

ILLINOIS POLLUTION CONTROL BOARD

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STATE OF ILLINOIS  
Pollution Control Board

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

R03-19  
(NPDES RULEMAKING)

*PC#15*

COMMENTS OF THE ILLINOIS COAL ASSOCIATION

The Illinois Coal Association ("ICA") submits the following written comments on the proposal to amend the rules relating to permitting procedures and public participation under the National Pollution Discharge Elimination System ("NPDES") in 35 Ill. Adm. Code Part 309 in this docket. Notice of the proposal was published in the Illinois Register on September 19, 2003.

The ICA is an organization formed to foster, promote and defend the interests of the Illinois Coal Association. Our members include active producers of coal and owners of coal reserves. Our members' mining and reclamation operations are required to have NPDES permits issued by the Agency under Part 309, and those members would be affected by the proposed revisions to Part 309.

BACKGROUND

Part 309 sets forth procedures for the issuance of NPDES permits by the Illinois Environmental Protection Agency (the "Agency"). The Part 309 rules include provisions for public participation in the permitting process through public notice and the opportunity for public comment and public hearings.

On January 13, 2003, the Environmental Law and Policy Center of the Midwest and others (collectively the "Proponents") filed a rulemaking proposal under 415 ILCS 5/28 proposing numerous revisions to the Part 309. The ICA and other parties, including the

Agency, filed comments on the proposal. On September 4, 2003, the Illinois Pollution Control Board (the "Board") entered its opinion and order in this docket directing that a rulemaking proposal be published in the Illinois Register. The rulemaking proposed by the Board adopts some but not all of the revisions to Part 309 advocated in the Proponents' proposal.

#### GENERAL COMMENTS

In its earlier comments on the Proponents' proposal, the ICA recognized the importance of public participation in the NPDES permitting process but expressed our concern that the proposed revisions to Part 309 could increase procedural delays in the NPDES permitting process and could be abused by permit opponents to tie NPDES permits up in procedural challenges.

We believe that the Board's proposal generally rejects those rule revisions suggested by the Proponents which have the greatest potential for abuse and delay, we support the Board's decision to reject those proposed revisions. We further believe that the Board's rulemaking proposal generally will not increase permitting delays. Our comments will specifically address the proposed revisions to two sections of Part 309 with which we continue to be concerned.

#### COMMENTS ON SPECIFIC SECTIONS

Section 309.120 - This proposed new section would provide for reopening the public comment period on proposed NPDES permits where the Agency has significantly modified a draft permit. The ICA earlier commented that the Proponents' proposed new Section 309.121, which also provided for reopening the public comment period, was unnecessary and likely to cause confusion. While the ICA is not fully convinced that Part 309 needs to be revised to provide explicitly for reopening the comment period, we believe that the Board's proposed Section 309.120 is well drafted and should not create confusion.

The ICA would seek clarification of one point. Our understanding of the proposed rule language is that while the Agency will be required to reopen the comment period if it finds that

the final permit is not a logical outgrowth of the proposed draft permit, the determination whether the final permit is a logical outgrowth is committed to the Agency's sound discretion, and that the Agency is not required to make specific findings as to each factor listed in proposed Section 309.120(a)(1)-(4). Our concern again is that the proposed revision not be misused to create additional procedural delays for permit issuance.

Section 309.143 - A new subsection (a) is proposed to be added to this section which would require that the effluent limitations established in NPDES permits

"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."

The proposed language is taken more or less verbatim from 30 CFR §122.44(d)(1)(i). As a stylistic matter, the ICA would suggest that for the sake of consistency with usage elsewhere in Part 309, "any State water quality standard" should be "any water quality standard of 35 Ill. Adm. Code 302, 303 or 304."

The ICA would also suggest that if the Board elects to incorporate the language of section 122.44(d)(1)(i) into Section 309.143, it might be helpful also to incorporate the language of section 122.44(d)(1)(ii), which explains how the preceding subdivision is to be applied:

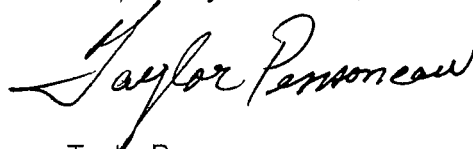
"(ii) When determining whether a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above a narrative or numeric criteria within a State water quality standard, the permitting authority shall use procedures which account for existing controls on point and nonpoint sources of pollution, the variability of the pollutant or pollutant parameter in the effluent, the sensitivity of the species to toxicity testing (when evaluating whole effluent toxicity), and where appropriate, the dilution of the effluent in the receiving water."

Consistent with our comment above, we would suggest that if the Board elects to incorporate this additional federal language, the term "Agency" be substituted for "permitting authority," and the phrase "a water quality standard of 35 Ill. Adm. Code Part 302, 303 or 304" be substituted for "a State water quality standard."

Finally, the ICA would seek clarification that the language proposed to be added as Section 309.143(a) is not intended to supersede or affect Section 309.103(c) or 35 Ill. Adm. Code 406.203, which deal specifically with the application of water quality standards to NPDES discharges from mining activities.

The ICA appreciates this opportunity to submit comments on the proposed revisions to the Part 309 regulations.

Respectfully submitted,

A handwritten signature in black ink that reads "Taylor Pensoneau". The signature is written in a cursive style with a large, sweeping initial "T".

Taylor Pensoneau  
President, Illinois Coal Association