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STATE OF ILLINOIS
Pollution Control Board

ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	
PROPOSED AMENDMENTS TO:	)	
PUBLIC PARTICIPATION RULES IN 35	)	R03-19
ILL. ADM. CODE PART 309 NPDES	)	(NPDES RULEMAKING)
PERMITS AND PERMITTING	)	
PROCEDURES	)	

P.C. #1

COMMENTS OF THE ILLINOIS COAL ASSOCIATION

The Illinois Coal Association ("ICA") submits the following written comments on the rulemaking proposal filed in this docket by the Environmental Law and Policy Center of the Midwest and others (collectively referred to as the "Proponents") proposing revisions to the Illinois Pollution Control Board (which agency is hereinafter referred to as the "Board") regulations codified in 35 Ill. Adm. Code Part 309, which govern the issuance of permits under the National Pollution Discharge Elimination System ("NPDES") by the Illinois Environmental Protection Agency (the "Agency").

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The ICA is an organization formed to foster, promote and defend the interests of the Illinois Coal Association. Our members include active producers of coal and owners of coal reserves. Our members' mining and reclamation operations are required to have NPDES permits issued by the Agency under Part 309, and those members would be affected by the proposed revisions to Part 309.

The Proponents indicate that the proposed rulemaking is intended to insure adequate opportunities for public participation in the NPDES permitting process, and to insure compliance with the federal Clean Water Act. ("Statement of Reasons" filed January 13, 2003 by Environmental Law and Policy Center of the Midwest, et al., p. 1. This document is hereinafter

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cited as "Proponents' Statement"). The ICA recognizes the importance of public participation in the NPDES permitting process.

However the ICA is concerned that the effect of many if not all of the proposed rule revisions would be to increase procedural delays in the NPDES permitting process and multiply opportunities for opponents of projects requiring NPDES permits to tie up those permits in frivolous procedural challenges.

The ICA is also concerned that one of the Proponents' main objectives appears to be to reverse interpretations of the Part 309 regulations made by the Board in Prairie Rivers Network v. Illinois Environmental Protection Agency and Black Beauty Coal Company, PCB 01-112 (August 9, 2002) affd. sub nom. Prairie Rivers Network v. Illinois Pollution Control Board; Illinois Environmental Protection Agency; and Black Beauty Coal Company, No. 4-01-0801 (October 24, 2002) (the "Prairie Rivers Network case"). The Proponents appear to assume that the fact that the Illinois Court of Appeals upheld the Board's construction of its Part 309 regulations somehow proves the necessity for revisions to those regulations. That is simply not the case. As the Proponents acknowledge, "Illinois currently normally affords the public an opportunity to comment on all substantive provisions of NPDES permits." Proponents' Statement at p. 4. We believe that because the current public participation procedures provided by the Board rules are sufficient to satisfy all state and federal requirements, the proposed amendments should not be adopted.

Our comments on the Proponents' specific rulemaking proposals follow, organized by section.

SECTION 309.105

Proposed New Subsection 309.105(f) --

Proponents would add a new subsection (f) to this section to require denial of NPDES permits when "The public has not had a fair opportunity to comment on all substantial terms of the permit."

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The proposed revision should not be adopted. While the ICA does not dispute the importance of public participation in NPDES permitting, existing Part 309 regulations already provide ample opportunity for public participation. See 35 Ill. Adm. Code Sections 309.109, 309.110, 309.111, 309.115, 309.116. The proposed revision would not enhance public participation in the NPDES permitting process; it would simply add an additional basis for challenging a permit issued by the Agency. No matter now ample the opportunity for public comment on a particular NPDES permit may have been, under the proposed revision a dissatisfied commenter could always contend that he or she had been denied "fair opportunity to comment." Because the standard set forth in the proposal is vague, such contentions would be difficult to evaluate and decide, with the result that NPDES permits could be unnecessarily delayed by lengthy administrative appeals.

The Proponents may be correct when they predict that not many permits would be overturned on appeal under their proposed language. (Proponents' Statement, p. 4). The ICA believes, however, that the proposal, if adopted, could result in many NPDES permits being unnecessarily delayed by appeals based on this vague standard.

As explained in greater detail in our following comments on the specific procedural changes suggested by the Proponents, the ICA believes that the Board's Part 309 regulations already provide for ample public participation in the NPDES permitting process. *A permit already may be challenged if IEPA fails to comply with the public participation requirements established in the Board rules. That protection is sufficient to ensure that no permit is issued without providing the public with the required opportunity to comment. The proposal stating that permits may not be issued without a "fair opportunity to comment" is therefore unnecessary, and simply injects a new, vague, and undefined term into the well-defined and established procedures available for public participation.* We urge that the Proponents' proposed new subsection 309.105(f) not be adopted.

Proposed New Subsection 309.105(g) –

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This proposed subsection would prohibit the issuance of an NPDES permit if the permit, permit conditions, or the procedures followed in drafting or issuing the permit was inconsistent "with any applicable federal law." Proponents claim that this language is necessary to correct an error in the Illinois Appellate Court's decision affirming the Board's decision in the Prairie Rivers Network case. (Proponents' Statement, p. 5). That is not the case. In the Prairie Rivers Network case, proponent Prairie Rivers Network did argue that the Agency should have followed various United States Environmental Protection Agency ("USEPA") procedural regulations (some of which are included in the proposed rules that proponent has now put forward). The Board correctly found those regulations not to be applicable to Illinois NPDES permitting. (See, e.g., Prairie Rivers Network v. Illinois Environmental Protection Agency and Black Beauty Coal Company, PCB 01-112, August 9, 2001, slip op. at p. 19; Prairie Rivers Network v. Illinois Protection Control Board, et al., No. 4-01-0801, October 24, 2002, slip op. at pp. 17-18).

The ICA believes that the proposed language would at best engender confusion over the applicability of specific USEPA regulations to Illinois NPDES permitting. This is of particular concern given the structure of 40 CFR Parts 122-124, which contain some requirements applicable to state permitting and others, which are not applicable. We note that USEPA already has authority to object to state NPDES permits under 40 CFR Section 123.44 when USEPA believes that the permit would be inconsistent with federal law.

The ICS submits that the Proponents' proposed subsection 309.105(g) is at best unnecessary and at worst could create confusion and delays in NPDES permitting.

SECTION 309.107

Proponents propose to add a new subsection 309.107(c) which would require the Agency to notify the Illinois Department of Natural Resources ("IDNR") of any NPDES permit application once the application is determined to be complete, unless otherwise agreed in a

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. The ICA has difficulty following the Proponents' rationale for this proposed language, not least because the Proponents' citations to the Prairie Rivers Network decision (Proponents' Statement, p. 5) do not appear to be accurate.¶

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memorandum of understanding to be reached between the Agency and IDNR. The ICA believes that this is a matter best left to the Agency's discretion. We urge that the Board not adopt this proposed rule.

SECTION 309.108

Proposed Revision of Subsection 309.108(c) –

Proponents propose that 35 Ill. Adm. Code 309.108(c) be revised to elaborate the requirements for the statement the Agency is required to make as to the basis of the permit conditions included in the draft permit. The ICA has no comment on this proposed language.

Proposed New Subsection 309.108(e) –

Proponents propose a new subsection 309.108(e) which would require the Agency to prepare a "draft" administrative record on its tentative decision to issue a permit and would require the record to demonstrate that any permitted discharge will not cause or contribute to the violation of any applicable water quality standard.

While the ICA recognizes the importance of the preparation of a proper administrative record, we are concerned that the proposal is actually intended to reverse or circumvent the holdings of the Board and Appellate Court in the Prairie Rivers Network case that a third party NPDES permit appellants have the burden of showing that the contested permit should not have been issued. The proposed language would shift the burden in permit appeals without justification, through its mandate that the Agency's administrative record must satisfy the requirements of the proposed new subsection. Moreover, since the Agency is already obligated to maintain a record, including the documents submitted to it by the applicant and third parties, this change is unnecessary.

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The only support offered by the Proponents for the proposed new subsection is a quotation from the USEPA NPDES Permit Writers' Manual. (Proponents' Statement, p. 7). The

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Proponents admit that the manual "is not strictly mandatory on [sic] state NPDES programs..." (Ibid.). The manual actually carries the following disclaimer on its title page:

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> "The statements in this document are intended solely as guidance. This document is not intended, nor can it be relied on, to create any rights enforceable by any party in litigation with the United States. EPA and State officials may decide to follow the guidance provided in this document, or to act at variance with the guidance, based on an analysis of specific site circumstances. This guidance may be revised without public notice to reflect changes in EPA's policy."

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By its terms, the manual is not even binding on USEPA itself. Moreover, the quoted language from Section 11.1.1 of the manual does not support the language Proponents would add to Section 309.108; nor do 40 CFR Sections 124.9 or 124.18, the USEPA regulations which are cited in the manual as prescribing the contents of the administrative record in a USEPA permitting action (these regulations are not applicable to state programs).

The ICA urges the Board not to adopt proposed 309.108(e).

SECTION 309.109

Subsection 309.109(a) –

Proponents propose a revision of 35 Ill. Adm. Code Section 309.109(a). The proposed revision is to conform the language of this subsection to substantive changes in the NPDES permitting procedure which the Proponents would make in 35 Ill. Adm. Code Sections 309.121 and 309.122. The ICA opposes this change as unnecessary because the proposed revisions to Sections 309.121 and 309.122 should not be adopted, as discussed below in our comments on the proposed revisions to those sections.

Proposed Revision of Subsection 309.109(b) –

The ICA has no comment on this proposed revision.

SECTION 309.110

Proponents propose that a new subsection 309.110(f) be added to this regulation, which specifies the content of the public notice of an NPDES permit application required to be given by

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the Agency. The Proponents' proposed new subsection would require additional information. The Proponents state that 40 CFR Section 124.10(d)(v) requires that state NPDES permit notices provide all of the information which would be required by their proposed language. The Proponents allege that 40 CFR Section 123.125 requires the Board to adopt "rules regarding notice that are at least as stringent as the federally required language." (Proponents' Statement, p. 8).

The ICA believes that the proposed new subsection is unnecessary and could lead to confusion.

The experience of the ICA's members in NPDES permitting is that the information sought to be required by this proposed language is generally included in the Agency's public notices, as the Proponents appear to concede. (Proponents' Statement, p. 8). The ICA does not agree with the Proponents that 40 CFR Section 123.25 requires states to adopt rules identical to the state – applicable regulations in 40 CFR Part 124; the federal regulations requires that the procedures followed by state NPDES authorities be the same or more stringent. The Board's Part 309 rules were approved by USEPA even though they do not include language identical to all of the voluminous state – applicable USEPA Part 124 regulations. The proposed revisions are therefore unnecessary to achieve compliance with federal requirements.

If the Board should see merit in expressly incorporating the requirements of 40 CFR Section 124.10(d)(v) into Part 309, the ICA would suggest that the Board not employ the Proponents' redrafted federal language. The Proponents' language would require a description of "procedures for the formulation of final determinations" where the federal regulation refers to "comment procedures." Proponents' language is much more vague than the relatively straightforward federal language and appears well suited - if not calculated - to serve as a basis for permit challenges based on alleged public notice deficiencies.

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The ICA urges that the Board not adopt the Proponents' proposed subsection 309.110(f), but also urges that if the Board does adopt the proposal, the Board should substitute the phrase "comment procedures" for "procedures for the formulation of final determinations."

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SECTION 309.112

The Proponents propose to amend this section to add references to Sections 309.121 and 309.122. This proposed revision is to accommodate changes proposed to the former section and the proposed adoption of a new section. The ICA believes that the revision proposed for this section is unnecessary because the substantive changes should not be made for the reasons set forth in our comments on those sections.

SECTION 309.113

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Proponents propose that subsection 309.113(a) be amended to add six new subdivisions with additional information which the Agency would be required to include in its fact sheet required for certain NPDES permits.

Proposed new subdivision (a)(5)[1] is a paraphrase of language from 40 CFR Section 124.8(a). As noted above in our comments on the proposed revisions to 35 Ill. Adm. Code Section 309.110, states are required to follow the procedures set forth in the federal rule, not incorporate identical language in their own NPDES regulations. Based on our members' experience with their own NPDES permits, the ICA believes that the Agency already includes a discussion of facts and questions considered in its fact sheets. Proposed Section 309.113(a)(5) appears to be unnecessary.

[1] Proponents would renumber existing Section 309.113(a)(5) as 309.113(a)(10), so that 309.113(a)(5)-(9) and -- (11) in Proponents' proposed are new subdivisions.

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The remaining proposed subdivisions would require information not required by any federal regulation,[2] but are taken from the NPDES Permit Writers Manual. As discussed above, this manual is a guidance document, not binding on USEPA or on the state NPDES authorities. The ICA questions why the Agency should be bound to follow USEPA guidance as a legal requirement when USEPA has not even seen fit to bind itself to follow the guidance document. We are again concerned that the effect of the proposal would be to delay NPDES permitting procedures and to provide technical grounds for objections to permits. The ICA urges that the new subdivisions proposed to be added to Section 309.113(a) not be adopted.[3]

SECTION 309.117

Proponents propose to add a sentence to 35 Ill. Adm. Code Section 309.117 requiring the Agency "or the [permit] applicant" to identify the "documents or other materials referred to or relied on...to support the tentative decision..." at the pre-decision public hearing. Proponents cite the NPDES Permit Writers' Manual and the need for a clear definition of the content of the administrative record for purposes of appeal. (Proponents' Statement, p. 9).

The ICA submits that the Proponents' rationale does not support the proposed language, which would require identification of the administrative record at a pre-decisional public hearing. As explained below in the ICA's comments on proposed Section 309.123, the administrative record in Agency permitting decisions is already defined by existing Board procedural regulations. Even if there were a need for greater specificity in this definition, the Proponents offer no justification for requiring identification of this record at a pre-decisional public hearing.[4] The ICA urges that the proposed revision to Section 309.117 not be adopted.

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2 Proponents state that the additional information requirements are "necessary...to comply with 40 CFR Section 124.56" (Proponents' Statement, p. 8) but do not explain why. None of the specific proposed requirements appears in 40 CFR Section 124.56.

3 The proposal also includes a minor revision to existing 35 Ill. Adm. Code Section 309.113(a)(5)(A), which Proponents would renumber as Section 309.113(a)(10)(A). The ICA has no comment on this revision.

4 The cited portion of the NPDES Permit Writers' Manual, paragraph 11.1.1, merely recommends that the record be available to the public.

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SECTION 309.119

Proponents propose a revision of 35 Ill. Adm. Code 309.119. The proposed revision is to conform the language of this subsection to substantive changes in the NPDES permitting procedure which the Proponents would make in 35 Ill. Adm. Code 309.121 and 309.122. The ICA opposes this change as unnecessary because the proposed revisions to Sections 309.121 and 309.122 should not be adopted, as discussed below in our comments on the proposed revisions to those sections.

SECTION 309.120

Proponents propose a new Section 309.120 which would require both public commenter and permit applicants to "raise all reasonably ascertainable issues and submit all reasonably available arguments supporting their position by the close of the public comment period..." Proponents cite 40 CFR Section 124.13, which they concede is not binding on states, as support for this proposal, and state "There is no excuse for failing to present arguments to Illinois EPA during the comment period." (Proponents' Statement, pp. 9-10). The ICA has no objection to the proposal except to the extent that it would apply to permit applicants. We believe that the proposal ignores the fundamental difference between permit applicants and public commenters. The public participation procedures provided by the Board's Part 309 rules provide the mechanism for interested members of the public to present their views and any pertinent facts on a proposed permit to the Agency. The permit applicant and the Agency, however, are engaged in an ongoing process, which entails direct communication regarding the proposed permit. There is no justification for limiting issues and arguments which may be raised by a permit applicant to those raised in the public comment period. The ICA urges that if the proposed section is adopted, references to "the applicant" be deleted.

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SECTION 309.121; SECTION 309.122

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Proponents propose two new sections for reopening the public comment period. Proponents state that proposed Section 309.121 is based on 40 CFR Section 124.13(a) and that proposed Section 309.122 is based on 40 CFR Section 124.14(b). (Proponents' Statement, p. 10). Proponents concede that 40 CFR Section 124.14 is not binding on states (Ibid.) but contend that the decisions of the Board and of the Appellate Court in the Prairie Rivers Network case demonstrate that these new provisions are necessary to permit effective public participation. (Ibid, at pp. 10-11).

The ICA submits that the Board's own decision in the Prairie Rivers Network undercuts the Proponents' argument. The Board did not find, as the Proponents assume, that Prairie Rivers Network should have had additional opportunity to comment, but that the Board's Part 309 regulations precluded Prairie Rivers Network from further comment. The Board actually found that under the existing Part 309 regulations, Prairie Rivers Network failed to show that it was not afforded a meaningful opportunity to participate in the permitting process. Prairie Rivers Network v. IEPA and Black Beauty Coal Company, PCB 01-112 (August 9, 2002) slip op. at p. 19.

The ICA urges that the proposed new sections not be adopted. Neither proposed section is necessary, and the ICA is concerned that they could cause substantial delays in the NPDES permitting process. Proposed Section 309.121 is extremely unclear as drafted, and would create confusion in permit reviews. Both proposed sections would lend themselves to endless rounds of comment (or to disputes in administrative appeals as to whether further rounds of comment should have been allowed). The Proponents suggest a far-fetched hypothetical situation in which "effluent limits or critical monitoring" requirements are deleted from a draft permit prior to issuance of the final permit. (Proponents' Statement, p. 11). The ICA submits that the more likely scenario is one in which the Agency makes revisions to a draft permit in an effort to address commenters' concerns, and the commenters submit additional comments which dismiss the Agency's efforts as insufficient. It is important to keep in mind

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that IEPA is already required to notify stakeholders if significant changes are made, and that if they object to these changes, an appeal is the proper avenue for redress. The agency has to balance the interest in obtaining opportunity to comment with the interest in obtaining timely permit decisions to ensure economic stability, by allowing dischargers to continue existing operations and to modify or expand those operations without undue disruptions or uncertainty. The existing regulatioons have achieved the necessary balance while complying with all state and federal requirements, and should not be disturbed.]

SECTION 309.123

Proponents propose a new Section 309.123 to define "record before the Agency." Proponents state that this proposal is intended to prevent confusion in appeal hearings. (Proponents' Statement, p. 14).

The Board already has a regulation, 35 Ill. Adm. Code Section 105.212(b), which specifies the content of the Agency's administrative record. Proponents do not argue that the definition of the record in Section 105.212 is deficient; they simply ignore the rule and propose a new rule. This revision is unnecessary and the ICA recommends that it not be adopted.

SECTION 309.143

Proponents propose that a new subsection 309.143(a) be added to require "that effluent limitations in NPDES permits control all pollutants sufficiently such that [sic] the discharge does not cause or contribute to a violation of water quality standards including narrative standards." (Proponents' Statement, p. 14). Proponents argue that this language must be added to the Board's Part 309 regulations because it appears in 40 CFR Section 122.44(d)(l)(i). (Ibid., p. 15).

As noted above in our comments on the proposed revision to 35 Ill. Adm. Code Section 309.110, Illinois is not required to adopt language identical to the USEPA regulations even where the regulations are applicable to state programs. The Proponents implicitly concede this

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by proposing to incorporate only one paragraph of subsection 122.44(d), perhaps 10% of the total content of the federal subsection.

Proponents do not make any attempt to explain why existing 35 Ill. Adm. Code Section 309.141(d)(1), which requires NPDES permits to contain "[a]ny more stringent limitation...necessary to meet water quality standards..." does not adequately address the relationship between NPDES permit effluent limitations and water quality standards. Their proposal appears to be an effort to select language from the USEPA rules which permit opponents might find useful in future permit appeals. They have failed to justify their proposal to add a new subsection 309.143(a) and the ICA urges that it not be adopted.

SECTION 309.146

Proposed Revision of Subsection 309.146(a)(2) –

Proponents propose to revise subsection 309.146(a)(2) by adding language providing that the reports required from NPDES permittees shall be adequate to determine compliance with permit conditions. Proponents acknowledge that this language is not taken from USEPA regulations but from the NPDES Permit Writers' Handbook. (Proponents' Statement, p. 15).

Again the ICA questions the wisdom of writing language from guidance documents into the Board's Part 309 regulations. This proposed revision appears to be another intended to augment the arsenal of material available to be relied on by NPDES permit opponents in permit appeals. If this proposal is actually intended to remedy any real problem under existing NPDES permitting procedures, the Proponents have failed to provide any information documenting the existence of the problem. In fact, no such problem exists. The ICA urges that the proposal revision of subsection 309.146(a)(2) not be adopted.

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Proposed Revision Subsection 309.146(a) – New 309.146(a)(5)

Proponents propose that a new subdivision (5) be added to subsection 309.146(a) and that existing 309.146(a)(5) be renumbered. The new subdivision would contain language from

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40 CFR Section 122.48, which the Proponents contend is required to satisfy federal requirements. (Proponents' Statement, p. 15).

Viewed on its face, the proposed new language seems to duplicate existing requirements of subsection (a) in an awkward[5] and redundant manner. Proponents explain, however, that the revision is necessary to correct "confusion." "[I]t has sometimes by [sic] seen as acceptable to issue a permit without all of the key monitoring terms in the permit..." (Proponents' Statement, pp. 15-16).

The "confusion" to which the Proponents refer is presumably the Board's decision in the Prairie Rivers Network case. Proponent Prairie Rivers Network argued that the Agency should not have issued an NPDES permit to Black Beauty Coal Company with a condition that the permittee submit a monitoring plan for Agency approval (rather than further delaying the permit and seeking public comment on the monitoring plan). The Board rejected Prairie Rivers Network's argument.

Assuming that Proponents are attempting to overrule this portion of the Board's Prairie Rivers Network decision sub silentio, the ICA submits that the proposed language would not necessarily have this effect. Nothing in the federal rule copied in this proposed language prohibits what the Agency did in the Prairie Rivers Network case, which was entirely appropriate. The proposed language would merely make Section 309.146 longer and more confusing, and perhaps provide permit opponents with more opportunities to utilize permit appeals to delay or prevent important projects from occurring. The existing rules are fully sufficient to comply with applicable requirements, so ICA urges that this proposal not be adopted.

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CONCLUSION

The Proponents' rulemaking proposal would not improve opportunities for effective public participation in Illinois NPDES permitting. The proposal instead would create additional paperwork and procedural requirements, and multiply opportunities for diehard opponents of projects requiring NPDES permits to delay those permits through unfounded administrative appeals. The ICA urges the Board not to adopt the proposal.

[5] Existing subsection 309.146(a) begins with the phrase "The Agency shall require..." followed by a list of dependent clauses containing the specific requirements. The proposed revision would insert a complete sentence beginning "All permits shall specify..." into the string of clauses.

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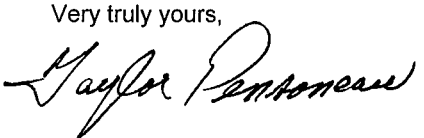
We appreciate this opportunity to submit comments on the proposal.

Very truly yours,



Taylor Pensoneau
President

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