

ILLINOIS POLLUTION CONTROL BOARD

April 26, 2018

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

Adopted Rule. Final Order.

OPINION AND ORDER OF THE BOARD (by C.K. Zalewski):

The Board today adopts a rule to amend the Board's procedural rules. The Illinois Environmental Protection Agency (IEPA) filed a proposal with the Board to add Subpart E to 35 Ill. Adm. Code 104 (Regulatory Relief Mechanisms). The rule provides procedures necessary for the Board to consider and adopt time-limited water quality standards (TLWQS), a new mechanism for regulatory relief enacted in Public Act 99-937. The rules specify types, purpose, timelines, and requirements of TLWQS proceedings. They also clarify the role of the Board, IEPA, and each participant in all aspects of those proceedings, like petitioning for, adopting, and reviewing TLWQS.

The Board provided an overview of this rulemaking in its first notice opinion, adopted on August 17, 2017. During the first notice period, the Board received numerous public comments, which the Board addressed in its second notice opinion and order, adopted on February 8, 2018. In the second notice opinion, the Board proposed amendments for second notice review by the Joint Committee on Administrative Rules (JCAR) under the Illinois Administrative Procedure Act (IAPA) (5 ILCS 100/5-40(c) (2016)). On March 6, 2018, IEPA filed a motion for clarification, which the Board grants in this order.

On March 13, 2018, JCAR issued its Certification of No Objection subject to JCAR's proposed amendments. The Illinois Environmental Regulatory Group (IERG) and IEPA filed comments on JCAR's amendments. As discussed below, the Board finds none of JCAR's amendments to be substantive and therefore declines IERG's and IEPA's requests to omit specified JCAR amendments from the final rule.

In this opinion and order, the Board first provides brief legislative and procedural background, followed by disposition of IEPA's motion. The Board then summarizes changes to the rule requested by JCAR during second notice and addresses IERG's and IEPA's comments on JCAR's revisions. The final rule language appears in the appendix following this opinion and order.

**LEGISLATIVE AND PROCEDURAL BACKGROUND**

Public Act 99-937, effective February 24, 2017, amended the Environmental Protection Act (Act) by adding a new Section 38.5. 415 ILCS 5/38.5 (2016). Section 38.5 authorizes the Board to issue, for the first time, TLWQS to conform with the recently-enacted rules of the

United States Environmental Protection Agency (USEPA). TLWQS are “water quality standard variances.” USEPA’s rules, adopted on August 21, 2015, allow water quality standard variances for a single discharger, multiple dischargers, a watershed, a water body, or a waterbody segment when the applicable designated uses are not attainable in the near-term but may be attainable in the future. *See* Water Quality Standards Regulatory Revisions; Final Rule. 80 Fed. Reg. 51020 (Aug. 21, 2015); Attachment A. Before the addition of Section 38.5 to the Act, the Board’s authority was limited to granting individual “variances” only. 415 ILCS 5/35(a) (2016). IEPA’s proposal was modeled after USEPA’s rules in 40 C.F.R. § 131.14. The proposal provided procedures necessary for the Board to consider, adopt, and review TLWQS.

Public Act 99-937 requires the Board to adopt rules within nine months after IEPA files its proposal. IEPA filed the proposal on August 9, 2017. The Board, thus, must adopt final rules by May 9, 2018. On August 17, 2017, the Board issued an opinion and order accepting IEPA’s proposal for first notice under the IAPA (5 ILCS 100/5-40(b) (2016)), without commenting on the merits of the proposal. The Board provided a detailed overview of this rulemaking in its first notice opinion. *See* Regulatory Relief Mechanisms: Proposed New 35 Ill. Adm. Code Part 104, Subpart E, R18-18, slip op. at 1-2 (Aug. 17, 2017).

The first notice amendments were published in the *Illinois Register* on September 8, 2017 (41 Ill. Reg. 11236-62). During the first notice period, the Board held a hearing on October 10, 2017 and received numerous public comments, which the Board addressed in its second notice order, adopted on February 8, 2018. *See* Regulatory Relief Mechanisms: Proposed New 35 Ill. Adm. Code Part 104, Subpart E, R18-18 (Feb. 8, 2018) (Feb. 8 Order). During the second notice period, the Board received numerous revisions from JCAR.

### **IEPA’S MOTION FOR CLARIFICATION**

IEPA filed a motion on March 6, 2018 (Mot.), asking the Board to clarify its second notice order of February 8, 2018. Mot. at 1. IEPA notes that it is unclear if the Board intends to adopt IEPA’s modification to Section 104.525(b)(3) proposed in IEPA’s December 19, 2017 Reply to Comments (PC 18), because the modification is not in the second notice addendum. Mot. at 1-2. IEPA asks the Board to modify Section 104.525(b)(3) as follows:

[I]f the person fails to file an amended petition to address the Board’s non-substantial compliance determination under Section 104.545 by the deadline established under Section 104.540, the Board will dismiss the original petition and the stay continues all rights to judicial review are exhausted. PC 18 at 12; Mot. at 1-2.

In the second notice order, the Board accepted IEPA’s modification. Feb. 8 Order at 5. Due to a clerical error, however, this amendment did not get incorporated into the second notice addendum. Because the Board accepted this modification and JCAR approved it with minor changes, the Board adds the amendment to the final rule text.

### **JCAR’S REQUESTED SECOND NOTICE AMENDMENTS TO THE RULE LANGUAGE**

During the second notice period, JCAR provided numerous comments to the Board on the rule language, none of which are substantive. Based upon the agreements with JCAR, the Board amends the final rule text. The amendments include abbreviating “time-limited water quality standard” throughout the rules, replacing “will” with “must” for IEPA’s obligations, making other minor stylistic changes, and replacing legalese. The Board agreed with JCAR to replace “will” with “must” in this proposal, given Board’s statutory deadline for final rule adoption. The Board interprets “will”, as used for IEPA, to have the same legal meaning as “must”. The Board may use “will” more broadly in upcoming rulemakings, specifically for IEPA and Board obligations.

In Section 104.545(a), the Board removes “40 CFR 131.14, and Section 38.5 of the Act” because the definition of “substantial compliance”, added during first notice, clarifies that the term means “compliance with substantial or essential content requirements of 40 CFR 131.14, Section 38.5 of the Act, and Section 104.530 of this Part.”

### **IERG’ AND IEPA’S COMMENTS ON JCAR’S AMENDMENTS**

On March 13, 2018, JCAR issued its Certification of No Objection subject to JCAR’s proposed amendments, which were filed on March 19 and April 4, 2018 (JCAR’s Amendments). On April 5, 2018, IERG filed a comment on JCAR’s Amendments (PC 19). On April 10, 2018, IEPA also filed comments on JCAR’s Amendments (PC 20).

Both IERG and IEPA suggest that the Board reject JCAR’s changes to Section 104.560(a)(6) because they are inconsistent with federal rule language in 40 C.F.R. § 131.10(g)(6). PC 19 at 1-2; PC 20 at 1. JCAR proposed the following amendments:

Controls more stringent than those required by sections 301(b) and 306 of the Clean Water Act would result in a substantial and widespread negative economic and social impact on the public. *See* JCAR Second Notice Changes, at 7, changes 129-130 to lines 682-683 (revised Apr. 3, 2018, filed Apr. 4, 2018).

The Board disagrees with IERG and IEPA. JCAR’s proposed revisions do not change the substance of the federal rule language and are consistent with its content. *See* Interim Economic Guidance for Water Quality Standards – Workbook, USEPA, EPA-823-B-95-002 (March 1995) at 3 (noting that “the State is responsible for interpreting the circumstances of each case and determining where there are substantial and widespread economic and social impacts, or where important economic and social development would be inappropriately precluded”); *see also id.* at 1-2 (stating that “Each analysis of economic impacts must demonstrate: that the polluting entity, whether privately or publicly owned, would face substantial financial impacts due to the costs of the necessary pollution controls (substantial impacts or would interfere with development), and that the affected community will bear significant adverse impacts if the entity is required to meet existing or proposed water quality standards (widespread impacts or important development).”).

IEPA further states that the Board should also reject JCAR’s changes to 35 Ill. Adm. Code 104.560(a)(2) and (3) and 104.560(c) for the same reasons – as inconsistent with the

language of the 40 C.F.R. § 131.10(g) factors. PC 20 at 1. The Board disagrees. JCAR's revisions are not substantive and, thus, do not deviate from the substance of the federal rule.

**ORDER**

The Board adopts the proposed rule as a final rule and directs the Clerk to submit the adopted rule to the Secretary of State for publication in the *Illinois Register*. The adopted rule text follows in the addendum to this order; additions are underlined.

IT IS SO ORDERED.

Board U-Jung Choe abstained.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2016); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on April 26, 2018, by a vote of 5-0.

A handwritten signature in black ink that reads "Don A. Brown". The signature is written in a cursive, flowing style.

Don A. Brown, Clerk  
Illinois Pollution Control Board