

ILLINOIS POLLUTION CONTROL BOARD  
August 14, 2015

IN THE MATTER OF: )  
)  
WATER POLLUTION: PROPOSED ) R15-24  
AMENDMENTS TO 35 ILL. ADM. CODE ) (Rulemaking - Water)  
PART 309 )

**HEARING OFFICER ORDER**

On June 1, 2015, the Illinois Environmental Protection Agency filed a proposal to amend the Board's rules governing water pollution permits, 35 Ill. Adm. Code 309. The Board accepted the Agency's proposal for hearing three days later. Later that month, a hearing officer order scheduled the first hearing for August 25, 2015 in Springfield. The order also set dates to submit pre-filed testimony and pre-filed questions concerning the testimony in preparation for the hearing.

On July 24, 2015, the Agency timely pre-filed the testimony of witness Mr. Darin Lecrone.

The Board and its staff have reviewed the Agency's proposal and the pre-filed testimony. Based on those filings, the Board poses questions filed with this order as Attachment A. The Board directs the Agency to prepare to respond at the hearing on August 25, 2015. The Board may raise additional questions at the hearing.

IT IS SO ORDERED.



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## Attachment A to August 14, 2015 Hearing Officer Order

### Questions for Darin Lecrone, Illinois Environmental Protection Agency

#### Proposed Amendments to 35 Ill. Adm. Code 309.Subpart A

The Illinois Environmental Protection Agency (Agency) explains that its proposed amendment to 35 Ill. Adm. Code 309.104(a)(1) “clarifies when [a National Pollutant Discharge Elimination System (NPDES)] permit renewal application will be considered timely.” Statement of Reasons (SR) at 7. The proposed amendment to this section provides that the Agency may grant a written waiver if the permittee has difficulty submitting a renewal application 180 days prior to the expiration date of the existing permit. SR at 7. The Agency states that it “may deny a waiver request in such instances where a permittee has not made a good faith effort to file a renewal application on time, or has not provided justification for such a request.” SR at 8; Pre-Filed Testimony of Darin Lecrone (PFT) at 3.

#### *Proposed Revisions to Language*

1. Section 309.104(a)(1), amended as proposed, does not explicitly state that an application for a new permit submitted before the a written waiver’s new due date is timely. Would it be acceptable to the Agency if the subsection were reworded to make this explicit? For example, the subsection could read:

(a) Any permittee who wishes to continue to discharge after the expiration date of the NPDES Permit shall timely apply for reissuance of the permit.

(1) A permittee has submitted a timely application for a new permit when:

(A) The permittee submits an application 180 days prior to the expiration date of the existing permit; or

(B) The permittee submits an application and the Agency grants a written waiver to submit the application less than 180 days prior to the expiration date of the existing permit.

2. 40 CFR § 122.21(d) specifies that a waiver cannot allow submission of a renewal application after the expiration date of the existing permit. Should this provision also be added to the proposed regulation? Would it be acceptable to the Agency to add language to Section 309.104(a)(1)(B) that reads:

(B) . . . The Agency shall not grant a waiver for applications to be submitted later than the expiration date of the existing permit.

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### *Just Causes for Waiver*

3. Please address whether the proposed amendments to this section should expressly require a permittee to request a written waiver from the Agency in order to receive one. If so, please comment on including language in the proposed amendments reflecting the Agency's intent that requests include the "just causes" for the waiver. SR at 6. Please comment on whether the amended language should include examples of just causes to help permittees identify circumstances that the Agency considers acceptable justifications for granting a waiver.
4. The Agency lists instances where it would grant a waiver. SR at 7. Some of these examples have been discussed in regulatory and judicial actions.

The U.S. Environmental Protection Agency (USEPA) addressed the difficulty in collecting effluent samples from intermittent sources in a rulemaking. 53 Fed. Reg. 33,004 (Aug. 29, 1988). A commenter in this rulemaking suggested that renewal applications should be given additional time due to this difficulty. In response, USEPA stated that "it is reasonable to expect permittees to plan their sampling sufficiently far in advance of permit expiration so that such problems [with obtaining sufficient effluent data from an intermittent source] do not arise." 53 Fed. Reg. at 33,006

Kay v. Fed. Communications Comm'n, 525 F.3d 1277 (D.C. Cir. 2008), questioned whether a change in corporate ownership was a just cause to grant a waiver. This communications licensing case concerns a provision of the Federal Administrative Procedure Act (Federal APA) that also applies to NPDES permits, 5 U.S.C. § 558(c). In Kay, a court examined an application to renew a license held by one entity and transferred to another. The court stated that "there is no unfairness in the assignment context because a potential assignee may simply demand, as a condition of the assignment contract, that a potential assignor...seek a timely renewal from the Commission." 525 F.3d at 1279.

In light of these actions, what criteria will the Agency use to decide whether a permittee has just cause to seek a waiver? Does the Agency rely on USEPA guidance or other resources to ensure that these criteria are consistent with federal law?

### *Waiver Requests and Determinations*

5. Will the Agency require a permittee to request a waiver 180 days prior to the expiration date of the existing permit? Or will the Agency allow a permittee to request a waiver less than 180 days prior, *i.e.*, any time before the existing permit expires?
6. Will waivers contain a specific renewal application due date? Or will they allow the permittee to submit a renewal application at any time before the existing permit expires?
7. Please address whether the amendments to this section should include a timeframe for the Agency to issue the written waiver such that the permittee has time for recourse if the Agency did not grant the waiver.

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8. NPDES permits are administratively continued when the permittee has submitted a timely and *sufficient* renewal application that is unresolved before the expiration date of the existing permit. This is required by § 558(c) of the Federal APA. Natural Res. Def. Council v. U.S. Env'tl. Prot. Agency, 859 F.2d 156, 211-15 (D.C. Cir. 1988). How will the Agency determine whether a permit application is sufficient? Should the proposed regulation acknowledge that the application must be sufficient?
9. Please address whether denial of a request for a written waiver could be appealable to the Board. If so, please comment on including such language in the proposed amendments.

### Amendments to 35 Ill. Adm. Code 309.201(b)(2)

10. The Agency's proposal exempts discharges from operating permit requirements if USEPA has issued a pretreatment permit pursuant to federal law. Please clarify whether the federal law in Section 309.201(b)(2) refers to the Clean Water Act. If so, would it be acceptable to the Agency if the reference to federal law is replaced by a reference to the Clean Water Act? Also, please comment on whether similar changes could be made to proposed Sections 309.203(b) and 309.204(b).

### Amendments to 35 Ill. Adm. Code 309.202

11. Please comment on whether it would be acceptable to the Agency if the phrase "that discharges" is included in Section 309.202(b)(2) as follows:
  - (b)(2) a wastewater source that discharges to a publicly owned or publicly regulated sanitary or combined sewer.
12. Please clarify what "publicly regulated" means in the context of the proposed rule. Should the rule include a citation to any laws or regulations pursuant to which a sewer subject to this section is regulated?
13. Please clarify whether the exemption from construction permit pursuant to Section 309.202(c)(6) applies to groundwater remediation system "with or without" pretreatment. If so, comment on whether it would be acceptable to the Agency if the proposed language is revised as follows:
  - (c)(6) Cooling towers, oil/water separators, pH adjustment facilities without additional pretreatment, and groundwater remediation systems with or without pretreatment.
14. Please clarify whether the construction permit requirement under Section 309.202(d) applies to a groundwater remediation pretreatment system notwithstanding the exemption under Section 309.202(c)(6). If so, please revise subsection (d) to clarify the proposed intent.

## **Attachment A to August 14, 2015 Hearing Officer Order**

### **Amendments to 35 Ill. Adm. Code 309.242**

15. As proposed, Section 309.242(c) allows the Agency to issue operating permits under Section 309.203 for sewers, wastewater sources and pretreatment works for the lifetime of the sewer or the pretreatment works. However, the rule does not specify any criteria for the Agency to consider in issuing lifetime permits. Please clarify under what circumstances the Agency would issue lifetime operating permits. Also, comment on whether the criteria for issuing lifetime permits must be included in the rule.
  
16. Section 309.242(e) requires a permittee seeking termination of a permit to submit the request in writing to the Agency on a form and in a format prescribed by the Agency. Please comment on whether the permit termination form would be available on the Agency's website. Also, provide a copy of the termination form for inclusion in the record.