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CLERK'S OFFICE
MAR 27 2003

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
)
PROPOSED AMENDMENTS TO:) R03-19
PART 309 SUBPART A -)
35 Ill. Adm. Code 309.105, 309.7, 309.8,)
309.117, 309.119, 309.143, 309.147; and)
PROPOSED 35 Ill. Adm. Code 120 through)
122 – NPDES PERMITS AND PERMITTING)
PROCEDURES)

STATE OF ILLINOIS
Pollution Control Board

NOTICE OF FILING

TO: Dorothy Gunn, Clerk
Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, IL 60601

Marie E. Tipsord
Illinois Environmental Protection Agency
James R. Thompson Center
100 West Randolph Street, Suite 11-500
Chicago, IL 60601

Mathew Dunn
Illinois Attorney General's Office
Environmental Control Division
James R. Thompson Center
100 West Randolph Street
Chicago, IL 60601

Legal Service
Illinois Department of Natural Resources
524 South Second Street
Springfield, IL 62701

Toby Frevert
Illinois Environmental Protection Agency
1021 North Grand Avenue East
Springfield, IL 62702

See Attached Service List

PLEASE TAKE NOTICE today that I have filed with the Clerk of the Illinois Pollution Control Board **Motion to File Written Testimony Instantly and Pre-Filed Testimony of Roy M. Harsch**, a copy of which is herewith served upon you.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Sheila H. Deely", is written over a solid horizontal line.

Dated: March 27, 2003
Roy M. Harsch
Sheila H. Deely (ARDC No. 6236949)
Gardner Carton & Douglas, LLC
191 N. Wacker Drive - Suite 3700
Chicago, IL 60606-1698
Telephone: (312) 569-1000

THIS FILING IS SUBMITTED ON RECYCLED PAPER

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STATE OF ILLINOIS
Pollution Control Board

MOTION TO FILE WRITTEN TESTIMONY INSTANTER

The Illinois Association of Wastewater Agencies (IAWA), by its attorneys Gardner Carton & Douglas, moves to file its written testimony instanter. In support thereof, IAWA states as follows:

1. IAWA, represented by Roy Harsch of Gardner, Carton & Douglas, has members that receive NPDES permits from the Illinois EPA, and the IAWA therefore has a strong interest in the subject matter of this rulemaking.

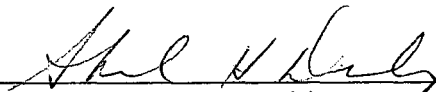
2. Counsel for IAWA was unable to file written testimony by March 26, 2003, as required by the Board's order, because of circumstances beyond its control. Counsel for IAWA nonetheless worked diligently to ensure the delay in filing written testimony was minimal, and conferred with the hearing officer about the delay on the date testimony was due.

3. IAWA believes its participation in this rulemaking is important, moves the Board to accept this written testimony.

WHEREFORE, IAWA moves the Board to accept the written testimony of Roy M.

Harsch instanter.

Respectfully submitted,



One of Attorneys for Petitioner

Roy M. Harsch
Sheila H. Deely
Gardner Carton & Douglas LLC
191 N. Wacker Drive – Suite 3700
Chicago, IL 60606-1698
Telephone: (312) 569-1000

CH02/22236918.1

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PRE-FILED TESTIMONY OF ROY M. HARSCH

My name is ROY M. HARSCH, I am a Principal in the law firm of Gardner, Carton & Douglas LLC, who has been retained on behalf of the Illinois Association of Wastewater Agencies (IAWA) to represent it in this matter. As the Illinois Pollution Control Board (Board) is aware, IAWA has a long and active history of involvement before the Board in matters of water pollution regulation. IAWA represents fifty-five sanitary districts and municipalities located across the length of Illinois. IAWA members are required to possess NPDES permits regulating their discharges of wastewater from their treatment plants and must obtain authorizations to construct and revisions to NPDES permits as they have to expand their treatment systems to treat the wastewater that is generated from new growth that occurs in their service areas. As an association of public agencies, IAWA has no fundamental objection to the public's right to provide public comment on NPDES permits and to request appropriate public hearings to present public comments upon proposed NPDES permits.

Before proceeding with my testimony, I think it is important to provide some personal background. I was the Administrative Assistant to Chairman Jake Dumelle from 1973 through 1975 when the Board had before it R73-11 and R73-12 which were the NPDES Permit Proposals. I was the designated Hearing Officer in these consolidated regulatory proceedings and I had the principle responsibility for drafting the final regulations, the Board's Order that was adopted on August 29 and September 5, 1974 and the Board's Opinion dated December 5, 1974. After leaving the Board in the summer of 1975, I moved to the United States Environmental Protection Agency (U.S. EPA) where one of my assignments was to assist in the negotiation of the delegation of the NPDES Permit Program from U.S. EPA to the State of Illinois. I had a substantial role in the drafting of the final delegation agreement between U.S. EPA and the State of Illinois. I co-authored a Law Review article with Gail C. Ginsberg, the former general counsel for Region 5, which describes the legal requirements for development of an NPDES permit program and its delegation to a state as well as the steps that Illinois took to implement its NPDES permit program, and the problems that it encountered in carrying out this program. This Law Review article is found at 27 DePaul Law Review, 3 pages, 739 through 760 (Spring 1978). Given my involvement in the development of the Illinois NPDES regulations, the

delegation of the program to the State of Illinois and the 25 years of private practice where I have represented numerous clients before the Illinois Environmental Protection Agency (IEPA) in NPDES permitting matters and the Board in NPDES permit appeals, I believe that I have ample qualifications to provide insight to testify in this proceeding.

As previously stated, IAWA does not object to the public's right to comment on proposed NPDES permits. What IAWA objects to, is that the proponents in this proceeding have failed to meet their burden to establish the reasons why the Board should enact this proposal. It has been IAWA members' experience, and that of my personal professional experience, that the proponents of this regulation have availed themselves at every opportunity to comment on proposed NPDES permits. Many of these comments include requests for public hearings which are routinely granted by the IEPA. Thus, IAWA fails to see that under the existing regulations that the proponents have not been afforded the opportunity to provide public comment on NPDES permits, and requests for public hearings as required by the Clean Water Act.

I have chosen not to address the rules on a line by line, rule by rule basis because I believe the proponents have totally and with arrogance ignored their burden of providing a justification for the amendments. Next, we have been informed that the IEPA, based upon the statements of records by Toby Frevert, will be moving to amend the proposal to address those provisions that the IEPA believes it is currently carrying out in practice. We understand that the IEPA has met with the proponents with respect to this redrafting and we expect that we will shortly be meeting with the IEPA to review its draft as well. We would expect that a third hearing would be a distinct possibility unless the Board were to dismiss this proposal based upon the lack of support submitted by the proponents.

In essence the basis of this proposal is, namely, that the proponents lost an appeal of the Black Beauty NPDES permit. What they are apparently really seeking in this proposal is to shift the burden of proof before the IEPA to make it essentially procedurally impossible for the IEPA to issue a permit that can withstand the procedural rigors of an unending round of potential appeals should they elect to pursue them. Second, the proponents seek to add to the arsenal of procedural roadblocks of unending public comment periods and requests for public hearings that they currently employ when objecting to permits authorizing expansion of publicly owned treatment works ("POTW") to serve growth.

The same proponents of this proceeding have utilized the threat of objections to proposed NPDES permits and requests for public hearings, as well as the actual public hearing process itself, to negotiate monitoring requirements, effluent limitations, load restrictions, flow diversions and other requirements not presently required by The Clean Water Act, the Illinois Environmental Protection Act or existing Board regulations. This tactic has been most successful when a POTW is faced with an urgent need to begin construction because of new significant development in its service area. Thus the POTW discharger must have a permit issued which would accommodate growth. By in essence holding the permit hostage, these environmental groups have attempted to extract concessions not required by existing regulations. Upon reaching an agreement the public hearing request is withdrawn and IEPA is free to issue

the “agreed” upon permit. Given the demonstrated power of the proponents to extract such concessions under the current NPDES permitting system, IAWA sees no need for the proposal currently before the Board.

Mr. Ettinger testified at the first hearing that any relaxation in a permit condition would require re-publication of the public notice and a new opportunity for the request of a public hearing, which under current IEPA policy means an automatic grant of the public hearing concerning the relaxation of the limitation. This simply means that we are in a never ending process of delay for basically what amounts to delays sake in the issuance of NPDES permits. This is not acceptable and involves a substantial cost to the State of Illinois at a time of severe budget crisis, as well as a negative impact on the regulated community by delaying the construction of needed new treatment facilities to accommodate growth. This will either lead to the continued practice of forcing POTWs to negotiate with environmental groups and accede to their demands for limitations not required by existing regulations in order to obtain withdrawal of requests for public hearings or suffer the consequence of the delay.

Unfortunately, one tactic that has come out of this process is that we have had to advise our POTW clients, in truly time sensitive projects, that upon the initial draft pre-public notice stage, the POTW should request its own public hearing, thus, bypassing the initial publication stage. This cuts approximately 60 to 90 days out of the cycle, knowing full well on many NPDES projects that the same citizen groups that are proponents here, will be objecting to permits and using the process to object to growth and/or to attempt to negotiate restrictive permit conditions. This process has, of course, greatly increased the costs of permitting for the municipalities and sanitary districts. It also has had the impact of tying up substantial resources at IEPA as it has to go through the public hearing process. The proposal that is presently on the table before the Board would exacerbate this because any change or relaxation of any condition would require a re-public notice and an opportunity for a second hearing request, and a third, fourth and on and on.

IAWA objects to the proposal as it is currently drafted as being unnecessary, unsupported and finally, unreasonable in that it will lead to an increase in the delay associated with necessary NPDES permitting at a time when we currently have over 1,000 NPDES permits awaiting action by the IEPA.

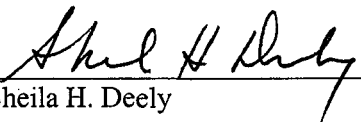
I would again caution as I did in my opening statement that the existing NPDES regulations, including the public participation regulations that are at issue in this proceeding, were the subject of substantial public debate and thought at the time of the original adoption by the Board in R73-11 and 12. The difficulty facing the Board, then as now, is that the U.S. EPA regulations and guidance to states for developing NPDES Permit Programs were written using the U.S. EPA structure, not a structure that we have in Illinois, with two independent agencies as a model. In large part, that is what was taken into consideration during the rewrite of the original proposal that occurred early in 1974 by the Board. This rewrite preserved the independent roles of the IEPA and the Board. Some of what has been proposed in this proceeding ignores these separate roles. The current NPDES permitting system has served the State, public and regulated

community well for close to thirty years. There is no need to adopt the extraordinary proposal significantly amending the current NPDES system when there has been no need shown on the record by the proponents.

CH02/22236660.1

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing **Notice of Filing - Motion to File Written Testimony Instanter and Pre-Filed Testimony of Roy M. Harsch** were filed by hand delivery with the Clerk of the Illinois Pollution Control Board and served upon the parties to whom said Notice is directed by first class mail, postage prepaid, by depositing in the U.S. Mail at 191 North Wacker Drive, Chicago, Illinois 60606 on Thursday, March 27, 2003.



Sheila H. Deely

CH01/12281014.1

**R03-19 Service List
Amendments to Part 309 Subpart A**

W.C. Blanton
Blackwell Sanders Peper Martin, LLP
2300 Main
Suite 1000
Kansas City, MO 64108

Larry Cox
Downers Grove Sanitary District
2710 Curtiss Street
Downers Grove, IL 60515

James Daugherty
Thorn Creek Basin Sanitary District
700 West End Avenue
Chicago Heights, IL 60417

John Donahue
City of Geneva
1800 South Street
Geneva, Illinois 60134

Albert Ettinger
Environmental Law & Policy Center
35 E. Wacker Drive - Suite 1300
Chicago, IL 60601

Susan M. Franzetti
Sonnenschein Nath & Rosenthal
8000 Sears Tower
Chicago, Illinois 60606

Lisa M. Frede
Chemical Industry Council
250 East Devon Ave., Suite 239
Des Plaines, Illinois 60018

Dorothy Gunn, Clerk
Pollution Control Board
100 West Randolph, Suite 11-500
Chicago, Illinois 60601

James T. Harrington
Ross & Hardies
150 North Michigan Avenue
Suite 2500
Chicago, IL 60601

Ron Hill
Metropolitan Water Reclamation District
100 East Erie
Chicago, Illinois 60611

Katherine Hodge
Hodge Dwyer Zeman
3150 Roland Avenue
Springfield, IL 62705

Fred L. Hubbard
415 North Gilbert Street
PO Box 12
Danville, Illinois 61834-0012

Vicky McKinley
Evanston Environment Board
223 Grey Avenue
Evanston, Illinois 60202

Robert A. Messina
Illinois Environmental Regulatory Group
215 East Adams Street
Springfield, IL 62701

**R02-19 Service List
Ammonia Nitrogen Standards**

Irwin Polls
Metropolitan Water Reclamation District Of
Greater Chicago
R&D Laboratory
6001 West Pershing Rd.
Cicero, IL 60804

Michael G. Rosenberg
Metropolitan Water Reclamation District
100 East Erie Street
Chicago, Illinois 60611

Mary G. Sullivan
Illinois-American Water Company
300 North Water Works Drive
PO Box 24040
Belleville, Illinois 62223-9040

Joel Sternstein
Assistant Attorney General
Environmental Bureau North
188 W. Randolph Street, 20th Floor
Chicago, Illinois 60601

Erika K. Powers
Barnes & Thornburg
10 South LaSalle, Suite 2600
Chicago, Illinois 60201

Sue A. Schulz
General & Associate Corporate Counsel
Illinois-American Water Company
300 N. Water Works Dr., PO Box 24040
Belleville, Illinois 62223-9040

Sanjay Sofat
Connie Tonsor
Illinois Environmental Protection Agency
1021 N. Grand Ave., East
Springfield, Illinois 62794-9276

Charles Welsselhoft
Ross & Hardies
150 north Michigan
Chicago, Illinois 60601