BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF ELECTRONIC FILING

PLEASE TAKE NOTICE that on December 5, 2017, I electronically filed with the Clerk of the Pollution Control Board of the State of Illinois, **COMMENTS OF THE ILLINOIS CHAPTER OF THE SIERRA CLUB, NATURAL RESOURCES DEFENSE COUNCIL, PRAIRIE RIVERS NETWORK, OPENLANDS, FRIENDS OF CHICAGO RIVER, RECOVERY ON WATER AND LITTLE VILLAGE ENVIRONMENTAL JUSTICE ORGANIZATION**, a copy of which is attached hereto and herewith served upon you.

Dated: December 5, 2017

Respectfully Submitted,

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

COMMENTS OF THE ILLINOIS CHAPTER OF THE SIERRA CLUB, NATURAL RESOURCES DEFENSE COUNCIL, PRAIRIE RIVERS NETWORK, OPENLANDS, FRIENDS OF CHICAGO RIVER, RECOVERY ON WATER AND LITTLE VILLAGE ENVIRONMENTAL JUSTICE ORGANIZATION

The Illinois Chapter of the Sierra Club, Natural Resources Defense Council, Prairie Rivers Network, Recovery on Water, Friend of Chicago River, Openlands and Little Village Environmental Justice Organization ("Environmental Groups") hereby provide initial comments on Regulatory Relief Mechanisms: Proposed New 35 Ill.Adm. Code Part 104, Subpart 4 that has been proposed by the Illinois Environmental Protection Agency (IEPA). The Environmental Groups have numerous members who use Illinois' rivers, lakes and streams for drinking water and in their work, as well as for fishing, swimming, and other forms of recreation in and on the water. Further, many of these members live near waters that do not meet water quality standards and thereby suffer adverse effects on the healthfulness and the value of their property.

The law requires that the goals of the Clean Water Act ("CWA") 33 USC 1251 et seq. be realized in Illinois as soon as possible. Variances and other regulatory mechanisms that may be used to delay realization of those goals should be allowed only as shown to be necessary. In particular, the stay of implementation of new water quality standards provided in Illinois law, 415 ILCS 5/38.5(h), to allow potentially affected parties to seek a "time limited water quality standard" should not be used as a vehicle to stonewall implementation of attainable controls on water pollution.

As indicated by the General Assembly, IEPA and Board, consideration of variances should be completed "as soon as practicable." See, 415 ILCS 5/38.5(g). The Environmental Groups unabashedly admit to having supported timing provisions in the Illinois law that would serve to prevent the availability of time limited water quality standards and the stay of implementation of new water quality standards from being used by dischargers to delay unnecessarily implementation of water quality criteria.

IEPA has done a commendable job in its proposal of weaving together the somewhat opaque requirements of the federal regulations contained in 40 CFR 131.14 and the Illinois statute appearing at 415 ILCS 5/38.5. However, at least one additional provision should be added by the Board. Also, the Board in its decision could usefully frame expectations as to proceedings to occur under the rules.

I. The General Requirements of the Law

In most general terms, the new (2015) U.S. EPA regulations that appear at 40 CFR 131.14 allow water quality standards variances that have been proven to be:

- Necessary, including necessary to avoid "substantial and widespread economic impact." See 40 USC 131.14(b)(2)(i)(A) incorporating 40 CFR 131.10(g)(6)
- No greater relief than necessary from what full implementation of the underlying criteria that are protective of designated uses would require, and
- No longer than necessary.

Further, variances must be:

- Approved by U.S. EPA and
- Reviewed at least every five years.

To be understood, the new 40 CFR 131.14 variance rules must be read in the context of the Clean Water Act, which requires that fishable/swimmable water uses be achieved "wherever attainable" CWA 101(a), 33 USC 1251(a)(2);[1] the regulations regarding designation of uses, 40 CFR 131.10; and the regulations regarding development of criteria to protect those uses. 40 CFR 131.11.

An example of how the federal rules might work:

It appears from reading the preamble to the federal rule that 40 CFR 131.10(g) and 40 CFR 131.14 are supposed to work together as described in the example discussed below. Our example will make use in part of an example presented by U.S. EPA in its explanation of the new variance rules, see FR Vol. 80 No. 162/Friday August 21, 2015, 51020 at 51036. However, the U.S. EPA example will be altered and expanded slightly to make it cover more situations that will potentially come before IEPA and the Board.

In this somewhat complicated example (nonetheless simpler than real life), two important forms of aquatic life, AL1 and AL2, are determined to be more sensitive to a pollutant X than was formerly understood. Protective criteria for pollutant X are found to be necessary and are adopted at 7 mg/L to protect AL1 and 1 mg/L to protect AL2. The current criterion is 10 mg/L so the current standard is not properly protective of AL1 or AL2.

Further, in our example, AL2 cannot live in impounded waters.

Still further, controlling pollutant X can be done readily to a level of 6 mg/L by putting in new treatment equipment that takes 6 years to install. 4 mg/L is achievable with capital improvements for which it will take 8 years to raise the capital and complete construction. Getting to 2 mg/L is currently extremely expensive but might be

[1] This was supposed to happen by July 1, 1983. As that is now impossible, attainment must be done as soon as possible.

approached with a pollutant minimization program that has yet to be developed fully. Getting to 1 mg/L is currently technologically impossible.[2]

What regulatory relief might be justifiable under these circumstances?

First, as to the impounded water, a use attainability analysis might be done under 40 CFR 131.10(g)(4) to remove protection of AL2 as a designated use. Still, impounded waters would have to be protected for the "highest attainable use." The criterion for those waters must be reduced to 7 mg/L to protect AL1. A variance might be granted for six years to install new treatment to reach 7 mg/L but then, unless there are new changes to the water quality criteria for X, there would be no need for further time limited water quality standards because the criterion achieved with installation of the new equipment, 6 mg/L, is actually lower than the criterion necessary to protect AL1, the "most sensitive use." 40 CFR 131.11(a)

As to non-impounded waters, unless there is an immediate prospect of improving wastewater treatment regarding pollutant X, a variance could be granted for eight years setting 4 mg/L as the "highest attainable interim use and interim criterion." 40 CFR §131.14 (b)(1)(B)(1). Further, under our example, the permit writing agency should give dischargers compliance schedules in their permits such that the water body meets 6 mg/L in 6 years and 4 mg/L in 8 years. See FR Vol. 80 at 51037.[3]

No later than five years after issuance of the variance, the highest attainable condition must be reconsidered if the variance is to last longer than five years. 40 CFR 131.14 (b)(1)(5)

The variance should probably end in eight years as the "highest attainable condition" (e.g. 4mg/L in our example) will then have been attained. 40 CFR 131.14(b)(1)(iv). However, at the end of the eight years, it might be possible to apply for a new variance. If new control technology has been identified, the variance should be set to give time to install that technology. If new technology to control X has not been developed, a new variance would have to be based on the concept of a "Pollutant Minimization Program" which allows for variances to allow time to take certain other actions. 40 CFR §131.14(b)(1)(ii)(A)(3) and (B)(2).

II. The rule would benefit from addition of a provision clarifying certain time restraints.

The IEPA proposal properly requires that it be proven that the criteria needed to protect the designated use[4] cannot be attained. 104.530 (a)(7), 104.560(a) It also requires that it be shown what is attainable and requires that the best that can be done be done. 104.530(a)(12), 104.550(b)(1)(A), 104.565(d)(5)[5]

[2] In this example we are looking at possible water body variances under 131.14 (b)(1)(B) and ignoring dilution and mixing zone issues.
[3] 6 mg/L must be reached "as soon as possible" under 40 CFR 122.47(a)(1).
[4] In our example above that was 1 mg/L for most waters.
[5] In our example 4 mg/L.

However, the time schedule for water quality improvements and the length of the variance under the IEPA proposal could be more clear. It is not clear what to do to clarify IEPA's proposal because the confusion is also present in the U.S. EPA language. It appears that the amount of time selected for the time limited water quality standard could be either the amount of time needed to impose limits based on known technology, 40 CFR 131.14(b)(1)(A)(1) or 131.14(b)(1)(B)(1) or the amount of time needed to have the greatest pollution reduction that can be achieved by a Pollutant Minimization Program. It is not clear what the time frame should be if, as in the normal case, there are reductions possible through identifiable feasible control technology and reductions possible through a Pollution Minimization Program.

Accordingly, the Environmental Groups must ask that the rule be clarified with an additional provision in the final Board rule stating:

> 104.565 - Clarification of Certain Time Limits
> a. A time limited water quality standard will not extend longer than the period that it has been shown that criteria designed to protect the underlying designated use are unattainable,
> b. Improvements to water quality are expected to be achieved as soon as they are attainable and
> c. The highest attainable condition shall be achieved as soon as it is attainable.

It is believed that this clarification represents the intent of the EPA rule and the IEPA proposal.

III. It must be assured that petitions for time limited water quality standards do not serve as a method to delay implementation of water quality standards through the filing of petitions filed largely for purposes of delay.

The Environmental Groups are concerned that unless the rule is improved and carefully policed by the Board, petitions for time limited water quality standards could become an instrument for unjustifiable delay of water quality improvements. Under the rule proposed, a discharger, despite knowing that a new criteria was coming for the years it typically takes in Illinois to develop and approve a new criteria, could file an utterly meritless petition for a time limited water quality standard fully expecting that the Board would find that the petition is not in substantial compliance with the requirements for a petition. This would buy the discharger time during which it could do nothing to meet the new criteria. It is for this reason that it was sought to have language added to the Illinois law to make clear that the Board should rule on the substantial compliance of petitions "as soon as practicable." 415 ILCS 5/38.5(g).

After the Board finds that a petition does not substantially comply, a discharger could then file a serious proposal (if it has one). If a discharger files a petition that substantially complies on its face, it will avoid compliance with the new standard however many months or years it takes the Board and the courts to rule that the petition is actually inappropriate.

IEPA's proposed Section 104.525 tracks 415 ILCS 5/38.5 and, thus, cannot be substantially altered by the Board. However, it should be noted that rules exist against filings made for delay.

Further, while we recognize that the Board has competing claims on its time and resources, it should beware of being used as a tool to prevent compliance with attainable water quality standards. In its decision on these rules, the Board could make clear that the Board will make every effort to rule expeditiously on petitions that fail to meet requirements and will set very strict timelines for the filing of a corrected petition under 415 ILCS 38.5(h)(3) after finding that it has received a petition that was deficient.

Respectfully submitted,

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Counsel for Sierra Club
and authorized to file this comment on behalf of Natural Resources Defense Council, Recovery on Water, Friends of Chicago River, Openlands, Prairie Rivers Network and Little Village Environmental Justice Organization

CERTIFICATE OF SERVICE

I, Albert Ettinger, hereby certify that I have filed the attached **NOTICE OF ELECTRONIC FILING** and **COMMENTS OF THE ILLINOIS CHAPTER OF THE SIERRA CLUB, NATURAL RESOURCES DEFENSE COUNCIL, PRAIRIE RIVERS NETWORK, OPENLANDS, FRIENDS OF CHICAGO RIVER, RECOVERY ON WATER AND LITTLE VILLAGE ENVIRONMENTAL JUSTICE ORGANIZATION** in PCB R2018-018 upon the attached service list by electronic mail on December 5, 2017.

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