

ORIGINAL

ILLINOIS POLLUTION CONTROL BOARD

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JUN 15 2001

STATE OF ILLINOIS
Pollution Control Board

IN THE MATTER OF:)	
)	
PROVISIONAL VARIANCES FROM)	R01-31
WATER TEMPERATURE STANDARDS:)	(Rulemaking - Water)
PROPOSED NEW 35 Ill. Adm. Code)	
301.109)	


NOTICE OF FILING

TO: Ms. Dorothy M. Gunn	Andrew Boron, Esq.
Clerk of the Board	Hearing Officer
Illinois Pollution Control Board	Illinois Pollution Control Board
James R. Thompson Center	James R. Thompson Center
100 West Randolph Street	100 West Randolph Street
Suite 11-500	Suite 11-500
Chicago, Illinois 60601	Chicago, Illinois 60601
(VIA FIRST CLASS MAIL)	(VIA FIRST CLASS MAIL)

(PERSONS ON ATTACHED SERVICE LIST)

PLEASE TAKE NOTICE that I have filed today with the Clerk of the Illinois Pollution Control Board an original and nine copies of the **QUESTIONS FOR ILLINOIS EPA** and **MOTION TO REQUEST THIRD HEARING**, copies of which are herewith served upon you.

Respectfully submitted,
ILLINOIS ENVIRONMENTAL
REGULATORY GROUP,

By: 
One of Its Attorneys

Dated: June 13, 2001

Robert A. Messina
Illinois Environmental
Regulatory Group
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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

JUN 15 2001

IN THE MATTER OF:)
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PROVISIONAL VARIANCES FROM)
WATER TEMPERATURE STANDARDS:)
PROPOSED NEW 35 Ill. Adm. Code 301.109)
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R01-31
(Rulemaking-Water)

STATE OF ILLINOIS
Pollution Control Board

QUESTIONS FOR ILLINOIS EPA

NOW COMES the ILLINOIS ENVIRONMENTAL REGULATORY GROUP ("IERG"), by and through one of its attorneys, Robert A. Messina, pursuant to the Illinois Pollution Control Board's ("Board") request at its June 7, 2001, hearing, and hereby respectfully submits to the Board its additional questions of the Illinois Environmental Protection Agency (Illinois EPA). The questions are as follows:

1. Regarding Section 301.109(a), what is the rationale for including the contents of the "application" in the Agency recommendation?
 - a. Is this "inclusion" in addition to a discussion of the items in 301.109 (a)(1), (2), and (3)?
 - b. Or, is it just that the information included in the application will be used to prepare paragraphs (a)(1)-(3) in the Agency's recommendation?
2. What "other rules" are the Agency referring to when it refers to water temperature standards "set forth in 35 Ill. Adm. Code 302.211 or 303 or any other rule?"
3. Does the Agency believe that all of the 180.202(b) information should be required even in those instances when an applicant submits a provisional variance application pursuant to the emergency provisions contained in Section 180.204?

- a. If yes, how do you reconcile that with the clear language of 180.204 regarding emergencies? What is the purpose of emergency petitions?
 - b. Doesn't this, in effect, eliminate the ability to have provisional variances on an emergency basis for thermal dischargers?
 - c. Do emergencies never exist for thermal dischargers?
4. Regarding Section 301.109(a)(1), do the current applications contain enough information to allow the Agency to fulfill its responsibility under this provision?
- a. If so, please explain what is provided in the application that would allow the Agency to fulfill its responsibility.
 - b. If not, what additional information and effort will be required of the Agency, and how long will it take to gather the necessary information?
 - c. On whom will the agency rely for this additional information, the applicant or other information sources, and what would those other sources be?
5. Regarding Section 301.109(a)(2), do the current applications contain enough information to allow the Agency to fulfill its responsibility under this provision?
- a. If so, please explain what is provided in the application that would allow the Agency to fulfill its responsibility.
 - b. If not, what additional information and effort will be required of the Agency, and how long will it take to gather the necessary information?
 - c. On whom will the agency rely for this additional information, the applicant or other information sources, and what would those other sources be?

6. How does the Agency plan to make a foreseeability determination?
 - a. If the weather conditions during the summer of 1999 were to repeat themselves tomorrow, would those conditions be reasonably foreseeable?
 - b. How, in the Agency's view, does foreseeability relate to arbitrary or unreasonable hardship?
 - c. Would the proposed rules have the effect of providing a basis for denying a provisional variance request based on the Agency's determination that the weather conditions were "reasonably foreseeable?"
7. Regarding Section 301.109(a)(3), why has the Agency included a provision seeking information regarding five year historical data?
 - a. Is this data to be a determinant in the granting or denial of a provisional variance?
 - b. If so, what is the statutory basis for this type of restriction?
8. Regarding Section 301.109(b)(2), is it the intent of this proposal to require that the Agency recommend the imposition of all of the listed conditions on every provisional variance unless the Agency justifies otherwise? If so,
 - a. Please discuss why each condition should be applied in all cases.
 - b. Please explain why the language requires the Agency to explain what actions it did not take rather than the actions it did take.
 - c. Can the Agency identify any other case in which it is required to defend an action that it did not take (in the context of an approval; not a permit denial)?

- d. Why is it not appropriate to reverse the language to explain why a condition was added rather than why it was not added?
 - e. What level of justification must the Agency provide when recommending that a specific condition not be imposed?
 - f. Must the Board accept that level of justification?
9. Regarding Section 301.109(b)(2)(A), is this a condition that is currently imposed in thermal provisional variances?
10. Please explain the need for, and feasibility of, requiring continuous monitoring of the receiving water.
- a. Is this currently being done by all potentially affected facilities?
 - b. If not, what type of facilities currently do so?
 - c. What would be the cost and feasibility of adding such monitoring for a provisional variance if it is not currently undertaken by the facility?
11. What is the need for inspection of the intake area?
12. What does the Agency intend by requiring inspections three times daily?
- a. Will this require nighttime inspections?
 - b. What level of effort would be required at such inspections to determine mortality?
13. Regarding Section 301.109(b)(2)(B), is this a condition that is currently imposed in thermal provisional variances?
14. Please explain what the Agency means by “document environmental conditions.”
- a. What level and types of activities are expected?

15. What actions will the Agency take to assess the adequacy of the information submitted?
 - a. What occurs if the Agency (or the Board) is not satisfied with the submittal?
 - b. Can either the Agency or the Board request additional information?
 - c. What, if any, appeal rights are anticipated?
16. Regarding Section 301.109(b)(2)(C), is this a condition that is currently imposed in thermal provisional variances?
17. Please explain what the Agency means by “immediately implement.”
18. Please explain what the Agency means by “biological activities.”
 - a. Would they vary among different habitats and different situations?
 - b. What types of plans would an applicant have to submit to demonstrate that it was prepared to “implement biological activities?”
 - c. What type of review would the Agency need to determine whether the plans are adequate?
 - d. Can this be done within the context of the time frame for a provisional variance? Of an emergency provisional variance?
19. This provision requires the applicant to “characterize how aquatic life respond[s] to the thermal conditions.” What will the characterization be compared to?
 - a. How will this response to thermal conditions be measured?
 - b. How would this requirement differ from the requirements contained in Section 301.109(b)(2)(A)?

- c. Please comment on the feasibility of undertaking such an effort within the time frame of a provisional variance.
20. Regarding Section 301.109(b)(2)(D), is this a condition that is currently imposed in thermal provisional variances?
21. Please explain and give examples of what the Agency means by “unusual conditions.”
22. Will the applicant be required to remedy problems even if the provisional variance does not cause the problem?
- a. Is there any presumption in the proposed rules that any “unusual conditions” observed have been caused by the provisional variance discharge unless proven otherwise?
 - b. Will the discharger have the burden of proving a lack of causation in order to be relieved of an obligation to remedy the problem observed in the receiving water?
 - c. Please expand on what type of remedy the Agency envisions for specific possible problems.
23. This provision requires applicants to notify the Agency and DNR when normal conditions return. What is the basis of comparison for determining normal conditions?
24. Regarding Section 301.109(b)(2)(E), is this a condition that is currently imposed in thermal provisional variances?
25. Please explain from where the authority to require remediation is derived.
- a. Who will judge the adequacy of the remediation plan?

- b. By what criteria will this adequacy be judged?
- c. What are the appeal provisions from this condition?

26. Within Section 301.109(b)(2), paragraphs (B), (C) and (D), the proposal would require an applicant to provide various information to the Illinois Department of Natural Resources (DNR). What statutory authority does the Board or Agency have to require certain reports to be submitted to the DNR?

- a. To whom at the DNR would these be submitted?
- b. What actions would the DNR take with respect to these reports?
- c. Does the Agency believe that its own review of and determinations regarding provisional variances have been inadequate to protect aquatic life?
- d. Why can the DNR not fill the same role without such inclusion in the regulation?
- e. Does the inclusion of DNR in this proposal indicate some regulatory or decision-making authority in this process beyond that which the Department currently possesses?

In addition to the above listed questions, IERG requests that the Illinois EPA supplement its answer to two questions, which IERG asked, at the first hearing. The questions are as follows:

- 1. Do you believe the Board has the authority to deny a provisional variance if the Agency recommends that it be answered?

2. If the Agency were to make a recommendation to the Board with conditions, can the Board grant that provisional variance without those conditions or with different conditions, or is the Board bound by those conditions?

In the Illinois EPA's answers to these questions at hearing, Mr. Frevert suggested that he would consult with the legal staff at the Agency and provide any corrections (*See* June 7, 2001, Hearing Transcript, p. 20; and June 7, 2001, Hearing Transcript, p. 22). IERG believes that concise answers to these two questions are necessary to allow our Executive Director to adequately prepare for policy testimony at the July 20, 2001, hearing.

WHEREFORE, IERG respectfully submits these questions to the Board and requests the Illinois EPA respond.

Respectfully,

By:


Robert A. Messina

Dated: June 13, 2001

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

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

JUN 15 2001

IN THE MATTER OF:

PROVISIONAL VARIANCES FROM
WATER TEMPERATURE STANDARDS:
PROPOSED NEW 35 Ill. Adm. Code 301.109

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R01-31
(Rulemaking-Water)

STATE OF ILLINOIS
Pollution Control Board

MOTION TO REQUEST A THIRD HEARING

NOW COMES the ILLINOIS ENVIRONMENTAL REGULATORY GROUP ("IERG"), by and through one of its attorneys, Robert A. Messina, pursuant to 35 Ill. Adm. Code 102.402, and hereby respectfully requests the Illinois Pollution Control Board ("Board") hold a Third Hearing in the above-referenced matter. In support of its Motion, IERG states as follows:

1. On April 13, 2001, the Illinois Environmental Protection Agency ("Illinois EPA" or "Agency") filed a proposal to create new 35 Ill. Adm. Code 301.109 of the Board's regulations ("Proposal").
2. On April 25, 2001, Hearing Officer Andrew Boron issued an Order setting the First Hearing on June 7, 2001, in Springfield, Illinois, and the Second Hearing on June 20, 2001, in Chicago, Illinois.
3. On June 7, 2001 the First Hearing was held. On behalf of the Illinois EPA, Mr. Kenneth Rogers offered testimony in support of the Proposal and Mr. Toby Frevert responded to questions regarding the Agency's Proposal. The Board, however, interrupted cross-examination of the Agency and requested all additional questions be filed with the Board and sent to the Service List for this docket. Further, Hearing Officer

Boron indefinitely postponed the Second Hearing to accommodate both the filing of additional questions and preparation of answers by the Illinois EPA.

4. On June 12, 2001, IERG was notified by Hearing Officer Boron that the Second Hearing will be scheduled for July 20, 2001, in Chicago, Illinois, with pre-filed testimony to be received by the Board no later than July 13, 2001. The mailbox rule will not apply. Further, Hearing Officer Boron indicated the Board intends to require the Illinois EPA to submit its answers to filed questions by June 29, 2001.

5. With this Motion, IERG is also filing the "Questions for Illinois EPA," pursuant to the Board's request. IERG also intends to offer testimony at the Second Hearing on IERG's general issues of concern, namely those issues upon which IERG was able to cross-examine the Agency, regarding the Proposal. However, the short time frame involved between the deadline for the Agency to respond to filed questions and the deadline for pre-filed testimony for the Second Hearing will adversely affect IERG's ability, and particularly its member companies' ability, to prepare a meaningful response to the Agency's answers to the filed questions. There will simply be insufficient time to receive and review the Agency's answers to the filed questions, to brief IERG's member company representatives, to solicit their input, and to prepare detailed testimony in response to the Agency's answers. Also, IERG anticipates preparing proposed revisions to the Proposal, and preparing testimony in support of the same.

6. IERG is hereby requesting that the Board schedule a Third Hearing in this matter for the purpose of providing sufficient time to review the Illinois EPA's response to IERG's filed questions and to analyze their impact on IERG's member companies.

Further, additional time will allow IERG to offer more detailed testimony on our areas of concern and in support of proposed revisions to the Agency's proposal.


7. In addition, there is not currently a deadline by which the Board is required to adopt the regulations proposed in this rulemaking. As such, no material prejudice would result if the Board were to grant this Motion, and hold a Third Hearing in this matter.

8. Further, because this proposal has not been submitted for First Notice, statutory procedural requirements would preclude this proposal from being promulgated until after the season during which thermal provisional variances traditionally have been issued. Again, no material prejudice would result if the Board were to grant this Motion.

WHEREFORE, for the above and foregoing reasons, IERG respectfully requests the Board hold a Third Hearing in the above-referenced matter.

Respectfully,

By:


Robert A. Messina

Dated: June 13, 2001

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

CERTIFICATE OF SERVICE

I, Robert A. Messina, the undersigned, certify that I have served a copy of the
QUESTIONS FOR ILLINOIS EPA and MOTION TO REQUEST THIRD

HEARING upon:

Ms. Dorothy M. Gunn
Clerk of the Board
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Andrew Boron, Esq.
Hearing Officer
Illinois Pollution Control Board
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SEE ATTACHED SERVICE LIST.

by depositing said documents in the United States Mail in Springfield, Illinois on

June 13, 2001.



Robert A. Messina

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