BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	
PROPOSED AMENDMENTS TO	)	R 2022-018
GROUNDWATER QUALITY	)	
35 ILL. ADM. CODE 620	)	

NOTICE OF FILING

TO: Mr. Don A. Brown,
Clerk of the Board
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601
(VIA ELECTRONIC MAIL)

Vanessa Horton,
Hearing Officer
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601
(VIA ELECTRONIC 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: (1) **SUBSTITUTION OF COUNSEL AND ENTRY AND APPEARANCE**; and (2) **FIRST NOTICE COMMENT OF THE ILLINOIS ENVIRONMENTAL REGULATORY GROUP**, copies of which are hereby served upon you.

Dated: June 17, 2024

Respectfully submitted,

ILLINOIS ENVIRONMENTAL REGULATORY GROUP

By: /s/ Trejahn Hunter

Trejahn Hunter
Illinois Environmental Regulatory Group
215 E. Adams Street
Springfield, Illinois 62701
thunter@ierg.org
(217) 522-5512

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	
PROPOSED AMENDMENTS TO	)	R 2022-018
GROUNDWATER QUALITY	)	
35 ILL. ADM. CODE 620	)	

SUBSTITUTION OF COUNSEL AND ENTRY OF APPEARANCE

NOW COMES Trejahn Hunter, and hereby enters his appearance in this matter on behalf of the ILLINOIS ENVIRONMENTAL REGULATORY GROUP in substitution of Melissa S. Brown of HeplerBroom LLC, who hereby withdraws her appearance in this matter.

Dated: June 17, 2024

Respectfully submitted,

ILLINOIS ENVIRONMENTAL REGULATORY GROUP

By: /s/ Trejahn Hunter

Melissa S. Brown
HeplerBroom LLC
4340 Acer Grove Drive
Springfield, Illinois 62711
melissa.brown@heplerbroom.com
(217) 528-3674

Trejahn Hunter
Illinois Environmental Regulatory Group
215 E. Adams Street
Springfield, Illinois 62701
thunter@ierg.org
(217) 522-5512

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	
PROPOSED AMENDMENTS TO	)	R 2022-018
GROUNDWATER QUALITY	)	
35 ILL. ADM. CODE 620	)	

FIRST NOTICE COMMENT OF THE ILLINOIS ENVIRONMENTAL REGULATORY GROUP

I. INTRODUCTION

The Illinois Environmental Regulatory Group ("IERG"), by and through its attorney, Trejahn Hunter, and in response to the Opinion and Order of the Board, PCB R 22-18 (Mar. 7, 2024) ("Order") on First Notice, submits the following First Notice Comment for the Illinois Pollution Control Board's ("Board") consideration in this rulemaking.

IERG does not support the Illinois Environmental Protection Agency's ("IEPA" or "Agency") proposed Groundwater Quality Standards ("GWQS") for the six per- and polyfluoroalkyl substances ("PFAS") in its Order moving to Second Notice for two reasons.

First, in its most recent submittal, which was its post-hearing comment filed on February 24, 2023, IERG communicated its opposition to the Board's proposed PFAS GWQS for the six PFAS and explained the issues that the proposal neglects. Some of the issues addressed by IERG in the post-hearing comment included:

1. The proposed PFAS GWQS for Illinois are more stringent than those in comparison to other states, which are expected to create excessive liability with PFAS identified throughout Illinois from numerous sources.

2. There is a low likelihood regulated entities in Illinois will be equipped to produce reliable measurements of such low traces of PFAS to assess their compliance with the proposed PFAS GWQS.

3. The proposed PFAS GWQS have not been accompanied by an adequate evaluation of the technical feasibility or the costs associated with achieving compliance.

4. The proposed PFAS GWQS were not evaluated in light of their impact on Illinois' Tiered Approach to Corrective Action Objectives ("TACO") program.

5. Ongoing research into PFAS chemistry, toxicology, and regulatory approaches is creating a rapidly changing understanding of PFAS, giving reason to pause further rulemaking in Illinois.

See IERG's Post-Hearing Comment, PCB R 22-18 (Feb. 24, 2023). These issues still remain in the Board's Order on First Notice.

Second, the Board's introduction, for the first time in this rulemaking, proposed additions to the Part 620 requirements on groundwater management zones ("GMZs") are both legally baseless and excessive in practice, as outlined below. For each of these reasons, IERG objects to the Board's rulemaking moving forward.

II. PFAS GWQS

A. The GWQS Should Aim to Reflect Federal PFAS Regulatory Developments

Because the United States Environmental Protection Agency's ("U.S. EPA") recently adopted[1] final National Primary Drinking Water Regulation ("NPDWR") for six PFAS constituents, the Board should postpone further groundwater rule development and instead focus on state drinking water standards. IERG agrees with the Board that IEPA's approach to addressing PFAS contamination in the Illinois public water supply by attempting to instead regulate PFAS in groundwater is a less-than-ideal order of PFAS rulemaking and likely counterproductive to the protection of health and environment.[2]

Further, in the Board's Order, the Board stated that "once USEPA finalizes [the NPDWR] proposal, the Board will propose amendments to the Safe Drinking Water Regulations

[1] *PFAS National Primary Drinking Water Regulation*, 89 Fed. Reg. 32532 (Apr. 26, 2024).

[2] IERG acknowledges that there may be other compelling reasons to do so, such as U.S. EPA's final designation of two widely used PFAS – PFOA and PFOS – as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). *Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances*, 89 Fed. Reg. 39124 (May 8, 2024).

standards under Part 611 consistent with the federal rules." (Order at 2.) By the Board's own logic, because the NPDWR being finalized, the Agency should pause its proposed PFAS GWQS and instead aim its attention toward developing statewide PFAS drinking water standards, which may then serve as a basis for GWQS. 415 ILCS 55/2(b) (2022). And then, once the GWQS are finalized, the Agency can use "[the] GWQS ... as a benchmark for developing corrective action objectives for remediating contaminated groundwaters under the state's remediation programs such as TACO." (Order at 16.)

IERG remains concerned that the stringency of the Board's proposed PFAS GWQS, along with the prevalence of PFAS throughout the State, creates an impossible burden on the ability of the regulated community to comply. In response to IERG's concern raised in its February 24, 2023, Post-Hearing Comment, the Board's Order glosses over it by superficially concluding that "it is technically feasible for laboratories to measure PFAS using USEPA methods." (Order at 67.) IERG disagrees with the Board's conclusion that third party laboratories are able to perform PFAS testing because it presumes that (1) laboratories will have the capacity to process a sudden and unprecedented influx of Illinois groundwater PFAS tests, and (2) regulated entities will have reasonably attainable access to treatment options.

Furthermore, the Agency and the Attorney General's Office have encouraged the Board to continue assessing proposed PFAS GWQS decoupled from any economic considerations; however, IERG believes that the novelty and complexity of PFAS makes it appropriate to consider the substantive standards and their economic feasibility. (*See id.*) Despite recognizing the economic burden that the proposed PFAS GWQS may impose upon regulated entities through increased remediation costs, the Board has not considered the economic impact that insufficient testing capacity and treatment options may have on the regulated community.

Furthermore, IERG acknowledges the Board's efforts to align the proposed PFAS GWQS to match U.S. EPA's NPDWR for PFOA and PFOS. IERG supports the standard for PFOA being revised from 2 ppt to 4 ppt, while IERG does not support the standard for PFOS being revised from 7 ppt to 4 ppt. The Board's proposed PFAS GWQS likely will overburden the regulated community in efforts to detect PFAS in Illinois' groundwater and to treat it for compliance, causing confusion, concerns from the public about threats to their health, and disputes concerning PFAS detections and potential liability. IERG believes that adopting PFAS GWQS that are likely to be attainable will provide certainty to the regulated community.

The chart below shows the difference between the U.S. EPA's Maximum Contaminant Level ("MCL") and the proposed PFAS GWQS, including the Board's proposed revisions.

Compound	Final MCLG	Final MCL (enforceable levels)	R22-18 Proposed Limits
PFOA	0 parts per trillion (ppt)	4 ppt	2 ppt (Board proposes 4 ppt)
PFOS	0 ppt	4 ppt	7.7 ppt (Board proposes 4 ppt)
PFHxS	10 ppt	10 ppt	7.7 ppt
PFNA	10 ppt	10 ppt	12 ppt
HFPO-DA[3]	10 ppt	10 ppt	12 ppt
PFBS	N/A	N/A	1,200 ppt
Mixtures[4]	1 (unitless) Hazard Index	1 (unitless) Hazard Index	N/A

[3] Commonly known as "GenX" chemicals.

[4] Containing two or more of PFHxS, PFNA, HFPO-DA, and/or PFBS.

B. The GWQS Has Substantial Effects on Linked Regulatory Activities

Finally, IERG remains concerned that IEPA has not sufficiently considered the broader impacts of the proposed PFAS GWQS, and that this lack of consideration is evident in the absence of clarity and guidance on how the proposed standards will impact linked regulatory activities. For example, IERG would like the Agency to provide the regulated community with clarity and guidance on how the proposed PFAS GWQS will impact the Groundwater Management Zone ("GMZ") Program at RCRA facilities. Although the Board proposes to flesh out aspects of the GMZ process on which the current rules are silent, and clarify existing provisions that are vague or confusing, it remains unclear as to whether a GMZ that has completed corrective action may be reopened if PFAS is detected. (*See* Order at 2, 45.)

IERG is also concerned about how the proposed PFAS GWQS will impact the Leaking Underground Storage Tank ("LUST") Program and the Site Remediation Program ("SRP"). Additionally, IERG wants to understand how the Agency plans to implement the proposed PFAS GWQS into National Pollutant Discharge Elimination System ("NPDES") permits and handle certain complex situations, such as where permit applicants are passive receivers of PFAS detected in their groundwater.

III. GROUNDWATER MANAGEMENT ZONES

A. 35 Ill. Adm. Code 620.250(b)(1)

The Board, in its Order and Addendum thereto ("Addendum"), for the **first time** in this rulemaking, introduced the new subsection 620.250(b)(1): "If the GMZ would extend off-site, the GMZ application must include **each affected property owner's written permission** to the establishment of the GMZ on its property." (Addendum at 19-20 (emphasis added).)

The Board explained that:

> Consistent with IEPA responses to Board questions during this rulemaking, **the Board proposes to overhaul its 32-year-old groundwater management zone (GMZ) rules**. The proposed changes will not alter the purpose of GMZs or how they work. Instead, **the first-notice proposal fleshes out aspects of the GMZ process on which the current rules are silent and clarifies existing provisions that are vague or confusing**. As proposed, the amended GMZ rules will make plain what a GMZ is, how to apply for a GMZ, what IEPA must consider in approving or rejecting a GMZ, what constitutes an IEPA approval, how and when a GMZ starts, what a GMZ does, and how and when a GMZ ends. (Order at 2 (emphasis added).)

Continuing:

> **The Board also proposes a new subsection (b)(1)** to clarify that if a GMZ would extend off-site, **the GMZ application must include each affected property owner's written permission to the establishment of the GMZ on its property**. This common-sense addition reflects IEPA practice. *See* IEPA 5/6/22 Resp. at 4, link to IEPA's "Establishment of Groundwater Management Zones at RCRA [Resource Conservation and Recovery Act] Facilities" (Oct. 12, 2001) at 2. Part 620 already defines "off-site" and "on-site." See 35 Ill. Adm. Code 620.110. (*Id.* at 49 (emphasis added).)

There are three concerns with the current proposal. **First**, the requirement for written permission from off-site property owners to establish a GMZ is not contained in the Illinois Environmental Protect Act (the "Act"). *See Lily Lake Road Defenders v. County of McHenry*, 156 Ill. 2d 1, 10 (1993) ("In enacting the [Act], the legislature created the . . . Board and granted it authority to determine, define and implement the environmental control standards and to promulgate rules and regulations in accordance with the statute."). Any requirement for written permission from off-site property owners to establish a GMZ must be grounded in the Act because "an administrative agency is a creature of statute, any power or authority claimed by it must find its source within the provisions of the statute by which it is created." *Estate of Slightom v. IPCB*, 2015 IL App (4th) 140593, ¶ 24 (citing *Granite City Division of National Steel Co. v. IPCB*, 155 Ill. 2d 149, 171 (1993)).

Here, the Board's proposal to introduce a new requirement under Part 620—*i.e.*, for written permission from off-site property owners to establish a GMZ—had previously been introduced in 1997 for Part 740.[1] *See Site Remediation Program and Groundwater Quality (35 Ill. Adm. Code 740 and 35 Ill. Adm. Code 620)*, R97-11 (June 5, 1997) ("1997 Op.") at 16; *see also* 35 Ill. Adm. Code 740.530(b) ("Where the groundwater management zone extends across property boundaries, the written permission of the owners of the affected properties shall be obtained before the groundwater management zone becomes effective unless the affected properties already are included within the remediation site."). Despite the Board in this earlier rulemaking "adopt[ing] amendments to . . . 35 Ill. Adm. Part 620 to conform those rules" to **Part 740** (the Site Remediation Program ("SRP")), the Board did not introduce a similar requirement under **Part 620** for written permission from off-site property owners to establish a GMZ. (1997 Op. at 1.)

It is thus not clear that the Board has ever set forth **any** legal authority to support such a requirement. When it previously established this requirement under Part 740, the Board apparently found that "requiring the consent of affected property owners is consistent with the Act," without citing **any** provision of the Act. (*See* 1997 Op. at 16.) Now, when proposing to establish this requirement under Part 620, the Board justifies its approach by stating that its new requirement is a "common-sense addition [that] reflects IEPA practice. (Order at 49.) The basis for this "practice" is an Illinois EPA webpage from 2001: *Establishing a Groundwater Management Zone at RCRA Facilities* (Oct. 12, 2001), *available at* https://epa.illinois.gov/topics/cleanup-programs/rcra/remediation-projects/establishing-a-gmz.html (last visited June 2, 2024). The "additional consideration" that "[t]he off-site landowner must concur in writing to the establishment of the GMZ" does not cite **any** provision

of the Act. "Common sense" and "IEPA practice" are no substitutes for "the provisions of the statute by which [the Board] is created." *See Slightom*, 2015 IL App (4th) 140593, ¶ 24.

Second, the requirement under Part 620 (*i.e.*, the current rulemaking) for written permission from off-site property owners to establish a GMZ is silent and thus ambiguous as to pre-existing GMZs. The Board should clarify that 35 Ill. Adm. Code 620.250(b)(1) applies only to new GMZs on a going-forward basis, and has no application to pre-existing GMZs, including any proposed modifications to such GMZs.

Third, the requirement for written permission from off-site property owners to establish a GMZ is unduly burdensome where there is no realistic possibility of exposure to the off-site property owner. The Board should consider adopting the off-site notification requirements under the SRP (Part 740). The SRP allows the use of "institutional controls" to achieve compliance with the remedial objectives of the SRP. *See, e.g.*, 35 Ill. Adm. Code §§ 740.440(b)-(c), 740.450(f), 740.455(a)(3)(B), 740.515(b)(1)(B), 740.520(b)(3), 740.525(c). A remedial applicant can use an "ordinance adopted by a unit of local government that effectively prohibits the installation of potable water supply wells (and the use of such wells)"—often called a "groundwater ordinance"—to achieve compliance with the SRP. *See id.* § 742.1015(a). If "all properties under which groundwater is located that exceeds the applicable groundwater remediation objectives" includes third-party owners, the remedial applicant must provide written **notification** to such "off-site" owners that the applicant will use a groundwater ordinance to achieve compliance with the SRP. *See id.* § 742.1015(c). The remedial applicant must then submit proof of such notification to the Illinois EPA. *Id.*

The Board should apply this same construct to the proposed Part 620 requirement here. That is, if establishing a GMZ would extend to off-site property owners, but such off-site owners

could not otherwise use the groundwater because a groundwater ordinance applies, obtaining their consent to establish a GMZ is an exercise in futility. A better approach would match the SRP: if the off-site property owners are subject to a groundwater ordinance, written notification to—and not written permission from—such off-site property owners before establishing a GMZ is the more appropriate requirement.

B. 35 Ill. Adm. Code 620.250(c)(2)

The Board proposes to modify another section of the GMZ regulations as follows: "A GMZ is established when the Agency issues a written determination approving the GMZ, including its corrective action. Once a GMZ is established, the Agency may, as new information warrants, issue written determinations amending any part of the GMZ, including its size, the contaminants that are subject to it, and its corrective action." (Addendum at 20.)

The Board explained that:

> The Board also proposes adding a sentence to this new subsection (c) **that articulates what has been implicit under Part 620** but was made explicit in 1997 for GMZs established under the Site Remediation Program (SRP) (see 35 Ill. Adm. Code 740.530), namely, that as new information warrants, IEPA may modify the size of a GMZ, the contaminants that are the subject of a GMZ, and the GMZ's corrective action. *See* Ex. 10 at 27-28. (Order at 50 (emphasis added).)

There are two concerns with the current proposal. **First**, "articulating what has been implicit under Part 620" is no substitute for "the provisions of the statute by which [the Board] is created." *See Slightom*, 2015 IL App (4th) 140593, ¶ 24. Accordingly, the Board must identify some authority under the Act to expand the Illinois EPA's ability to modify the size of the GMZ as new information comes to light.

Second, the determination to change a GMZ should be a joint decision between the remedial applicant or owner and the Illinois EPA; or, in the alternative, the remedial applicant should have the opportunity to petition Illinois EPA to decline to exercise its authority to do so,

or otherwise adjust its decision making to incorporate comments from the remedial applicant. In any event, there should be a documented process developed that includes the assessment of risk and possible actions and outcomes. The unilateral and plenary ability of the Illinois EPA to act here, as written, fails to take into account the unique circumstances of each GMZ including:

- If Illinois EPA determines that a GMZ should be made smaller, it could be technically infeasible or impractical to remediate constituents which still exceed relevant groundwater standards outside the GMZ.

- If Illinois EPA determines that a GMZ should be made larger, subsection 620.250(b)(1) obligates the remedial applicant to obtain permission from the "new" off-site property owners above where the new GMZ boundaries extend.

- If Illinois EPA adds contaminants to the GMZ, the existing corrective action may be inappropriate to address those contaminants. By failing to incorporate comments from the remedial applicant into the Illinois EPA's decision, the uninformed decision to modify the GMZ could increase costs and delay cleanup and ultimately beneficial reuse.

* * * * *

IERG asks that the Board not move the proposed PFAS GWQS to Second Notice so that the Board can instead focus its efforts on adopting PFAS drinking water standards, IEPA may revisit its regulatory approach to dealing with PFAS in Illinois public water supplies, and IEPA may provide further guidance and clarity on the broader impacts of the proposed standards. Additionally, IERG asks that the Board not move forward with their proposed amendments to the GMZ Program to address the concerns presented.

IERG would like to thank the Board for the opportunity to submit this comment.

Dated: June 17, 2024

Respectfully submitted,

ILLINOIS ENVIRONMENTAL REGULATORY GROUP

By: /s/ Trejahn Hunter

Trejahn Hunter
Illinois Environmental Regulatory Group
215 E. Adams Street
Springfield, Illinois 62701
thunter@ierg.org
(217) 522-5512

CERTIFICATE OF SERVICE

I, Trejahn Hunter, the undersigned, hereby certify that I have served the attached **SUBSTITUTION OF COUNSEL AND ENTRY AND APPEARANCE AND FIRST NOTICE COMMENT OF THE ILLINOIS ENVIRONMENTAL REGULATORY GROUP**, to the following:

Mr. Don A. Brown
Clerk of the Board
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601
Don.brown@illinois.gov

Vanessa Horton
Hearing Officer
Illinois Pollution Control Board
100 West Randolph Road
Suite 11-500
Chicago, Illinois 60601
Vanessa.Horton@illinois.gov

Sara Terranova
Nicholas E. Kondelis
Assistant Counsel
Division of Legal Counsel
Illinois Environmental Protection Agency
1021 North Grand Avenue East
Post Office Box 19276
Springfield, Illinois 62794-9276
sara.terranova@illinois.gov
Nicholas.E.Kondelis@illinois.gov

Renee Snow
General Counsel
Illinois Department of Natural Resources
One Natural Resource Way
Springfield, Illinois 62702
renee.snow@illinois.gov

Ellen F. O'Laughlin
Jason James
Assistant Attorney General
69 West Washington Street
Suite 1800
Chicago, Illinois 60602
Ellen.Olaughlin@ilag.gov
Jason.James@ilag.gov

Jorge T. Mihalopoulos
Head Assistant Attorney
Susan Morakalis
General Counsel
J. Mark Powell
Senior Attorney
Metropolitan Water Reclamation District
of Greater Chicago
100 E Erie Street
Chicago, Illinois 60611
Jorge.mihalopoulos@mwrd.org
morakaliss@mwrd.org
PowellJ@mwrd.org

Fredric P. Andes
PFAS Regulatory Coalition
Barnes & Thornburg
1 North Wacker Drive, Suite 4400
Chicago, IL 60606
fandes@btlaw.com

James M. Morphew
Sorling, Northrup, Hanna, Cullen &
Cochran, Ltd

Sandra Carey - HSE Executive
International Molybdenum Association
454-458 Chiswick High Road,

1 North Old State Capitol Plaza, Suite 200
PO Box 5131
Springfield, IL 62705
jmmorphew@sorlinglaw.com

London, W4 5TT, United Kingdom
sandracarey@imoa.info

Joshua R. More
Bina Joshi
Daniel J. Deeb
Sarah L. Lode
Alex Garel-Frantzen
ArentFox Schiff LLP
233 South Wacker Drive Suite 6600
Chicago, IL 60606
Joshua.More@afslaw.com
Bina.Joshi@afslaw.com
Dan.Deeb@afslaw.com
Sarah.Lode@afslaw.com
Alex.Garel-Frantzen@afslaw.com

Aleacia Chinkhota
Rob Simon
American Chemistry Council
700 2nd Street, NE
Washington, DC 20002
aleacia_chinkhota@americanchemistry.com
Rob_Simon@americanchemistry.com

Nessa Coppinger
Daniel Schulson
Beveridge & Diamond, PC
1900 N. St. NW
Washington, DC 20036
ncoppinger@bdlaw.com
dschulson@bdlaw.com

That my email address is thunter@ierg.org.

That the number of pages in the email transmission is ___15___.

That the email transmission took place before 5:00 p.m. on the date of June 17, 2024.

Date: June 17, 2024

/s/ Trejahn Hunter
Trejahn Hunter