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 19, 2017, I electronically filed with the Clerk of the Pollution Control Board of the State of Illinois, **REPLY OF ILLINOIS CHAPTER OF THE SIERRA CLUB, NATURAL RESOURCES DEFENSE COUNCIL, PRAIRIE RIVERS NETWORK, RECOVERY ON WATER, FRIENDS OF CHICAGO RIVER, OPENLANDS AND LITTLE VILLAGE ENVIRONMENTAL JUSTICE ORGANIZATION TO CERTAIN COMMENTS ON THE IEPA PROPOSAL FOR TIME LIMITED WATER QUALITY STANDARDS**, a copy of which is attached hereto and herewith served upon you.

Dated: December 19, 2017

Respectfully Submitted,

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REPLY OF ILLINOIS CHAPTER OF THE SIERRA CLUB, NATURAL RESOURCES DEFENSE COUNCIL, PRAIRIE RIVERS NETWORK, RECOVERY ON WATER, FRIENDS OF CHICAGO RIVER, OPENLANDS AND LITTLE VILLAGE ENVIRONMENTAL JUSTICE ORGANIZATION TO CERTAIN COMMENTS ON THE IEPA PROPOSAL FOR TIME LIMITED WATER QUALITY STANDARDS

The Illinois Chapter of the Sierra Club, Natural Resources Defense Council, Prairie Rivers Network, Recovery on Water, Friends of Chicago River, Openlands and Little Village Environmental Justice Organization. ("Environmental Groups") hereby reply to certain comments made by dischargers regarding the draft Regulatory Relief Mechanisms: Proposed New 35 Ill. Adm. Code Part 104, Subpart 4 that has been proposed by the Illinois Environmental Protection Agency (IEPA).

Many of the comments filed by the Metropolitan Water Reclamation District of Greater Chicago, the Illinois Environmental Regulatory Group and Midwest Generation LLC (MWG) call for useful, or at least, harmless clarifications of the rules proposed by IEPA. However, several of the proposals filed by MWG are unnecessary, illegal, unworkable and fraught with potential for years of delay in implementing improved water quality standards.

I. Background: New Water Quality Standards Will Not In Fact Be "New" to Illinois Dischargers.

It is safe to say that the first petitions for time limited water quality standards that will be before the Board will be those of: (1) MWRD relating to dissolved oxygen standards in the Chicago Area Waterways System ("CAWS) (R16-28), (2) MWRD and numerous municipalities relating to chloride in the CAWS (R16-14), and (3) Flint Hills and MWG relating to heat dischargers into the Chicago Sanitary and Ship Canal and the Lower Des Plaines River (R16-24, R16-29). Each of these likely petitions relate to changes in water quality standards arising from the Chicago Area Waterways Use Attainability Analysis (R8-09), which has been the subject of over 50 days of testimony, and intense scrutiny by Midwest Gen and others before the Board for over a decade. While the procedural rules concerning variances have changed, the underlying environmental issues are certainly not news to the potential petitioners.

The petitions stemming from the CAWS UAA are a special case in some respects but still illustrate the truth that Illinois dischargers will generally have many years to prepare to respond to changes in Illinois water quality standards. Indeed, MWRD has established work groups over the last couple of years to develop a petition on a chlorides variance. Such preparation can include evaluating the costs of meeting the new standards, studying the science on impacts on designated uses if the standards would not be met in particular waters, and conferring with IEPA and USEPA regarding what would be expected of a petition for a time limited water quality standard. Any affected discharger then has 35 days after the effective date of the change in water quality standard to stay the new standard by filing a petition for a time limited water quality standard. 415 ILCS 5/38.5(h)(1). A petitioner has two chances to file a petition that is in substantial compliance, the second after being specifically informed by the Board of the defects of its first petition. If the petitioner somehow fails to file a sufficient petition even on the second try, but then files an appeal, it will enjoy still more time, possibly months to years, to comply while the appeals process pays out. 415 ILCS 5/38.5(h)(5).

II. Four of the MWG Proposals are Fatally Flawed

Four of these proposals (C, E, F and G in MWG's Post Hearing Comments) wrongly express that the rules could be "punitive" in that dischargers may face an extended period between the termination of the stay provided by 415 ILCS 5/38.5(h) and adoption of a time limited water quality standard. See, MWG Post-Hearing Comments p.11. Each of those proposals should be rejected.

A. Section C of MWG's Proposal

After a hearing, a time limited water quality standard may be approved by the Board. It is at this point of the process that MWG expresses both impatience and fear.

MWG is impatient in that it would like the Board to forbid the filing of any motion for reconsideration by anyone other than the petitioner because such reconsideration could delay submittal of the Board's approved time limited water quality standard to USEPA under 104.570. (MWG at 6-7.) It is difficult to understand what actual concern animates MWG's impatience because the stay of the new or revised standards would remain in place during any period during which the motion for reconsideration is pending. To the contrary, this exclusion could affect the rights of interested parties under Illinois law.

B. Section E of MWG's Proposal

MWG proposes that the stay of the effectiveness of a newly adopted or revised water quality standard be extended beyond a denial of approval of a time limited water quality standard by the United States Environmental Protection Agency ("USEPA") (MWG Post-Hearing Comments pp. 8-10). The proposal to add such an extension should be rejected because it blatantly contradicts the statute, which states that the stay "shall

continue until" USEPA "disapproves the time limited water quality standard," 415 ILCS 5/38.5(h)(4). Even if it were possible to ignore the statute, MWG has not demonstrated that the proposed rule would likely produce an arbitrary or absurd result. There is simply no reason to believe that the scenario proposed by MWG would ever come to pass. To the contrary, it is much more likely that the MWG proposal would result in unwarranted delay in implementing changes in water quality standards.

MWG fears a "punitive" result if, despite coordination efforts by IEPA and approval by the Board, USEPA disapproves the time limited water quality standard. There could, then, be a period during which the stay was not in effect while the petitioner modifies the petition to meet USEPA objections or appeals the USEPA decision through the federal courts. It is unclear, however, how or why MWG believes that this will work significant prejudice to petitioners.

First, depending on the discharges and flows, the limits and conditions in its existing NPDES permit, and perhaps other factors, a USEPA disapproval of a time limited water quality standard may or may not cause a petitioner to come to be in violation of its permits or other provisions of the law. If the petitioner is not thrown into any form of non-compliance risk by the hiatus, it does not seem there is any serious adverse impact.

Even if USEPA disapproval does cause the petitioner to be in non-compliance with its permit or some other provision, significant prejudice is highly unlikely. First, USEPA's disapproval may be ultimately upheld, in which case the petitioner cannot claim prejudice from having to follow the law. Whatever the ultimate outcome, if the petitioner is seeking review of the USEPA disapproval in federal court, it can seek a stay of the USEPA ruling by the federal court.

Whether the petitioner is seeking court review or working to modify the time limited water quality standard to meet USEPA objections, the only risk of allowing the standard to go into effect during such process is that the new or revised standard would be the basis for an enforcement action. An enforcement action against a petitioner is, as a practical matter, extremely unlikely. IEPA is certainly not likely to take legal action against the petitioner because it is discharging in compliance with a time limited water quality standard that was approved by the Board. A Clean Water Act citizen suit could only be brought after giving 60 days notice. 33 U.S.C. §1365(b). It is hard to imagine a circumstance in which sending such a letter, let alone bringing suit after 60 days, would make any sense given that the violation of a new or revised standard would be undone by a petitioner's successful judicial challenge or modification efforts. Clean Water Act citizen suits can only be brought to prevent continuing violations. *Gwaltney v. Chesapeake Bay Foundation*, 484 U.S. 49 (1987).

C. Section F of the MWG Proposal

In the alternative, MWG proposes a procedure whereby the Board would "issue a tentative order and opinion" (MWG Post-Hearing Comments p.10) on a time limited water quality standard petition. This new procedure invented by MWG:

- Contradicts long-standing procedures established under Illinois law;
- Clearly runs contrary to federal law or USEPA procedure;
- If adopted, would open up a path for years of unjustified delay in implementing changes in water quality standards; and
- Has not been shown to addresses a problem that actually exists.

D. Section G of the MWG Proposal

MWG's final proposal to address its perceived effect of the denial of a time limited water quality standard by USEPA is to suggest shortening the already-truncated 21-day comment period on modifications provided at Section 104.570(c)(5). (MWG Post-Hearing Comments p. 11) Twenty-one days for public comment is already among the shortest comment periods in any environmental law context. MWG has failed to demonstrate what substantial or irreparable harm could possibly come to pass in a three-week period or to explain how reducing the length of the comment period would accomplish anything other than kneecapping the public's ability to participate.

III. MWG's Attempt to Limit Non-Petitioners' Ability to Participate in Reconsideration Should Be Rejected.

MWG also proposes a "clarification" that would specify that petitioners, but not other participants in proceedings regarding time limited water quality standards, be allowed to seek reconsideration of a Board Order before the order is submitted to USEPA for approval. (MWG Post Hearing Comment C, pp. 6-7.) Differentiating between petitioners and other participants in this manner is a departure from current public participation provisions, is unhelpful, and might in some cases create a mess, as demonstrated below in Paragraph V.

IV. MWG's Proposals to Prevent the Possibility of a Gap in the Stay Between USEPA Disapproval of a Time Limited Water Quality Standard and Resolution of the Standard, Should Be Rejected.

As mentioned, MWG has proposed three measures to prevent or shorten any period in which the stay of the underlying water quality standard lapses between a disapproval by USEPA of a Board-approved time limited water quality standard and a judicial reversal of that USEPA disapproval or the establishment of a time limited water quality standard modified to meet USEPA objections. All of these proposals should be rejected because the danger of such a disapproval occurring is unlikely if the petitioner(s) has done its homework and extremely unlikely to cause serious injury to anyone even if such a scenario does develop.

MWG's proposed solutions should also be rejected because they are inconsistent with the plain reading of the statute. MWG is asking the Board to read the statute setting the period of the stay as though it said "at least until," instead of "until." Even if MWG's proposal were legal, it still should not be adopted, because it would give some petitioners an incentive to litigate a minor USEPA disapproval problem that could easily be fixed. By doing this, the petitioner might win years of delay having to meet conditions while the federal courts addressed the matter.

MWG's proposal for an "interim order" by the Board is even worse. MWG gives no indication of how USEPA would treat such an interim order. It is entirely possible that USEPA would either refuse to consider such an interim order or would take a very long time to consider it. Either way the whole process could be delayed for years.

MWG's proposal to shorten the period for the public to comment on modifications designed to comply with USEPA objections is unnecessary and too restrictive. Even twenty-one days give the public little time to learn about a proposed modification and prepare meaningful comments.

Moreover, it is not safe, particularly in the immediate years to come, to assume that a modification requested by USEPA is going to benefit Illinois. There is certainly no legal constraint that requires USEPA modifications to require greater environmental protection. Clean water and public health advocates may well wish to object to a USEPA modification and need sufficient time to do so.

V. The Board Should Reject MWG's proposal Regarding Motions for Reconsideration Before Submission of Time Limited Water Quality Standards to USEPA for Approval.

Claiming to seek to "avoid unnecessary delays," MWG proposes that final Board orders on time limited water quality standards be subject to motions for reconsideration "for the useful purpose of identifying unintended Board errors or prompting the reassessment of key issues" before the order is presented to USEPA for approval if petitioners file the motion (MWG Comment p. 6). However, MWG proposes that non-petitioners may file their motion to reconsider, but that the agency would simply reattach it to its submission to the USEPA for approval. The Board would not actually hear the motion until after the USEPA approves the time limited water quality standard. This disparate treatment and procedural anomaly makes no sense.[1]

It is hoped that the occasions for needing to correct Board errors will be few, but if there is such an error, it should be corrected before the Board Order is sent to the USEPA if possible. This is because a Board Order submitted to the USEPA is a final

[1] Environmental commenters agree that a motion by non-petitioners for reconsideration of an order finding that petition was substantially complete should not normally be subject to a motion for reconsideration or appeal.

agency action. The ability of non-petitioners to send comments to USEPA is not spelled out in 40 CFR 131.14 and it is not clear how such comments would be treated. Allowing non-petitioners to file a motion for reconsideration of final Board Orders might avoid a misunderstanding. Further, because allowing such a motion will not affect a discharger's stay of the underlying water quality standard, no petitioner could be prejudiced in any event.

An example might be useful here. Let us say that the Board approves a time limited water quality standard but through some "unintended" error, misidentifies one of the waters to be affected by the time limited standard. If non-petitioners comment to USEPA on the order and if USEPA moves to address the noted problem, then USEPA would have to disapprove the time limited standard and send the matter back for modifications. Why would we prefer this over doing the Order correctly in the first place? If USEPA does not understand the problem with misidentification, it might approve the Board Order as written. MWG prefers a procedure whereby the non-petitioner files its motion to reconsider after the approval. (MWG comment p. 6) But what happens if the non-petitioner does this, the Board then realizes its' mistake and modifies its order? Would not the modified order then have to be re-presented to USEPA? Again, the proposed procedure makes no sense and could in fact delay matters more.

In reality, the proposed change by MWG could actually cause a greater delay than they fear in their response. Under 40 CFR 131.14, time-limited water quality standards are authorized "subject to the provisions of this section and public participation requirements at 40 CFR 131.20(b). Section 131.20(b) in turn requires water quality standards determinations to be made "in accordance with provisions of State law and EPA's public participation regulation (40 CFR Part 25)." Additionally, 40 CFR 25.10(b) specifically requires that the state adhere to its "administrative procedures act" in conducting CWA-related rulemakings. So, we know this process has to comport with the existing Illinois procedural statutes that apply to other CWA rulemaking decisions.

In looking at the Illinois process, Section 41(a) of the Illinois Environmental Protection Act (35 ILCS 5/41(a)) authorizes "any party to a Board hearing" and "any party adversely affected by a final order or determination of the Board," to seek judicial review "under the provisions of the Administrative Review Law" (ARL). The ARL, in turn, has been interpreted to require putative ARL plaintiffs to exhaust available remedies and seek reconsideration at the agency level before seeking judicial review.

So, if non-petitioner participants to a time-limited water quality standard proceeding are precluded from seeking reconsideration (as MWG suggests), then this would actually cause greater delay because it could lead to litigation instead of the administrative correction of any errors in a final Board Order being submitted to USEPA. Under the ARL, without the opportunity to seek reconsideration within the governing regulations, there would be no reconsideration requirement for a "non-petitioner" participant to exhaust the administrative process, and such third parties would be forced to immediately seek judicial review of a Board-approval in state court.

For all of these reasons, there are no advantages to MWG's proposal.

VI. Conclusion

The Board should reject MWG proposed changes C, E, F and G.

Respectfully submitted,

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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 **REPLY OF ILLINOIS CHAPTER OF THE SIERRA CLUB, NATURAL RESOURCES DEFENSE COUNCIL, PRAIRIE RIVERS NETWORK, RECOVERY ON WATER, FRIENDS OF CHICAGO RIVER, OPENLANDS AND LITTLE VILLAGE ENVIRONMENTAL JUSTICE ORGANIZATION TO CERTAIN COMMENTS ON THE IEPA PROPOSAL FOR TIME LIMITED WATER QUALITY STANDARDS** in PCB R2018-018 upon the attached service list by electronic mail on December 19, 2017.

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PCB R2018-018 SERVICE LIST
December 2017

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