

FOURTH DIVISION  
September 30, 2016

No. 1-15-2003

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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The Salt Institute,	)	Petition for Administrative Review
	)	of Rulemaking and Order Issued by
Petitioner-Appellant,	)	the Illinois Pollution Control Board
	)	
v.	)	
	)	PCB No.: R08-9 (Subdocket D)
Illinois Pollution Control Board,	)	
	)	
Respondent-Appellee.	)	
	)	

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JUSTICE HOWSE delivered the judgment of the court.  
Justices McBride and Burke concurred in the judgment.

ORDER

¶ 1 *Held:* Although the Salt Institute was not a party to the Illinois Pollution Control Board's rulemaking proceedings, the Salt Institute had associational standing to challenge the Board's new chloride standard on behalf of its members; where the Board considered all the factors laid out in section 27 of the Illinois Environmental Protection Act when it set a year-round chloride standard of 500

1-15-2003

mg/L, the actions of the Board were not clearly arbitrary and capricious, and accordingly, we cannot act as a superagency and invalidate that standard.

¶ 2 In this administrative review action, petitioner the Salt Institute (Salt Institute) seeks to vacate the 500 mg/L year-round chloride water quality standard for the Chicago Area Waterway System (CAWS) and the Lower Des Plaines River (LDPR) that was adopted by the Illinois Pollution Control Board (Board) pursuant to sections 27 and 28 of the Illinois Environmental Protection Act (Act). 415 ILCS 5/27-28 (West 2012). Salt Institute argues that setting the chloride standard at this level was arbitrary and capricious because it is scientifically indefensible and, in coming to this standard, the Board failed to consider several factors required under section 27 of the Act. 415 ILCS 5/27 (West 2012). For the reasons that follow, we affirm the Board's regulation pertaining to the chloride standard.

¶ 3 Background

¶ 4 The federal Clean Water Act (CWA) gives States primary responsibility to set water quality standards for intrastate waters for approval by the United States Environmental Protection Agency (USEPA). See 33 U.S.C. § 1313(a) (West 2012). Setting water quality standards includes two tasks: (1) establishing the designated uses for the waters; and (2) promulgating numeric or narrative criteria for offensive conditions and toxic pollutants necessary to protect those designated uses. See 33 U.S.C. § 1313(c)(2)(A) (West 2012).

¶ 5 The Salt Institute is a non-profit trade association dedicated to advocating the many benefits of salt, particularly to ensure winter roadway safety, quality water and healthy nutrition. The Salt Institute is comprised of members that produce and sell road salt, which consists of chloride-containing materials, for use as a deicing agent. Several members that operate along the CAWS and LDPR include, but are not limited to, Cargill Deicing Technology, Cargill Salt, Central Salt LLC, Compass Minerals, Inc., and Morton Salt, Inc.

1-15-2003

¶ 6 The Board is an independent state board that adopts environmental rules and regulations. The Board's Mission Statement provides that the Board works for "[t]he establishment of coherent, uniform, and workable environmental standards and regulations that restore, protect, and enhance the quality of Illinois' environment."

¶ 7 On October 26, 2007, the Illinois Environment Protection Agency (IEPA) filed a rulemaking proposal with the Board under the provisions of sections 27 and 28 of the Act. The Board accepted the IEPA's proposal and opened a rulemaking docket on or about November 1, 2007. The purpose of the proposed rulemaking was to update the designated uses and water quality standards applicable to the CAWS and LDPR. The CAWS and LDPR consist of portions of the Chicago, Calumet and Lower Des Plaines River drainages which have been altered to promote commercial navigation and prevent untreated sewage from flowing into Lake Michigan. These waterways also serve as outlets for urban storm-water runoff and municipal sewer effluent and are an important part of the Chicago metropolitan storm water management system.

¶ 8 Chloride was a controversial constituent the Board addressed in its rulemaking, and it is the subject of this appeal. Chloride is naturally present in all waterways, including CAWS and LDPR. However, elevated concentrations of chloride due to human activities negatively impacts aquatic ecosystems. Evidence presented to the Board during the Board's rulemaking hearings showed that the waterways experience increased chloride concentrations during the winter months. The source of the increased winter chloride concentrations are primarily stormwater runoff and discharges containing increased chloride as the result of deicing road salt applied to the roadways.

¶ 9 Prior to the Board's rulemaking now at issue, there had been no prior chloride water quality standard specifically applied to CAWS or the LDPR. Rather, the Board had been

1-15-2003

accounting for chloride through a 1,500 mg/L total dissolved solids (TDS) standard that applied to waterways. As part of the IEPA's proposal to the Board, it recommended that the 1,500 mg/L criteria for TDS be replaced with a separate standard for chloride because scientific research indicated that the quantities of the individual constituents of the TDS standard are more relevant to toxicity than their simple sum. The IEPA initially suggested a year-round 500 mg/L chloride standard.

¶ 10 The objectives of the CWA are to restore and maintain the integrity of the waterways. In Illinois, the CWA's fishable/swimmable goals are considered attainable in those waters designated as "general use waters." The CAWS and LDPR do not meet the CWA's fishable/swimmable goals and are thus classified as "secondary contact waters." In its "Statement of Reasons," the IEPA explained that the proposed standard was identical to the chloride standard adopted for more strictly regulated Illinois General Use waters. The general use standard applies to all Illinois surface waters unless specifically designated otherwise. 35 Ill. Admin. Code § 302.101 (West 2012). The IEPA noted that the USEPA's national criteria document for chloride recommended a maximum, acute concentration of 860 mg/L and a chronic concentration of 230 mg/L. The IEPA also noted that there would be violations of the proposed 500 mg/L chloride standard in the winter as a result of road salting activities undertaken to address icy conditions and protect motorists' safety.

¶ 11 Pursuant to section 27(b) of the Act, on November 16, 2007, the Board's chairman made a written request to the Director of the Illinois Department of Commerce and Economic Opportunity (DCEO) to conduct an economic impact study concerning the IEPA's rulemaking proposal. The DCEO did not respond to the Board's request.

1-15-2003

¶ 12 On June 12, 2008, the Metropolitan Water Reclamation District of Chicago (District) filed a motion to stay the rulemaking proceeding, which was supported by: (1) Midwest Generation LLC, (2) Chemical Industry Council of Illinois, and (3) Stephan Company (Stephan). Several environmental groups filed a response opposing the motion to stay the proceedings, and the Board denied that motion. Citgo Petroleum Corporation (Citgo) and PDV Midwest, LLC (PDV) were also parties to the hearings leading up to the creation of the new chloride standard.

¶ 13 In March 2010, in response to a motion filed by several environmental groups, the Board severed the rulemaking into four subdockets. Subdocket A and B dealt with recreational use designations and disinfection standards, neither of which are at issue here. Subdocket C addressed aquatic life uses and designations. On February 6, 2014, the Board designated aquatic life uses to apply to the CAWS and LDPR. Subdocket D, which is at issue here, was established to adopt water quality criteria necessary to protect the aquatic life uses designated in Subdocket C.

¶ 14 Hearings on aquatic life water quality standards in Subdocket D were held on July 29, 2013, September 23, 2013, and December 17, 2013. At these hearings, the Board heard testimony from: Scott Twait, an environmental protection engineer for the IEPA's water quality standards and the lead technical staff for the LDPR's use attainability analysis; Dr. Marcelo Garcia, an engineering professor and director of a hydrosystems lab; Larry Tyler, the environmental advisor for the water compliance program for Citgo; Roger Klocek and James Huff, both of Huff & Huff environmental consulting firm, whom Citgo had retained to develop and purpose winter chloride water quality limits for the Chicago Sanitary and Ship Canal (CSSC); and Lial Tischler, a consultant at an environmental firm retained by Exxon. The IEPA and other parties requested that the Board open a separate docket for chloride. As support for

1-15-2003

this request, the IEPA noted that it was still in discussions with various entities and the USEPA regarding chlorides, and it needed more time to work on an "approvable" chloride standard and a variance produced by which a discharger could seek relief from a chloride standard. Exxon asserted that "additional time for negotiations" was needed in light of the unique challenges associated with developing and implementing a chloride standard due to significant seasonal chloride contributions to the waterways. The Board refused the request to open a separate subdocket for chloride and proceeded to First Notice in Subdocket D with a proposed chloride water quality standard.

¶ 15 The Board issued its First Notice Opinion and Order in Subdocket D on September 18, 2014. At First Notice, the Board proposed repealing the TDS standard and implementing a year-round single-value chloride standard of 500 mg/L in the CAWS and LDPR. Separate from the CAWS and LDPR, the Board altered the 500 mg/L year-round chloride standard for the CSSC. For the CSSC, the Board proposed a chronic standard of 620 mg/L and acute standard of 990 mg/L for chlorides in the CSSC from December 1 through April 30, the winter months. The CSSC site-specific standard was designed to reflect local physical and environmental conditions and was developed by utilizing the USEPA's recalculation procedure.

¶ 16 The Board stated that its proposal of a year-round 500 mg/L chloride standard was supported because: (1) no entity had proposed another specific standard, with supporting data to apply to the waterways in the CAWS and LDPR (Citgo offered another proposed standard for the CSSC with supporting data); (2) the USEPA stated that 500 mg/L was sufficient for protecting the waterways; (3) the record contained the USEPA's national criteria document for chloride of 860 mg/L (acute) and 230 mg/L (chronic) as well as the IEPA's rationale for using a different methodology for the proposed 500 mg/L chloride standard; (4) the IEPA stated that it

1-15-2003

was working with the USEPA on a winter chloride standard; (5) the USEPA recommended that the Board move forward with the rulemaking without waiting for it to release its new national criteria standards for chloride; and (6) any entity was free to file site-specific rulemaking or a new rulemaking with the Board to establish a different chloride standard for a segment of CAWS or LDPR that would be protective of the designated uses as further scientifically defensible information came to light.

¶ 17 In its First Notice, the Board acknowledged that "the major cause and contributor to winter chloride levels in the CAWS and LDPR are the storm water discharges from road salting activities," that "chloride will continue to be used for road safety in the foreseeable future," and there was no evidence in the record to demonstrate that the use of best management practices (BMPs) would reduce salt use to the point of compliance with the proposed chloride standard. In its First Notice Opinion and Order, the Board also rejected proposed amendments that would have permitted the use of mixing zones for chloride as a means of complying with the proposed chloride water quality standard.

¶ 18 After the Board issued its First Notice Opinion and Order, the IEPA withdrew its support of the year-round 500 mg/L chloride standard it proposed at First Notice. The IEPA noted that, under the year-round standard, there would "still be wide spread non-compliance." The IEPA reasoned that the 500 mg/L chloride standard could be implemented for non-winter months, but that the standard was unworkable for winter weather conditions. As a result, the IEPA advocated that the Board should open a new subdocket to specifically address chloride.

¶ 19 On March 19, 2015, the Board adopted its Second Notice Opinion and Order. At Second Notice, the Board altered the previously proposed year-round 500 mg/L chloride standard by delaying the effective date for three years. In the interim, a 500 mg/L chloride standard would

1-15-2003

apply from May through November, and the existing 1,500 mg/L TDS standard would remain in effect from December through April. The Board's Second Notice Opinion and Order rejected proposals to allow an amendment to the mixing zone rules for chloride. The Board also refused to apply the methods used to justify the site-specific criteria for the CSSC to the other portions of the CAWS waterways or to recalculate the proposed chloride criteria for the CAWS.

¶ 20 The Board explained that the three-year delay compliance date served several purposes. It allowed the USEPA to publish its new, but currently unfinished, national criteria document for chloride. It also allowed the work group to complete its charge regarding proposals for chloride and a waterbody-wide variance. As such, the three-year delay would allow time for determining the best course of action in light of those two events. Municipal point source dischargers operate under an environmental water quality discharger permits—a National Pollutant Discharge Elimination (NPDES) permit. The Board recognized that future amendments to the chloride water quality standard and the NPDES permit regulations might be needed to reflect "more current science and methodologies" and local conditions should those support a standard other than the 500 mg/L year-round standard.

¶ 21 The Board issued its Final Opinion and Order formally adopting the new chloride standard as proposed at Second Notice, on June 18, 2015. In its Final Opinion and Order, the Board made several findings, which are relevant here. With respect to the Board's First Notice, the Board made the following statements:

- "The Board found that the 500 mg/L chloride standard must be adapted for the Chicago Sanitary and Ship Canal (CSSC) from December 1 until April 30. Therefore, the Board proposed for the CSSC a numeric standard of 620 mg/L as a chronic water quality



standard and 990 mg/L as an acute water quality standard for chloride from December 1 until April 30."

"Other than CSSC/PDV's proposal for the CSSC, no party proposed any other specific standard to apply during the winter.

The Board found that the record contained sufficient information to proceed with adoption of chloride water quality standards for [CAWS and LCPR]."

"Although Citgo/PDV had provided information in the record indicating that measures are being taken by various applicators to reduce the quantity of road salt for deicing, such anti-icing techniques and use of beet juice as an alternative to road salt, there is no information in the record that demonstrates such sources are planning to reduce the use of road salt to the point of compliance with the 500, 620, or 990mg/L chloride water quality standards during the winter in the foreseeable future. With no feasible alternative to chloride deicing salts on the horizon, the Board noted that temporary relief does not reflect the enduring reality that as long as it snows and water freezes on the roadways in this highly urbanized watershed, chloride will continue to be used for road safety in the foreseeable future."

¶ 22 With respect to the Board's Second Notice, the Board made the following statements:

"The Board is cognizant that variances have been used in the past as a relief mechanism but may not be feasible for CAWS and

LDPR not due to recent USEPA actions. However, adjusted standards and site-specific rules are available and variances may again be available in the future. \*\*\* The Board noted that Citgo/PDV in effect provided information to support a site-specific rule in its proceeding. Furthermore, the Board specifically indicated with chloride water quality standards that other participants could consider site-specific relief. Therefore, even if the standards proposed were technically infeasible or economically unreasonable to a specific discharger, relief mechanisms are available."

"Also, IEPA initially proposed a 500 mg/L year-round chloride standard, which is the General Use chloride standard. However, the issues associated with adopting a winter chloride standard have proven to be complex. The Board notes that the record has presented limited options for addressing the chloride issue."

"IEPA, Citgo/PDV, ExxonMobil, and Stepan noted significant impacts and widespread noncompliance if the Board were to move forward with adopting a 500 mg/L chloride water quality standard in the winter. IEPA and Citgo/PDV presented evidence showing that most segments of CAWS and LDPR would be expected to exceed a 500 mg/L chloride water quality standard two to 13 percent of the time in the winter. During these times, Citgo/PDV stressed that industrial point sources would be faced with the

possibility of losing their mixing zones and not being able to discharge into the waterways without costly treatment or facility shut downs."

"The Board recognized that future amendments to the winter standards and NPDES permit regulations may be needed for addressing chloride to reflect more current science and methodologies as well as local conditions. At the adoption of second notice, the Board noted that IEPA still awaits USEPA's planned revisions to the chloride national criteria as well as the completion of efforts by the work group on a proposal for chloride and a water body wide variance. The Board determined that a three-year delayed effective date would allow time for determining the best course of action."

"Several participants stated that if the Board proceeded to adopt the 500 mg/L chloride water quality standards for CAWS and LDPR, the Board must provide appropriate relief mechanisms. The three year interim period with delayed effective date is intended to allow time for the work group to develop a proposal to address chloride and a water body wide variance as well as for others who may be seeking alternatives. Even as the chloride work group progresses, the Board noted that a site-specific rulemaking or adjusted standard may be available for dischargers upon adequate proof that a different standard would protect aquatic life

uses. Citgo/PDV provided such information during this proceeding, and the Board noted that this option is available to others if site-specific circumstances are not able to be addressed through the work group's efforts."

"The three-year delay in adopting a 500 mg/L year-round chloride standard and the interim TDS standard should address the concerns about the need for a subdocket at this point. This should also provide time for a specific proposal to be filed in a new rulemaking."

¶ 23 The amended regulations that adopted the new chloride standard took effect on July 1, 2015 and were published in the Illinois Register on July 10, 2015. On July 23, 2015, the Salt Institute timely filed its Petition for Administrative Review.

¶ 24 Analysis

¶ 25 Standing

¶ 26 The Board argues that this appeal should be dismissed because the Salt Institute lacks standing to seek judicial review of the chloride standards. We begin by addressing this standing question, which is a question of law that we review *de novo*. *Wexler v. Wirtz Corp.*, 211 Ill. 2d 18, 23 (2004). A lack of standing is an affirmative defense; therefore, the Board has the burden to plead and prove lack of standing. *Greer v. Illinois Housing Development Authority*, 122 Ill. 2d 462, 494 (1988).

¶ 27 Section 29(a) of the Environmental Protection Act (Act) states: “[a]ny person adversely affected or threatened by any rule or regulation of the Board may obtain a determination of the validity or application of such rule or regulation by petition for review under Section 41 of this

1-15-2003

Act.” 415 ILCS 5/29(a) (West 2012); see also *Illinois State Chamber of Commerce v. Pollution Control Board*, 49 Ill. App. 3d 954, 956 (1977). "Section 29 has been directed to pre-enforcement challenges to substantive regulations by persons adversely affected or threatened by the regulation." *Landfill, Inc. v. Pollution Control Board*, 74 Ill. 2d 541, 551 (1978). Thus, if the Salt Institute can show that it was in some way “adversely affected or threatened” by the Board's chloride regulation, it has standing to seek review of that regulation under section 29(a) of the Act. See 415 ILCS 5/29(a) (West 2012).

¶ 28 The Board argues that the Salt Institute does not have standing to review the Board's regulation on chloride standards because it was not “adversely affected or threatened” by that regulation. Specifically, the Board argues that the Salt Institute does not have standing under section 29(a) of the Act to challenge the chloride standard because it claims a speculative financial impact to its members resulting from potential, future acts of other entities in decreasing the amount of salt they purchase. The Board further argues that the Salt Institute is not a representative of the traveling public and, therefore, also does not have associational standing to challenge the chloride standard on behalf of the traveling public. The Salt Institute, in turn, argues that its members and participants operate in the CAWS and/or LDPR, are required to comply with the chloride standard and will suffer direct harm when they have to reduce chloride output during the winter months. The Salt Institute also argues that it has associational standing to challenge the chloride standard on behalf of the traveling public because road safety is germane to the purpose of the association. Last, the Salt Institute points out that it is not required to be a party to or participate in the rulemaking proceedings regarding the chloride standard it now challenges in order to meet the requirements of section 29(a) of the Act.

1-15-2003

¶ 29 "[A] liberal construction should be applied to the standing requirements of section 29. This it seems is consistent with the legislative scheme providing for judicial review of PCB regulations prior to the initiation of enforcement proceedings." *Illinois State Chamber of Commerce v. Pollution Control Board*, 49 Ill. App. 3d 954, 957 (1977) (holding that the Chamber, as a representative of business and industry in the State of Illinois, has standing to seek review of these regulations.). Although the Board acknowledges such a liberal construction, it argues that there still must be "a clear, direct nexus between the rule and the entity 'adversely affected by' it" and here there is only "a mere speculative, and indirect, financial impact to Salt Institute's members triggered by the chloride standard, that applies to other entities not before this court." The Board argues that: "[t]he only purported link between Salt Institute's members and the chloride standard is that those entities that must comply with and not cause the standard to be violated (point and non-point source dischargers of water containing chloride) might buy less road salt in the future which might, in turn, affect Salt Institute's members' sales of road salt to those entities in the future." We note that nowhere does the Salt Institute argue that it personally will be adversely affected by the chloride standards; rather, the Salt Institute claims that *its members* will be adversely affected where those members have to comply with the chloride standards or where those members will see a decrease in salt sales during the winter months when their customers have to comply with the chloride standards. It further argues that the traveling public, which is another group it claims it advocates on behalf of, would also be adversely impacted by the chloride standard.

¶ 30 The Salt Institute argues that *Illinois State Chamber of Commerce v. Pollution Control Board*, 49 Ill. App. 3d 954 (1977), supports its argument that it has standing based on a adverse affect or threat that its members and participants will suffer as a result of the Board's chloride

1-15-2003

standard. We note that in that case, the Chamber of Commerce did claim a direct adverse affect to itself as a result of the damage that would also be caused to its members. *Illinois State Chamber of Commerce*, 49 Ill. App. 3d at 957. To defeat the Board's argument that the Chamber of Commerce did not have standing, the Chamber of Commerce, in turn, contended that "the unfavorable business climate which will result in Illinois from the enactment of poorly-conceived noise pollution regulations will cause it to lose the financial support of those of its members who choose to relocate in other states, as well as the financial support of businesses which choose not to locate new facilities in Illinois as a result of the regulations." *Id.* Based on this argument, the court concluded that, "the Chamber, as a representative of business and industry in the State of Illinois, has standing to seek review of these regulations[,]" and that such a finding was "consistent with the legislative scheme providing for judicial review of PCB regulations prior to the initiation of enforcement proceedings." *Id.*

¶ 31 While we recognize that the Salt Institute does not allege a direct adverse affect to itself, our courts recognize the concept of associational standing, which recognizes that an association may have standing to assert the claims of its members even where it has suffered no injury from the challenged activity. See *International Union of Operating Engineers, Local 148, AFL-CIO v. Illinois Department of Employment Security*, 215 Ill. 2d 37, 47 (2005). In *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977), the Supreme Court defined the test applicable to an association seeking to represent the interests of its members in legal proceedings:

“[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are

germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” *Hunt*, 432 U.S. at 343.

¶ 32 We find that the Salt Institute has associational standing to challenge the chloride standard on behalf of its members where it is uncontested that the chloride standards will affect the production and purchase of salt, where the Salt Institute's stated mission is to advocate the many benefits of salt, particularly to ensure winter roadway safety, quality water and healthy nutrition, and where the individual members do not need to participate in this litigation. Our finding that the Salt Institute has associational standing to bring this action is also in line with the requirement that we liberally construe the standing requirements in section 29 of the Act (*Illinois State Chamber of Commerce*, 49 Ill. App. 3d at 957), as well as the language of section 29(a) of the Act, which merely requires an adverse affect or the threat of an adverse affect. 415 ILCS 5/29(a) (West 2012). As such, the Salt Institute has standing to bring this lawsuit under the theory of associational standing (see *Hunt*, 432 U.S. at 343), which we also find to be in line with a liberal construction of the standing requirements of section 29 of the Act.

¶ 33 Last, while the Board brings up several times that the Salt Institute did not participate in the rulemaking proceedings, both parties recognize that participating in the rulemaking proceedings is not a requirement for standing under section 29(a) of the Act when a challenge is made to a regulation (see 415 ILCS 5/29(a) (West 2012)), like it would be under section 41 of the Act when a challenge is made to an order (see 415 ILCS 5/41 (West 2012)). As such, the Salt Institute is challenging a regulation and, therefore, standing is assessed under section 29(a) of the Act and, under that section, whether the Salt Institute participated in the rulemaking proceedings is of no consequence.



1-15-2003

¶ 34

### The Board's Chloride Standard

¶ 35 Having found that the Salt Institute has standing to bring this action challenging the regulations on chloride standards, we now address the main contention of this appeal, whether the adoption of the Board's chloride standard was arbitrary and capricious. When an administrative agency such as the Board exercises its rulemaking powers, it is performing a quasi-legislative function, and, therefore, it has no burden to support its conclusions with a given quantum of evidence. *Illinois State Chamber of Commerce v. Pollution Control Board*, 177 Ill. App. 3d 923, 928 (1988); see also *Granite City Division of National Steel Co. v. Illinois Pollution Control Board*, 155 Ill. 2d 149, 180 (1993). The burden of establishing the invalidity of regulations promulgated by the Board is on the appellants, and that burden is very high. *Id.* Because administrative agencies are inherently more qualified to decide technical problems, this court, when reviewing administrative rules and regulations, may not invalidate a regulation unless it is clearly arbitrary, unreasonable or capricious. *Illinois State Chamber of Commerce*, 177 Ill. App. 3d at 928. It is not this court's role to determine whether the Board's action was wise, or even if it was the most reasonable based on the record. *Central Illinois Public Service Co. v. Pollution Control Board*, 116 Ill. 2d 397, 412 (1987). "The Board, unlike this court, is well equipped to determine the degree of danger which a pollutant will cause, and then to balance the public threat against an alleged individual hardship." (Internal quotation marks omitted.) *Id.* In *Greer*, 122 Ill. 2d 462 (1988), our supreme court laid out certain guidelines for determining whether an administrative agency's action is arbitrary and capricious:

"Agency action is arbitrary and capricious if the agency: (1) relies on factors which the legislature did not intend for the agency to consider; (2) entirely fails to consider an important aspect of the

problem; or (3) offers an explanation for its decision which runs counter to the evidence before the agency, or which is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Greer*, 122 Ill. 2d at 505-06.

See also *Hoffelt v. Illinois Department of Human Rights*, 367 Ill. App. 3d 628, 632 (2006)

("Agency action is arbitrary and capricious when the agency contravenes the legislature's intent, fails to consider a crucial aspect of the problem, or offers an implausible explanation contrary to agency expertise."). It is not arbitrary and capricious when an agency sets out an aspirational goal in promulgating rules. *Shell Oil Co. v. Pollution Control Board*, 37 Ill. App. 3d 264, 276 (1976) ("Legislative facts are facts which do not concern any particular individual; they typically involve expert opinions, predictions, forecasts and estimates concerning present or future, rather than past, events. They are the type of facts utilized by a legislative or quasi-legislative body in the course of exercising discretion and formulating policy for the governance of future conduct.").

¶ 36 The Board has authority to promulgate water quality standards applicable to all dischargers who discharge into Illinois waters. 415 ILCS 5/5 *et seq.* (West 2012). In promulgating regulations, the Board is governed by section 27 of the Act. 415 ILCS 5/27 (West 2012). Section 27 of the Act provides:

"(a) The Board may adopt substantive regulations as described in this Act. Any such regulations may make different provisions as required by circumstances for different contaminant sources and for different geographical areas; may apply to sources outside this State causing, contributing to, or threatening

environmental damage in Illinois; may make special provision for alert and abatement standards and procedures respecting occurrences or emergencies of pollution or on other short-term conditions constituting an acute danger to health or to the environment; and may include regulations specific to individual persons or sites. In promulgating regulations under this Act, the Board shall take into account the existing physical conditions, the character of the area involved, including the character of surrounding land uses, zoning classifications, the nature of the existing air quality, or receiving body of water, as the case may be, and the technical feasibility and economic reasonableness of measuring or reducing the particular type of pollution. The generality of this grant of authority shall only be limited by the specifications of particular classes of regulations elsewhere in this Act.

\* \* \*

(b) Except as provided below and in Section 28.2, before the adoption of any proposed rules not relating to administrative procedures within the Agency or the Board, or amendment to existing rules not relating to administrative procedures within the Agency or the Board, the Board shall:

(1) request that the Department of Commerce and Economic Opportunity conduct a study of the economic impact of

the proposed rules. The Department may within 30 to 45 days of such request produce a study of the economic impact of the proposed rules. At a minimum, the economic impact study shall address (A) economic, environmental, and public health benefits that may be achieved through compliance with the proposed rules, (B) the effects of the proposed rules on employment levels, commercial productivity, the economic growth of small businesses with 100 or less employees, and the State's overall economy, and (C) the cost per unit of pollution reduced and the variability in cost based on the size of the facility and the percentage of company revenues expected to be used to implement the proposed rules; and

(2) conduct at least one public hearing on the economic impact of those new rules. At least 20 days before the hearing, the Board shall notify the public of the hearing and make the economic impact study, or the Department of Commerce and Economic Opportunity's explanation for not producing an economic impact study, available to the public. Such public hearing may be held simultaneously or as a part of any Board hearing considering such new rules.

In adopting any such new rule, the Board shall, in its written opinion, make a determination, based upon the evidence in the public hearing record, including but not limited to the economic impact study, as to whether the proposed rule has any

adverse economic impact on the people of the State of Illinois."

415 ILCS 5/27 (West 2012).

¶ 37 The standards set forth in section 27(a) of the Act reflect a legislative intent to prescribe Board rulemaking to the extent necessary to insure that the Board acts within the boundaries of its delegated authority. *Stepan Co. v. Pollution Control Board*, 193 Ill. App. 3d 827, 835 (1990). The section does not mandate any particular standards that the Board must comply with in adopting its rules nor does it impose specific requirements applicable to the resolution of individual challenges of a regulation. *Id.* However, the Act does require that the Board "take into account" the several factors listed in section 27 of the Act in promulgating regulations, specifically "the technical feasibility and economic reasonableness" of complying with the amended regulations. *Granite City Division of National Steel Co.*, 155 Ill. 2d at 181. This has been interpreted to mean that "the Board is only required to 'consider' or 'weigh carefully' the technical feasibility and economic reasonableness of compliance with proposed regulations in the rulemaking process." *Id.* Such an interpretation is "bolstered by the provision of the Act that requires courts to liberally construe its terms and provisions in order to achieve its stated purpose." *Id.*; 415 ILCS 5/2(c) (West 2012) ("The terms and provisions of this Act shall be liberally construed so as to effectuate the purposes of this Act\*\*\*."). In this regard, the Act specifically provides:

"It is the purpose of this Act, as more specifically described in later sections, to establish a unified, state-wide program supplemented by private remedies, to restore, protect and enhance the quality of the environment, and to assure that adverse effects

upon the environment are fully considered and borne by those who cause them." 415 ILCS 5/2(b) (West 2012).

¶ 38 Here, the Salt Institute argues that the Board failed to comply with the requirements of section 27 of the Act by failing to consider the designated uses and characteristics of the CAWS and LDPR, failing to consider whether the standard they chose was technically feasible or economically reasonable, and failed to conduct an economic impact study or explain why one was not conducted. The Salt Institute further argues that the Board's chloride standard was arbitrary and capricious irrespective of whether potential relief mechanisms were available. The Board counters that: it did consider all the factors in section 27(a) of the Act and heard evidence and argument on the hardship that the new chloride standard might cause to those entities that produce and/or discharge chloride into the CAWS and/or LDPR; the 500 mg/L chloride standard effectuates the purposes of state and federal environmental laws; and the chloride standard cannot be vacated unless is it found to be arbitrary and capricious.

¶ 39 Here, we find that the Board did consider all the factors in section 27(a) of the Act as it acknowledged that there would be hardships on businesses to comply with the new chloride standard in the winter months. It acknowledged that several groups were conducting research on acceptable levels of chloride, but that those studies were not yet available. It considered alternatives, such as beet juice, as well as relief mechanisms, such as variances, adjusted standards, and site-specific rules. Although the Board decided to adopt the 500 mg/L chloride standard and delay its effective date for three years, and it acknowledged that compliance with the standard would be difficult if not impossible for many, this is not enough for us to find that the chloride standard was arbitrary and capricious. The Board's broad rulemaking authority is not limited by the extent of hardship that a regulation may cause to dischargers. *Granite City*

1-15-2003

*Division of National Steel Co.*, 155 Ill. 2d at 182. The Board need not conclude that compliance with a proposed regulation is “technically feasible and economically reasonable” before it can adopt such regulation. *Id.* It is not this court's role to determine whether the Board's action was wise, or even if it was the most reasonable based on the record. *Central Illinois Public Service Co.*, 116 Ill. 2d at 412. “The Board, unlike this court, is well equipped to determine the degree of danger which a pollutant will cause, and then to balance the public threat against an alleged individual hardship.” (Internal quotation marks omitted.) *Id.* We believe that the Board did that here. And even though we may not agree with the Board’s standard and mechanism, we cannot act as a superagency and vacate the standard merely because we may not agree. “Such is essential if the basic notion of separation of powers is to survive.” *Shell Oil Co.*, 37 Ill. App. 3d at 271. From the record before us, we cannot say that the Board, in promulgating the new rule, relied on factors that the legislature did not intend for the agency to consider; or that the Board entirely failed to consider an important aspect of the problem; or that the Board offered an explanation for its decision that runs counter to the evidence before the agency; or that the Board’s rule was so implausible that it could not be ascribed to a difference in view or the product of agency expertise. *Greer*, 122 Ill. 2d at 505-06. Therefore, we cannot find the decision to be *clearly* arbitrary or capricious. As such, because we find that the Board did consider the factors laid out in section 27 of the Act and did not create a regulation that is “clearly arbitrary, unreasonable or capricious,” (*Illinois State Chamber of Commerce*, 177 Ill. App. 3d at 928), we affirm the Board’s rule on the chloride standard of 500 mg/L, which is set to take effect in July 2018.

¶ 40

Conclusion

1-15-2003

¶ 41 For the reasons above, we affirm the Board's rulemaking on chloride standards and uphold the amendments.

¶ 42 Affirmed.