

ILLINOIS POLLUTION CONTROL BOARD
September 15, 1982

IN THE MATTER OF:)
)
PARALLEL SHORE PROTECTION) R 82-11
IN LAKE MICHIGAN (Subtitle C;)
Part 311))

Proposed Rule. First Notice.

Opinion and Order of the Board (by J. D. Dumelle):

This matter comes before the Board upon a petition for amendments to Title 35 of the Illinois Administrative Code; Subtitle C: Water Pollution; Chapter I: Pollution Control Board, which was filed by the Illinois Department of Transportation (IDOT) on March 3, 1982. The petition was accompanied by a motion to waive the requirement that such petitions be signed by 200 people. That motion was granted on May 13, 1982 at which time hearings were also authorized. On June 1, 1982 IDOT filed an amended proposal and hearings were held after proper notice on July 20, 1982 at the Board Conference Room in Chicago and on July 27, 1982 in the Waukegan City Hall. The only person to testify at the hearings was Dan Injerd, Chief, Lake Michigan Management Section, Division of Water Resources, IDOT, although some members of the public attended both hearings.

The purpose of this rulemaking as proposed by IDOT is to obviate the need for Board review of individual Lake Michigan permit applications for approval of structures in the water which comply with general permit conditions as established by this rulemaking. The Board would, in effect, grant its concurrence by having the Board Chairman sign a general permit document (see Ex. 2) which would be issued to future applicants whose applications demonstrate compliance with the general permit conditions for parallel shore construction as determined by IDOT. Those conditions will be established to insure that there will be no harmful environmental effects caused by construction of the structures. For a description of the types of structures involved, see Exhibit #1, pp. 664-753 and 787-799.

Ill. Rev. Stat., Ch. 19, §18 requires Board concurrence for any permit "authorizing any fill or deposit of rock, earth, sand or other material or any refuse matter of any kind or description in Lake Michigan." Under current procedures, upon an IDOT determination that a permit should issue, the relevant documents are filed with the Board, docketed, and placed on the Board agenda for the following Board meeting. After Board review, and assuming the Board concurs, the Board enters an Order instructing and authorizing the Chairman to sign the permit document, and the completed document is returned to IDOT for issuance. This process takes two to four weeks (R. 65).

Under the procedures proposed by IDOT nothing would be forwarded to the Board when certain specified conditions are determined by IDOT to have been met. These conditions are specified in proposed Sections 311.210 through 311.255. These sections limit the materials that can be used in construction of parallel shore protection structures (§311.210) and the placement of these structures (§311.215 and §311.240). They also limit the length of the structures to 300 feet and the types of material that can be used as backfill and for revetments (§311.220). They require that increases in suspended solids be minimized (§311.225), that the bulkhead be completed prior to placement of backfill (§311.230), that no dredging occur below the ordinary high water mark of Lake Michigan (§311.235), that excavation be limited to that necessary to place the toe of the structure (§311.235), that no excavated materials be placed in the lake (§311.235), that such structures not be placed within a man-made harbor or within 200 feet of the mouth of a waterway (§311.240), that the Illinois Department of Conservation be notified of any historical or archeological materials found (§311.245), and that no unreasonable interference with navigation be allowed (§311.250). Finally, if IDOT determines that multiple projects, which would individually qualify for a general permit, may cause cumulative detrimental impacts or if there are other unique aspects in a particular case, the normal permitting process would be required (§311.255).

According to Mr. Injerd's testimony, the threat of water pollution should be avoided by these conditions in that materials used in construction would not be allowed to be of a type that could cause pollution. The use of parallel shore protection devices should actually cut down on the suspended solids and other contaminants that would otherwise enter the lake through erosion (R. 16-17), and should also serve to ensure that lake currents are unaltered (R. 14-15). Furthermore, environmentally sensitive areas, such as those areas where fish spawning or bird nesting take place, are protected (R. 16).

The general permit mechanism would allow IDOT to be more "responsive to the needs of property owners who are experiencing shoreline erosion," and "reduce the administrative workload associated with processing permits for projects that have little or no" detrimental impact (R. 11). Instead of the overall permitting process taking 8-12 weeks, a general permit could be issued in 8-10 days (R. 18). Mr. Injerd testified that this shortening of the period of time is especially important for the types of structures that would fall under the general permit requirements in that they "are done by private property owners" who often "react to crises, ... can't get their permit soon enough" and may miss the construction season (R. 65-66). He admitted, however, that "there are few cases where there is an emergency, where there is danger to property" (R. 67).

Clearly, the present length of time required for permitting is not solely due to the time needed for Board action. Most of it is due to IDOT procedures which include an analysis of the permit application, tentative approval and a 21-day public notice period (R. 17). However, IDOT has indicated that the whole general permit scheme would fall if the Board were not to adopt its proposal (R. 64-65).

The major question in this proceeding is whether the Board has the power to adopt these regulations. First, the Environmental Protection Act gives no explicit power to the Board to adopt either substantive or procedural rules regarding parallel shore protection, nor does Ch. 19, §18. If the Board has such power, it must be implied. Second, the proposed regulations may constitute an unconstitutional subdelegation from the Board to IDOT of the Board's duty to concur in the issuance of Lake Michigan permits.

Without deciding whether the Board does in fact have such power, the Board, for purposes of First Notice, will propose Section 311.200 in a form which differs from IDOT's proposal in that it requires that IDOT serve notice upon the Board at least four days prior to the proposed issuance of a general permit. The Board will also propose the addition of Section 311.205 which allows for Board action to terminate the general permitting process and thereby to require that normal permitting processes be followed.

This procedure will allow the Board to continue its active oversight of the Lake Michigan permitting process while shortening the period of time required for Board review of such permits to four days. While the proposed procedures represent a departure from normal Board procedures, there are at least two factors which render the departure appropriate in this area. First, the Board's power in this area derives from Ch. 19, §18 of the Illinois Revised Statutes rather than from the Environmental Protection Act, and Chapter 19 does not articulate any procedures to be used for Board concurrence. Second, Board concurrence decisions are based upon the individual Board member's knowledge rather than upon a developed record, thus distinguishing it from the usual Board decision-making process.

The Board finds that the conditions of the general permit are adequate to insure that the environment will not be harmed by parallel shore construction which would be allowed under the general permit. Further, present Board concurrence procedures for such permit applications may consume valuable time for property owners, IDOT and the Board. Therefore, the Board will propose for First Notice the regulations proposed by IDOT in this matter with only minor editorial changes to clarify the intent of the rules, the modification of Section 311.200 and the addition of the Section 311.205.

The Board does, however, encourage comments during this First Notice period regarding the Board's power to adopt these rules in the form proposed by IDOT or in the form proposed in this First Notice.

ORDER

The Board hereby proposes for First Notice that its Water Pollution Rules be amended by the addition of the following regulations:

TITLE 35: ENVIRONMENTAL PROTECTION
SUBTITLE C: WATER POLLUTION
CHAPTER I: POLLUTION CONTROL BOARD

PART 311

LAKE MICHIGAN PERMITS

SUBPART A: GENERAL PROVISIONS

Section

311.100 Reference to Other Sections
311.110 Scope and Applicability
311.120 Definitions
311.121 Breakwater
311.122 Bulkhead
311.123 Revetment
311.124 Riprap

SUBPART B: PARALLEL SHORE PROTECTION

Section

311.200 Board Concurrence
311.210 Construction Material
311.215 Proximity
311.220 Specifications
311.225 Suspended Solids
311.230 Timing
311.235 Excavation
311.240 Prohibited Locations
311.245 Historical or Archeological Materials
311.250 Navigation
311.255 Exclusions

AUTHORITY: Authorized by Section 27 of the Environmental Protection Act (Ill. Rev. Stat. 1979, ch. 111½, par. 1027) and implementing Section 18 of the Regulation of Rivers, Lakes and Streams (Ill. Rev. Stat. 1979, ch. 19, par. 65).

SOURCE: Adopted and codified at 6 Ill. Reg. _____, effective _____.

SUBPART A: GENERAL PROVISIONS

Section 311.100 Reference to Other Sections

Unless the contrary is clearly indicated, all references to "Parts" or "Sections" are to Ill. Admin. Code, Title 35: Environmental Protection. For example, "Part 309" is 35 Ill. Admin. Code 309 and "Section 309.101" is 35 Ill. Admin. Code 309.101.

Section 311.110 Scope and Applicability

- a) Part 311 contains definitions and conditions applicable to the issuance of general permits authorizing any fill or deposit of rock, earth, sand, or other material, or any refuse matter of any kind in Lake Michigan.
- b) Subpart B contains conditions applicable to the issuance of a general permit for construction of parallel shore protection.

Section 311.120 Definitions

As used in this Part, the following terms defined by Section 311.121 et seq. shall have the meanings specified.

Section 311.121 Breakwater

"Breakwater" means a structure protecting a shore area, harbor, anchorage, or basin from wave action.

Section 311.122 Bulkhead

"Bulkhead" means a structure or partition to retain or prevent sliding of land or to protect the upland against damage from wave action.

Section 311.123 Revetment

"Revetment" means a facing of stone, pre-cast concrete or other non-contaminated material built to protect a bank, shoreline or shore structure against erosion by wave action or currents.

Section 311.124 Riprap

"Riprap" means a layer, facing or protective mound of stones randomly placed to prevent erosion, scour, or sloughing of a structure, beach, or embankment.

SUBPART B: PARALLEL SHORE PROTECTION

Section 311.200 Notification of the Intent to Issue a General Permit

If any Illinois Department of Transportation general permit is proposed to be issued under this Part, the Illinois Department of Transportation shall notify the Board of such proposed general permit by filing the proposed general permit and any supporting documents with the Board at least four days prior to issuance of such permit.

Section 311.205 Board Concurrence

- a) If within the four-day notice period described in Section 311.200 any Board member notifies the Illinois Department of Transportation of an objection to the issuance of a general permit, such permit shall not be issued until the Board has taken formal action concurring with such issuance.
- b) If no Board member objects to the issuance of a general permit within the four-day period prior to proposed issuance, the Illinois Department of Transportation may deem Board inaction as concurrence for purposes of issuance of the general permit and the Board shall ratify such concurrence at a subsequent Board meeting.

Section 311.210 Construction Materials

Bank and shoreline protection shall consist only of rock riprap, sand-filled bags, revetments, permeable or impermeable breakwaters, or bulkheads. Bulkheads must be constructed of steel, wood or concrete.

Section 311.215 Proximity

Except for those structures which must be placed in offshore water in order to be hydraulically effective to control wave action and shore erosion (such as breakwaters, underwater reefs, and similar structures), bank and shoreline protection shall be located as close to the existing bank or bulkheads as feasible.

Section 311.220 Specifications

Parallel shore protection structures must be constructed of clean material such as steel, wood, poured or precast concrete, or field stone and shall not exceed 300 feet in length (for each individual property owner). Materials placed behind a bulkhead or revetment must be clean material, including, but not limited to sand, gravel, or rock. If broken concrete is used as backfill, all reinforcing rods must be cut flush with the surface of the concrete. Any clay or dirt placed as backfill must be completely contained by an impermeable bulkhead. No debris, asphalt, toxic material or organic material will be allowed.

Section 311.225 Suspended Solids

All work is to be conducted so as to minimize increases in suspended solids.

Section 311.230 Timing

Whenever work consists of construction of a bulkhead and placement of backfill, the bulkhead must be completed prior to placement of the backfill.

Section 311.235 Excavation

No dredging of materials shall occur below the ordinary high water mark of Lake Michigan (580.8 IGLD). Excavation shall be limited to that necessary to place the toe of the structure. No material excavated during construction shall be placed in Lake Michigan.

Section 311.245 Historical or Archeological Materials

If work reveals historical or archeological materials, operations shall be suspended and the permittee shall notify the Staff Archeologist at the Illinois Department of Conservation.

Section 311.250 Navigation


No work shall cause or create an unreasonable interference with navigation.

Section 311.255 Exclusions

Multiple projects of adjacent property owners that may cause cumulative detrimental impacts or work in environmentally sensitive areas or work which may have unusual impacts on Lake Michigan or surrounding areas will be reviewed by the Illinois Department of Transportation, Division of Water Resources and may be excluded from the general permitting process.

IT IS SO ORDERED.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify the above Opinion and Order were adopted on the 15th day of September, 1982 by a vote of 5-0.


Christan L. Moffett, Clerk
Illinois Pollution Control Board