language is in direct conflict with 35 Ill. Adm. Code 105.212. *Id.*

The IEPA is concerned that the proposed language is too restrictive in scope and requires the IEPA to reopen the comment period for non-substantive documents. PC 2 at 8. The IEPA also believes that the language would require that the comment period be reopened to include documents such as the IEPA’s response to a private citizen or USEPA comments. *Id.* This language stifles the IEPA’s ability to communicate with the applicant and concerned citizens, according to the IEPA. *Id.*

The IEPA believes that the IEPA’s record is not closed at the end of the comment period but rather when all the issues raised during the comment period have been addressed. PC 2 at 8. Any documents, which might be identified to address these issues, are included in the IEPA record, according to the IEPA. *Id.* The IEPA believes the proposed language leads to waste of resources and impairs the IEPA’s ability to perform duties under the Act. *Id.* For these reasons the IEPA opposes the inclusion of this new Section in the rules. *Id.*

Sections 309.121 and 309.122

The IEPA offers alternative language for these two Sections that will combine the two Sections into one. PC 2 at 8. As proposed, Section 309.121 sets forth a procedure for reopening the permit record when fairness and necessity dictate. Section 309.122 requires that the record be opened for additional comment if the changes to the permit are significant. The language suggested by the IEPA is derived from Natural Resources Defense Council v. USEPA 279 F.3d 1180 (Feb. 13, 2002). The IEPA’s proposed language would require the IEPA to reopen the public comment period to receive additional comments under certain circumstances. PC 2 at 8-9.

For example, if the IEPA determines that the draft permit has been significantly modified and if the permit is not a logical out growth of the draft permit, the comment period will be reopened. PC 2 at 9. The proposed language includes four specific inquiries to be made, and if any one of those indicates that the permit is not a logical growth of the draft permit, the comment period must be reopened. *Id.* Under the proposed language the IEPA must identify the issue or issues for which the comment period is reopened and comments are limited to the issue or issues identified. *Id.* The following language is suggested by IEPA:

- 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 period shall be limited to the substantial new issues that caused its reopening.
- c) For the notification purposes, the Agency shall follow the public notice requirements of Section 309.109.

Section 309.123

The proposal would add new Section 309.123 which defines the record before the Agency to include all documents or other materials prepared, properly placed in the record or identified for the record. The IEPA states that the Board's existing definition of the "record before the IEPA" at 35 Ill. Adm. Code 105.212 is preferred. PC 2 at 9. The IEPA opines that the proponents' attempt to define an existing definition would lead to confusion and produce absurd results. *Id.*

Section 309.143(a)

The amendments to Section 309.143(a) require effluent limitations in NPDES permits sufficient to avoid causing or contributing to water quality violations including narrative standards. The IEPA supports this proposed language without any changes. PC 2 at 9-10.

Section 309.146(a)(2) and (5)

The proposal amends Section 309.146(a)(2) by requiring reports adequate to determine compliance or lack of compliance with all effluent limits and special conditions of the permits. The IEPA supports the proposed change, but recommends that the phrase “by the permit holder” be deleted to remove redundancy in the rule. PC 2 at 10.

New Section 309.146(a)(5) requires proper installation and maintenance of monitoring equipment. The IEPA supports the proposed language but recommends that the language be moved to a new subsection. PC 2 at 10. The IEPA recommends the move because the concepts proposed in subsection (a)(5) do not coincide with the concepts in the existing Section 309.146(a). *Id.*

Proponents Comments and Testimony

Dr. Cynthia Skrukud, Beth Wentzel, and Albert Ettinger presented testimony on behalf of proponents at the first hearing. Tr.1 at 16, 19, and 23. The proponents also filed final comments (PC 11) with the Board. The following discussion will briefly summarize the testimony of each testifier and then the final comments.

Dr. Cynthia Skrukud

Dr. Skrukud is a clean water advocate for the Illinois Chapter of the Sierra Club. Tr.1 at 20. Dr. Skrukud testified that the IEPA and permit applicant hold many lengthy discussions in order to develop a draft permit. Consequently, the IEPA and applicant have exchanged a great deal of information before the public receives notice of an NPDES permit. Tr.1 at 21. To ensure that the public is fully engaged in the process, Dr. Skrukud opines that the public needs an informative public notice and access to the administrative record. *Id.* Dr. Skrukud states that the public should also be informed of any proposed changes. *Id.*

Dr. Skrukud noted that the proposal requires that more information about the receiving waters be included in the fact sheet. Tr.1 at 21. Dr. Skrukud indicated that this was included because impact of the proposed discharge on the receiving stream can be a major concern for the public. *Id.* Additionally, members of the public often have information, such as site-specific knowledge of the use of the receiving stream by children, which the IEPA may not have. Tr.1 at 22.

Dr. Skrukud testified that the public must be able to understand the special conditions of a permit. Tr.1 at 22. A special condition that is not properly monitored under the permit is “a hollow promise” according to Dr. Skrukud. Tr.1 at 23. Dr. Skrukud stated that the public should be able to understand from the administrative record how conditions were derived and how compliance will be monitored. *Id.*

Beth Wentzel

Ms. Wentzel is a watershed scientist for Prairie Rivers Network and she testified that the public should be allowed to understand the basis for and to comment on all terms and conditions of a permit. Tr.1 at 17. Ms. Wentzel pointed out that the current law requires the IEPA to conduct analyses to determine the impact of a discharge on water quality. *Id.* The analyses must take place prior to the issuance of a draft permit for public comment, and Ms. Wentzel states that it is only fair that such analysis be made available to interested persons. Tr.1 at 17-18.

Ms. Wentzel stated that if commenters do not have access to the derivation of terms of draft permits and assurances that those terms protect the waters, then public participation is not meaningful. Tr.1 at 18. Ms. Wentzel emphasized the support of Prairie Rivers Network for the proposed language requiring information justifying all terms and conditions of a permit be included in the record. *Id.* If information is not available to justify all terms and conditions, the permit should not be finalized until the information is available and the permit is re-noticed to the public. *Id.*

Ms. Wentzel also testified that the monitoring requirements are extremely important conditions to a permit. Tr.1 at 19. In order to ensure that all monitoring requirements are included in a permit, the proponents have recommended changes to Section 309.146. *Id.*

Finally, Ms. Wentzel stated that many of the proposed requirements are merely codifying steps already undertaken by the IEPA in the NPDES permit process at the discretion of the IEPA. Tr.1 at 19. Ms. Wentzel testified that public participation in the NPDES permit process is too important to include unnecessary or inappropriate limitation. *Id.*

Albert Ettinger

Mr. Ettinger is Senior Staff Attorney at the Environmental Law & Policy Center of the Midwest and Water Issues Coordinator and General Counsel for the Illinois Chapter of the Sierra Club. Tr.1 at 23-24. Mr. Ettinger testified that earlier drafts of the proposal had been discussed with the IEPA and members of various interest groups concerned with the NPDES permitting process. Tr.1 at 24. No consensus was reached as to the proposal according to Mr. Ettinger. *Id.*

Proponents' Public Comment 11

Proponents filed public comment number 11 on June 16, 2003, to present their positions after attending post-hearing discussions with the IEPA and dischargers. In addition, proponents presented their response to the IEPA's comments. Proponents inform the Board that discussions with the IEPA and dischargers were held after the March 17 and April 2, 2003 public hearings in this proceeding. PC 11 at 1. As a result of these discussions, the IEPA proposed alternative language for the proposal. *Id.* The proponents support the language proposed by the IEPA 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). PC 11 at 2. The proponents point out that the IEPA has not agreed to the language proposed in Sections 309.105(f) and (g), 309.112,

309.113(a)(5), 309.119, and 309.120. *Id.* The proponents also indicate that they have withdrawn the proposed change to 309.110(f) and seem to withdraw the changes to Section 309.117. PC 11 at Exh. A. The following discussion summarizes the proponents' position on the both the proposal and the IEPA's suggestions for the proposal.

Section 309.105(f) and (g). Proponents urge the Board to adopt the language for these two subsections as proposed. PC 11 at 3. Proponents indicate that the purpose in proposing these subsections was to create "catch-all language" to ensure that Board rules allow NPDES permits to be issued only in compliance with federal law and after a "fair opportunity" for comment. *Id.* Proponents offer this language in response to the Prairie Rivers decision. *Id.* Prior to that decision, proponents thought the Board's rules were clear that a fair opportunity to comment on substantive provisions in an NPDES permit must be allowed. *Id.* Proponents believe the decision in Prairie Rivers can be read to allow the issuance of a permit even if the procedures were unfair or violated federal law as long as no Board rules were violated. *Id.* Proponents do not believe that the language will affect any permits, but is instead a safety net. *Id.*

Proponents also respond to some of the comments made by groups who oppose the adoption of Section 309.105(f) and (g). PC 11 at 12. Proponents state that the proposed language is designed to be general and cover a broad range of potential problems. PC 11 at 13. Proponents assert there is nothing wrong with this and point out that the U.S. Constitution uses general and imprecise terms. *Id.* Further, the Act and Board rules often incorporate federal substantive and procedural requirements by reference. *Id.* Proponents believe the proposed language will give the IEPA and the Board the ability to deny a permit if the applicant insists on a decision despite problems with allowing public participation or compliance with federal law. PC 11 at 14.

Proponents also believe that the rules are "broken" and need to be fixed. PC 11 at 14. Proponents state that just because the dischargers are happy with the existing rules does not mean that there is not a problem. *Id.* Although the rules are over 30 years old, they had not been tested regarding the ability to protect public participation until recently. *Id.* The Board and courts decision in Prairie Rivers establish that at least the potential for unfairness exists in the current system. PC 11 at 15.

Sections 309.112 and 309.119. The proponents agree with the IEPA's proposed changes to these Sections but would add the phrase "Subject to Sections 309.120 and 309.121" to the beginning of the proposed Sections. PC 11 at 16, 17. In Section 309.112, proponents believe this addition will make clear that the IEPA should not immediately decide on a permit if the record needs to be reopened. PC 11 at 16. The proponents believe the addition is necessary in Section 309.119 because of the Prairie Rivers decision. PC 11 at 17. The proponents also suggest adding language at the end of Section 309.119 specifying that a different effective date may be stated in the permit.

Section 309.113. The proponents agree with the IEPA's proposed changes for this Section except that the proponents believe that the IEPA should summarize any changes in a reissued permit. PC 11 at 16. The proponents note that generally a reissued permit is identical to

the prior permit; however there can be instances where a reissued permit has substantial changes in the permit. PC 11 at 16-17. Proponents believe that requiring the IEPA to identify any changes in reissued permits will save the public the need to examine reissued permits where no changes were made. PC 11 at 17.

Section 309.114(c). Proponents recommend correcting the spelling of “navigable” in this Section.

Section 309.120. Proponents believe that the IEPA’s continued opposition to the language in this new Section is a result of the IEPA’s failure to understand the proposal and the implications of the Prairie Rivers decision. PC 11 at 18. Proponents state that the proposal was not intended to limit the IEPA’s ability to include items in the record, including the responsiveness summary and responses to public comments. *Id.* To alleviate this concern the proponents suggest adding a parenthetical to the language. *Id.* Proponents also believe the language is necessary to allow the IEPA the discretion to take testimony or receive materials after the public comment period in light of the Prairie Rivers decision. PC 11 at 19.

Comments and Testimony Against Proposal

The Board received comments and testimony from Illinois Association of Wastewater Agencies (IAWA), the Illinois Coal Association (ICA), Metropolitan Water Reclamation District of Greater Chicago (District), Illinois Environmental Regulatory Groups (IERG), and the Attainable Housing Alliance and the Home Builders Association of Illinois (AHA/HBAI) in opposition to the proposed changes. In addition, Frederick L. Hubbard on behalf of the Vermillion Coal Company and Mark Johnson on behalf of Illinois American Water Company testified in opposition to the proposal. Generally, the groups believe that the NPDES process has worked well for over 30 years and no changes to the rules are necessary. Further, the groups believe that the language is vague and the proponents have failed to support the proposal. The commenters do not believe that the Board should proceed to first notice with the proposal as submitted by proponents. The Board will summarize each of the comments and testimony below.

Vermillion Coal Company

Mr. Fred Hubbard testified on behalf of Vermillion Coal Company at the April 2, 2003 hearing. Tr.2 at 6; Exh. 2. Mr. Hubbard testified that Vermillion Coal Company is an advocate of an efficient proceeding which does not get “bogged” down. Tr.2 at 7. Mr. Hubbard testified that the “modifiers” included in the proposal could in fact slow down the process. Tr.2 at 7-8. Mr. Hubbard suggested eliminating the modifiers and putting more specificity in the proposal. *Id.* Mr. Hubbard stated that Vermillion Coal Company believes that the proposal is “probably slanted toward the objectors.” Tr.2 at 8.

Illinois American Water Company

Mr. Mark Johnson testified on behalf of Illinois American Water Company. Tr.2 at 51; Exh. 6. Mr. Johnson stated that Illinois American Water Company believes that the proposals

are generally acceptable, with one major concern. Tr.2 at 51. Specifically, Mr. Johnson indicated that there are no definitive end points for public comment periods. *Id.* Mr. Johnson testified that “obviously” Illinois American Water Company believes in public participation in the NPDES permitting process; however often facilities need to be completed for public health reasons. Tr.2 at 52. Thus, Mr. Johnson stated that a definitive time line is desirable. *Id.*

In addition to the open-ended comment periods, Mr. Johnson indicated that Sections 309.105(f) and (g) are unnecessary as the conditions set forth in the proposed language are more fully addressed in other sections of the regulations. Exh. 6 at 1. Mr. Johnson also noted that the language proposed in Sections 309.109, 309.110(f)(3), and 309.122 is vague and ambiguous. Exh. 6 at 1-2.

Illinois Coal Association (PC 1)

ICA provided both public comment and testimony at the second hearing regarding the proposed amendments. Mr. Fredrik Andes testified on behalf of ICA. The following discussion will briefly summarize first Mr. Andes’ testimony and then the comments filed by ICA.

Mr. Andes testimony reiterated the comments of ICA and he indicated that ICA believes the current public participation procedures in NPDES permitting are adequate. Tr.2 at 15. Mr. Andes indicated that ICA believes the proposed rule would have a series of problems. *Id.* More specifically, Mr. Andes stated that overall ICA thinks the proposal would introduce unnecessary complexity into the NPDES permitting process, slow down the NPDES permitting process, and create costly delays which could discourage companies from locating in Illinois. *Id.* Mr. Andes further stated that ICA would be open to working with stakeholders and the IEPA to perhaps modify the proposal. *Id.*

ICA recognizes the importance of public participation in the NPDES permitting process and believes that the existing regulations are sufficient to satisfy all state and federal requirements. PC 1 at 1-2. ICA is concerned that the effect of the proposed rules would be to increase procedural delays and multiply opportunities for opponents of projects to delay permitting with frivolous challenges. PC 1 at 2.

ICA believes that one of the main objectives of proponents is to reverse the interpretations of the Part 309 regulations made by the Board and affirmed by the court in Prairie Rivers. PC 1 at 2. ICA argues that the proponents assume that because of the court’s ruling the regulations need to be amended. *Id.* ICA disagrees with that assumption. *Id.* ICA also offers comments on sections of the rule, which are summarized below.

Section 309.105(f). ICA argues that the proposed Section should not be adopted because the proposed revision would not enhance public participation. PC 1 at 3. Further, the ICA maintains that the language is vague and could lead to unnecessary delays in NPDES permitting. *Id.* ICA believes the Part 309 regulations already provide ample opportunity for public comment and the proposed language is unnecessary. *Id.*

Section 309.105(g). ICA disagrees that this Section is necessary “to correct an error in the Illinois Appellate Court’s decision affirming the Board’s decision” in Prairie Rivers. PC 1 at 4. ICA believes the proposed language would cause confusion over the applicability of USEPA regulations to NPDES permitting in Illinois. *Id.*

Section 309.107. ICA urges the Board not to adopt this language as the notification of IDNR is a matter best left to the discretion of the IEPA. PC 1 at 5.

Section 309.108(e). ICA is concerned that the proposed language is designed to circumvent the decisions by the Board and the court in Prairie Rivers that a third-party appellant has the burden of showing that the contested permit should not have been issued. PC 1 at 5. ICA believes this language will shift the burden of proof in NPDES permit appeals without justification and the change is not necessary. *Id.*

Sections 309.109(a), 309.112, and 309.119. The proposed changes in these Sections reflect changes to Section 309.121 and 309.122. ICA opposes these changes as unnecessary because the ICA also opposes the changes to Sections 309.121 and 309.122. PC 1 at 6, 9.

Section 309.110(f). ICA believes that the proposed new Section is unnecessary as the information sought to be required is already included in the IEPA’s public notices. PC 1 at 7. ICA disagrees with proponents that federal regulations require states to adopt rules identical to the federal regulations. *Id.* Rather, ICA believes federal regulations require state regulations to include procedures the same or more stringent. *Id.* Because the Part 309 rules have been approved by the USEPA, ICA feels the proposed revisions are unnecessary to achieve compliance with the federal regulations. *Id.*

ICA urges the Board to amend the language of the provision, if the Board does decide to adopt the provision. PC 1 at 7. ICA would have the Board substitute the phrase “comment procedures” for the phrase “procedures for the formulation of final determinations” in the proposal. *Id.* ICA believes the language as proposed is vague and the substituted language would be more straightforward. *Id.*

Section 309.113. ICA urges the Board not to adopt the proposed new subsections in this proceeding. PC 1 at 9. ICA is concerned that the information sought to be included is already a part of the fact sheets or is not required by federal law. PC 1 at 8. ICA points out that the items proposed for inclusions other than new subsection (a)(5) come from the *NPDES Permit Writers Manual* which is a guidance document and not binding on USEPA. *Id.* ICA questions why a document not binding on USEPA should be applied to the IEPA. *Id.*

Section 309.117. ICA argues that proponents’ rationale for this change does not support the proposed language. PC 1 at 9. ICA maintains that the administrative record in IEPA permitting decisions is already defined by Board regulations and even if greater specificity was needed, proponents offer no justification for this language. *Id.*

Section 309.120. ICA does not object to this Section of new language so long as the Section does not apply to permit applicants. PC 1 at 10. ICA is concerned that the proposal

ignores the fundamental difference between public commenters and permit applicants. *Id.* ICA feels the proponents have offered no justification for limiting issues and arguments which may be raised by the applicant to those issues raised during public comment. *Id.*

Section 309.121 and 309.122. ICA believes that neither of these two proposed Sections is necessary and the adoption of the language will result in substantial delays in the permitting process. PC 1 at 11. ICA indicates that the IEPA has to balance the interest in obtaining public comment with the interest in obtaining timely permits and the existing regulations have done that. *Id.* ICA feels the exiting rules should not be disturbed. *Id.*

ICA disagrees with the proponents' interpretation of Prairie Rivers and the necessity of a change in the rules. ICA states that the Board actually found that Prairie River Network, as the petitioner, failed to demonstrate that petitioner was not afforded meaningful opportunity to participate in the permitting process. PC 1 at 11, citing Prairie Rivers Network v. IEPA and Black Beauty Coal Company PCB 01-112, slip. op. at 19 (Aug. 9, 2002) (PCB 01-112). ICA opines that the Board did not determine that additional comment was prohibited by the Part 309. *Id.*

Section 309.123. ICA states that the Board already has a definition for what constitutes the record before the IEPA. PC 1 at 12. ICA points out that proponents do not assert that the existing definition is insufficient. *Id.* ICA believes this revision is unnecessary. *Id.*

Section 309.143. ICA feels proponents have failed to justify the need for this proposed new language. PC 1 at 12. ICA reiterates that Illinois is not required to adopt language identical to federal regulations and proponents seem to concede this by proposing to add only part of the federal language. *Id.* ICA believes that the existing language at 35 Ill. Adm. Code 309.141(d)(1) sufficiently addresses the relationship between NPDES permit effluent limits and water quality standards. *Id.*

Section 309.146. The proposed language in this Section also originates with *NPDES Permit Writers Manual* and ICA questions the "wisdom" of writing language from a guidance document. PC 1 at 13. ICA believes that the proposed new language duplicates existing requirements and is redundant. *Id.*

Metropolitan Water Reclamation District of Greater Chicago (PC 3)

The District favors public participation in the NPDES permitting process; however, the District believes that the proposed amendments would create an "amorphous standard that injects excessive subjectivity into" the NPDES permitting process. PC 3 at 1. The District thinks that the existing rules provide sufficient public participation without imposing delays. PC 3 at 2. The District is concerned that the proposed language would remove certainty and finality from various stages of the NPDES permitting process. *Id.* The District also provided comments on various sections of the proposed language.

Section 309.105(f). The District believes that the language proposed is vague and will inject uncertainty, delay and expense in the NPDES permitting process. PC 3 at 2.

Section 309.120. The District concurs with the IEPA that this provision should not be adopted. PC 3 at 2. The District argues that the language removes the certainty and finality of the comment period. *Id.* The District believes the language could result in additional motions practice or hearings on whether an issue was “reasonable ascertainable” during the comment period. PC 3 at 3.

The District also has concerns with the provision which would allow an extension of the comment period. PC 3 at 3. The District feels that extensions should be granted by the Board and only on showing of good cause. *Id.*

Section 309.121. The District also believes that this Section removes the certainty and finality in the permitting process and replaces the certainty and finality with the potential for endless rounds of public comment. PC 3 at 3. If this Section is adopted by the Board for first notice, the District suggests modifying the language in subsection (d) for clarity. *Id.* The District does support the IEPA’s language proposed for this Section. PC 3 at 4.

Section 309.122(a). The District concurs with the IEPA’s suggested language for this Section. PC 3 at 4. The District objects to the language as proposed by the proponents as the language injects a lack of finality in the process. *Id.* The District does suggest that if the Board proceeds with the language as proposed that the language be modified to remove IEPA discretion on the comments to be received. *Id.*

Illinois Association of Wastewater Agencies (PC 5)

IAWA provided both public comment and testimony at the second hearing regarding the proposed amendments. Mr. Roy Harsch testified on behalf of IAWA. Tr.2 at 53; Exh. 7. The following discussion will briefly summarize first Mr. Harsch’s testimony and then the comments filed by IAWA.

Mr. Harsch testified that IAWA believes that the proponents have failed to meet their burden to establish reasons why the Board should enact this proposal. Tr.2 at 54. Further, Mr. Harsch stated that the testimony indicates that USEPA has not issued any notices of inadequacies. *Id.* Mr. Harsch testified that the essence of the proposal is “that proponents lost and appeal” in a third-party NPDES permit proceeding and proponents are seeking to shift the burden of proof before the IEPA. Exh. 7 at 2.

Mr. Harsch stated that IAWA is concerned that the proposal would create a new level of requirements that will translate in to additional staff time and cost for the IEPA. Tr.2 at 54. IAWA believes that the proposed changes are unnecessary, unsupported, and unreasonable according to Mr. Harsch. Exh. 7 at 3.

IAWA indicates in the public comment that IAWA supports public participation in the NPDES permitting process and believes that the existing Part 309 has served the state well. PC 5 at 1. IAWA reiterates that proponents have not supported the need for a change and that the

reason for the change is because proponents lost a case before the Board. PC 5 at 1-2. IAWA does not believe that losing a case is sufficient reason to support a rulemaking. PC 5 at 2.

Illinois Environmental Regulatory Group (PC 8)

IERG believes that the proposal is unnecessary and potentially problematic for the continued operation of the NPDES program by the IEPA. PC 8 at 2. IERG urges the Board not to adopt the proposal or in the alternative to adopt the language proposed by the IEPA for certain provisions. *Id.* IERG generally states two reasons why the proposal should not be adopted. First, IERG argues that the proponents have not sufficiently justified the need for the proposed language. *Id.* The public participation rules were adopted 30 years ago under the Clean Water Act. *Id.* The existing rules have been approved by the USEPA, which clearly means that the existing rules are consistent with the federal law, according to IERG. PC 8 at 2-3. Second, IERG disagrees with the proponents' position that the amendments are necessary because of provisions of the Clean Water Act or the Permit Writer's Manual. PC 8 at 3.

IERG argues that the current NPDES permitting system has served the State, public and regulated community well for over 30 years. For that reason alone the Board should not make changes when the justification for change is minimal. PC 8 at 3. Furthermore, where potential harm to the program in the form of time delays and increased costs to the applicant and the IEPA would result, the Board should proceed with changes only where sufficient justification is provided. *Id.* IERG specifically set forth concerns on the proposed changes and the following discussion will summarize those concerns.

Sections 309.105(f) and (g). IERG feels that both these proposed subsections are unnecessary and vague. PC 8 at 4. IERG agrees with the IEPA that the language in Part 309 was adopted to give a fair opportunity to comment and if there is a specific concern, that concern should be addressed. *Id.* Also, IERG points out that the NPDES program has been delegated to the State, but delegation does not require the NPDES program in the State be identical to the federal program. *Id.*

Section 309.107(c). IERG believes that this Section is unnecessary, however IERG is not concerned with the language. PC 8 at 4.

Section 309.108(c). IERG indicates that this language was the subject of discussion between various stakeholders and the proponents following the second hearing in this proceeding. PC 8 at 4. IERG concurs with the language for this Section proposed by the IEPA. *Id.* IERG's understanding is that the language proposed by the IEPA is merely a codification of the IEPA's current practice and imposes no additional requirements on the IEPA. *Id.*

Section 309.108(e), 309.117, and 309.123. These Sections all deal with the IEPA's record and IERG is concerned that the language creates an additional requirement on the IEPA. PC 8 at 4-5. IERG believes that the language may require the IEPA to prepare a third record besides the main file and the permit file. PC 8 at 5. IERG feels that such a requirement is a redundant exercise and will delay the process. *Id.* IERG therefore supports that IEPA's comments concerning alternative language for subsection (e) and deletion of proposed Section

309.123. *Id.* IERG also urges the Board not to adopt the proponents' language for Section 309.117. *Id.* IERG states that after discussions with the IEPA, IERG understands that the IEPA intended to recommend striking the language in Section 309.117 as well. *Id.*

Section 309.109(a), 309.112, 309.119, 309.121, and 309.122. IERG believes that these Sections as proposed are vague, could cause confusion, and would imposed an administrative hardship on the IEPA. PC 8 at 5. IERG does believe that the IEPA's proposed changes to these Sections would provide a "potentially acceptable alternative to the language proposed by the proponents." *Id.* IERG would like to discuss the IEPA's language at hearing with the IEPA. *Id.* However, at this time IERG concurs with the IEPA's comment. *Id.*

IERG also asks the Board to modify Section 309.119. PC 8 at 5-6. IERG believes that the IEPA inadvertently omitted a phrase dealing with a specific effective date for a permit. PC 8 at 6. IERG asks the Board to add that phrase.

Section 309.109(b) and Section 309.110(f). IERG has no objection to the change in Section 309.109(b) and concurs with the IEPA's comment for Section 309.110(f). PC 8 at 6.

Section 309.113(a)(5-9). IERG believes that the language proposed for these Sections is not required and could be costly and burdensome to the IEPA. PC 8 at 6. However, if the Board believes the current language is not sufficient, IERG urges the Board to adopt the language as submitted by the IEPA. *Id.*

Sections 309.113(a)(11) and 309.114(c). IERG concurs with the language offered by the IEPA for Section 309.113(a)(11) and finds the proposed language at Section 309.114(c) acceptable. PC 8 at 7.

Section 309.120. IERG opposes the adoption of this proposed language. PC 8 at 7.

Sections 309.143(a) and 309.146(a)(2), (5). IERG now supports the language of Section 309.143(a) and can support the language of Section 309.146(a)(2) and (5) as modified by the IEPA. PC 8 at 7.

Attainable Housing Alliance and the Home Builders Association of Illinois (PC 12)

Together these two organizations represent homebuilders, developer, remodelers, suppliers, subcontractor, and the housing industry. PC 12 at 1-2. Members of these organizations may be affected by this rulemaking in two ways. PC 12 at 2. First, homebuilders are required to obtain NPDES permits for discharges of stormwater from construction activities. *Id.* Second, homebuilders are required to obtain services from the publicly owned treatment facilities that must obtain NPDES permits. *Id.* ABA/HBAI supports strong public participation in the NPDES permit process as long as participation is not used to delay the decision-making process, to impede growth, or to impose new requirements not necessitated by the law. *Id.* ABA/HBAI is concerned that the proposed rules are not directed at allowing effective public participation, but rather are designed to facilitate challenges which will frivolously limit permittees. *Id.* ABA/HBAI believes that the existing process balances interests of the regulated

party with the interest of the public. *Id.* This proposal would shift the balance and result in unfair burdens being placed on the regulated parties with no justification or identification of any deficiency in the existing rules, according to ABA/HBAI. PC 12 at 3.

ABA/HBAI concurs with other commenters that the proposed rules are vague and unclear. PC 12 at 4. ABA/HBAI further agrees that the proposal is unwarranted and has not been justified by the proponents. *Id.* ABA/HBAI specifically objects to the Sections discussed below.

Sections 309.105(f) and (g). ABA/HBAI agrees with the IEPA that these provisions are both repetitive and unnecessary and provide little in the way of substantive legal guidance. PC 12 at 4. ABA/HBAI objects to regulations which do not identify substantive requirements. *Id.*

Section 309.107. ABA/HBAI also believes this provision is unnecessary and is unclear as to why IDNR should be notified of NPDES permits. PC 12 at 4. ABA/HBAI further indicates that the role of IDNR in the NPDES permitting process is not identified by this provision. *Id.*

Section 309.108(e). ABA/HBAI believes this provision is burdensome and not required by law. PC 12 at 6. ABA/HBAI contends that this proposed language has been “recognized by many commenters as an attempt to shift the burden of proof in a permit challenge to the IEPA or the permittee.” *Id.* ABA/HBAI does not object to the IEPA’s proposed language for this Section, however, ABA/HBAI believes that even that language is unnecessary. *Id.*

Section 309.110(f). ABA/HBAI believes that the language proposed goes beyond federal requirements and the information which would be required by this provision is already included in the IEPA’s notice. PC 12 at 6. ABA/HBAI also contends that this language is vague as written and appears to be a basis for procedural challenges in future permits. *Id.*

Sections 309.113 and 309.117. ABA/HBAI feels that these requirements are unnecessary. PC 12 at 7. Specifically, the provisions of Section 309.113(a)(6)-(9) are burdensome procedural requirements and subsection (a)(5) is repetitive, according to ABA/HBAI. *Id.* ABA/HBAI points out that the administrative record is defined by law, not the IEPA of the public and includes the items identified in Section 309.117. *Id.*

Section 309.120. ABA/HBAI argues that this Section is not necessary as law defines the burden on the applicants and public commenters for purposes of the administrative record. PC 12 at 7. ABA/HBAI also believes that there is a fundamental difference between the applicant and commenters during the permitting process and administrative review and the rules are intended to govern public participation not the permittee. *Id.* ABA/HBAI also objects to the allowance of an extension of the public comment period. *Id.*

Sections 309.121 and 309.122. ABA/HBAI objects to these Sections as being over broad and confusing. PC 12 at 8. ABA/HBAI believes that the proposed language will turn the issuance of an NPDES permit into a “public negotiation rather than a process governed by substantive regulations” adopted with public notice and comment. *Id.* ABA/HBAI contends that

public participation requirements are primarily intended to provide information to the public and ensure that the public has a reasonable opportunity to comment. *Id.* ABA/HBAI insists that the proposed language “infringes on the rights of permittee” by causing undue delay in permit issuance. *Id.*

Sections 309.143 and 309.146. ABA/HBAI believes that both these Sections are unnecessary and are being proposed to bolster future challenges to NPDES permits rather than to facilitate public participation. PC 12 at 8-9. ABA/HBAI further contends that the proponents have not justified the addition of Section 309.146. *Id.*

Comments and Testimony in Support of the Proposal

The Board received comments from Starved Rock Audubon Society, Openlands Project, Larry Miller, Thomas Lindblade, Margaret Mitchell, and Illinois Stewardship Alliance in support of the proposal. The comments generally support the concept of simplified, full and complete public participation in the NPDES permit process.

BOARD DISCUSSION

The Board believes that proponents, the IEPA and other supporters of this proposal have provided the Board with sufficient justification to warrant proceeding to first notice with amendments to Part 309. The Board will proceed with some of the proposal as drafted by the proponents, while accepting some amendments to the original proposal from the IEPA and IERG. With other parts of the proposal, the Board finds that the record does not support proceeding to first notice. The following discussion will elaborate on the justification for proceeding and then discuss the specific language that will be proposed for first notice.

Proceeding to First Notice

The Board finds sufficient support in the record to proceed with first notice under the Illinois Administrative Procedure Act (5 ILCS 100/1/1 *et seq.* (2002)). The Board agrees that the Prairie Rivers decision does establish a need for changes to the Board’s rules. Also, many of the changes suggested by proponents are merely codifying the IEPA existing practices in the rules. Because public participation is required in the permitting process by both the Act (415 ILCS 5/1 *et seq.* (2002)) and the Clean Water Act (33 U.S.C. §1251 *et seq.*), the Board finds that the IEPA’s procedures for gathering public comment in NPDES permitting should be included in rules.

The Board and appellate court decisions in PCB 01-112 and Prairie Rivers revealed a potential ambiguity in the Board regulations. The Board found that petitioners in that case failed to demonstrate that they were not given meaningful opportunity to comment. Prairie Rivers Network v. IEPA and Black Beauty Coal Company, PCB 01-112 (Aug. 9, 2001). The appellate court agreed with the Board, and stated that the IEPA was “not required to issue a second draft permit and reopen the public comment period in direct contravention of applicable regulations.” Prairie Rivers 335 Ill. App. 3d 391, 384; 781 N.E. 2d 372, 384. A narrow reading of the court’s decision limits the IEPA’s ability to send a permit back to hearing, unless the Board’s rules

specify a procedure for doing so. In testimony in this proceeding, Mr. Frevert explained that the IEPA believes it may send a permit back to public comment and hearing. Tr.1 at 76-77. Therefore, the Board finds that a change in the rule is necessary to address any ambiguity that may exist between the IEPA's actual practices and the court's decision.

Furthermore, the IEPA in an opening statement at the first hearing indicated that the proposal would "document some of the IEPA's existing practices" in the NPDES permitting process. Tr.1 at 14. For those procedures already followed by the IEPA, codification of those procedures will inform all interested persons of the procedures used by the IEPA. The Board finds that the addition of language codifying IEPA procedures is warranted.

Section by Section Review

In general, the Board will proceed with the majority of the proposal. The Board will amend the proposal after careful consideration of suggested language from the IEPA, and in light of comments by various participants in this rulemaking. In the following discussion, the Board will review each Section of the proposal and indicate whether or not that Section will be included in the first-notice proposal.

Sections 309.105(f) and (g)

The proposed language in these two new subsections would prohibit the IEPA from issuing an NPDES permit if there has not been a fair opportunity for the public to comment (subsection (f)) or if the permit is not consistent with federal law (subsection (g)). The proponents argue that this language is necessary because of the decision by the court in Prairie Rivers. Proponents feel that the proposed subsections are a necessary "catch all" that will ensure that a permit cannot be issued without a fair opportunity to comment and that a permit meets all federal laws even if the permit meets all the Board's rules. Proponents maintain that the language is intentionally broad to cover a range of potential problems. The IEPA, Illinois American Water Company, ICA, the District, IERG, and ABA/HBAI feel this language is overly vague and unnecessary.

The Board disagrees with the concerns expressed by the proponents. Particularly, given the amendatory language the Board will propose in this proceeding, the Board believes that the suggested new subsections have not been justified. The proposed language for Section 309.120 will ensure full and complete public participation in NPDES permitting process. Therefore, the Board finds that a prohibition on the issuance of a permit absent "fair opportunity to comment" is unnecessary based on this record. Second, regarding the proposed prohibition for lack of consistency with federal law, the Board believes the language of existing rules sufficiently addresses this concern. For example, the Board's existing rules at Section 309.141 (which are not a part of this proposal) require that the IEPA ensure compliance with several provisions of the Clean Water Act including effluent standards, effluent prohibitions, standards of performance, and water quality standards pursuant to Sections 301, 302, 306, and 307 of the Clean Water Act. 35 Ill. Adm. Code 309.141. The Board finds that the language in Section 309.141 clearly prohibits the IEPA from issuing an NPDES permit that is not consistent with

federal law. For these reasons the Board will not proceed to first notice with the proposed new subsections at Section 309.105 (f) and (g).

Section 309.107

The Board will proceed with the requirement that the IEPA notify IDNR when an NPDES permit application is complete, subject to a memorandum of agreement with IDNR. Although several groups indicated that this provision was not necessary, the IEPA supports the language. Further, the IEPA is currently the process of developing a memorandum of agreement with IDNR. Because the proposed language merely codifies a procedure the IEPA was already implementing, and the IEPA does not object to the language, the Board will propose Section 309.107 for first notice.

Section 309.108

Proposed language for Section 309.108(c) adds specific items to be included in the IEPA's tentative determination on an NPDES permit. The IEPA suggested minor changes to the proposed language and suggested that the proposal be amended to include the language proposed in Section 309.113(a)(7). The proponents have accepted the IEPA's suggestions, as have other commenters. IERG indicated that because IERG understands the suggested language is a codification of the IEPA's current practice, IERG does not object to the language. PC 8 at 4. The Board also agrees with the proposed language as amended by the IEPA. The Board will proceed to first notice with the language suggested by the IEPA.

As proposed, new subsection (e) requires the IEPA to create a draft administrative record in support of the IEPA's tentative decision on the permit. Both ICA and ABA/HBAI expressed concern that the proposed language was attempting to shift the burden of proof in an NPDES permit appeal.

The IEPA proposed language that provides that all documents related to the IEPA's tentative decision on a permit application become a part of the IEPA's record. The IEPA could either identify the document for the record or include the document in the record. ABA/HBAI does not object to the language proposed by the IEPA and, IERG also supports that language suggested by IEPA. Further, the proponents agree with the amendments suggested by the IEPA. Therefore, the Board will proceed with the language as offered by the IEPA. The language merely requires the IEPA to identify or place in the permit record any documents that support the IEPA's decision. All such documents should already be a part of the record based on the Board's procedural rules (*see* 35 Ill. Adm. Code 105.212(b)(5)) and this provision merely reiterates the need for inclusion.

Section 309.109

Both the IEPA and the proponents agree that if the Board proceeds with the IEPA suggested amendment to Section 309.121 the proposed amendments to this Section are unnecessary. The IEPA indicated that the concepts included in the proposal in this Section are now included in the language proposed by the IEPA for Section 309.121 (renumbered by the

Board as Section 309.120, *see* discussion on pages 28-29). As indicated below, the Board will proceed to first notice with the language suggested by the IEPA for Section 309.120. The Board agrees with the IEPA that the concepts from proposed Section 309.109 are a part of the language the Board will propose for first notice. Therefore, the Board will delete Section 309.109 from the proposed first notice, but will include the concepts in the first-notice language at Section 309.120.

Section 309.110

The proponents indicated that they were withdrawing the proposed change to this Section. PC 11 at Exh. A. Therefore, the Board will not include Section 309.110 in the first-notice proposal.

Sections 309.112 and 309.119

The proponents suggest cross-referencing Sections 309.120 and 309.121 at the beginning of these two Sections. In addition proponents and IERG suggest adding a phrase at the end of Section 309.119 regarding effective dates of permits. The IEPA disagrees with the cross-reference proposal, because the IEPA believes a cross-reference is unnecessary given the change to Section 309.121.

The Board will proceed to first notice with a cross-reference. Although the proposed changes to Section 309.121 (renumbered by the Board as Section 309.120, *see* discussion on pages 28-29) do clarify when a public comment period will be reopened, the cross-reference to that Section in Sections 309.112 and 309.119 clarifies that additional comment periods may occur. Therefore the Board will add a cross-reference in these Sections. The Board will also proceed to first notice with language regarding the effective date of the permit as suggested by IERG and proponents.

Section 309.113

Existing Section 309.113 specifies information to be included in public information fact sheets for dischargers exceeding 500,000 gallons in one day. The language that was proposed for Section 309.113 would require the inclusion of additional information in the fact sheets prepared by the IEPA during the NPDES permitting process. The IEPA recommended several changes to the proposal including the deletion of some proposed subsections and the redrafting of others. The proponents agreed with the changes suggested by IEPA, except in one instance. In addition to IEPA's suggestions, the proponents believe that a summary of changes should be included for reissued permits as well as new permits.

IERG, ICA, and ABA/HBAI all oppose the changes suggested by the proposal. ICA is concerned that the changes require additional information that is either already in the fact sheet or information that is not required by federal law. IERG believes that the language proposed is not required and would be costly to the IEPA. IERG does support the language in the proposed Section 309.113(a)(11) as amended by the IEPA. ABA/HBAI also feels the language is not required and burdensome.

The Board acknowledges that federal law does not necessarily require the proposed language. However, the additional requirements for the fact sheets will assist in the public's ability to participate in the NPDES permitting process. Further, with the exception of one issue, the IEPA and the proponents have agreed upon language that removes some of the language objected to by IERG, ICA and ABA/HBAI. The Board finds that the language developed by the IEPA is justified and the Board will proceed to first notice with the language. In addition, the Board will retain the requirement that a summary of changes for reissued permits be included. The Board is, at this time, convinced that such a summary might assist in the public comment process for NPDES permits. However, the Board invites the IEPA and other participants to provide additional comment on this issue.

Section 309.114

The proponents suggest correcting a typographical error in Section 309.114(c) and the Board will proceed with that amendment.

Section 309.117

The proponents seem to be withdrawing the proposed change to this Section. PC 11 at Exh. A. Therefore, the Board will not include Section 309.117 in the first-notice proposal.

Section 309.120

The proponents' proposed language in this new Section provides that persons wanting to object to permits or permit conditions must raise the issues during the public comment period. The proponents state that the new language is not intended to limit the IEPA's ability to include items in the record. Rather, the language is necessary because of the Prairie Rivers decision to allow the IEPA discretion to take testimony or receive comments after the public comment period, according to the proponents.

The IEPA, the District, IERG, and ABA/HBAI all oppose the addition of this new Section. ICA does not oppose the language as long as the requirement does not apply to the applicant. The concerns center around the perception that the language attempts to define the record before the IEPA and that the language may extend the public comment period.

The Board will not proceed with this language at this time. First, the Board is not convinced that the language as proposed actually accomplishes the intent of the proponents. The Board agrees with the IEPA that the language appears to define the record before the IEPA, and existing rules already define the contents of the record (*see* 35 Ill. Adm. 105.212). Second, the Board believes that the concerns of the proponents regarding the Prairie Rivers decision are addressed by the language proposed for first notice in Sections 309.120 and 309.108. Therefore, the Board will not proceed at this time. However, the Board invites the proponents as well as other participants to provide additional comment on this issue.

Sections 309.121, 309.122, and 309.123

The language proposed in Sections 309.121 and 309.122 would identify when the record should be reopened in order to receive additional public comments. The language proposed in Section 309.123 would clarify what constitutes the record before the IEPA.

The IEPA has offered alternative language for Sections 309.121 and 309.122. The IEPA further recommends the deletion from the proposal of Section 309.123. The proponents agree with the IEPA's suggestions. The District also concurs with the IEPA's proposed changes but opposes the language as originally proposed.

IERG feels that the IEPA's language could be an acceptable alternative, however, IERG would like the opportunity to discuss the language at hearing. ICA and ABA/HBAI both oppose the language as originally proposed as unnecessary. ICA and ABA/HBAI are concerned that the proposed change could inject uncertainty in the NPDES permitting process.

The Board will proceed with the language suggested by the IEPA as a new Section. Because the Board has decided not to propose Section 309.120 as included in the proposal, the Board will renumber Section 309.121 from the proposal to Section 309.120. The Board feels that this language is necessary to clarify the current IEPA practice reopening public comment. Further, the Board finds that this will alleviate any ambiguity regarding reopening the public comment period raised by the Prairie Rivers decisions. Therefore, the Board will propose for first notice a new Section 309.120 and the Board will not proceed with Sections 309.122 and 309.123.

Section 309.143

The language proposed for Section 309.143 requires the control of pollutants or pollutant parameters that may potentially cause a violation of the water quality standards. ICA and ABA/HBAI oppose proposing the language in Section 309.143 for first notice. ICA believes that the language is unnecessary and the Board's existing rules sufficiently address the relationship between NPDES permits and the water quality standards. PC 1 at 12. ABA/HBAI contends that proponents have not justified amendment of Section 309.143 and that the amendment is proposed to bolster future challenges to NPDES permits. PC 12 at 8-9. The IEPA and IERG support the amendment of Section 309.143 as proposed by the proponents. PC 2 at 9-10; PC 8 at 7.

The Board will proceed with the proposed language for Section 309.143. The language is identical to federal language and IEPA is prohibited from issuing an NPDES permit that is not in compliance with federal law (*see* 35 Ill. Adm. Code 309.141). Although the Board is not required to adopt the federal language verbatim, the Board finds that the addition of this language will clarify the relationship of water quality standards to effluent limits in NPDES permits without adding additional requirements.

Section 309.146

The proposal adds language to require that reports made by permit holders are adequate to determine compliance and to require permit to include specifications concerning monitoring. ICA and ABA/HBAI oppose proposing the language in Section 309.143 for first notice. ICA believes that the proposed new language duplicates existing requirements and is redundant. PC 1 at 13. ABA/HBAI contends that proponents have not justified amendment of Section 309.146. PC 12 at 8-9.

The IEPA supports the change suggested for Section 309.146(a)(2) but suggests minor changes to eliminate redundancy in the rule. The IEPA also supports the language proposed as subsection (a)(5) and suggests moving the language to a new subsection (d). IERG supports the language as amended by the IEPA in Section 309.146

The Board disagrees that the proposed language is redundant. The Board believes that in fact the language will add specificity to the rule by delineating what must be included in reports. Further, the addition of the language on monitoring clarifies what the permits must include on the issue of monitoring. Therefore, the Board finds that the changes to Section 309.146 are justified and the Board will proceed to first notice with those changes as amended by the IEPA.

CONCLUSION

After carefully considering the comments, testimony and proposal in this rulemaking, the Board finds that the proponents have justified proceeding to first notice with this rulemaking. The Board will proceed to first notice with a rule based on the proposal which incorporates suggestions from the IEPA, proponents, and IERG. The Board finds the proposed rule is economically reasonable and technically feasible. Therefore, the Board adopts for first notice amendments to the Board's rules at 35 Ill. Adm. Code 309.

ORDER

The Board directs the Clerk to cause the publication of the following rule for first notice in the *Illinois Register*.

TITLE 35: ENVIRONMENTAL PROTECTION
SUBTITLE C: WATER POLLUTION
CHAPTER I: POLLUTION CONTROL BOARD

PART 309
PERMITS

SUBPART A: NPDES PERMITS

Section	
309.101	Preamble
309.102	NPDES Permit Required
309.103	Application - General
309.104	Renewal
309.105	Authority to Deny NPDES Permits

309.106	Access to Facilities and Further Information
309.107	Distribution of Applications
309.108	Tentative Determination and Draft Permit
309.109	Public Notice
309.110	Contents of Public Notice of Application
309.111	Combined Notices
309.112	Agency Action After Comment Period
309.113	Fact Sheets
309.114	Notice to Other Governmental Agencies
309.115	Public Hearings on NPDES Permit Applications
309.116	Notice of Agency Hearing
309.117	Agency Hearing
309.118	Agency Hearing File
309.119	Agency Action After Hearing
<u>309.120</u>	<u>Reopening the Record to Receive Additional Written Comment</u>
309.141	Terms and Conditions of NPDES Permits
309.142	Water Quality Standards and Waste Load Allocation
309.143	Effluent Limitations
309.144	Federal New Source Standards of Performance
309.145	Duration of Permits
309.146	Authority to Establish Recording, Reporting, Monitoring and Sampling Requirements
309.147	Authority to Apply Entry and Inspection Requirements
309.148	Schedules of Compliance
309.149	Authority to Require Notice of Introduction of Pollutants into Publicly Owned Treatment Works
309.150	Authority to Ensure Compliance by Industrial Users with Sections 204(b), 307 and 308 of the Clean Water Act
309.151	Maintenance and Equipment
309.152	Toxic Pollutants
309.153	Deep Well Disposal of Pollutants (Repealed)
309.154	Authorization to Construct
309.155	Sewage Sludge Disposal
309.156	Total Dissolved Solids Reporting and Monitoring
309.157	Permit Limits for Total Metals
309.181	Appeal of Final Agency Action on a Permit Application
309.182	Authority to Modify, Suspend or Revoke Permits
309.183	Revision of Schedule of Compliance
309.184	Permit Modification Pursuant to Variance
309.185	Public Access to Information
309.191	Effective Date

SUBPART B: OTHER PERMITS

Section	
309.201	Preamble
309.202	Construction Permits

309.203	Operating Permits; New or Modified Sources
309.204	Operating Permits; Existing Sources
309.205	Joint Construction and Operating Permits
309.206	Experimental Permits
309.207	Former Permits (Repealed)
309.208	Permits for Sites Receiving Sludge for Land Application
309.221	Applications - Contents
309.222	Applications - Signatures and Authorizations
309.223	Applications - Registered or Certified Mail
309.224	Applications - Time to Apply
309.225	Applications - Filing and Final Action By Agency
309.241	Standards for Issuance
309.242	Duration of Permits Issued Under Subpart B
309.243	Conditions
309.244	Appeals from Conditions in Permits
309.261	Permit No Defense
309.262	Design, Operation and Maintenance Criteria
309.263	Modification of Permits
309.264	Permit Revocation
309.265	Approval of Federal Permits
309.266	Procedures
309.281	Effective Date
309.282	Severability

Appendix References to Previous Rules

AUTHORITY: Implementing Sections 13 and 13.3 and authorized by Section 27 of the Environmental Protection Act [415 ILCS 5/13, 13.3 and 27].

SOURCE: Adopted in R71-14, at 4 PCB 3, March 7, 1972; amended in R73-11, 12, at 14 PCB 661, December 5, 1974, at 16 PCB 511, April 24, 1975, and at 28 PCB 509, December 20, 1977; amended in R73-11, 12, at 29 PCB 477, at 2 Ill. Reg. 16, p. 20, effective April 20, 1978; amended in R79-13, at 39 PCB 263, at 4 Ill. Reg. 34, p. 159, effective August 7, 1980; amended in R77-12B, at 41 PCB 369, at 5 Ill. Reg. 6384, effective May 28, 1981; amended in R76-21, at 44 PCB 203, at 6 Ill. Reg. 563, effective December 24, 1981; codified at 6 Ill. Reg. 7818; amended in R82-5, 10, at 54 PCB 411, at 8 Ill. Reg. 1612, effective January 18, 1984; amended in R86-44 at 12 Ill. Reg. 2495 effective January 13, 1988; amended in R88-1 at 13 Ill. Reg. 5993, effective April 18, 1989; amended in R88-21(A) at 14 Ill. Reg. 2892, effective February 13, 1990; amended in R91-5 at 16 Ill. Reg. 7339, effective April 27, 1992; amended in R95-22 at 20 Ill. Reg. 5526, effective April 1, 1996; amended in R99-8 at 23 Ill. Reg. 11287, effective August 26, 1999; amended in R02-11 at 27 Ill. Reg. 202, effective December 20, 2002; amended in R03-19 at _____ Ill. Reg. _____, effective _____.

SUBPART A: NPDES PERMITS

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) Notify the Illinois Department of Natural Resources (IDNR), subject to any memorandum of agreement between the Agency and the IDNR.

(Source: Amended at _____ Ill. Reg. _____, effective _____)

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 zones, how the

conditions of the draft permit were derived, and the statutory or regulatory provisions and appropriate supporting references.

- 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 of the Act [415 ILCS 5/39- 40.2], 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.

(Source: Amended at _____ Ill. Reg. _____, effective _____)

Section 309.112 Agency Action After Comment Period

Subject to Section 309.120, 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.

(Source: Amended at _____ Ill. Reg. _____, effective _____)

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; ~~and~~
 - 5) In the case of modified and reissued permits, a summary of changes between the public noticed permit and the previous permit;
 - 6) Summary of the antidegradation analysis including characterization of the receiving waters and the existing uses of the receiving waters;
 - 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 address where comments will be received; ~~The 30-day comment period;~~
 - 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,~~ and.
 - 8) Information on how to obtain the Agency record.
- b) The Agency shall add the name of any person or group, upon request, to a mailing list to receive copies of fact sheets.

(Source: Amended at _____ Ill. Reg. _____, effective _____)

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 ~~navigable~~ waters.
- 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.

(Source: Amended at _____ Ill. Reg. _____, effective _____)

Section 309.119 Agency Action After Hearing

Subject to Section 309.120, 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.

(Source: Amended at _____ Ill. Reg. _____, effective _____)

Section 309.120 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 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.

(Source: Added at _____ Ill. Reg. _____, effective _____)

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.
- 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.

(Source: Amended at _____ Ill. Reg. _____, effective _____)

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

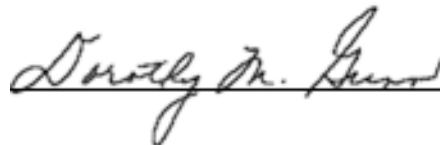
- a) The Agency shall require every holder of an NPDES Permit, as a condition of the NPDES Permit issued to the holder, to:
- 1) Establish, maintain and retain records;
 - 2) Make reports adequate to determine the compliance or lack of compliance with all effluent limits and special conditions in the permit.
 - 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, interval, and frequency sufficient to yield data which are representative of the monitored activity including, when appropriate, continuous monitoring.

(Source: Amended at _____ Ill. Reg. _____, effective _____)

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on September 4, 2003, by a vote of 5-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board