

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
)
PUBLIC WATER SUPPLIES: PROPOSED) R18-17
NEW 35 ILL. ADM CODE 604 AND)
AMENDMENTS TO 35 ILL. ADM CODE) (Rulemaking-Public Water Supplies)
PARTS 601,602, 607 AND 611)

NOTICE OF FILING

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board ILLINOIS EPA'S FIRST NOTICE COMMENTS, a copy of which is herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: /s/Joanne M. Olson
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Date: September 17, 2018

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ILLINOIS EPA’S FIRST NOTICE COMMENTS

NOW COMES the ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, ("Illinois EPA" or "Agency") by and through its counsel, and submits the following first notice comments to the Illinois Pollution Control Board (“Board”) in the above-captioned rulemaking.

I. Introduction

On August 3, 2017, the Agency proposed a new Part 604 and amendments to Parts 601, 602, 607 and 611. This regulatory proposal contained revisions to the Agency’s existing design, maintenance and operational rules for community water supplies and incorporated standards contained in the 2012 edition of the Recommended Standards for Waterworks. The Agency intends to repeal its rules after the Board adopts the proposed rules for community water supplies.

The Board held two hearings in this matter in the fall of 2017 and accepted post-hearing comments until January 5, 2018. The Board issued an Opinion and Order directing the Clerk to file the first notice proposal with the Secretary of State on July 26, 2018. Attached to the Board’s July 26, 2018, order was an addendum containing the proposed regulatory language. The Board’s regulatory proposal was published in the Illinois Register on August 10, 2018.

The Board specifically requested comment on four issues, which the Agency addresses in Section II below. Section III of this document contains the Agency’s comments on the proposed

regulatory language in the Board's addendum. Section IV of this document contains the Agency's comments on the regulatory language as published in the Illinois Register.

II. Response to Board Questions

- 1) For proposed Section 604.725(a), the Free Chlorine Comments address the detection limit for equipment used to report a free chlorine residual. The Comments argue that reasonably priced methods can reliably report a concentration of 0.2 mg/L. They suggest that systems using less precise methods must meet a more stringent standard. The Board seeks IEPA's comment on this proposal, and the Board welcomes comment on it from any of the other participants.

AGENCY'S COMMENT: Section 611.381(c)(1) specifies approved methods for residual disinfection monitoring/measurement. Therefore, it is unnecessary to further specify or restrict approved methods. Additionally, because of the importance of chlorination residuals, the Illinois EPA does not believe that it is appropriate or necessary to vary the regulation based upon equipment or methodology. The Illinois EPA does not support varying standards based upon testing equipment.

- 2) For proposed Section 604.725(a), CDWM questioned whether a system would be non-compliant if it has more than five percent of sites falling below the proposed limit or if it has a single site below that limit. While the Board believes that the language of IEPA's current rule and proposal address this question, the Board requests IEPA's response and welcomes comment from any of the other participants.

AGENCY'S COMMENT: The proposed requirement in Section 604.725(a) is, "A minimum free chlorine residual of 0.5 mg/L or a minimum combined residual of 1.0 mg/l

shall be maintained in all active parts of the distribution system at all times.” Therefore, the Illinois EPA interprets a single site below the regulatory limit as noncompliant.

- 3) For proposed Section 604.725(a), CDWM requested that the Board amend IEPA’s proposal to allow HPC measurements as evidence of disinfection when the chlorine residual is less than 0.5 ppm. The Board requests that IEPA comment with its position on CDWM’s proposal, argument in support of that position, and any revision to Section 604.725 it may wish to offer. The Board also welcomes comment on this issue from any of the other participants, including any elaboration CDWM may wish to offer.

AGENCY’S COMMENT: The Illinois EPA agrees that HPC monitoring may provide information on the efficacy of disinfection. However, efficacy of disinfection at the point of measurement is not the same as maintenance of residual disinfection at all points in the distribution system.

Arguably, a decline in residual disinfection with favorable HPC measurements could be indicative of a breach in the distribution system where the chlorine has acted in a proactive and affirmative manner. The Illinois EPA would argue that this area of the distribution system should be further evaluated to determine why there was a decline in residual. The Illinois EPA does not support allowing HPC in lieu of minimum disinfectant residuals.

- 4) For proposed Section 604.725(a), CDWM commented that adding chlorine gas to meet IEPA’s proposed requirement may increase pH and corrosion of metals. The Board requests IEPA’s response and welcome comments from any of the other participants.

AGENCY'S COMMENT: The Illinois EPA acknowledges that any change in chemical addition has the potential to alter the attributes of the water being supplied to customers. The chemistry of the water can be affected by the state of the distribution system and plumbing connections, and by the use of corrosion inhibitors.

Therefore, whenever a water system changes the chemistry of the water being supplied to its customers, the potential for corrosion must be evaluated. This potential must be assessed in a thorough manner prior to the change in chemistry (e.g., pH could be adjusted for corrosion control). Then, following the change, there are regulatory provisions that allow confirmatory monitoring of water being distributed to customers.

Finally, as the Board has noted, the Illinois EPA's proposed requirements do not automatically require increased chemical addition. The Illinois EPA has identified strategies that should limit water age in the distribution system, improve treatment and achieve compliance without increasing chemical addition.

III. Board's Addendum

Standards of Issuance

Section 602.105 governs the issuance of permits to community water supplies. The Board's proposal substitutes the word "will" in the place of the word "shall" in subsections (a)(1), (a)(2), (a)(3), (a)(4), (a)(5) and (b). The use of the term "will" is unconventional in statutes and regulations in Illinois. Traditionally, the words "shall" or "must" have been used to indicate a mandatory action. *Jennings v. Rodriguez*, 138 S. Ct. 830, 844, 200 L. Ed. 2d 122 (2018) ("Unlike the word 'may,' which implies discretion, the word 'shall' usually connotes a requirement."). In Illinois, the courts will look to whether the statute prescribes a consequence for failure to obey in

determining whether a regulation is mandatory or discretionary. *Board of Education of Waukegan Community Unit School District 60 v. Illinois State Charter School Commission*, 97 N.E.3d 85, 102, 420 Ill.Dec. 511, 528 (2015).

The court in *Board of Education of Waukegan Community Unit School* summarized: “Therefore, under the mandatory-directory dichotomy of statutory construction, it is not the use of obligatory language, such as the word “shall,” that determines whether a statutory command is mandatory or directory, but rather whether noncompliance with such language dictates a resulting consequence.” *Id.* at 102. A procedural command to a government entity is presumed to be directory. *Id.* The courts have developed a two-part test to determine whether regulatory language, which is presumed to be discretionary, is in fact mandatory: “(1) negative language in the statute or rule prohibits further action in the case of noncompliance or (2) the right the statute or rule is designed to protect would generally be injured under a directory reading.” *Id.*

The Illinois Environmental Protection Act (Act) provides, “it shall be the duty of the Agency to issue such permit upon proof by the applicant that the facility . . . will not cause a violation of the Act or of regulations hereunder.” 415 ILCS 5/39(a). If the Agency fails to issue the permit, the applicant may deem the permit issued. 415 ILCS 5/39(a). Clearly, under the Act and case law governing the mandatory/directory dichotomy of statutory construction, the Act mandates that the Agency issue a permit when the permit applicant can show the requested permitted activity will not violate Illinois’ environmental laws.

The substitution of the word “shall” to “will” does not make the regulations easier to comprehend for the regulated community. This change unnecessarily invites debate on the meaning of the word “will”. It opens the door for future litigation on whether each of the elements in Section 602.105 are mandatory vs. discretionary. This change has the potential to create

ambiguity, where the current regulatory language has none. In particular, subsection (a)(3) is of vital importance. As currently drafted, it prevents the Agency from issuing a construction permit if the proposed construction is not based on design criteria that will produce consistently satisfactory results. By changing the “shall” to a “will”, the Agency will be pressured into issuing a permit in the absence of such design criteria. Subsection (a)(3) is one of the cornerstones of public health protection in Illinois.

The Agency requests that the Board not change “shall” to “will” as this change has no positive effect. The Agency wants the regulations to contain mandatory language. If the Board dislikes the word “shall”, the Agency proposes that the Board uses the word “must” instead.

Construction and Operating permits

Section 18(c) of the Act provides: “No person shall . . . construct, install or operate any public water supply without a permit granted by the Agency, or in violation of any permit condition imposed by such a permit.” Section 602.200 and Section 602.300, as currently adopted, reflect the “no person shall” is statutory language. The Board proposes to change this from “no person shall” to “no person may”. The Agency requests the Board refrain from making this change to maintain consistency with the language in the Act.

Section 604.1105(i)

In Section 604.1105, entitled Feed Equipment and Chemical Storage, Subpart K Chemical Application, the Board proposes in subsection (i) to use the term “make-up water supply”. The Illinois EPA had proposed the term “make-up-water lines”. The Agency and industry do not use the term “make up water supply,” and instead use the term “make-up-water lines”. The Agency requests the Board use the term “make-up-water lines” to be consistent with industry practice.

Section 604.1335(a)

The Agency believes the Board's proposal in Section 604.1335(a) should be re-written as follows:

- a) Clearwell storage must:
 - 1) provide contact time, where required, under Section 604.715;
 - 2) ~~to~~ ensure adequate disinfectant contact time by sizing, ~~size~~ the clearwell to include extra volume to accommodate depletion of storage during the nighttime for intermittently operated filtration plants with automatic high service pumping from the clearwell during non-treatment hours;
 - 3) be sized~~size clearwell storage~~, in conjunction with distribution system storage, to relieve the filters from having to follow fluctuations in water use;
 - 4) provide an overflow and vent; and
 - 5) provide a minimum of two clearwells or clearwell compartments.

Section 604.1440(d)(1): The Agency believes the Board's proposal in Section 604.1335(a) should be re-written as follows:

- d) Notwithstanding subsection (a) or (b), a sanitary sewer force main must have at least the following minimum separation:
 - 1) when the sanitary sewer force main and the water main are parallel, a 10 foot horizontal separation from water mains; and ~~10 feet~~

Section 604.1515

When drafting this section, the Agency inadvertently omitted the word "cross" from the title. The Agency requests the Board amend the title to "Agency Approved Cross Connection Control Measures" in both the table of contents and the regulatory text.

IV. Illinois Register

The Board's rules that were published in the Illinois Register are not identical to the rules contained in the Board's July 26, 2018 Opinion and Order. The Agency believes that these changes were made either by a staff member of the Secretary of State's Index Department or a staff member

of the Joint Committee On Administrative Rules. The Agency has no objection or comment on the changes made in Parts 601, 602 or 611. The Agency's comments on the changes made to Part 604 follow.

Section 604.200(e)(3)

The Board, in its July 26, 2018 Opinion and Order, proposed the following:

- 3) More frequent sampling must be required to obtain a true representation of raw water quality. Raw water characteristics must be determined after heavy rainfall and runoff, low stream flow and at other times when unusual factors pertaining to physical and chemical quality, treatability, tastes, and odors exist.

The version published in the Illinois Register contains the following change:

- 3) More frequent sampling must be required to obtain a true representation of raw water quality. Raw water characteristics must be determined after heavy rainfall and runoff; or low stream flow, and at other times when unusual factors pertaining to physical and chemical quality, treatability, tastes, and odors exist.

The Agency requests that the Board adopt the language in the July 26, 2018 Opinion and Order unchanged. As drafted in the July 26, 2018 Opinion and Order, the raw water characteristics must be determined in three circumstances: 1) after heavy rainfall and runoff; 2) after low stream flow and 3) at other times. The Illinois Register version adds the conjunction "or" between runoff and low stream flow. This creates confusion and ambiguity because it seems to require raw water characteristics to be determined at either heavy rainfall and runoff or low stream, not both. Therefore, the Agency believes the changes reflected in the Illinois Register publication are substantive and should not be made.

Section 604.505(d)

For Section 604.505(d), the proposed rule published in the Illinois Register contains the following change from the Board's July 26, 2018 Opinion and Order:

- d) Mixing – Mixing must be adequate to disperse chemicals in the basin. The detention period should be instantaneous, but not longer than 30 seconds, with mixing equipment capable of imparting a minimum ~~velocity gradient~~ (G value) of at least 750 fps/ft.

The Agency requests that the Board adopt the language in the July 26, 2018 Opinion and Order unchanged.

Section 604.510(e)

For Section 604.510(e), the proposed rule published in the Illinois Register contains the following change from the Board's July 26, 2018 Opinion and Order:

- e) Other designs -Designs – Baffling may be used to provide for flocculation in small plants only after Agency approval. The design should be such that the velocities and flows ~~as provided~~ recommended in subsection (c) will be maintained.

The Agency requests that the Board adopt the language in the July 26, 2018 Opinion and Order unchanged. Subsection (c) does not contained recommendations. This change is confusing and misleading.

Section 604.620

For Section 604.620, the proposed rule published in the Illinois Register contains the following change from the Board's July 26, 2018 Opinion and Order:

Biologically active filtration refers to the filtration of surface water or a groundwater with iron, manganese or significant natural organic material, which includes the establishment, and maintenance of biological activity within the filtration media. The objectives of biologically active filtration may include control of disinfection byproduct precursors; increased disinfectant stability; reduction of substrates for microbial regrowth; breakdown of small quantities of synthetic organic chemicals; and oxidation of ammonia-~~Nitrogen~~, iron and manganese. Biological activity can have an adverse impact on turbidity, particle and microbial pathogen removal, disinfection practices, head loss development and filter run times and distribution system corrosion.

The Agency requests that the Board adopt the language in the July 26, 2018 Opinion and Order unchanged.

Section 604.900(c)(2)

The proposed rule published in the Illinois Register for Section 604.900(c)(2) changed SO₄ to SO⁴. The equation should be: $L-SI = (Cl + SO_4) / \text{Alkalinity}$. The Agency requests that the Board adopt the language in the July 26, 2018 Opinion and Order unchanged.

WHEREFORE, the Agency respectfully submits these first notice comments, and requests the Board proceed to second notice in accordance with the comments contained herein.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

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CERTIFICATE OF SERVICE

Joanne M. Olson, Assistant Counsel for the Illinois EPA, herein certifies that she has served a copy of the foregoing NOTICE OF FILING and ILLINOIS EPA'S FIRST NOTICE COMMENTS upon persons listed on the Service List, by placing a true copy in an envelope duly addressed bearing proper first class postage in the United States mail at Springfield, Illinois on September 17, 2018, or by sending an email from my email account (joanne.olson@illinois.gov) to the email addresses designated below with the following attached as a 13 page PDF document in an e-mail transmission on or before 5:00 pm on September 17, 2018.

/s/Joanne M. Olson

Joanne M. Olson

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