

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)	
)	
WATER QUALITY STANDARDS AND)	
EFFLUENT LIMITATIONS FOR THE)	R08-9 (C)
CHICAGO AREA WATERWAY SYSTEM))	(Rulemaking – Water)
AND LOWER DES PLAINES RIVER:)	
PROPOSED AMENDMENTS TO 35 ILL.)	
ADM. CODE 301, 302, 303 AND 304)	

NOTICE OF FILING

TO: Mr. John T. Therriault	Ms. Marie E. Tipsord
Assistant Clerk of the Board	Hearing Officer
Illinois Pollution Control Board	Illinois Pollution Control Board
100 West Randolph Street	100 West Randolph Street
Suite 11-500	Suite 11-500
Chicago, Illinois 60601	Chicago, Illinois 60601
(VIA ELECTRONIC MAIL)	(VIA FIRST CLASS MAIL)

(SEE PERSONS ON ATTACHED SERVICE LIST)

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board the ILLINOIS ENVIRONMENTAL REGULATORY GROUP'S RESPONSE TO COMMENTS OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, a copy of which is herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
REGULATORY GROUP,

Dated: August 30, 2013

By: /s/ Alec M. Davis
Alec M. Davis

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**ILLINOIS ENVIRONMENTAL REGULATORY
GROUP'S RESPONSE TO COMMENTS OF THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

NOW COMES the ILLINOIS ENVIRONMENTAL REGULATORY GROUP (“IERG”) by and through its attorney, Alec M. Davis, and pursuant to the July 30, 2013, Hearing Officer Order, hereby submits its response to comments of the United States Environmental Protection Agency (“USEPA”) in the above-captioned matter.

IERG is a not-for-profit Illinois corporation affiliated with the Illinois Chamber of Commerce. IERG is composed of fifty-one (51) member companies that are regulated by governmental agencies that promulgate, administer or enforce environmental laws, regulations, rules or other policies. A number of IERG member companies have facilities located along, and discharging to, the waterways subject to this rulemaking. In addition, the precedent set in this rulemaking has the potential to affect IERG members state-wide. As such, IERG and its member companies have participated in this rulemaking, and IERG offers the following response to comments filed by USEPA, for the Illinois Pollution Control Board’s (“Board”) consideration in promulgating its proposed aquatic life use designations, and for it to keep in mind as it progresses through its Subdocket D proceedings.

I. INTRODUCTION

IERG welcomes the participation of USEPA in this rulemaking and recognizes the fact that USEPA staff includes knowledgeable individuals who can offer meaningful comments in this rulemaking. However, IERG is concerned about the timing and manner of USEPA's input. The Board and USEPA play separate and unique roles in the adoption and approval of water quality standards in Illinois. When USEPA steps beyond its statutorily defined role in the water quality standard approval process and participates in a rulemaking, information introduced into the record by USEPA must be weighed consistently with similarly submitted evidence by other participants.

In particular, public comments containing conclusory statements and mere references to guidance documents should be given less weight than evidence introduced into the record and available for cross-examination. Public comments containing conclusory statements citing little evidence should be given even less weight than public comments backed by scientific evidence introduced into the record. To decide otherwise would circumvent the statutory obligation of the Board. In addition, IERG disagrees with comments made by USEPA regarding use designations and the applicability of bacteria criteria to waters throughout Illinois. Finally, based on USEPA's positions regarding regulatory relief, IERG cautions the Board to not adopt unattainable water quality standards, and to provide adequate justification to support its findings.

II. DESCRIPTION OF USEPA INVOLVEMENT

USEPA has been involved with this rulemaking in a variety of capacities. USEPA advised the Illinois Environmental Protection Agency ("Illinois EPA") on the development of the Use Attainability Analysis ("UAA") and its proposal, approved and disapproved regulations adopted by the Board, and provided comments directly to the Board.

On March 26, 2010, Illinois EPA entered a January 29, 2010 letter from USEPA into the record.¹ In that letter, USEPA comments on Illinois EPA's October 2007 proposal and focuses on designated uses, temperature criteria for the protection of aquatic life, chemical criteria for the protection of aquatic life, and criteria for the protection of human health. *Id.* USEPA's comments introduce little, if any, additional substantive scientific evidence into the record, urge the Illinois EPA to bolster the justification submitted with its proposal, and merely reference other technical recommendation documents.

USEPA copied the Board on a letter to Illinois EPA, dated May 16, 2012, that describes the approval and disapproval of various regulations adopted by the Board.² The letter approves and disapproves regulations adopted by the Board pursuant to Section 303(c) of the Clean Water Act ("CWA"). 33 U.S.C. § 1313(c). USEPA also copied the Board on a letter, dated March 15, 2013, describing the disapproval of a variance granted by the Board.³

On June 26, 2013, USEPA submitted comments with the Board addressing issues related to the Board's First Notice, Opinion and Order in Subdocket C.⁴ In those comments, USEPA addresses the Board's proposed adoption of uses and aquatic life use descriptions, and encourages the Illinois EPA to adopt bacteria criteria for waters throughout Illinois, beyond those

¹ Illinois EPA's Filing of Comments Received from US EPA on Proposed Water Quality Standards for the Chicago Area Waterway and Lower Des Plaines River, *In the Matter of: Water Quality Standards and Effluent Limitations for the Chicago Area Waterway System and Lower Des Plaines River: Proposed Amendments to 35 Ill. Adm. Code 301, 302, 303 and 304*, R08-9(C) (Ill.Pol.Control.Bd. March 26, 2010)) (hereinafter rulemaking is cited as "R08-9" with appropriate subdocket and comments cited and referred to as "January 29, 2010 Comments").

² May 16, 2012 Letter from Susan Hedman, Regional Administrator, USEPA to John M. Kim, Interim Director, Illinois EPA, R08-9(C) (Ill.Pol.Control.Bd. May 22, 2012).

³ March 15, 2013 Letter from Susan Hedman, Regional Administrator, USEPA to John Kim, Director, Illinois EPA, R08-9(D) (Ill.Pol.Control.Bd. Mar. 19, 2013) (hereinafter cited as PC #1367).

⁴ June 26, 2013 Letter from Tinka G. Hyde, Director, Division of Water, USEPA Region V to Illinois Pollution Control Board, Clerk's Office, R08-9(C) (Ill.Pol.Control.Bd. June 27, 2013) (hereinafter cited and referred to as "June 26, 2013 Comments").

that have been the subject of this rulemaking. *Id.* As with the January 29, 2010 Comments directed to Illinois EPA, the June 26, 2013 Comments directed to the Board are largely conclusory and provide little analysis of substantive evidence in the record.

Most recently, Illinois EPA stated in its pre-filed testimony, and has alluded in testimony presented to the Board at hearing in Subdocket D to discussions with USEPA. For example, Scott Twait discussed his interaction with USEPA on the issue of cold shock.⁵ In his pre-filed testimony, Mr. Twait stated that “USEPA commented that they thought that the Agency should protect aquatic life from cold shock.” Scott Twait pre-filed testimony, dated May 24, 2013, at 9. Mr. Twait acknowledges in his pre-filed testimony that “[t]o the Agency’s knowledge, this system has not had trouble with fish kills due to cold shock; however, the Agency has proposed a narrative standard that was developed from language that has been adopted in Wisconsin.” *Id.* Illinois EPA gave such little credence to the inclusion of the cold shock provision in its proposed amendments that it could not even provide any more details during the July 29, 2013 hearing. At the hearing, the Agency stated that the Wisconsin cold shock language was provided to it by USEPA, and that it had had no follow-up conversations with Wisconsin regarding its cold shock regulation or how it is implemented. Transcript at 179.

III. THE BOARD SHOULD BE CAREFUL NOT TO GIVE UNDUE WEIGHT TO COMMENTS SUBMITTED BY USEPA

As described above, USEPA has played a variety of roles in the development and approval of water quality standards. However, its role as a participant in this rulemaking must be differentiated from its other roles under the CWA. In this rulemaking, the Board must weigh evidence in the record and reach a determination as to whether to adopt Illinois EPA’s proposed

⁵ July 29, 2013 Transcript, R08-9(D) at pp. 175-176 (Ill.Pol.Control.Bd. Aug. 8, 2013) (hereinafter cited as “Transcript”).

regulations. Following that process, USEPA may approve or disapprove water quality standards that are adopted by the Board. Therefore, USEPA's comments directed to Illinois EPA and the Board should not be confused with approvals and disapprovals under Section 303(c) of the CWA. Such comments should be given less weight than testimony presented to the Board at hearing, or written comments that are backed by testimony at hearing, since USEPA has not provided representatives for cross-examination.

Section 5(c) of the Illinois Environmental Protection Act ("Act") gives the Board the "authority to act for the State in regard to the adoption of standards for submission to the United States under any federal law respecting environmental protection." 415 ILCS 5/5(c). In addition, the Act gives the Board authority to adopt regulations pursuant to Title VII of the Act to "promote the purposes of this Title," which may include water quality standards and effluent standards. 415 ILCS 5/13(a). Section 27 of the Act gives the Board authority to "adopt substantive regulations as described in this Act." 415 ILCS 5/27. Federal regulations promulgated under the CWA recognize that it is the State's authority to review, establish, and revise water quality standards. 40 C.F.R. § 131.4(a).

Under the CWA, USEPA reviews, approves, and disapproves water quality standards adopted by States. Specifically, whenever a State "revises or adopts a new standard, such revised or new standard shall be submitted to the [USEPA] Administrator." 33 U.S.C. § 1313(c)(2)(A). If the USEPA Administrator determines within sixty (60) days after submission that the standard meets the requirements of the CWA, the standard is considered the water quality standard under the CWA. 33 U.S.C. § 1313(c)(3). If the USEPA Administrator determines that a new or revised standard is not consistent with the CWA, the State will be notified not later than the ninetieth day after the date of submission, and the USEPA

Administrator specifies the changes necessary to meet the requirements of the CWA. *Id.* If the State does not adopt such changes, the Administrator shall promulgate the standard pursuant to 33 U.S.C. § 1313(c)(4). *Id.*

The Board has an obligation to follow its statutory obligations under Sections 27 and 28 of the Act and make a decision based on the record before it. USEPA approves or disapproves water quality standards pursuant to Section 303(c) of the CWA following the adoption of the standards by the State. To the extent that USEPA is involved in the State rulemaking process, it should be on equal footing as any other participant in the rulemaking. As such, USEPA's participation is governed by the Board's statutory obligations and its procedural rules. Testimony and comments submitted by USEPA must be considered in a manner consistent with all other participants. If USEPA wishes to substantively participate in the process, it is welcome to introduce evidence and present witnesses for cross-examination. However, USEPA has no authority to mandate an outcome through the above-described conclusory comments, secondhand testimony from Illinois EPA, or veiled threats of disapproval. Such actions are illustrated by the case of "cold shock" as previously described. IERG discourages the Board from considering unnecessary regulations, especially when the proposed regulations are not accompanied by adequate justification.

Furthermore, IERG notes that any factual information submitted in a public comment "is generally accorded less weight because it is not supported by a sworn witness and the witness is not subject to cross-examination."⁶ Therefore, public comments filed by USEPA should be given less weight than testimony at hearing or pre-filed testimony where the filing is subject to

⁶ Interim Order, *In the Matter of: Volatile Organic Material Emissions from Stationary Sources: RACT III*, R82-14 at p. 5 (Ill.Pol.Control.Bd. Jan. 8, 1987).

cross-examination. USEPA comments filed or presented by a third party should be given even less weight.

Finally, technical recommendation documents referenced in comments presented to the Board must be introduced directly into the record and addressed by participants if they are to be considered by the Board. Mere references to such documents do not provide the Board with any substantive guidance on such matters.

IV. RESPONSE TO USEPA'S JUNE 26, 2013 COMMENTS

In its June 26, 2013 Comments, USEPA disagrees with or requests additional rationale for conclusions reached by the Board related to designated uses. June 26, 2013 Comments at 1-3. In doing so, USEPA comments on three UAA factors and directs the Board to provide a better explanation, basis, and demonstration for its proposed findings on specific waters. *Id.* In addition, USEPA questions the Board's proposed aquatic life use descriptions. *Id.* at 3. Finally, USEPA notes Illinois' obligation to adopt certain standards for Great Lakes recreational waters pursuant to Section 303(i)(1)(B) of the CWA consistent with the 2012 Recreational Water Quality Criteria. *Id.* USEPA "encourages Illinois to update all recreational water standards [bacteria criteria] for all recreational waters in Illinois, including the CAWS and LDPR, during this same action." *Id.*

USEPA appears to second-guess the Board's assessment of the record by simply stating that it is "unaware" of information in the record supporting the Board's conclusions related to the UAA factor regarding human caused conditions or sources of pollution. *Id.* at 1. Similarly, USEPA states that it is "not aware" of information that supports the Board's finding related to low flow conditions in the context of the UAA factor regarding physical conditions related to the natural features of the water body. *Id.* at 2. USEPA then simply directs the Board to "strengthen

its rationale” for its reliance on the UAA factor related to dams, diversions, or other types of hydrological modifications. *Id.* at 2. USEPA goes on to comment on the Board’s proposed findings for individual waterways by supporting Board determinations or requesting more justification for its determinations. *Id.* at 2-3.

IERG disagrees with USEPA’s assessment of the Board’s analysis of the UAA factors. Such conclusory statements and directives by USEPA should be given little weight since they are supported by minimal references to the record. Further, USEPA’s comments fail to consider the UAA factors in their entirety and fail to take into consideration the amount of evidence before the Board supporting its proposed aquatic life use designations. USEPA narrowly construes the UAA regulations in each of the UAA factors it cites in its letter. In pointing out the Board’s deficiencies in applying UAA factor 3 to the designation of aquatic life uses, USEPA only notes “human caused sources of pollution” in the waterways caused by Combined Sewer Overflows, and fails to recognize the presence of steep banks, vertical dock walls, and commercial barge traffic, which are all also “human caused conditions” to be considered under UAA factor 3. *Id.* at 2. USEPA’s interpretation of UAA factor 5, in its comments, focuses solely on “low flow conditions” and fails to take into account other relevant portions of UAA factor 5 including “physical conditions related to the natural features” such as “lack of proper substrate, cover, flow, depth, pools, riffles and the like” that the record supports in establishing a Use B designation. *Id.* at 2-3. IERG asks that the Board be mindful of the limited focus and dependence of USEPA’s comments on these particular factors and USEPA’s conclusions. The record contains substantial evidence to support the proposed aquatic life use designations, and IERG suggests that, in the future, USEPA provide additional support, in the form of witnesses or specific references to the record if it expects the Board to reach a different conclusion that it did

at First Notice. However, it is worth noting that the Board's future Opinion and Orders in this rulemaking could more explicitly note the basis upon which it relies for its findings (such as the examples described above).

Finally, IERG discourages the Board from considering USEPA's "encouragement" to adopt bacteria criteria standards to waterways that have heretofore not be the subject of this rulemaking. Potentially impacted sources have not been put on notice of the possibility of any such amendment. The recreational bacteria standards were the subject of Subdocket B and are beyond the scope of Subdocket C which addresses solely aquatic life use designations, and are not applicable or relevant to the scope of Subdocket C. Further, IERG is aware of an ongoing effort at the Illinois EPA to develop bacteria standards for Illinois, including formation of a stakeholders group; therefore, USEPA's comments should more properly be addressed to the Illinois EPA for consideration in connection with a new, future rulemaking. It would be premature at this time for the Board to move forward with any bacteria standard amendments.

V. **THE BOARD MUST NOT ADOPT UNATTAINABLE WATER QUALITY STANDARDS**

As described above, the Board's adoption of regulations, including water quality standards, is governed by Section 27 of the Act. 415 ILCS 5/27. The Board is required to "take into account 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." *Id.* The Illinois Supreme Court has interpreted the Section 27(a) mandate to mean that while the Board must consider the various factors specified (including the technical feasibility and economic

reasonableness of compliance), the Board need not necessarily conclude that compliance with a proposed regulation is technically feasible and economically reasonable before it can adopt such regulation. *Granite City Division of National Steel Co. v. The Illinois Pollution Control Board*, 155 Ill.2d 149, 182-83, 613 N.E. 2d 719, 734 (Ill. 1993). An example identified by the Court is in the case of technology-forcing standards which are beyond the reach of existing technology. *Id.* However, the Court is careful to point out that in such cases, “the Act specifically provides for variance and adjusted standard procedures by which the Board may relieve a discharger from compliance with its environmental control standards upon a showing of unreasonable economic or individual hardship.” *Id.*

As recognized by the Illinois Supreme Court, the Board is empowered by the Act to grant individual variances from any rule, regulation, requirement, or order of the Board, upon a finding that compliance with the rule, regulation, requirement or order would impose an arbitrary or unreasonable hardship. 415 ILCS 5/35(a). Such regulatory relief is especially important in situations where the Board has adopted a rule, regulation, requirement, or order, without a complete understanding of its impact on each and every entity subject to it, or, as described above, where a standard intended to be technology-forcing is ultimately impossible or extremely costly to comply with.

IERG understands that the Illinois EPA has recently enacted a policy of sending Board-adopted variances and other regulatory relief from CWA-related rules, regulations, requirements or orders to USEPA for its review and approval.

A recent such USEPA review has resulted in USEPA’s denial of a Board variance, and has been filed by USEPA in this rulemaking as a public comment. PC #1367. As described in the enclosure accompanying the denial letter, USEPA interprets the Board’s variance as “a

revision to water quality standards.” Enclosure to PC #1367 at 1. Further, USEPA’s denial means that “for CWA purposes, the indigenous aquatic life designated use and the TDS criterion to protect that use at 35 Ill. Admin. Code 302.407 apply...notwithstanding IPCB’s variance decision.” PC #1367 at 2.

Although USEPA suggests that variance relief is available under the CWA regulations, it would seem that a full use-attainability analysis (concluding that a designated use is unattainable), or scientific study showing that the criteria from which relief is sought is more stringent than necessary to protect for the designated use, would be required. Bearing in mind that in adopting water quality standards, including the use designations in this subdocket, and the criteria in subdocket (D), the Board will be finding that the designated uses *are attainable* and that the criteria *are necessary* to protect for those uses, IERG is extremely troubled by the potential for the precedent of this denial to effectively nullify the Board’s variance authority for all CWA-derived rules, regulations, requirements, or orders. The importance to the regulated community of having available regulatory relief mechanisms cannot be understated. This is critical, particularly in situations such as the current rulemaking, where there are areas of disagreement regarding the achievability of numerous proposed standards.

In the case of chlorides, the record indicates that not only is the proposed chloride standard unachievable, but the information required by USEPA is so burdensome, that obtaining relief from that standard would be unlikely if not impossible. The Agency recognized in its testimony at the July 29, 2013 hearing that elevated chloride levels in the waterway are caused by “human caused conditions,” as described in UAA factor 3, but that the data needed to show that site specific standards or longer term variances are appropriate was “significant” (implying that the Agency had no intentions of pursuing that option). Transcript at 123. In light of the

above, IERG would strongly encourage the Board to give extra weight to the economical reasonableness and technological feasibility factors it is required to consider by Illinois law, and be cognizant of the fact that adopting unattainable WQS may have a severe detrimental impact on the regulated community, as the availability of regulatory relief is in question.

VI. CONCLUSION

IERG has participated in this rulemaking because its member companies will be directly impacted by the proposed aquatic life use designations and corresponding water quality standards developed during this proceeding and because of its potential to have a precedential impact on its members state-wide. IERG is concerned that USEPA's involvement in this matter has gone beyond its CWA directed role, and cautions the Board to not give its comments undue weight. IERG disagrees with much of USEPA's June 26, 2013 Comments, particularly the suggestion that the Board take action in this rulemaking to amend bacteria standards beyond the waterways subject to this matter. Finally, based on USEPA's positions regarding regulatory relief, IERG cautions the Board to not adopt unattainable water quality standards.

IERG appreciates the opportunity to provide these comments. Thank you for your consideration.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
REGULATORY GROUP,

Dated: August 30, 2013

By: /s/ Alec M. Davis
Alec M. Davis

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CERTIFICATE OF SERVICE

I, Alec M. Davis, the undersigned, hereby certify that I have served the attached ILLINOIS ENVIRONMENTAL REGULATORY GROUP'S RESPONSE TO COMMENTS OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY upon:

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by depositing said documents in the United States Mail, postage prepaid, in Springfield, Illinois on August 30, 2013.

By: /s/ Alec M. Davis
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