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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

JAN 20 2004

STATE OF ILLINOIS  
Pollution Control Board

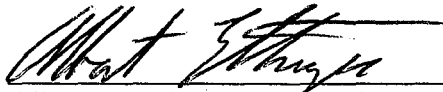
IN THE MATTER OF: )  
PROPOSED AMENDMENTS TO: )  
PART 309 SUBPART A - )  
35 Ill. Adm Code 309.105, 309.7, 309.8, )  
309.9, 309.10, 309.12, 309.13, 309.14, )  
309.117, 309.119, 309.143, 309.147; and )  
PROPOSED 35 Ill. Adm. Code 309.120 )  
through 122 - NPDES PERMITS AND )  
PERMITTING PROCEDURES )

R03-19

pc 16

NOTICE OF FILING

PLEASE TAKE NOTICE that the Environmental Law and Policy Center of the Midwest, Illinois Chapter of the Sierra Club, and Prairie Rivers Network have filed Petitioners' Comments on Proposed First Notice Rule.



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January 20, 2004

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R03-19

**PETITIONERS' COMMENTS ON PROPOSED FIRST NOTICE RULE**

Petitioners Environmental Law and Policy Center of the Midwest, Illinois Chapter of the Sierra Club and Prairie Rivers Network (collectively "Petitioners") are pleased that the Board through its Opinion and Order of September 4, 2003 ("First Notice Order") has seen fit to adopt a number of proposals that will substantially improve Illinois NPDES permitting procedures and permits. Petitioners in these comments on the First Notice Order will not reargue broadly matters that were debated prior to the First Notice Order. Instead, these comments will focus on four matters that are raised by the testimony given in the November 19, 2003 hearing in this proceeding.

First, testimony given in the November 19, 2003 hearing made clear that one matter not resolved by the Board's First Notice Order really should be addressed in this proceeding. As discussed below, the Board should clarify that IEPA has the authority to reopen a permit proceeding to receive further public comment if IEPA believes that a better decision may be made if it reopens the record. Petitioners offer language to accomplish this result to be added by the Board to 309.120.

As to two provisions, representatives of the regulated community during the November 19 hearing suggested changes to the First Notice Order with which Petitioners agree. These changes are deleting 309.120 (a)(4) and adding a sentence to 309.143(a) of the proposed First Notice Order.

The changes as to 309.120 and the change as to 309.143(a) Petitioners now propose are attached as Petitioners' Proposed Final Rules Changes.

Finally, there were suggestions during the November 19 hearing by various parties that the Board erred in requiring in proposed 309.113(a)(5) that there be a summary of proposed permit changes in fact sheets as to reissued permits. Petitioners believe that the Board did not err and 309.113(a)(5) should be adopted as provided in the First Notice Order.

**I.     The Board should adopt language making clear that the Agency has discretion to reopen the public comment period.**

Testimony given in the November 19 hearing makes clear that there is a very important procedural matter, that is not clear in the existing rules, that the Board should resolve. On a critical procedural point that will undoubtedly eventually arise in a permit proceeding, IEPA and members of the regulated community are not in accord. IEPA believes that it has authority to reopen a proceeding for further public comment after a permit hearing but it is apparent that this is not clear in the eyes of the regulated community.

Toby Frevert, the witness for the Agency, testified as follows:

Q: Does the Agency believe that given the Black Beauty decision that the Agency may reopen the public comment period ... to receive further comments if it

believes that further submissions may assist the Agency to reach an appropriate decision?

Mr. Frevert: If I understand your question right, you are asking if we believe we have the authority to extend the public comment to a second notice period and potentially even a second round of hearing?

Q: Right now we have Section [120 in the First Notice Order] and it provides circumstances in which the Agency shall allow written comments under certain circumstances. My question is just whether the Agency feels whether it now has authority that it may reopen the record for public comment following a hearing if it feels it is necessary.

Mr. Frevert: Yes, I believe we do. (Tr. 14-15)

Later in the November 19 hearing, the question was posed to the witness for the Illinois Environmental Regulatory Group ("IERG"), Katherine Hodge, whether she believes that the Agency may reopen a record to receive further testimony:

Q: I asked Toby whether or not he believed the Agency had authority to reopen the hearing – this is not shall, but may reopen the comment period after the hearing if it believes it's necessary. My question to IERG is: Do you agree that the Agency has that authority?

Ms. Hodge: We have heard the Agency's testimony. We would probably reserve on this until the written comment because I personally can't answer that. I don't know whether they have the authority. We will address that in our comment. (Tr. 37-8)

Petitioners are eager to learn IERG's answer to this question, but it really does not matter what IERG now writes. If the attorney who may well be the leading authority on the Illinois Environmental Protection Act and the Board rules cannot personally answer whether the Agency can reopen the record to receive further public comment after a hearing, the Board really should clarify the matter. Even if IERG in its written comments

agrees with Mr. Frevert that the Agency does have authority to reopen the comment to receive further testimony, we all know with moral certainty that some permit applicant in the future, whose permit was affected by the Agency deciding to reopen the record, will not see matters that way.<sup>1</sup>

It is clear that the Agency should have discretion to reopen the period for public comment if it believes that such further comment will improve its decision-making. Facts may be learned during the comment period about the presence of drinking water or recreational uses of a receiving water, endangered species or other matters that may require that a permit be reconsidered by the Agency in a new light. The Agency believes it is entitled to go to the permit applicant, even after the close of the comment period, to learn facts necessary to address facts raised during the comment process. (Frevert Testimony, November 19, 2003, Tr. 22-23 ). The Agency certainly should also be allowed to seek information from the public, as it now believes (perhaps erroneously) that it can do. (Ibid.)

Accordingly, Petitioners reassert that language that makes clear that the Agency has authority to reopen the public record should be added to the rules. Petitioners propose a new Section 309.120(b) that states simply:

The Agency may reopen the public comment period to receive further comments if it believes that further submissions may assist the Agency to reach and appropriate decision.<sup>2</sup>

This proposed new provision would not give the Agency any authority that it does not believe that it already has. The new provision would serve to eliminate a big dispute

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<sup>1</sup> Such a disgruntled permit applicant would have a strong argument based on the Black Beauty decision which indicates that the Agency does not have authority to reopen the record unless the Board gives it such authority through a change in the rules. See Petitioners' Post Hearing Comments, filed 6-13-03, pp. 5-7, 19.

just waiting to happen. The language is set forth in Petitioners' Proposed Final Rule Changes that is attached to these comments.

**II. The Board should make the changes suggested during the hearing to Sections 309.120(a)(4) and 309.143(a).**

Two matters were brought up during the November 19 hearing on which there was consensus that minor revisions to the First Notice Order are appropriate.

There was considerable discussion during the November 19 hearing of the probable effect of proposed 309.120(a)(4). Petitioners believe that a consensus was reached that 309.120(a)(4) adds confusion. The Agency should order the comment period reopened if the answer to any of the questions posed by 309.120(a) (1), (2) or (3) is "yes", but a "yes" answer to the question posed by 309.120(a)(4) is not determinative. (Mr. Sanjay Sofat, November 19 Tr.39-40). Thus, it is best to simply delete (a)(4).

The language of Section 309.143(a) of the First Notice Order is taken directly from a governing federal regulation, 40 CFR 122.44(d)(1)(i). During the November 19 hearing, Ms. Hodge testified that an additional sentence of that regulation, 40 CFR 122.44(d)(1)(ii), should be added to the Illinois rules (Tr. 11-12). Petitioners agree and the sentence IERG proposes to add is contained in Petitioners' Proposed Final Rules Changes.

**III. The Board should not change Proposed Section 309.113.**

With one exception, Petitioners and the Agency agreed on the information that should be added to the fact sheets. The difference of opinion related to 309.113(5) as to

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<sup>2</sup> Current provisions 309.120 (b) and (c) would be re-lettered to accommodate the new "b".

which the Agency did not agree that it should summarize any changes in reissued permits. The Board agreed with Petitioners on this issue in its First Notice Order.

At the November 19, 2003 hearing, various parties attempted to portray the Board's decision on this point as a monumental imposition on the Agency. It is not.

The Agency already as to proposed permit modifications generally describes in a few sentences what modifications are being proposed (see e.g. Ex. A). No one has suggested that providing such a description as to modifications is bankrupting the Agency. Actually, providing such a description is probably saving the Agency money because members of the public are not getting excited about things that it is not proposed to change and are not making phone calls, Freedom of Information Act requests, or hearing requests about matters that are not at issue.

While it is true that theoretically the whole NPDES permit should be reconsidered as to a reissued permit, no one claims that typically many of the permit limits or conditions actually change on a reissued permit.<sup>3</sup> In virtually all cases in which a permit is reissued it will be no more difficult to describe the changes from the old permit than it is in the case of modifications. In the rare case in which large portions of the new permit are different from the prior permit, the Agency can simply say in its "summary" that the much of the permit has been changed and that members of the public interested in the changes should carefully compare the proposed permit with the old permit.

While it may be a little more trouble for the Agency to add a couple sentences to

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<sup>3</sup> This is unfortunate. The Clean Water Act established as a national goal the elimination of all discharges by 1985. 33 U.S.C. §1251(a)(1). When the Act was enacted in 1972, it was expected that National Pollutant Discharge *Elimination* System permits would only be issued until technology was developed to eliminate discharges and NPDES discharge limits would be tightened over time until there were no discharges. Rodgers, Jr., W.H. *Environmental Law*, Second Edition (1994) pp.361-62.

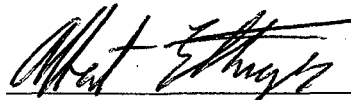
the fact sheet on a reissued permit that generally describes the changes from the old permit, this information is very useful to the public.<sup>4</sup> The only other good way to track changes is to file a Freedom of Information Act request on the Agency to get the old permit and then compare the draft permit with the old permit line by line.

Further, while there does not seem any scientific manner to weigh the relative costs, we believe that it will save the Agency resources in the long run to include this information in fact sheets on changes to reissued permits. It does not take many instances of members of the public getting confused and, as a result, requesting documents or hearings as to permits for which no change is proposed to outweigh whatever savings may arise from not having to add a few sentences on changes to the fact sheets.

### CONCLUSION

The Board should revise Sections 309.120 and 309.143(a) as proposed in Petitioners' Proposed Final Rules Changes and should not make any other changes to the First Notice Order.

Respectfully submitted,



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Environmental Law and Policy Center  
35 E. Wacker Dr. Suite 1300  
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January 20, 2004

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<sup>4</sup> Actually, members of Petitioners originally assumed that nothing changed on a "reissued" permit and failed in some changes to note important changes. We have no doubt that some members of the public are still confused by this terminology.



## Petitioners' Proposed Final Rules Changes

**New changes proposed or agreed to by Petitioners are indicated in bold and italics.**

### Section 309.120      Reopening the Record to Receive Additional Written Comment

- a) The Agency shall order the public comment period reopened to receive additional written comments where the Agency significantly modifies the draft permit and the final permit is not a logical outgrowth of the proposed draft permit. In determining if the final permit is a logical outgrowth of the draft permit, the Agency shall consider the following:
  - 1) Whether the interested parties could not have reasonably anticipated the final permit from the draft permit;
  - 2) Whether a new round of notice and comment would provide interested parties the first opportunity to offer comments on the issue; *or*
  - 3) Whether the provisions in the final permit deviate sharply from the concepts included in the draft permit or suggested by the commenters;  
~~or~~
  - 4) *Whether the changes made in the final permit represent an attempt by the Agency to respond to suggestions made by commenters.*
- b) *The Agency may reopen the public comment period to receive further comments if it believes that further submissions may assist the Agency to reach an appropriate decision.*
- cb)* The public notice of any comment period extended under this section shall identify the issues as to which the public comment period is being reopened. Comments filed during the reopened comment period shall be limited to the substantial new issues that caused its reopening.
- de)* For the notification purposes, the Agency shall follow the public notice requirements of Section 309.109.

## SUBPART A: NPDES PERMITS

### Section 309.143 Effluent Limitations

- a) Effluent limitations must control all pollutant or pollutant parameters (either conventional, nonconventional, or toxic pollutants) which the Agency determines are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality. When determining whether a discharge causes, has the reasonable potential to cause or contributes to an in-stream excursion above a narrative or numeric criteria within a State water quality standard, the Agency shall use procedures which account for existing controls on point and nonpoint sources of pollution, the variability of the pollutant or pollutant parameter in the effluent, the sensitivity of the species to toxicity testing (when evaluating whole effluent toxicity), and where appropriate, the dilution of the effluent in the receiving water.
- b) In the application of effluent standards and limitations, water quality standards and other applicable requirements, the Agency shall, for each permit, specify average and maximum daily quantitative limitations for the level of pollutants in the authorized discharge in terms of weight (except pH, temperature, radiation, and any other pollutants not appropriately expressed by weight, and except for discharges whose constituents cannot be appropriately expressed by weight). The Agency may, in its discretion, in addition to specification of daily quantitative limitations by weight, specify other limitations, such as average or maximum concentration limits, for the level of pollutants in the authorized discharge. Effluent limitations for multiproduct operations shall provide for appropriate waste variations from such plants. Where a schedule of compliance is included as a condition in a permit, effluent limitations shall be included for the interim period as well as for the period following the final compliance date.

NPDES Permit No. IL0071889  
Notice No. FLR:01102903.bah

Public Notice Beginning Date: **October 24, 2003**

Public Notice Ending Date: **November 24, 2003**

National Pollutant Discharge Elimination System (NPDES)  
Permit Program

Draft Modified NPDES Permit to Discharge into Waters of the State

Public Notice/Fact Sheet Issued By:

Illinois Environmental Protection Agency  
Bureau of Water, Division of Water Pollution Control  
Permit Section  
1021 North Grand Avenue East  
Post Office Box 19276  
Springfield, Illinois 62794-9276  
217/782-0610

Name and Address of Discharger:

Royster-Clark, Inc.  
Post Office Box 410  
Meredosia, Illinois 62665

Name and Address of Facility:

Royster-Clark, Inc.  
1921 Old Naples Road  
Meredosia, Illinois 62665  
(Morgan County)

The Illinois Environmental Protection Agency (IEPA) has made a tentative determination to modify an NPDES permit to discharge into the waters of the state and has prepared a draft permit and associated fact sheet for the above named discharger. The Public Notice period will begin and end on the dates indicated in the heading of this Public Notice/Fact Sheet. The last day comments will be received will be on the Public Notice period ending date unless a commentor demonstrating the need for additional time requests an extension to this comment period and the request is granted by the IEPA. Interested persons are invited to submit written comments on the draft permit to the IEPA at the above address. Commentors shall provide his or her name and address and the nature of the issues proposed to be raised and the evidence proposed to be presented with regards to those issues. Commentors may include a request for public hearing. Persons submitting comments and/or requests for public hearing shall also send a copy of such comments or requests to the permit applicant. The NPDES permit and notice number(s) must appear on each comment page.

The application, engineer's review notes including load limit calculations, Public Notice/Fact Sheet, draft permit, comments received, and other documents are available for inspection and may be copied at the IEPA between 9:30 a.m. and 3:30 p.m. Monday through Friday when scheduled by the interested person.

If written comments or requests indicates a significant degree of public interest in the draft permit, the permitting authority may, at its discretion, hold a public hearing. Public notice will be given 45 days before any public hearing. Response to comments will be provided when the final permit is issued. For further information, please call Fred Rosenblum at 217/782-0610.

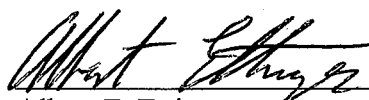
The applicant is engaged in the wholesale distribution of fertilizer at an anhydrous ammonia terminal (SIC 5191). Waste water is generated from the use of well water from an on-site deep well to generate non-contact cooling water and to perform hydrostatic testing of secondary containment tanks with rubber bladders. Plant operation results in an average discharge of 0.72 MGD of hydrostatic test water at outfall 001 on an infrequent intermittent basis and 0.150 MGD of non-contact cooling water at outfall 002.

The following modification is proposed: Coverage of the existing discharge of non-contact cooling water as outfall 002 along with the associated requirements. The discharge of non-contact cooling water was previously covered under General NPDES Permit No. ILG250163. The Agency intends to terminate coverage under that General NPDES Permit and cover the existing discharge of non-contact cooling water under NPDES Permit No. IL0071889.

Exhibit A

### CERTIFICATE OF SERVICE

I, Albert F. Ettinger, certify that on January 20, 2004, I filed the attached Petitioners' Comments on Proposed First Notice Rule. An original and 9 copies was filed, on recycled paper, with the Illinois Pollution Control Board, James R. Thompson Center, 100 West Randolph, Suite 11-500, Chicago, IL 60601, and copies were served via United States Mail to those individuals on the attached service list.

  
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