

ILLINOIS POLLUTION CONTROL BOARD

October 5, 2013

IN THE MATTER OF:)
AMENDMENTS TO PRIMARY DRINKING) R14-9
WATER STANDARDS: 35 Ill. Adm. Code) (Rulemaking - Public Water Supply)
611.490)

ORDER OF THE BOARD (by J.A. Burke):

The Illinois Environmental Protection Agency (Agency) filed a rulemaking proposal on September 19, 2013. The Agency separately submitted the text of its proposed amendment on September 24, 2013. The Agency seeks amendment of 35 Ill. Adm. Code 611.490(a), which is an identical-in-substance provision derived from 40 C.F.R. 141.28(a). Section 611.490(a) requires that a certified laboratory may perform chemical and physical analyses of source water and drinking water for the purposes of demonstrating compliance with the National Primary Drinking Water Regulations (NPDWRs).¹ At present, 35 Ill. Adm. Code 611.490(a) requires that the laboratories used must be certified and approved by either USEPA or the Agency. The Agency states that its amendment is intended to allow the use of laboratories certified by sister states where the states fulfill certain specified requirements.

The Board accepts the Agency's rulemaking proposal for hearing.² The details of the scheduled hearings are presented below. The Board does not comment on the merits of the Agency's proposal. The Agency filed its rulemaking proposal pursuant to Sections 17, 27, and 28 of the Environmental Protection Act (Act). 415 ILCS 5/17, 27, and 28 (2012).

RULEMAKING PROPOSAL

The Agency explains that USEPA has established NPDWRs pursuant to the federal Safe Drinking Water Act (SDWA). Statement of Reasons (SR) at 2; *see* 42 U.S.C. § 300g-1 (2011). The Agency further highlights that SDWA provides for USEPA to grant a state primary enforcement authority if the state, *inter alia*, adopts drinking water regulations that are no less stringent than the NPDWRs. SR at 2; *see* 42 U.S.C. § 300g-2 (2011). The Agency points out that the Board adopted drinking water regulations that were no less stringent than the federal NPDWRs in Amendments to the Public Water Supply Regulations, R77-13 (Mar. 1, 1979). SR at 2. The Agency states that USEPA granted primary enforcement authority to the State of Illinois effective September 28, 1979. *Id.* at 2; *see* 44 Fed. Reg. 50648 (Aug. 29, 1979).

¹ The primary drinking water standards of 35 Ill. Adm. Code 611 include the State provisions adopted using the identical-in-substance rulemaking procedure to embody the NPDWRs of 40 C.F.R. 141. *See* 415 ILCS 5/7.2 and 17.5 (2012).

² The Board has revised the caption of this proceeding from that submitted by the Agency. The Board removed the word "proposed" from before "amendments."

The Agency points out that the federal regulations require the use of certified laboratories to demonstrate compliance with the NPDWRs. SR at 2; *see* 41 C.F.R. 141.23(k)(3), 141.24(f)(17) and (h)(19), 141.28(a), 141.74(a), 141.89(b), 141.131(b)(2), 141.621(b), and 141.705(a) and (b) (2013) (corresponding with 35 Ill. Adm. Code 611.611(c), 611.646(q), 611.648(s)(1), 611.490(a), 611.531(a), 611.359(a), 611.381(b)(2), 611.971(b), and 611.1005(a) and (b), respectively). A state that has primary enforcement authority must maintain a program for certification of laboratories for drinking water analyses. *See* 142.10 (2013). The Agency points out that the Act grants the Agency authority to establish and maintain such a program and to issue certifications to entities that meet the minimum requirements under the program. SR at 2.

The Agency cites the requirements of the core federal requirement that a supplier have analyses performed by a certified laboratory. The Board quotes that provision in its entirety as follows:

§ 141.28 Certified laboratories.

(a) For the purpose of determining compliance with § 141.21 through 141.27, 141.30, 141.40, 141.74, 141.89 and 141.402, samples may be considered only if they have been analyzed by a laboratory certified by the State except that measurements of alkalinity, calcium, conductivity, disinfectant residual, orthophosphate, pH, silica, temperature and turbidity may be performed by any person acceptable to the State.

(b) Nothing in this part shall be construed to preclude the State or any duly designated representative of the State from taking samples or from using the results from such samples to determine compliance by a supplier of water with the applicable requirements of this part. 40 C.F.R. 141.28 (2013).

The Agency quotes the corresponding Illinois provision in part.³ The provision in its entirety states as follows:

Section 611.490 Certified Laboratories

- a) For the purpose of determining compliance with Subparts G, K through O, Q and S of this Part, samples will be considered only if they have been analyzed as follows:
 - 1) By a laboratory certified pursuant to Section 4(o) of the Act

³ Originally adopted as an identical-in-substance rule pursuant to 415 ILCS 5/7.2 and 17.5 in Safe Drinking Water Act Regulations, R88-26 (Aug. 9, 1990). The Agency omitted the ending Board note from its quotation.

[415 ILCS 5/4(o)];

- 2) By a laboratory certified by USEPA; or
 - 3) For measurements of alkalinity, calcium, conductivity, disinfectant residual, orthophosphate, silica, turbidity, free chlorine residual, temperature, and pH, by a person under the supervision of a certified operator (35 Ill. Adm. Code 603.103).
- b) Nothing in this Part must be construed to preclude the Agency or any duly designated representative of the Agency from taking samples or from using the results from such samples to determine compliance by a supplier of water with the applicable requirements of this Part.
 - c) The CWS supplier must have required analyses performed either at an Agency laboratory or a certified laboratory. The Agency may require that some or all of the required samples be submitted to its laboratories.

BOARD NOTE: Subsections (a) and (b) are derived from 40 CFR 141.28 (2006), as amended at 71 Fed. Reg. 65574 (Nov. 8, 2006). Subsection (c) is an additional State requirement. 35 Ill. Adm. Code 611.490; *see* SR at 3.

The Agency asserts that the Agency is authorized to delegate authority to certify laboratories (SR at 3; *see* 415 ILCS 5/4(o) (2012)), and that the Agency has delegated part of its authority to the Department of Public Health (DPH). SR at 3. The Agency states that laboratories certified by USEPA, the Agency, and DPH may be used for analyses intended to demonstrate compliance with the NPDWRs. *Id.* at 3-4.

The Agency points out, however, that there is a shortage of laboratories certified to perform radiochemical analyses. *Id.* at 4. The Agency proposes amendment of 35 Ill. Adm. Code 611.490 to allow use of a laboratory that has been certified by a sister state upon which USEPA has conferred primary enforcement authority. The Agency proposes amendment of 35 Ill. Adm. Code in pertinent part as follows:⁴

- a) For the purpose of determining compliance with Subparts G, K through O, Q and S of this Part, samples will be considered only if they have been analyzed as follows:

⁴ The Board notes that minor format corrections may be necessary to comply with *Illinois Administrative Code* format requirements before the Board submits the text of any proposed amendment to the Office of the Secretary of State.

- 1) By a laboratory certified pursuant to Section 4(o) of the Act [415 ILCS 5/4(o)];
- 2) By a laboratory certified by USEPA; or
- 3) When no laboratory has been certified pursuant to section (a)(1) of this Section to analyze a particular contaminant, by a laboratory certified, registered, accredited, licensed, or otherwise approved by another state with primary enforcement responsibility, or an agency or the federal government, if the standards used for the certification, registration, accreditation, licensure or other approval of that laboratory are substantially equivalent to the certification standards under Section 4(o) of the Act; or
- 4) For measurements of alkalinity, calcium, conductivity, disinfectant residual, orthophosphate, silica, turbidity, free chlorine residual, temperature, and pH, by a person under the supervision of a certified operator (35 Ill. Adm. Code 603.103). *Id.* at 5.

Technical Feasibility and Economic Reasonableness

The Agency represents that the proposed amendment “would not require any regulated entity to implement additional treatment technologies.” *Id.* at 5-6. The Agency further states that no regulated entity would incur added cost, and that the amendment would allow regulated entities to comply with the regulations in a situation where the Agency has not certified any laboratory for a particular analysis. *Id.* at 6.

Affected Facilities and Economic Impact

The Agency states that the proposed amendment could affect any public water supply in Illinois. The Agency further states that the proposed amendment could affect any laboratory that has been certified by a sister state which has primary enforcement responsibility. The Agency does not anticipate that the amendment will have an economic impact because the amendment will not impose any added standards or controls on the affected entities. *Id.* at 6.

Published Study or Research Report

The Agency points out that the Board’s procedural rules require citation to any published study or research that was used in developing the proposed amendment. The Agency claims that this requirement is inapplicable in the present proceeding because the Agency did not rely on any published study or research report in developing the proposal. *Id.* at 6; *see* 35 Ill. Adm. Code 102.202.

PUBLIC HEARINGS AND PUBLIC COMMENTS

The Board will conduct public hearings on the merits and economic impact of the proposed amendment in two areas of the State, as is required by 415 ILCS 5/28(a) and (b). The Board will immediately cause publication of the required notices of hearing. The Board has scheduled those hearings to occur as follows:

1:00 p.m., Tuesday, November 5, 2013

James R. Thompson Center
Illinois Pollution Control Board Hearing Room
100 West Randolph Street, Room 11-512
Chicago

and

1:00 p.m., Wednesday, November 13, 2013

Sangamo Building
Illinois Pollution Control Board Hearing Room
1021 North Grand Avenue
Springfield

The Board will receive public comments on the proposed amendment until 45 days after a Notice of Proposed Amendment appears in the *Illinois Register* relating to the Agency's proposal. That will not occur until after the Board has adopted the Agency's proposal for First Notice. Interested persons must mark public comments with the docket number R14-9 and submit them to the Clerk of the Board as provided in 35 Ill. Adm. Code 102.108 and Subpart C of 35 Ill. Adm. Code 101. The pertinent mailing address and contact information is as follows:

John T. Therriault, Clerk
Pollution Control Board
100 West Randolph Street, Suite 11-500
Chicago, Illinois 60601

312-814-3629

The Board's Internet address, through which relevant information is available about the Board, including the Board's procedural rules, is www.ipcb.state.il.us.

Interested persons may contact the hearing officer with any questions about the Agency's proposal or the procedural posture of this proceeding as follows, referencing docket R14-9:

Michael J. McCambridge, Attorney

Pollution Control Board
100 West Randolph Street, Suite 11-500
Chicago, Illinois 60601

312-814-6924

After conclusion of the public comment period, the Board may propose the amendment for Second Notice review by the Joint Committee on Administrative Rules (JCAR) after consideration of the record assembled. *See* 5 ILCS 100/5-40(b) and (c) (2012).

ORDER

1. The Board hereby accepts the Agency's rulemaking proposal for hearing.
2. The Board directs the assigned hearing officer to expeditiously proceed to hearing as outlined in this opinion and order.

I, John T. Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on October 3, 2013, by a vote of 4-0.



John T. Therriault, Clerk
Illinois Pollution Control Board