

ILLINOIS POLLUTION CONTROL BOARD
May 21, 2020

IN THE MATTER OF:)
)
RULEMAKING FOR CROSS CONNECTION) R20-21
CONTROL DEVICE INSPECTORS OF) (Rulemaking – Public Water Supply)
PUBLIC WATER SUPPLIES 35 ILL. ADM.)
CODE 604.1520)

Proposed Rule. First Notice.

OPINION AND ORDER OF THE BOARD (by B.F. Currie):

On April 10, 2020, the Illinois Environmental Protection Agency (IEPA) filed an emergency rulemaking proposal with the Board. The emergency rule proposal attempted to extend the renewal period for cross connection control device inspectors (CCCDI) from May 1, 2020 until June 30, 2020, to August 31, 2020 until October 30, 2020. 35 Ill. Adm. Code 604.1510 and Prop. 35 Ill. Adm. Code 604.1520. On April 16, 2020, the Board adopted the emergency rule, with an effective date of April 17, 2020. *In re* R20-20, April 16, 2020; 44 Ill. Reg. 7777 (May 1, 2020).

Because the 150-day duration of an emergency rule will expire before the extended deadline of October 30, 2020, the Board stated it would consider proposing for first notice a general rule extending the CCCDI renewal period at its next meeting in May. The Board invited comment on that issue by April 30. IEPA filed a comment on April 29, 2020, and no other comments were received. For the reasons discussed below the Board will proceed with a first notice proposal. The Board will schedule hearings and proceed to adopt the proposed rule before the emergency rule expires on September 13, 2020.

Below the Board summarizes IEPA’s proposal and explain the reasons for proceeding with a rule of general applicability. In addition, the Board will detail the schedule for proceeding with the rulemaking.

IEPA PROPOSAL

A CCCDI is approved by IEPA or its designee to inspect of mechanical devices that prevent contamination of a community water supply from a source of an unsafe substance or of unknown water quality. SR. at 3. The manufacturer’s instructions for these devices require annual inspection. SR at 3-4.

IEPA explains that CCCDIs are required to be licensed plumbers and are authorized to perform plumbing under the Illinois Plumbing License Law (225 ILCS 320/3(1)). 35 Ill. Adm. Code 604.1510(b)(1)(a).

IEPA notes that on March 31, 2020, the Illinois Department of Public Health (IDPH) published emergency rules extending the deadline for plumbers' license renewals, apprentice plumbers' license renewal(s), and plumbing inspectors' certificate renewals for 120 days to August 28, 2020. SR at 3. IEPA explains that because CCCDIs must be licensed plumbers, it proposes to extend the approval period for CCCDI for 120 days, consistent with the IDPH emergency rule. SR at 1.

The general rule requires:

CCCDIs must-renew the CCCDI Approval each year between May 1 and June 30. An application for CCCDI renewal will be sent by the Agency or its designee, and must be completed and returned by June 30 of the renewal year. 35 Ill. Adm. Code 604.1510(b)(2).

IEPA proposed and the Board adopted as an emergency rule a new Section 1510.620 that provides:

Due to the public health emergency related to the COVID-19 outbreak, the CCCDI approval renewal application deadlines for 2020 pursuant to Section 604.1510(b)(2) are extended. For renewal year 2020, CCCDIs must-renew their CCCDI Approval between August 31 and October 30. An application for CCCDI renewal will be sent by the Agency or its designee and must be completed and returned by October 30, 2020. Prop. Section 1510.620.

STATUTORY AND REGULATORY BACKGROUND

When adopting rules, the Board must follow both the Environmental Protection Act (Act), 415 ILCS 5 *et seq.* (2018) and the Illinois Administrative Procedure Act (IAPA), 5 ILCS 5/100 *et seq.* (2018).

Section 27(a) and (c) of the Act provides in part:

The Board may adopt substantive regulations as described in this Act. * * * In promulgating regulations under this Act, the Board shall take into account the existing physical conditions, the character of the area involved, including the character of surrounding land uses, zoning classifications, the nature of the existing air quality, or receiving body of water, as the case may be, and the technical feasibility and economic reasonableness of measuring or reducing the particular type of pollution.

On proclamation by the Governor, pursuant to Section 8 of the Illinois Emergency Services and Disaster Act of 1975, that a disaster emergency exists, or when the Board finds that a severe public health emergency exists, the Board may, in relation to any proposed regulation, order that such regulation shall take effect without delay and the Board shall proceed with the hearings and studies required by this Section while the regulation continues in effect.

When the Board finds that a situation exists that reasonably constitutes a threat to the public interest, safety or welfare, the Board may adopt regulations pursuant to and in accordance with Section 5-45 of the Illinois Administrative Procedure Act. 415 ILCS 5/27(a) and (c) (2018).

Section 5-45 of the IAPA provides in part:

- (a) “Emergency” means the existence of any situation that any agency finds reasonably constitutes a threat to the public interest, safety, or welfare.
- (b) If any agency finds that an emergency exists that requires adoption of a rule upon fewer days than is required by Section 5-40 and states in writing its reasons for that finding, the agency may adopt an emergency rule without prior notice or hearing upon filing a notice of emergency rulemaking with the Secretary of State under Section 5-70. The notice shall include the text of the emergency rule and shall be published in the Illinois Register. Consent orders or other court orders adopting settlements negotiated by an agency may be adopted under this Section. Subject to applicable constitutional or statutory provisions, an emergency rule becomes effective immediately upon filing under Section 5-65 or at a stated date less than 10 days thereafter. The agency's finding and a statement of the specific reasons for the finding shall be filed with the rule. The agency shall take reasonable and appropriate measures to make emergency rules known to the persons who may be affected by them.
- (c) An emergency rule may be effective for a period of not longer than 150 days, but the agency's authority to adopt an identical rule under Section 5-40 is not precluded.

* * *

The IAPA provides that, after filing, emergency rules will be reviewed by the Joint Committee on Administrative Rules (JCAR). Under Section 100/5-120, JCAR examines an emergency rule “to determine whether the rule is within the statutory authority on which it is based and whether the rule is in proper form.” 5 ILCS 100/5-120(a) (2018). If JCAR determines a rule is non-compliant, JCAR may file an objection, to which the adopting agency can respond. If JCAR is not satisfied with the response, it can take various actions, including suspension of the rule. 5 ILCS 100/5-120 and 125 (2018).

DISCUSSION

In its April 16, 2020 opinion and order, the Board agreed with IEPA that an emergency existed. *In re* R20-20, April 16, 2020. The Board adopted the emergency rule and filed it with the Secretary of State to ensure that the rule was effective by May 1, the first day to apply for

renewal. However, the Board noted that the emergency rule would expire before the October 30 date, the last day to return an application under the emergency rule. In response to a request for comment, IEPA agrees that the emergency rule will expire before the October 30 deadline. IEPA “appreciates the procedural dilemma of needing to extend a period of time within the context of an emergency rulemaking.” PC 1 at4-5.

IEPA offered as a potential solution a two-phase approach. PC 1 at 5. First, IEPA suggests modifying the Board’s order to adopt the emergency rule effective May 1, with a deadline of September 28. IEPA suggests the Board adopt a second emergency rule on June 2, so that the public will know that the September 28th deadline will be extended. *Id.*

While the Board appreciates IEPA’s recognition of the dilemma and its timely response, the Board is unconvinced that IEPA’s suggested approach is feasible. As an initial matter, the emergency rule was filed immediately after the Board adopted it and was therefore effective on April 17, 2020. *See* 44 Ill. Reg. 7777 (May 1, 2020). The rule has been adopted and published. Modifying the Board order is not feasible.

Additionally, the Board is unconvinced that adopting a second “emergency rule” is appropriate. First, it is possible – although difficult - to adopt a rule of general applicability during the emergency rules promulgation. Second, the fact that the emergency rule would expire before the October 30 deadline was apparent when the emergency rule was proposed by IEPA and was adopted. A review of two cases on emergency rules supports the Board’s concerns. In Senn Park Nursing Center v. Jeffrey C. Miller, 104 Ill. 2d 169, 480 N.E.2d 1029 (1984), the appropriateness of an emergency rulemaking by the Illinois Department of Public Aid (DPA) was at issue. DPA had filed emergency rules to implement a reimbursement procedure for nursing homes after the circuit court had previously declared the DPA procedure an illegally promulgated rule. Senn Park, 104 Ill. 2d at 174. The court invalidated the proposed emergency rule stating that there was no emergency within the meaning of the APA. The court found that any emergency “was the result of an avoidable administrative failure to properly enact a rule in accordance with statutory requirements, and the reasons given by defendant in support of his finding of an emergency are all tainted by this fact.” Senn Park, 104 Ill. 2d at 184. The Illinois Supreme Court affirmed this decision in its review of the case. Senn Park, 104 Ill. 2d at 186.

In Citizens for a Better Environment v. PCB, 152 Ill. App. 3d 105, 504 N.E.2d 166 (1st Dist. 1987) (CBE) the court found easing administration of the program while proceeding with permanent rules also does not constitute an emergency. In CBE, petitioners challenged the existence of an emergency sufficient to support the Board’s adoption of emergency rules implementing Section 39 (c) of the Act. That Section prohibited deposit of hazardous waste streams in permitted hazardous waste landfills without specific Agency authorization. The court stated that “the need to adopt emergency rules in order to alleviate an administrative need, which, by itself, does not threaten the public interest, safety, or welfare, does not constitute an ‘emergency’.” CBE, 152 Ill. App. 3d 105, 109.

The Board finds these cases instructive. Under IEPA’s two-phase plan, the Board would need to file a second emergency rule to address an issue that could have been addressed in the initial emergency rule. Under that plan, the Board would not at the same time propose to adopt a

rule of general applicability. Based on Senn Park and CBE, the Board considers it likely that JCAR would not consider a second emergency rulemaking proposal to extend the rule a genuine emergency. The Board will attempt to adopt a rule of general applicability, rather than adopt a second emergency rule on the same topic.

SCHEDULE

The Board today proceeds to first notice with a proposal identical to the emergency rule. The Board expects the proposal to appear in the *Illinois Register* on June 5, 2020. The 45-day first-notice comment period would then end on July 20, 2020. The Board would then adopt a second-notice opinion order at a special Board Meeting on July 27, 2020. This will allow the Board to file the rule with JCAR for consideration at JCAR's August meeting. The Board would then expect to adopt the proposed rule on September 3, 2020. The Board expects to hold hearings on June 18, 2020 and July 13, 2020, and directs its assigned hearing officer to expeditiously issue a Notice of Hearings.

CONCLUSION

The Board will propose for first notice a rule to extend the deadline for applying for CCCDI renewal. The Board finds that this process is more appropriate than the two-phase approach suggested by the IEPA.

ORDER

The Board directs the Clerk to file the following for first notice in the *Illinois Register*:

TITLE 35: ENVIRONMENTAL PROTECTION
SUBTITLE F: PUBLIC WATER SUPPLIES
CHAPTER I: POLLUTION CONTROL BOARD

PART 604
DESIGN, OPERATION AND MAINTENANCE CRITERIA

SUBPART A: GENERAL PROVISIONS

Section	
604.100	Purpose
604.105	General Requirements
604.110	Location
604.115	Usage
604.120	Piping Identification
604.125	Automatic Equipment
604.130	Operational Testing Equipment
604.135	Repair Work and Emergency Operation
604.140	Nitrification Action Plan
604.145	Exceptions for Community Water Supplies

604.150	Protection of Community Water Supply Structures
604.155	Electrical Controls and Standby Power
604.160	Safety
604.165	Monthly Operating Report
604.170	Security

SUBPART B: SOURCE DEVELOPMENT

Section	
604.200	General Requirements
604.205	Surface Water Quantity
604.210	Surface Water Quality
604.215	Surface Water Structures
604.220	Invasive Mussel Control
604.225	Reservoirs
604.230	Groundwater Quantity
604.235	Groundwater Quality
604.240	General Well Construction
604.245	Well Testing and Records
604.250	Aquifer Types and Construction Methods
604.255	Well Pumps, Discharge Piping and Appurtenances

SUBPART C: SOURCE WATER PROTECTION PLAN

Section	
604.300	Purpose
604.305	Source Water Protection Plan Requirement and Contents
604.310	Vision Statement
604.315	Source Water Assessment
604.320	Source Water Protection Plan Objectives
604.325	Action Plan
604.330	Submission
604.335	Agency Approval
604.340	Evaluation and Revision

SUBPART D: AERATION

Section	
604.400	General Requirements for Aeration
604.405	Forced or Induced Draft Aeration
604.410	Spray Aeration
604.415	Pressure Aeration
604.420	Packed Tower Aeration
604.425	Other Methods of Aeration

SUBPART E: CLARIFICATION

Section	
604.500	General Clarification Requirements
604.505	Coagulation
604.510	Flocculation
604.515	Sedimentation
604.520	Solids Contact Unit
604.525	Tube or Plate Settlers
604.530	Other High Rate Clarification Processes

SUBPART F: FILTRATION

Section	
604.600	Filtration
604.605	Rapid Rate Gravity Filters
604.610	Rapid Rate Pressure Filters
604.615	Deep Bed Rapid Rate Gravity Filters
604.620	Biologically Active Filtration

SUBPART G: DISINFECTION

Section	
604.700	Disinfection Requirement
604.705	Chlorination Equipment
604.710	Points of Application
604.715	Contact Time
604.720	Inactivation of Pathogens
604.725	Residual Chlorine
604.730	Continuous Chlorine Analyzers
604.735	Chlorinator Piping

SUBPART H: SOFTENING

Section	
604.800	Lime or Lime-soda Process
604.805	Cation Exchange Process

SUBPART I: STABILIZATION

Section	
604.900	General Stabilization Requirements
604.905	Carbon Dioxide Addition
604.910	Phosphates
604.915	Split Treatment

SUBPART J: OTHER TREATMENT

Section	
604.1000	Presedimentation
604.1005	Anion Exchange
604.1010	Iron and Manganese Control
604.1015	Taste and Odor Control
604.1020	Powdered Activated Carbon

SUBPART K: CHEMICAL APPLICATION

604.1100	General Chemical Application Requirements
604.1105	Feed Equipment and Chemical Storage
604.1110	Protective Equipment
604.1115	Chlorine Gas
604.1120	Acids and Caustics
604.1125	Chlorine Dioxide
604.1130	Sodium Chlorite
604.1135	Sodium Hypochlorite
604.1140	Ammonia
604.1145	Potassium Permanganate
604.1150	Fluoride

SUBPART L: PUMPING FACILITIES

604.1200	General
604.1205	Pumping Stations
604.1210	Pumps
604.1215	Booster Pumps
604.1220	Automatic and Remote-Controlled Stations
604.1225	Appurtenances

SUBPART M: STORAGE

604.1300	General Storage Requirements
604.1305	Overflow
604.1310	Access to Water Storage Structures
604.1315	Vents
604.1320	Level Controls
604.1325	Roof and Sidewalls
604.1330	Painting and Cathodic Protection
604.1335	Treatment Plant Storage
604.1340	Elevated Storage
604.1345	Hydropneumatic Storage
604.1350	Combination Pressure Tanks and Ground Storage

SUBPART N: DISTRIBUTION

604.1400	General Distribution System Requirements
604.1405	Installation of Water Mains
604.1410	Materials
604.1415	System Design
604.1420	Valves
604.1425	Hydrants
604.1430	Air Relief Valves
604.1435	Valve, Meter and Blow Off Chambers
604.1440	Sanitary Separation for Finished Water Mains
604.1445	Sanitary Separation for Raw Water Mains
604.1450	Surface Water Crossings
604.1455	Water Service Line
604.1460	Water Loading Stations

SUBPART O: CROSS CONNECTIONS

Section	
604.1500	Cross Connections
604.1505	Cross Connection Control Program
604.1510	Cross Connection Control Device Inspectors
604.1515	Agency Approved Cross Connection Control Measures
<u>604.1520</u>	<u>COVID-19 Emergency Provisions</u>

604.TABLE A Steel Pipe

AUTHORITY: Implementing Section 14-19 and authorized by Section 27 of the Illinois Environmental Protection Act [415 ILCS 5].

SOURCE: Adopted in R18-17 at 43 Ill. Reg. 8064, effective July 26, 2019; emergency amendment in R20-20 at 44 Ill. Reg. 7777 (May 1, 2020), effective April 17, 2020, for a maximum of 150 days; amended in R20-21 at 44 Ill. Reg. _____, effective _____.

SUBPART O: CROSS CONNECTIONS

Section 604.1520 COVID-19 Emergency Provisions

Due to the public health emergency related to the COVID-19 outbreak, the CCCDI approval renewal application deadlines for 2020 pursuant to Section 604.1510(b)(2) are extended. For renewal year 2020, CCCDIs must-renew their CCCDI Approval between August 31 and October

30. An application for CCCDI renewal will be sent by the Agency or its designee and must be completed and returned by October 30, 2020.

(Source: Added at 44 Ill. Reg. _____, effective _____.)

IT IS SO ORDERED.

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on May 21, 2020, by a vote of 4-0.



Don A. Brown, Clerk
Illinois Pollution Control Board