BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	
REGULATORY RELIEF	)	
MECHANISMS: PROPOSED NEW	)	R18-18
35 ILL. ADM. CODE PART 104,	)	(Rulemaking – Procedural)
SUBPART E	)	

NOTICE OF FILING

TO: Don Brown
Clerk of the Board
Illinois Pollution Control Board
100 W. Randolph Street, Suite 11-500
Chicago, Illinois 60601
(VIA ELECTRONIC MAIL)

Marie E. Tipsord
Hearing Officer
Illinois Pollution Control Board
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(VIA ELECTRONIC MAIL)

(SEE PERSONS ON ATTACHED SERVICE LIST)

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board the **POST-HEARING COMMENTS OF THE ILLINOIS ENVIRONMENTAL REGULATORY GROUP,** a copy of which is herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
REGULATORY GROUP

Dated: December 5, 2017

By: /s/ Joshua J. Houser
One of Its Attorneys

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CERTIFICATE OF SERVICE

I, Joshua J. Houser, the undersigned, on oath state the following:

That I have served the attached **POST-HEARING COMMENTS OF THE ILLINOIS ENVIRONMENTAL REGULATORY GROUP,** via electronic mail upon:

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That my email address is Joshua.Houser@heplerbroom.com.

That the number of pages in the email transmission is 13.

That the email transmission took place before 5:00 p.m. on the date of December 5, 2017.

/s/ Joshua J. Houser
Joshua J. Houser

Date: December 5, 2017

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POST-HEARING COMMENTS OF THE
ILLINOIS ENVIRONMENTAL REGULATORY GROUP

The ILLINOIS ENVIRONMENTAL REGULATORY GROUP ("IERG"), by and through its attorneys, HEPLERBROOM, LLC, and pursuant to the October 13, 2017 Hearing Officer Order, hereby submits its Post-Hearing Comments in the above captioned matter.

IERG appreciates the opportunity to provide these comments for the Illinois Pollution Control Board's ("Board") consideration. IERG is an Illinois non-profit corporation affiliated with the Illinois Chamber of Commerce and is comprised of forty-seven (47) member companies that are regulated by governmental agencies that promulgate, enforce, or administer environmental laws, rules, regulations, or other policies. IERG was a participant in the negotiations that ultimately became Public Act 99-937, which created Section 38.5 of the Illinois Environmental Protection Act (415 ILCS 5/38.5 "the Act") and directed the Board to adopt the rules that are the subject of this matter. IERG also participated in the Illinois Environmental Protection Agency's ("Illinois EPA" or "Agency") stakeholder outreach to discuss the proposed rules, and the IERG member companies are likely to be participants in proceedings pursuant to the rules once they are adopted. All references to the proposed rules contained in these comments are to the revised version filed by the Illinois EPA with the Board on November 14, 2017.

IERG is generally supportive of the Board's adoption of the rules proposed by the Agency, as the mechanism created by Section 38.5 of the Act provides dischargers with an avenue for obtaining much-needed relief from otherwise unattainable water quality standards ("WQS"). IERG recognizes the relatively short timeframes established in Section 38.5 for the regulatory adoption, and thanks the Agency for its efforts to quickly develop what is by necessity a fairly complicated proposal to establish the new program, and its willingness throughout the process to include and invite input from stakeholders.

IERG does, however, have a few implementation-related concerns that it believes to be reasonably foreseeable, that it encourages the Board to address in the context of this rulemaking, thereby providing clarity and regulatory certainty, rather than waiting for them to arise in a potentially contentious setting. Specifically, IERG is concerned that the process shifts much of the burden of what is typically a State function to the regulated community, that the United States Environmental Protection Agency's ("U.S. EPA") ultimate approval or disapproval of a Board-adopted time-limited water quality standard ("TLWQS") necessitates an unusually high-level of involvement of the federal government in a State proceeding, that additional clarity is needed as to what the "substantial compliance" determination entails, that the dates for the Board to take final action in reevaluations be clarified to be consistent with requirements in the federal rules, that further clarification be added regarding the intended scope of the newly defined "Best Management Practices" for purposes of these TLWQS rules, and that the proposed TLWQS rules be moved to a new Part of the Board's regulations.

The Role(s) of the Various Participants

IERG is concerned that too much of the burden of organizing dischargers, data collection, and substantiating the required elements necessary for the Board to approve a TLWQS is being

placed on petitioners. This is particularly likely to be the case in large multi-discharger, watershed/waterbody proceedings, or those that are inherently complicated.

The federal regulatory basis of the Illinois TLWQS process at 40 C.F.R. Section 131.14 does not recognize the differentiation of roles and responsibilities for various parties as in the proposed Subpart E of Part 104. The federal rule simply requires that the State may adopt a WQS variance, and that the responsibility for substantiating the various required elements and public participation also falls on the State. *See* 40 C.F.R. § 131.14, throughout. The federal rule does not explicitly contemplate that the State wears multiple hats in the process as do the Illinois EPA and the Illinois Pollution Control Board (a system that has long been established in Illinois by the Illinois Environmental Protection Act and which IERG has consistently supported) nor for any special role to be played by the potentially affected dischargers. The mechanism crafted in Section 38.5 reflects an attempt to create a system that will result in a TLWQS adopted by the State consistent with 40 C.F.R. Section 131.14, but retain the Illinois bifurcated system, and create the opportunity for one or more dischargers to initiate the process as a petitioner or co-petitioner. Unfortunately, the mechanism also results in an even more complicated process than that contemplated by the federal rules.

IERG supports the ability of one or more dischargers to initiate and obtain a TLWQS from the Board, regardless of whether the Illinois EPA is supportive of the endeavor, and is encouraged by the Agency's actions thus far in working with and helping coordinate participants in the multiple pending petitions for TLWQSs currently before the Board. However, it is not hard to envision a situation where the impacted dischargers are less sophisticated entities incapable of organizing among themselves or building a record to support issuance of a TLWQS, or where a state-wide or similarly complicated TLWQS is being sought that would require a

petitioner to have knowledge about a universe of point and non-point dischargers and activities that is patently unreasonable for any entity but the Agency itself. Similarly, even for more sophisticated entities, some elements of the required petition contents and demonstration requirements appear to be more suitably addressed or provided by the Agency.

IERG requests that the Board consider the following:

- An explicit acknowledgment that, although both Section 38.5 and the proposed Subpart E include a specific role and responsibilities of the Agency, the Agency is not precluded from acting as the petitioner or co-petitioner itself, and that in those instances, the Agency's Response and Recommendations will be deemed to be in support of the petition.
- That in some instances, the information required by the proposed Section 104.530 is of the type that is or should be readily available to the Agency, and might not be easily ascertained by a discharger. IERG encourages the Board to consider adopting a mechanism (perhaps in conjunction with a substantial compliance assessment) by which the Board can direct the Agency to provide or supplement information provided in a petition. IERG suggests such a case may arise in trying to comply with the following proposed subsections of Section 104.530:
    - (a)(6) surface water data for delineation of the current and anticipated future impairment;
    - (a)(7) identify and support appropriate Section 104.560 factors;
    - (a)(8) regarding prior issued regulatory relief;
    - (a)(9) regarding permits held by potentially affected dischargers;
    - (a)(10) identification of sources that contribute to violation of WQS;

- (a)(12) highest attainable condition, including changes during the course of the TLWQS;
- (a)(14) specify and support proposed duration of the TLWQS;
- (b)(1) proposed BMPs for non-point source controls (see further discussion below regarding BMPs); and
- (b)(2) extending a TLWQS, discussion of to-date BMP implementation for non-point source controls and water quality progress.

Also, IERG suggests that the language of this provision in proposed Section 104.530(a)(10) be revised as follows: "an identification and description of any process, activity, or source that contributes ~~to a violation of a water quality standard~~pollutant loads for the pollutant or parameter for which a time-limited water quality standard is sought, including the material used in that process or activity". IERG believes this revised language would be more in keeping with the intended scope of this particular petition content requirement.

Collective Action

IERG expects that most often the TLWQS process will be utilized for single dischargers. However, as is demonstrated by the current proceeding of consolidated petitions for chlorides, the universe of petitioners and potentially impacted entities can be complicated and convoluted. *See* Consolidated PCB Nos. 16-14, 16-15, 16-16, 16-17, 16-18, 16-20, 16-21, 16-22, 16-23, 16-25, 16-26, 16-27, 16-29, 16-30, 16-31, and 16-33. In this proceeding, at the Board's October 10, 2017 hearing, it was suggested that collective action could be achieved through a watershed group. *See* October 10, 2017 Hearing Transcript, at 28, 30, 149, 150, 151, and 154. IERG does not believe that industry participation in watershed groups has been commonplace in Illinois previously, so it is difficult to judge whether they could provide an adequate mechanism for

collective action. It is certainly not hard to envision scenarios where diversity of opinions among watershed group members makes it difficult, if not impossible, for consensus positions to be reached, or where some group members feel that their positions or interests are not adequately represented by group action. At this time, IERG does not have a readily available alternative to suggest for the Board's consideration; rather, IERG raises the issue as one for the Board to be mindful of in the future once more experience is gained in implementing proposed Subpart E and assessments for improvements can be made.

Federal Role in Process

As discussed at length at the Board's October 10, 2017 hearing, the effectiveness of a TLWQS (for federal Clean Water Act purposes) is contingent upon U.S. EPA approval. U.S. EPA's ultimate approval or disapproval of a Board-adopted TLWQS necessitates an unusually high level of involvement of the federal government in a State proceeding. In addition, this federal approval process may take longer than anticipated if U.S. EPA does not provide timely review and determinations, which has previously occurred in other non-TLWQS proceedings. *See* October 10, 2017 Hearing Transcript, at 184-189. Unclear or untimely feedback from U.S. EPA may necessitate delays in the TLWQS proceedings before the Board. See, e.g., proposed 104.570, 104.565(d)(6)(8). IERG suggests that the proposed rules expressly provide for the ability of the Agency to file motions for extensions, as necessary, when U.S. EPA's feedback is delayed.

Substantial Compliance

At the October 10, 2017 hearing, there was a great deal of discussion and apparent confusion regarding the concept of "substantial compliance." IERG was an active participant in the negotiations of the language that became Public Act 99-937. During these negotiations, the

discussion regarding the concept of "substantial compliance" was that the substantial compliance assessment was intended to serve as an initial screening process. That step was intended to serve dual purposes: 1) to discourage "sham petitions" being filed solely to take advantage of the stay, and 2) in recognition that some petitions may have been filed hastily in order to obtain the benefit of the stay, to provide some direction and guidance to petitioners as to how their petitions might be improved and an opportunity to timely do so, without necessarily terminating the stay. IERG does not believe the concept of substantial compliance was intended to be a weighing of the merits of the petition, or to the extent it was, simply a cursory review. The choice of the word "substantial" in this context is perhaps unfortunate, as it has multiple meanings that are plausible in the context in which it is used.

As currently drafted, the definition of "substantial compliance" in proposed 104.515 could be erroneously interpreted to require a weighing of the merits of the petition, in contrast to the legislative intent behind the substantial compliance concept. To avoid this confusion, IERG suggests that the definition of "substantial compliance" in proposed 104.515 be revised to clarify that a petition is in substantial compliance if the petition has in some way addressed the elements required by the rules, and that the merits of the elements will be determined at a later stage in the TLWQS proceeding.

Also, to further clarify the Agency's response to Midwest Generation's Question #26 regarding substantial compliance determinations, IERG suggests that the proposed rules clearly state that the Board will accept a petition's factual contentions as true when making the Board's determination on the substantial compliance issue. This clarification could be added to the definition of "substantial compliance" in proposed Section 104.515 and/or in proposed Section 104.545.

Reevaluation

The requirement to reevaluate a TLWQS as proposed in Sections 104.565(d)(7) and 104.580 flows exclusively from the federal rules, which require that the State perform a reevaluation no less frequently than U.S. EPA approval of the TLWQS, and that the results of the reevaluation be submitted to U.S. EPA within 30 days. *See* 40 C.F.R. §§ 131.14(b)(1)(v) and (b)(1)(vi). Absent from the proposal, however, is a specific requirement that the State (in this case the Board) will take final action to complete the reevaluation process by the deadline established. While IERG suspects that this is the intent of the proposal, IERG recommends that the dates established in either the Board's Section 104.565(d)(7) order, or establishing the various timeframes for filing a proposed reevaluation, public comments, Agency recommendation, etc., be explicitly tied to the Board taking final action by that certain date as required by the federal rules.

Best Management Practices

Pre-filed Board Question #7 and the Agency's response to same pertain to "Best Management Practices" or "BMPs". The Board has proposed the addition of a definition for "BMP" to proposed Section 104.515(b). The Board has proposed, and the Agency has supported, adopting a definition from the federal regulation at 40 C.F.R. Section 122.2.

40 C.F.R. Part 122 provides National Pollutant Discharge Elimination System ("NPDES") permit program regulations, the scope of which is limited to permits for the discharge of "pollutants" from any "point source." However, the use of "BMP" in the proposed amendments to Subpart E of Part 104 and 40 C.F.R. Section 131.14 is with respect to non-point source control. *See* proposed Sections 104.530(b)(1)-(2) and 104.555, and 40 C.F.R. § 131.14(b)(2)(iii).

As the use of "Best Management Practices" or "BMP" in the proposed regulations is in the context of non-point source controls, IERG proposes instead the adoption of the following federal definition from 40 C.F.R. Section 130.2(m) that encompasses non-point source controls:

> *Best Management Practices – methods, measures or practices selected by an agency to meet its nonpoint source control needs. BMPs include but are not limited to structural and nonstructural controls and operation and maintenance procedures. BMPs can be applied before, during and after pollution-producing activities to reduce or eliminate the introduction of pollutants into receiving waters.*

This definition also aligns better with the non-point source references found in the multi-discharger variance guidance that the Agency attached as Attachment A to its November 14, 2017 responses. *See* Illinois EPA, "Responses to Questions asked at the October 10, 2017 Hearing," at Attachment A, pages 3-319 and 3-320, PCB No. R18-18 (Ill.Pol.Control.Bd. Nov. 14, 2017).

In addition, it is IERG's understanding that, per the Agency's testimony during the October 10, 2017 hearing, point-source BMPs are encompassed by the Pollutant Minimization Program (as defined in proposed Section 104.515), and the newly proposed BMP definition in 104.515 is intended to apply to the non-point sources that are the responsibility of the State (see last sentence of second paragraph of Page 3-319 in Attachment A to the Agency's November 14, 2017 Response) ("In such a case, 131.14 … provides for the option of a waterbody variance that requires the permittees to maintain their current pollutant control technology and implement a PMP while the state address the non-point sources (NPS) of the pollutant."). IERG believes the proposed definitions in proposed Section 104.515 should be clarified to reflect this understanding.

Location of Proposed Rules in the Board's Regulations

In follow-up to the Agency's November 14, 2017 response to Midwest Generation's Pre-Filed Question #1, IERG suggests that the proposed TLWQS regulations be moved to a new Part 109 in the Board's regulations to be consistent with the statutory language regarding TLWQS proceedings being non-adjudicatory. *See* 415 ILCS 5/38.5(a).

Conclusion

As described above, IERG has been an active participant in establishing the TLWQS process from its inception. Given that there is very little experience in implementing the program at the federal level, or in other states, it should not be surprising that numerous questions exist and that there are likely to be aspects of the process that need to be worked through over time. IERG provides these comments in hopes that it can offer some of its perspectives to the Board, to identify potential issues before they become contentious, and to help make the program as workable as possible for both those implementing it and those tasked with complying with it.

Thank you for your consideration of these comments.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
REGULATORY GROUP,

Dated: December 5, 2017

By: /s/ Joshua J. Houser
One of Its Attorneys

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