

ILLINOIS POLLUTION CONTROL BOARD
May 1, 1980

AMENDMENTS TO THE WATER POLLUTION)
REGULATIONS OF THE ILLINOIS) R80-6
POLLUTION CONTROL BOARD)

PROPOSED OPINION AND ORDER (by Dr. Satchell):

On April 7, 1980 the Environmental Protection Agency proposed to amend Rule 951 of Chapter 3: Water Pollution and to add two definitions. The Board proposes to adopt the Agency's proposal and, in addition, to make other technical amendments to Chapter 3 which will not require hearings or environmental impact statements. These technical amendments seek to clarify the difference between variances and permit appeals.

104 Definitions

Definitions of "publicly owned" and "publicly regulated" have been added to Rule 104. These are used in connection with the proposed amendments to Rule 951.

604 Critical Review and Restricted Status

Rule 604 is now titled: "Critical Review and Restricted Status." Rule 605 now covers "New Connections." Rule 604(a) through (d) are unchanged. Rule 604(e) is now Rule 606(a). Rule 604(f), the effective date, has been stricken since this is no longer necessary.

605 New Connections

Rule 605(a) and (b) are new rules which make no substantive change in Chapter 3. Presently when a sewage system has been placed on restricted status pursuant to Rule 604(b) the Agency can no longer issue permits for construction or operation of facilities involving additional sewage connections because the standard for permit issuance under Rule 962 is not met. Since the sanitary district is a permitted facility, the restricted status is viewed as a condition of its permit forbidding it to authorize additional connections to its system. Rule 605 has been added to Chapter 3 to state this explicitly in Part VI next to the provisions for restricted status. This should make Chapter 3 more understandable to the affected public.

606 Appeal

Rule 606(a) has been adopted verbatim from Rule 604(e). Rule 606(b) is a new Procedural Rule. While Rule 606(a) pro-

vides for appeal by a sanitary district whenever it is placed on restricted status, there is presently no way for a discharger to the sewage system to appeal the restricted status itself. Rule 606(b) provides that such a discharger may at any time request that the Agency review the restricted status.

Rule 606(c) provides that if the Agency refuses to remove the restricted status, the refusal is a permit denial entitling the discharger to appeal to the Board pursuant to Part V of the Procedural Rules. The rule provides that the sanitary district must be joined as a respondent in this permit appeal, along with the Environmental Protection Agency as provided by Procedural Rule 502.

Presently persons other than the sanitary district who seek to challenge the propriety of the restricted status have no procedural mechanism other than a variance petition. Evidence that the restricted classification is wrong is more appropriate in the context of a permit appeal and does not fit well into a variance proceeding where the issue is arbitrary or unreasonable hardship. Rule 606(b) and (c) provide a method for appeal for a discharger into the sewage system.

607 Variance from Restricted Status

Rule 607 provides that if a discharger to a sewer system has been denied a permit because of restricted status he may petition the Board for a variance from Rule 605 to allow sewer connection in spite of the restricted status on a showing of arbitrary or unreasonable hardship. Such proceeding is governed by Part IV of the Procedural Rules. The sanitary district must be joined either as a respondent or as a petitioner. Presently dischargers who seek to obtain a variance from restricted status must petition for a variance from Rule 962(a), the standard for permit issuance. This is undesirable since it tends to blur the distinction between a permit appeal and a variance. It is theoretically possible to appeal any permit by a variance from the standard for permit issuance.

Rules 606 and 607 have been placed together next to the rule on restricted status so that they will provide guidance for municipal dischargers who are unfamiliar with the Board's Procedural Rules. If a discharger seeks to challenge the restricted status, he should file a permit appeal. If he seeks to admit that the restricted status is correct, but seeks to show hardship, he should follow Rule 607.

914 Permit Modification Pursuant to Variance

Rule 914 is presently titled, "Variances from NPDES Limitations, Standards and Requirements" which tends to lead one to the conclusion that he may obtain a variance from a condition of a permit. The Board has usually held that variances are available only from the underlying regulations which have been incorporated in the permit. The new title will more clearly state the intent of Rule 914.

Rule 914 presently states that the Board may grant variances from standards, limitations and requirements "imposed by these NPDES regulations." This has been changed to "imposed by the Act, the FWPCA and Board regulations adopted pursuant thereto." Rule 910 provides that the Agency must incorporate permit conditions mandated by the Act, Board Regulations, the FWPCA and federal effluent guidelines. The rest of subpart (a) of Part IX of Chapter 3 involves application procedures before the Agency. It is doubtful whether a variance from application procedures would be useful or meaningful. Therefore Rule 914 has been modified to state expressly what the variance is from. This wording will further avoid the interpretation that Rule 914 authorizes "variances" from permit conditions which should be obtained by way of a supplemental permit application directed to the Agency. If modification is within the authority of the Agency, there is no necessity for a Board variance. A variance is required only in a situation where some regulation mandates the inclusion of the permit condition. A variance may be obtained from the regulation. Rule 914 provides that the Board may order modification of the NPDES permit in the variance proceeding without a separate permit appeal or application.

951 Construction Permits

The Environmental Protection Agency has proposed modification of Rule 951(b)(2) to reverse the result of the Third District Appellate Court in the case of Paul Starcevich et al. v. EPA, 78 Ill App. 3rd 700, 397 N.E. 2d 870. This Opinion appears to authorize tap-ons to sewer tap-ons without a construction permit. In this manner an entire subdivision could conceivably be hooked into a sewer system without a construction permit by successively tapping onto each neighbor's tap-on. This is obviously not the intent of Rule 951. The proposed amendments will provide that the exemption from the construction permit will be limited to wastewater sources which discharge less than 1500 gallons per day and discharge directly into a publicly owned or publicly regulated sanitary or combined sewer.

962 Standards for Issuance

Rule 962(a) has been modified to delete the reference to variances and Rule 974 has been added to cover permit modification pursuant to variance. Once a person has a variance from a rule he may obtain a permit which would be denied except for the variance. This is the intent of Title IX of the Act. The specific reference to variances in Rule 962(a) adds nothing and invites petitions for variances from the standard for permit issuance. This tends to confuse the distinction between a permit appeal and a variance.

Rule 962(b) has been reworded to track the language of the Proposed Order in R77-10 (December 13, 1979). Rule 962(b) presently provides that the wastewater source must either conform to the criteria or "be based on such other criteria which the applicant proves will produce consistently satisfactory results." In permit issuance the Agency has consistently ignored this alternative and insisted that permit applicants who cannot comply with design criteria obtain a variance from the Agency's criteria. Section 35 of the Act does not mention Agency criteria or policies as subjects of Board variances. The preferred view is that the Agency policies and criteria can be modified by the Agency without resort to the Board. Where a discharger cannot comply with the criteria but can achieve the same results in another manner, he should be issued a permit. Review of the alternative design should be by way of permit appeal where the issue is whether the facility will be constructed, modified or operated so as not to cause a violation of the Act or of this Chapter, as provided in Rule 962(a). Since this frequently produces confusion, Rule 962(b) has been reworded to emphasize this. The Board intends Rule 962(b) to be merely a rewording of the existing Rule 962(b). It does not amount to a substantive change affecting the duties of a discharger.

Rule 962(c) has been deleted. Pending before the Board is a Proposed Order affecting Rule 902(i) in R79-13 (December 13, 1979). Rule 962(c) is being deleted for substantially the same reasons as 902(i)(1)(i). Rule 962(c) appears to impose an absolute requirement that dischargers comply with all conditions of a construction permit before an operating permit can be issued. This potentially could lead to a situation where a facility has been constructed so that it meets the standard for permit issuance under Rule 962(a) but cannot be permitted because of some violation of conditions of a construction permit which did not result in a facility which is

any less desirable from an environmental point of view. Deletion of Rule 962(c) will ensure that such a facility would be permitted under the general rule of 962(a). Breach of condition of a construction permit may be the subject of an enforcement action in an appropriate case but should not prevent permitting a facility if the general standard is met.

967 Design, Operation and Maintenance Criteria

Rule 967(a) has been modified to strike references to Agency procedures. These have been moved to Rule 967(b). Confusion has resulted from a rule which speaks both of criteria and procedures. Rule 971 has been deleted and Rule 967(b) added to provide for Agency procedures.

Rule 967(c) has been added to provide that both the criteria and the procedures are subject to the applicable provisions of the Illinois Administrative Procedure Act. The reference to the Administrative Procedure Act in Rule 971 is incorrect.

Rule 967(d) has been added to define the function of the criteria. The criteria are not rules in the sense that a discharger must comply with them. They represent a model permit. If a discharger designs his facility to meet the criteria, then he is assured that the permit will be promptly issued. This language is taken from the Proposed Order in R77-10 (December 13, 1979).

971 Procedures

Rule 971 has been deleted and moved to Rule 967(b) and (c).

974 Permit Modification Pursuant to Variance

Rule 974 has been added to Chapter 3. This parallels Rule 914 which applies only to NPDES permits. This restates the permittee's right to petition the Board for variance pursuant to Section 35 of the Act and Part IV of the Procedural Rules.

The last sentence of Rule 974 provides that the Board may order modification pursuant to a variance. This is a new rule which is procedural in nature. This is added to avoid the interpretation that a person who seeks a variance in order to obtain a permit must also file a permit appeal and maintain the permit appeal while awaiting the outcome of the variance.

In actual practice this is unnecessary since the discharger could always obtain permit modification subsequent to issuance of a variance by way of an application to the Agency. However, addition of this as a specific rule should provide guidance to dischargers unfamiliar with the Board's procedures.

This Opinion constitutes the Board's findings of fact and conclusions of law in this matter.

ORDER

The Board proposes to adopt the following amendments to Chapter 3: Water Pollution.

104 Definitions

"Publicly Owned" means ownership by a municipality, sanitary district, county, or state or federal agency.

"Publicly Regulated" refers to those otherwise private companies which are regulated as public utilities by the Illinois Commerce Commission pursuant to an Act Concerning Public Utilities, Ill. Rev. Stat. 1977, ch. 111 2/3, par. 1 et seq.

604 ~~New Connections~~ Critical Review and Restricted Status

- (a) Publication of Lists. The Agency shall publish and make available to the public at intervals of not more than three months a comprehensive and up-to-date list of sanitary districts and other wastewater treatment or transportation authorities then subject to restricted status on further sewer connections, as well as a list of those which are then under critical review by the Agency. Such lists shall include estimates of treatment plant and sewer capacity, and the amount of population equivalent added since publication of the previous list.
- (b) Restricted Status. Restricted status shall be defined as the Agency determination, ~~pursuant to Section 39 of the Act and Rule 962 of this Chapter,~~ that a sewer has reached hydraulic capacity or that a sewage treatment plant has reached design capacity, such that additional sewer connection permits may no longer be issued without causing a violation of the Act or regulations.
- (c) Critical Review. Critical review shall be defined as the Agency determination, ~~pursuant to Section 39 of the Act and Rule 962 of this Chapter,~~ that a sewer is approaching hydraulic capacity or that a sewage treatment plant is approaching design capacity, such that

additional sewer connection permit applications will require close scrutiny to determine whether issuance would result in a violation of the Act or regulations.

- (d) Notification of Individuals Requesting Connections. Sanitary districts, or other wastewater treatment or transportation authorities responsible for authorizing new sewer connections, which have been placed on restricted status or critical review by the Agency shall notify all individuals requesting connections of such Agency determination.
- (e) ~~Appeal:--Any sanitary district or other wastewater treatment or transportation authority responsible for authorizing new sewer connections, may petition, pursuant to Title 10 of the Act and Part 5 of the Board Procedural Rules, for a hearing before the Board to contest the decision of the Agency to place it on restricted status.~~
- (f) ~~Effective Date:--This rule shall become effective on January 1, 1976.~~

605 Sew Connections

- (a) The Agency shall not issue permits under part IX of Chapter 3 to allow construction or operation of facilities involving additional sewer connections to a sewer or sewage treatment plant which is on restricted status.
- (b) Sanitary districts or other wastewater treatment or transportation authorities responsible for authorizing new sewer connections shall not issue additional sewer connection permits for sewers or sewage treatment plants which are on restricted status.

606 Appeal

- (a) Any sanitary district or other wastewater treatment or transportation authority responsible for authorizing new sewer connections may petition, pursuant to Title 10 of the Act and Part V of the Board Procedural Rules, for a hearing before the Board to contest the decision of the Agency to place it on restricted status.

- (b) Any person who receives notification of restricted status pursuant to Rule 604(d) may request that the Agency review the restricted status. Such request shall include a statement of facts and reasons supporting removal of restricted status.
- (c) Refusal to remove the restricted status shall be a permit denial entitling the person to petition, pursuant to Title 10 of the Act and Part V of the Board Procedural Rules, for a hearing before the Board to contest the Agency's refusal to remove the restricted status. The sanitary district or other wastewater treatment or transportation authority which is responsible for authorizing new sewer connections shall be joined as a respondent.

607 Variances from Restricted Status

Any person who receives notification of restricted status pursuant to Rule 604(d) or who has been denied an Agency permit because of restricted status may petition the Board for a variance from Rule 605 to allow the sewer connection in spite of the restricted status upon a showing of arbitrary or unreasonable hardship. Such proceeding shall be governed by Part IV of the Board's Procedural Rules. The sanitary district or other wastewater treatment or transportation authority which is responsible for authorizing new sewer connections may join in the petition, but if it does not it shall be joined as a respondent, in which case it must receive notice and service as provided by Part III of the Procedural Rules.

914 Variances from NPDES Limitations, Standards and Requirements Permit Modification Pursuant to Variance

To the extent authorized by the FWPCA and the Act, the Board may grant variances from standards, limitations, and requirements imposed ~~by these NPDES Regulations~~ by the Act, the FWPCA and regulations adopted pursuant thereto upon a showing that compliance would impose an arbitrary and unreasonable hardship on the applicant or permittee. Any request for such relief shall be commenced in accordance with Rule 401 of the Procedural Rules and Part IV of the Procedural Rules shall govern the proceeding. If such a variance is granted the Board shall order the Agency to issue or modify an NPDES Permit consistent with the Board Order, the FWPCA, Federal NPDES Regulations and the Act.

951 Construction Permits

Except for treatment works or wastewater sources which have or will have discharges for which NPDES Permits are required, and for which NPDES Permits have been issued by the Agency,

- (a) No person shall cause or allow the construction of any new treatment works, sewer, or wastewater source or cause or allow the modification of any existing treatment works, sewer, or wastewater source without a Construction Permit issued by the Agency, except as provided in Paragraph (b).
- (b) Construction Permits shall not be required for the following:
 - (1) Storm sewers that transport only land runoff; or
 - (2) Any treatment works, sewer, or wastewater source designed and intended to serve a single building and eventually treat or discharge less than an average of 1500 gallons per day of domestic sewage and which will discharge directly to a publicly owned or publicly regulated sanitary or combined sewer; or
 - (3) Any sewer required by statute to secure a permit pursuant to Ch. 111 1/2 Ill. Rev. Stat., Sec. 713, et seq.; or
 - (4) Any treatment works, pretreatment works, sewer, or wastewater source that, on the effective date of this Subpart B, is being constructed or will be constructed under the authorization of a Permit already issued by the Agency or its predecessors; provided however, that all construction must be completed within four years from the effective date of this Subpart B; or
 - (5) Privately owned sewers tributary to industrial treatment works owned by the same person if the additional waste load does not exceed the permitted design capacity of the industrial treatment works.
- (c) No person shall cause or allow the construction of any pretreatment works or cause or allow the modification of any existing pretreatment works if such pretreatment works, after construction or modification, will:

- (1) Discharge toxic pollutants, as defined in Section 502(13) of the FWPCA, or pollutants which may interfere with the treatment process into the receiving treatment works; or
- (2) Discharge 15% or more of the total hydraulic flow received by the treatment works; or
- (3) Discharge 15% or more of the total biological loading received by the treatment works as measured by the 5-day biochemical oxygen demand;

without a Construction Permit issued by the Agency.

962 Standards for Issuance

- (a) The Agency shall not grant any permit required by this Subpart B, except an Experimental Permit under Rule 955, unless the applicant submits adequate proof that the treatment works, pretreatment works, sewer, or wastewater source; ~~(a) Will~~ will be constructed, modified, or operated so as not to cause a violation of the Act or of this Chapter; ~~or has been granted a variance under Title IX of the Act; and~~
- ~~(b)~~ ~~Either conforms to the design criteria promulgated by the Agency under Rule 967; or is based on such other criteria which the applicant proves will produce consistently satisfactory results; and~~
- (b) If the Agency has promulgated, pursuant to Rule 967, criteria with regard to any part or condition of a permit, then for purposes of permit issuance proof of conformity with the criteria shall be prima facie evidence of no violation. However, non-conformity with the criteria shall not be grounds for permit denial if the condition of subsection (a) of this rule is met.
- ~~(c)~~ ~~Conforms to all conditions contained in the Construction Permit; where applicable.~~

967 Design, Operation and Maintenance Criteria

- (a) The Agency may adopt ~~procedures which set forth~~ criteria for the design, operation, and maintenance of treatment works, pretreatment works, sewers, and wastewater sources. These procedures criteria shall be revised from time to time to reflect current engineering judgment and advances in the state of the art.

- (b) ~~Before adopting new criteria or making substantive changes to any criteria adopted by the Agency, the Agency shall:~~
- ~~(1) Publish a summary of the proposed changes in the Board Newsletter or a comparable publication, at the Agency's expense, and~~
 - ~~(2) Provide a copy of the full text of the proposed changes to any person who in writing so requests, and~~
 - ~~(3) Defer adoption of the changes for 45 days from the date of publication to allow submission and consideration of written comments on the proposed changes.~~

The Agency shall adopt such procedures as are necessary for permit issuance under this Subpart B of Part IX.

- (c) In adopting new or revised criteria or procedures, the Agency shall comply with the requirements of the Illinois Administrative Procedure Act, Ill. Rev. Stat. 1977, ch. 127, §1001 et seq.
- (d) To the extent the Agency adopts such criteria, they will represent a formal Agency interpretation of what is consistent with the Act and Chapter 3 and necessary to accomplish the purposes of the Act.

971 Procedures

~~In addition to procedures specifically authorized under this Part, the Agency may adopt and promulgate all procedures reasonably necessary to perform its duties and responsibilities under this Chapter. Such procedures, and revisions thereto, shall not become effective until filed with the Index Division of the Office of the Secretary of State as required by "An Act Concerning Administrative Rules," approved June 14, 1951, as amended.~~

Deleted

974 Permit Modification Pursuant to Variance

If a permit is denied or granted with objectionable conditions required by Board Regulations the permittee may petition the Board for a variance from the regulations. The

proceeding will be governed by Part IV of the Procedural Rules. If requested the Board may order permit modification pursuant to variance.

The record will be held open for public comment for forty-five days after publication of the first notice in the Illinois Register.

IT IS SO ORDERED.

Mr. Werner abstained.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify the above Proposed Opinion and Order were adopted on the 15th day of May, 1980 by a vote of 4-0.



Christan L. Moffett, Clerk
Illinois Pollution Control Board