

ILLINOIS POLLUTION CONTROL BOARD
May 12, 2022

IN THE MATTER OF:)
)
AMENDMENTS TO 35 ILL. ADM. CODE) R18-26
SUBTITLE F: PUBLIC WATER SUPPLY) (Rulemaking – Public Water Supply)

Proposed Rule. First Notice.

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

The Board opened this docket to amend its public water supply rules and in so doing, propose non-substantive changes that remove obsolete, repetitive, confusing, or unnecessary portions of the rules. Today, the Board proposes amended rules for first-notice publication in the *Illinois Register*, which begins a period of at least 45 days during which any person may file a public comment on the proposed amendments with the Board.

In this opinion and order, the Board first provides background on this rulemaking’s objectives and its procedural history. Next, the Board discusses proposed amendments Part-by-Part. The Board then discusses technical feasibility and economic reasonableness before concluding to propose amended rules. Finally, the Board directs its Clerk to provide first-notice publication of the proposal in the *Illinois Register*.

BACKGROUND

In 2016, the Board began reviewing its rules to identify obsolete, unclear, or otherwise unnecessary language. On January 10, 2018, the Illinois Environmental Protection Agency (IEPA or Agency) filed a proposal to amend numerous Board rules, including Parts 611, 615, 616, and 617 of the Board’s public water supply regulations. Clean-Up Amendments to 35 Ill. Adm. Code Parts 201, 211, 212, 214, 215, 216, 217, 218, 219, 225, 228, 232, 237, 301, 302, 303, 304, 306, 309, 401, 402, 403, 404, 405, 501, 611, 615, 616, 617, 722, 811, 813, 855, and 1000, R18-21 (Jan. 10, 2018). IEPA’s proposal cited Executive Order 2016-13, which required agencies to review existing regulations to identify provisions that are outdated, repetitive, confusing, or unnecessary and then revise or repeal them as appropriate.

The amendments proposed by the Board in this order consist of both IEPA’s original proposals and additional revisions identified by the Board in its own review. Both IEPA and the Board intend proposed amendments to be non-substantive in nature. PC 2 at 1.

PROCEDURAL HISTORY

On January 10, 2018, IEPA filed a proposal to make non-substantive revisions to Board rules including provisions of Subtitle F. On February 8, 2018, the Board opened this rulemaking docket to address public water supply regulations in Subtitle F of its rules. On June 17, 2021, the

Board adopted a proposal for public comment (Board Prop.). The proposal included both amendments originally proposed by IEPA and amendments proposed by the Board. In its order, the Board requested comment generally and directed seven questions to IEPA on specific matters.

In a letter dated September 17, 2021, the Board requested that the Department of Commerce and Economic Opportunity (DCEO) perform an economic impact study of the Board's proposal and respond to the request by November 1, 2021. *See* 415 ILCS 5/27(b) (2020). In a letter dated October 22, 2021, (DCEO letter) DCEO declined the Board's request, saying "[t]he proposed rule changes are administrative in nature, with no meaningful economic impact." DCEO letter at 1.

On November 16, 2021, IEPA filed responses to the Board's questions and requests for comments (PC 1).

The first hearing was held in Chicago on October 12, 2021, and the Board received the transcript (Tr. 1) on October 18, 2021. The second hearing took place in Springfield on January 6, 2022, and the Board received the transcript (Tr. 2) on January 14, 2022.

On December 28, 2021, IEPA filed an updated response to the Board's question number 7. (IEPA Resp.) On January 28, 2022, IEPA filed post-hearing comments (PC 2).

SUMMARY OF PROPOSED AMENDMENTS

The Board's public water supply rules contain the requirements necessary for owners and official custodians of public water supplies in the State to provide, "continuous operation and maintenance of public water supply facilities to assure that the water is safe in quality, clean, adequate in quantity, and of satisfactory mineral characteristics for ordinary domestic consumption." 35 Ill. Adm. Code 601.101(a). The Board proposes to amend the public water supply rules by removing redundant or unnecessary language, replacing outdated language, updating statutory references, and providing other non-substantive clarifications.

Throughout Subtitle F, the Board proposes non-substantive amendments, including matters of capitalization, punctuation, spelling, numerical order, and duplication. The Board proposes additional clarifying amendments such as changing passive to active voice, avoiding unnecessary nominalizations, using "must" instead of "shall" to be more clearly mandatory and use plain English, and updating outdated formal language. For example, the phrases "with respect to" and "for purposes of" are each changed to "for," and "pursuant to" is changed to "under." The Board also proposes amendments to make regulatory cross-references more precise, and correct apparent inadvertent errors.

After the Board proposed the amendments to the public water supply rules in June of 2021, IEPA separately proposed substantive amendments to Part 620. That rulemaking, captioned In the Matter of: Proposed Amendments to Groundwater Quality 35 Ill. Adm. Code 620, R22-18, is ongoing. As such, any suggested changes to Part 620 will be addressed in the R22-18 rulemaking and not in this rulemaking.

Part 601

Part 601 contains the general requirements, applicability of the Part, definitions, and a list of the materials incorporated by reference.

Section 601.101(b)(3)

In the Board's proposal Section 601.101(b)(3) was presented with the following changes:

- 3) Concentrations of constituents in finished water must not exceed the secondary MCLs listed in the following chart: ~~should not be exceeded in the finished water.~~

IEPA disagrees with the proposed strikeouts and added language. "The strikeouts changes the meaning significantly." PC 2 at 2.

The purpose of the strikeouts and additions proposed by the Board in Section 601.101(b)(3) were to alter the section from the passive voice to the active voice. Without further explanation from IEPA as to why the Agency believes the amendments change the meaning of the section significantly, the Board finds that its original proposal is sufficient.

On December 8, 2021, IEPA proposed changes to Part 620 and that rulemaking is ongoing. In R22-18, IEPA proposed changes to the maximum contaminant levels (MCLs) for Copper and Silver in Class I groundwater standards. To align Part 601 with the proposed changes to Part 620, IEPA asks that the MCLs for copper and silver be changed as follows: "The concentration of copper in water should not exceed 0.5 mg/L for safe consumption by livestock. The concentration of silver in water should not exceed 0.0019 mg/L for safe consumption by humans." PC 2 at 2.

The Board cannot at this time make the suggested changes to the MCLs for copper and silver. Such a change is certainly substantive and therefore outside the realm of this rulemaking which is limited to non-substantive, clarifying changes. In addition, Part 620 is a proposed rulemaking and making those proposed changes in this rulemaking would be premature.

Section 601.104(a)

IEPA requests that the "and" following the citation be changed to "or", saying, "the intent is not to require monitoring according to all of the cited rules in all instances." PC 2 at 2. The Board finds this change appropriate.

Section 601.102(b)(1)

The Board proposed the following changes to 601.102(b)(1):

- b) The rules Board regulations in this Subtitle adopted in this Chapter are organized as follows: provided in this Section.

- 1) Part 601 contains definitions, analytical testing requirements, and incorporations by reference applicable to Parts 601, 602, and 603 ~~and 607~~.

IEPA requests that (1) be changed to add “and 604” following “603”. The Board finds this change appropriate.

Section 601.102(b)(4)

The Board’s proposal deleted (b)(4) as it referenced a repealed section, 607. IEPA asks that (4) be reinstated as follows to reference Part 604 instead:

- 4) Part 604 contains design, operation, and maintenance criteria for community water supplies.

The Board finds this change appropriate.

Part 602

Part 602 establishes the minimum standards for permitting community water supplies. In its comment, IEPA said that it disagreed with striking “shall” and changing it to “must”. PC 2 at 3. As discussed above, in rulemakings, the Board regularly changes “shall” to “must” to be more clearly mandatory and to use plain English. Therefore, the Board declines to make IEPA’s proposed change.

Part 603

Part 603 contains requirements for ownership responsibilities to assure the continued maintenance and operation of community water supplies. In its post hearing comments, IEPA said that it had no comment with respect to this Part. PC 2 at 3.

Part 604

Part 604 includes the design, operation, and maintenance criteria for owners, operators and official custodians of community water supplies. In preparing this first-notice order and opinion, the Board found several small changes were necessary for Part 604. Those changes were not part of the proposed rule and proposal for public comment issued on June 17, 2021, but are proposed here for comment. Most proposed changes in Part 604 are grammatical. Section 604.1520, an expired emergency rule related to extending the deadline for cross connection control device inspector renewal applications due to COVID-19, is stricken.

Part 611

Part 611 contains regulations that are identical in substance to federal regulations that establish primary drinking water regulations under the Safe Drinking Water Act. In its initial proposal to the Board, IEPA requested that Section 611.591 be repealed. However, in its post hearing comment, IEPA said that after further review, the Agency asks that the Section not be

repealed. “Illinois must retain the State MCLs for manganese, iron and zinc for PWS [public water supplies] serving populations [greater than] 1000 persons or [greater than] 300 service connections.” PC 2 at 4. The Board finds this change appropriate and will retain section 611.591 rather than proposing to repeal the section.

Additionally, IEPA reports that it expects to have a proposal for updates to Part 611 to the Board within the next year and asks that any other revisions or updates to the Part be addressed in that rulemaking. PC 2 at 4. Finally, IEPA again asks that the Board not make the change from “shall” to “must” or from “pursuant” to “under”. As described above, the Board finds that using “must” and “under” rather than “shall” and “pursuant” is more clearly mandatory and plain English. As such, the Board declines to make this change.

Part 615

Part 615 contains the requirements and standards for the protection of groundwater for certain facilities located within a setback zone or a recharge area.

Section 615.102

IEPA asks that the Board make a change to the definition for “Method Detection Limit” or “MDL” to update the federal reference as follows:

"Method Detection Limit" or "MDL", ~~which~~ means the minimum concentration of a substance that can be measured as reported with 99 percent confidence that the true value is greater than zero ~~pursuant to~~ under 40 CFR 136, appendix B, 56 Fed. Reg. 3526-3597; incorporated by reference at Section 615.103; or

The Board finds the updated federal reference appropriate and has incorporated this change to the definition.

Additionally, IEPA requested that the definitions for “Detection”, “Method Detection Limit”, and “Practical Quantitation Limit” be changed, however, the definitions proposed by the Agency for those three terms exactly match what currently exists in Part 615. For all terms, IEPA asks that the definitions, “be made consistent with the Part 620 proposal.” PC 2 at 4.

The Board declines to make any changes to the definitions of “Detection”, “Method Detection Limit”, and “Practical Quantitation Limit” at this time as the terms proposed by IEPA exactly match the terms as they exist in Part 615.

Section 615.103

For Section 615.103, the Board asks that IEPA clarify its comment in PC 2. Part 615.103 lists the material incorporated by reference in the Part. The Board has proposed updated references as follows:

- a) The Board incorporates the following material by reference:

CFR (Code of Federal Regulations). Available from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402 (202) 783-3238.GPO. Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20401, (202)783-3238:

Method Detection Limit Definition, appendix B to Part 136, 40 CFR 136 (2017).

49 CFR 173 (2017).

National Primary Drinking Water Regulations, Final Rule, 56 Fed. Reg. 3526-3597 (January 30, 1991). Shippers General Requirements for Shipments and Packagings, 49 CFR 173 (1990).

NTIS. National Technical Information Service, 5285 Port Royal Road, Springfield VA 22161, (703) 605-6000(703)487-4600.

"Test Methods for Evaluating Solid Wastes, Physical/Chemical Methods", EPA Publication No. SW-846, as amended by Updates I, II, IIA, IIB, III, IIIA, and IIIB I, (Doc. No. 55-001-00000-1) (available on line).PB 89148076).

In PC 2, the Agency has not indicated whether any of the proposed changes should be modified. Should the Agency have a specific comment about the incorporations by reference, the Board requests that IEPA make such comment following first-notice and the Board will consider it at second-notice.

Section 615.402

Section 615.402 describes closure actions that must occur three years after the effective date of this Part. In the proposal for public comment, the Board asked, “[s]hould the second sentence of this section be deleted as that time frame has passed?” Board Prop. at 2. In response, IEPA agreed that the second sentence should be deleted. “Part 615 is a self-implementing regulation. As such, the presence of a regulated unit could be discovered at any time as part of some other permit-required activity or unrelated inspection.” PC 1 at 2. As the effective date of the regulation is known, IEPA suggested the following change to this section:

No A person shall must not cause or allow the operation within a minimum setback zone of any landfill unit commencing two years after the effective date of this Part after January 10, 1994. Closure shall be completed three years after the effective date of this Part of a landfill unit shall be completed within three years.

The Board finds the change appropriate with the modification of striking “shall” and adding “must” in the second sentence.

Section 615.463

IEPA notes a misspelling in this section. PC 2 at 5. The Board finds the change acceptable and will make the following change:

This section applies six months after the date of first applicability to For a waste pile not subject to Section 615.462

Section 615.702(b)

Section 615.702(b) describes closure actions that must occur three years after the effective date of this Part. In the proposal for public comment, the Board asked whether, “subsection (b) be deleted as that time frame has passed?” Board Prop. at 2. In response, IEPA suggests that parts (a) and (b) be combined as the effective date of the regulation is now known. PC 1 at 2. IEPA suggests the following changes to this section:

Section 615.702 Required Closure of Units Located Within Minimum Setback Zones

- a) A No person must not shall cause or allow the operation within a minimum setback zone of any road oil storage and handling unit after January 10, 1994.
Closure of a road oil storage handling unit must be completed within three years.
- ~~b) Subsection (a) is effective two years after the effective date of this Part. Closure must be completed within three years after the effective date of this Part.~~

The Board finds the change appropriate.

Part 616

Part 616 contains the requirements and standards for new facilities located within a setback zone or regulated recharge area.

Section 616.205(e)

In the Board’s proposal for public comment, Section 616.205(e) was changed as follows:

- e) If the owner or operator determines that the groundwater monitoring program no longer satisfies the requirements of this Section, the owner or operator mustshall, within 90 days, make appropriate changes to the program. Conditions under which a groundwater monitoring program no longer satisfies the requirements of this Section include, ~~but are not limited to:~~
 - 1) A Maximum Allowable Result (MAR) is exceeded in any monitoring well that is being used as a background monitoring well or that the owner or operator has previously determined to be hydraulically upgradient from the facility; or

- 2) A redetermination of groundwater flow rate and direction conducted ~~underpursuant~~ to subsection (d) shows that the existing monitoring system is not capable of assessing groundwater quality at the compliance points or points.

IEPA is opposed to the deletion of “but not limited to” in 616.205(e). The Agency argues that deleting “but not limited to” changes the meaning of the section so that as now drafted, 616.205(e)(1) and (2) are the only conditions under which a groundwater monitoring program can be modified. PC 2 at 6. Doing so would be a substantive change, IEPA argues. The Agency says, “it would be acceptable to say ‘... no longer satisfies the requirements of this Section, Section 616.207 or Section 616.208.’” PC 2 at 6.

The Board disagrees with IEPA that deleting the phrase “but are not limited to” after the word “include” in Section 616.205(e) would mean that subsections (e)(1) and (e)(2) describe “the only conditions under which a groundwater monitoring program can be modified.” PC 2 at 6. At first notice, the Board deletes “but are not limited to” for three reasons. First, the word “include” or “including” alone (*i.e.*, absent “but not limited to” or “without limitation”) is commonly understood to indicate that the ensuing list is illustrative, not exhaustive. *E.g.*, People v. Perry, 224 Ill. 2d 312, 330-31 (2007). Second, a phrase like “but not limited to” is legalese, not plain English. A primary objective of this rulemaking is to simplify rule text to make it more readily understandable. Third, for years now, the Board has been removing “but not limited to” from its existing rules and omitting the phrase from its new rules. Retaining “but are not limited to” here, without articulating a compelling reason for doing so, risks introducing ambiguity into those other Board rules. *Cf.* Proposed New 35 Ill. Adm. Code 204, Prevention of Significant Deterioration, Amendments to 35 Ill. Adm. Code Parts 101, 105, 203, 211, and 215, R19-1, slip op. at 5 (June 18, 2020) (the Board had stricken “but not limited to” at first notice but reinstated it at second notice because the State’s Prevention of Significant Deterioration permit program must “mirror” the federal program to avoid jeopardizing United States Environmental Protection Agency approval).

As to the Agency’s suggested change of adding 616.207 and 616.208 to 616.205(e), the Board requests that IEPA provide further explanation of this proposed change and a strikethrough/underlined proposal for 616.205(e). If it is the Agency’s intent to apply the conditions in subsections 616.205(e)(1) and (2) to Sections 616.207 and 616.208, the Board would consider that to be a substantive change and therefore not appropriate for this rulemaking.

Section 616.205(e)(2)

IEPA notes Section 616.205(e)(2) contains a typographical error. The Board agrees and will propose the following change:

- 2) A redetermination of groundwater flow rate and direction conducted ~~underpursuant~~ to subsection (d) shows that the existing monitoring system is not capable of assessing groundwater quality at the compliance points or points.

Section 616.207

For Section 616.207, IEPA requests that the Board make two general changes to match proposed changes for Part 620. PC at 6. First, IEPA suggests all references to the PQL (practical quantitation limit) should instead refer to the LLOQ (lower limit of quantification) or LCMRL (lowest concentration minimum reporting level), saying, “the incorporations by reference should also be updated to match the Agency’s Amendments to Part 620.” *Id.* Second, IEPA suggests that the section should be modified, “to eliminate the prescriptive method of calculating background... It would be more appropriate to refer to the 2009 Unified Guidance as does the Part 620 proposal.” *Id.*

The Board is willing to consider these changes in a general rulemaking, but as this is rulemaking is dedicated to non-substantive changes, the Board declines to make them at this time.

Section 616.445(b)

IEPA notes that “it” should have also been stricken in the proposal as follows:

- b. During operation, ~~While a surface impoundment is in operation,~~ it must be inspected weekly and after storms to detect evidence of any of the following:

The Board agrees and will make this change.

Part 617

Part 617 establishes the requirements and standards for regulated recharge areas. In its comment, IEPA suggested two changes. The first references Section 617.220(b) and (c), though the comment appears to be in reference to 617.215. Secondly, the Agency suggested a change to Section 617.225(c), however the comment appears to be in reference to 617.225(b). The Board asks that IEPA clarify its comments on Part 617 following first-notice and the Board will consider any suggested changes at second-notice.

In questions to IEPA, the Board asked, “Section 617.215, Recharge Area Registration Meeting, identifies an informational meeting that must be held within 30 days after September 1, 2001. Should this section be deleted as being obsolete?” Board Prop. at 3. In response, IEPA said that Section 617.215 should not be deleted as it, “represents a record of the regulated recharge development process.” PC 1 at 2. The Board agrees and does not strike this section at first-notice.

Part 618

Part 618 applies to all properties located wholly or partially within a maximum setback zone, generally, and also describes specific maximum setback zones for two community water supply wells. In questions to IEPA, the Board asked, “Section 618.100 describes the purpose of the Part. Section 618.200, within the same part, also describes the purpose. Should 618.200 be

deleted as repetitive?” Board Prop. at 3. In its response, IEPA said that both 618.100 and 618.200 should remain. “618.200 should remain because it describes the purpose for specific, established maximum setback zones for individual community water supply wells under Subpart B. 618.100 describes a more general purpose for Part 618.” PC 1 at 2. The Board agrees and will make no additional changes to those sections.

Part 620

As described earlier, IEPA filed a general rulemaking proposal for Part 620 on December 8, 2021. In its comment, the Agency asks that, “any changes to Part 620 should be addressed in the current rulemaking filed in December 2021 and no revisions to Part 620 should be addressed in this current rulemaking.” PC 2 at 7. The Board agrees and will not propose any changes to Part 620 in this rulemaking.

TECHNICAL FEASIBILITY AND ECONOMIC REASONABLENESS

As noted above under “Procedural History,” on September 17, 2021, the Board requested that DCEO perform an economic impact study of the Board’s proposal. *See* 415 ILCS 5/27(b) (2020). In a letter dated October 22, 2021, DCEO respectfully declined the Board’s request to perform a study. No participant at either hearing testified or commented on the Board’s request or DCEO’s response.

In this proceeding, the Board intends to propose only non-substantive amendments that clarify the language of existing rules. The Board has carefully considered the record, particularly IEPA’s responses on the Board’s questions in the proposal and IEPA’s post-hearing comments. Based on the record now before it, the Board concludes that its first-notice proposal does not make substantive revisions that affect complying with existing rules. Accordingly, the Board finds that the proposal is both technically feasible and economically reasonable. *See* 415 ILCS 5/27(a) (2020). The Board further finds that these proposed non-substantive amendments would not have any adverse economic impact on the people of the State of Illinois. *See* 415 ILCS 5/27(b) (2020).

FILING PUBLIC COMMENTS

Illinois Register publication of the Board’s first-notice proposal will start a period of at least 45 days during which any person may file a public comment with the Board, regardless of whether the person has already filed a public comment. 5 ILCS 100/5-40(b) (2020) (Illinois Administrative Procedure Act).

Public comments must be filed electronically through the Clerk’s Office On-Line (COOL) at pcb.illinois.gov. The Board requests that comments indicate the docket number R18-26 of this rulemaking. Questions about electronic filing should be directed to the Board’s Clerk at (312) 814-3461.

CONCLUSION

The Board concludes to propose non-substantive amendments to its public water supply rules for first-notice publication in the *Illinois Register*. The proposed amendments appear in the addendum to this opinion. Proposed deletions to the current rules are struck through. Proposed additions to the current rules are underlined. The Board invites public comments on all aspects of the proposal.

ORDER

The Board directs the Clerk to provide *Illinois Register* publication of the proposed first-notice amendments that appear in the addendum to this opinion. The Board invites public comments on all aspects of the proposal.

A handwritten signature in cursive script that reads "Don A. Brown". The signature is written in black ink and is positioned above a horizontal line.

Don A. Brown, Clerk
Illinois Pollution Control Board