

ILLINOIS POLLUTION CONTROL BOARD
September 9, 1993

IN THE MATTER OF:)
)
PROPOSED AMENDMENTS TO TITLE)
35, SUBTITLE F: PUBLIC) R87-37
WATER SUPPLIES CHAPTER 1:) (Rulemaking)
POLLUTION CONTROL BOARD)
35 Ill. Adm. Code 608)
CROSS-CONNECTION STANDARDS)

Proposed Rule. Dismissal Order.

OPINION AND ORDER OF THE BOARD (by G. T. Girard):

On October 20, 1987, the Illinois Environmental Protection Agency (Agency) filed a draft proposal to amend the cross-connection control regulations. The purpose of these proposed amendments to the Pollution Control Board's (Board) public water supply regulations (35 Ill. Adm. Code Subpart F) is to prevent drinking water degradation by eliminating unprotected cross-connections. Cross-connections are actual or potential connections between a potable and non-potable water supply. Presently, cross-connections are regulated by Section 607.104 (amended effective September 14, 1982). The proposal, filed by the Agency, attempted to clarify these regulations and would repeal Section 607.104 concurrently with the final adoption of proposed Section 608.

The Board's responsibility in this matter arises from the Illinois Environmental Protection Act (Act) (415 ILCS 5/1 et seq.). The Board is charged therein to "determine, define and implement the environmental control standards applicable in the State of Illinois"¹. More generally, the Board's rulemaking charge is based on the system of checks and balances integral to Illinois environmental governance: the Board bears responsibility for the rulemaking and principal adjudicatory functions, whereas the Illinois Environmental Protection Agency (Agency) is responsible for carrying out the principal administrative and enforcement duties. The latter's duties include administering and enforcing regulations adopted by the Board.

After a comprehensive review of the record, the Board declines to send this proposal to second notice because the record does not support adoption of this proposal. This proposal is dismissed and docket R87-37 is hereby closed.

¹Act at Section 5(b).

BACKGROUND

The Board initially notes that the Agency began this proceeding in response to action taken by the Joint Committee on Administrative Rules (Joint Committee). The Joint Committee found that the Board improperly delegated its rulemaking authority to the Agency. This proposal is intended to fulfill an agreement between the Agency and the Joint Committee. (EcIS at xi.)

The instant rulemaking was filed pursuant to Sections 4 and 28 of the Environmental Protection Act (Act). Addenda or amendments to the original proposal were filed by the Agency on October 27, 1987, May 17, 1988, October 11, 1988, and May 1, 1989. Unless specified otherwise, references to the "Agency proposal" in this document refer to the last amended proposal filed by the Agency (May 1, 1989). On March 26, 1992, the Board invited public comment to update the record.

On October 1, 1992, the Board adopted a substantive opinion and order sending the proposal to first notice under the Illinois Administrative Procedure Act (IAPA). (Ill. Rev. Stat. 1991, ch. 127, par. 1001-1 et seq.) The Board's action caused the publication of the proposal in the Illinois Register and began a minimum 45 day public comment period under the IAPA. The Board's proposal was generally similar to the last amended proposal filed by the Agency, but there were several differences which were delineated in the first notice opinion and order. The Board also proposed the repeal of the existing cross-connection control regulations at 35 Ill. Adm. Code 607.104.

The record for making these regulations included several public hearings, extensive public comments, and an Economic Impact Study (EcIS)². Four public hearings on the proposal were held by the Board: May 25, 1988 (Springfield); May 26, 1988 (Chicago); April 11, 1989 (Springfield); and May 1, 1989 (Chicago). On August 4, 1988, the Department of Energy and Natural Resources (DENR) filed a letter with the Board that an EcIS would be undertaken. EcIS hearings were held on June 26, 1990 in Springfield, and on June 28, 1990, in Chicago³. The DENR filed the final EcIS on November 7, 1990. Ninety-one public

²The Board notes that P.A. 87-860, effective July 1, 1992, removed the EcIS requirement for this type of rulemaking. However, as the EcIS has been completed the Board will consider the information provided in the EcIS in relevant portions of the opinion in evaluating the economic feasibility of the proposal.

³References to the transcripts are designated as follows: May 25 and 26, 1988, hearings - "Tr.1 at ..."; April 11 and May 1, 1989 - "Tr.2 at ..."; and June 26 and 28, 1990, hearings - "Tr.3 at ..."

comments were received by the Board between April 4, 1988, and May 29, 1992 (see Appendix A, First Notice opinion).

The Board specifically requested participants to address the following issues in any additional comments filed with the Board during first notice:

1. Standards or criteria for conducting the cross-connection control survey including what specific information the Agency will require to be included in the survey as well as what type of information the Agency is currently collecting.
2. Applicability of the proposed cross-connection control requirements, i.e. is the owner or operator responsible for carrying out the requirements (Section 608.301).
3. Who determines the presence of high or low hazard connections (Section 608.302).
4. The proposed retrofitting requirements for existing fire safety system connections at Section 608.305.
5. Should multi-family residential dwellings be exempted from the requirements (proposed at 608.307).
6. The definition of "low hazard connection" in which the term "pollutant" was substituted to insure consistent use of the word "pollutant" throughout the Board's regulation.
7. Explain more fully what the term "national consensus standard" means and explain why it is used.
8. Supply addresses for each of the organizations listed in Section 608.103 and update the incorporations in that section.
9. Is the definition of "official custodian" sufficient to ensure enforcement of the proposed regulations?
10. Is the definition of "public water supply distribution system" appropriate to achieve the goals of the cross-connection standards?

In addition to these specific areas the Board invited

comments to the proposal generally. The Board received fifteen additional comments after first notice began.

SUMMARY OF COMMENTS

PC #91 North Park Public Water District (NPPWD)

The NPPWD expressed concern regarding the proposed administrative and record keeping requirements applicable to water purveyors. NPPWD suggested that since the owner of an affected establishment is responsible for maintaining the records for the devices under the proposed regulations, the administrative recordkeeping would be a simple extension of such responsibility. In addition, the comments note that such a change in delegation of responsibility would result in a cost savings of \$2.4 to \$7.2 million for water purveyors.

PC #92 Illinois Department of Commerce and Community Affairs (DCCA)

The DCCA has stated that it will not conduct further analysis of the proposed regulations to determine the impact of the regulations on small businesses unless it is requested by the Board or another entity.

PC #93 & #101 Richard H. Solomon, P.E.

Richard Solomon (Solomon), a fire protection engineer, provided comments on three issues associated with the proposed rulemaking. First, Solomon's comments note that some of the consensus standards incorporated by reference in the proposed regulations are not current. The comment provides the citations to the updated standards (NFPA and UL). Second, Solomon voiced concern regarding the implications of the State Mandates Act and urged the Board to review the economic impact of the proposed regulation. In this regard the comments refer to the outcome of a recent advisory referendum on the States mandates issue. Finally, Solomon has expressed concern regarding the adoption of similar cross-connection standards by two agencies (the Agency and Illinois Department of Public Health) and suggested that in order to make it easier for the regulated community, only one agency should have a CCC program. In this regard, Solomon believes that the Agency would be the appropriate agency since the regulations cover both existing and new activities. Finally, the comments note that the fire safety requirements at Section 608.304(b) and (c) are not clear. Solomon's comments include clarifying language changes.

PC #94 Administrative Code Division

The Administrative code division provided a list of

nonsubstantive format changes that must be incorporated in the regulations to conform with the Code Unit requirements.

PC #95 Illinois Fire Inspectors Association (Fire Inspectors)

The Fire Inspectors provided comments regarding several requirements in the proposed regulations. Specifically, one issue raised is the inclusion of requirements in addition to the State Plumbing Code under Section 608.202(a)(1)(A). The comments state that the additional requirements will result in code officials working from two documents.

Further, the Fire Inspectors state that the fire safety requirement at Section 608.304(c) does not provide adequate guidance as to the type of CCC device required when chemical additives are employed by fire departments. The comment notes that chemical additives such as tank savers are used in water tanks on fire pumpers. Also, fire fighting foam, which is metered in to a fire house, is used on an "as needed" basis. The Fire Inspectors have recommended that the Board retain double detector check valves for such connections since the possibility of any additives entering the water system is remote and such additives are non-toxic.

PC #96 National Association of Water Companies (NAWC)

The NAWC has expressed serious concern regarding the proposed regulations and urged the Board to consider several amendments to the proposed regulations. The NAWC maintains that the rules unfairly and unreasonably place burden on the investor-owned water companies and that the rules are not justified on a cost/benefit basis. In addition, the NAWC has again discussed the implication of the State Mandates Act. The NAWC's also raised concerns regarding specific requirements of the proposed rules including the differences between the investor-owned water supplies (IOWS) and municipal-owned water supplies in adopting the proposed regulations. In particular, the NAWC maintains that IOWS do not have control over rates and rules of service which are determined by the Illinois Commerce Commission. Also, the IOWS do not have legal authority or responsibility regarding customers' facilities and water usage within customers' premises and the IOWS do not have companion "municipal" type functions such as enforcing plumbing code, issuing occupancy permits, etc.

The NAWC further asserts that the requirements of Section 608.202 are unfair, illegal and discriminatory since the Board has no legal authority to order IOWS to adopt tariffs or conditions of service. The NAWC asserts that the Public Utilities Act gives the Illinois Commerce Commission exclusive authority over such requirements. In addition, the NAWC maintains that the IOWS cannot adopt or enforce plumbing codes and therefore, unlike municipalities, they will be forced to

require backflow prevention devices at service connections.

The NAWC expressed concern with the definitions of "public water supply distribution system" and "official custodian". NAWC also pointed to specific concerns with the language proposed in Sections 608.202 and 608.302.

PC #97 Village of Downers Grove

The Village of Downers Grove (Downers Grove) voiced concern regarding certain definitions and the cross-connection control program requirements under Subpart B. The comments note that the definitions of "high hazard connection" and "low hazard connection" at Section 608.102 are vague. Downers Grove states that for enforcement purposes, the regulations must provide additional guidelines to assist the municipalities in hazard determination. The comment notes that the proposed definitions allow too much discretion to the water purveyors and therefore, may be subject to legal challenge.

Downers Grove states that the requirement at Section 608.202(a)(1)(B) that customers provide proof that their water system is in compliance with the Illinois State Plumbing Code is unclear. Specifically, the comments point out that: the usage of the term "customer's water supply" creates confusion since it is not defined in the regulations; and the requirement does not provide any guidance as to what constitutes "proof" of compliance with the plumbing code. Regarding the proof of compliance, the comment notes that if the intent is to require an inspection of the plumbing system, this requirement would impose enormous burdens on the manpower and financial resources of the municipalities.

The village also notes that a requirement at Section 608.202(a)(4) that public water supply terminate service to any customer who fails to comply with the condition of service may be subject to legal challenge. The village maintains that constitutional and other individual rights theories may null any argument the village could make for requiring such a condition of service. Further, Downers Grove notes that it will have to bear any legal expense associated with the condition of service.

PC #98 The Illinois Environmental Protection Agency (Agency)

The Agency addressed a number of issues associated with the proposed cross-connection control regulations. The comments indicate that, for the most part, the Agency concurs with the changes adopted by the Board in the First Notice regulations. However, the Agency's comments express concern regarding certain requirements relating to the fire safety systems. In addition, the comments address the specific issues identified in the Board's First Notice opinion.

The Agency's comments voice concern regarding the existing fire safety system requirements adopted by the Board. The Agency notes that the Board did not consider an important recommendation of the AWWA Manual M14 in not retaining the application of DDCVA for existing fire safety systems at Section 608.305. The Agency points out that AWWA Manual M14 requires the installation of a backflow prevention device between the water suppliers distribution system and the fire safety system when the fire safety system piping material is not an acceptable potable water system material. The Agency suggests that the Board retain the requirement for installation of a DDCVA. In addition the Agency's comments note that purpose of the alarm valve is to notify someone immediately of a backflow event so that appropriate measures may be undertaken.

The Agency notes that the ordinances and conditions of service requirements at Section 608.202(a)(1)(B) and (a)(1)(C) are confusing. The Agency believes that, as written, the requirements may be construed as allowing high hazard connections by either providing documentation that plumbing is installed in accordance with the plumbing code or installing a backflow assembly on the service connection.

The Agency's comments again address the implications of the State Mandates Act on the proposed regulations. Essentially, the Agency restates that the proposed regulations do not contain any service mandates since the proposed rules constitute the reenactment of the Agency technical policy statements adopted prior to the effective date of the State Mandates Act under the existing Board regulations.

The Agency notes that the requirement that the annual inspection be carried out by a cross-connection control device inspector under Section 608.302(a)(2)(C) may not be consistent with the Illinois Plumbing License Law, since the law allows any licensed plumber to conduct plumbing inspection.

PC #99 City of Springfield

The City of Springfield (Springfield) voiced concern regarding the implementation of CCC program requirements (608.Subpart B) and the installation of CCC devices (608.Subpart C). Essentially, the comments note that the cost of implementing the proposed regulations will be very high and would result in large rate increase. Springfield's comments are summarized below:

- a) The comments note that the conditions of service requirement at Section 608.201(a)(1)(B) is not clear. Specifically, the comments notes that the usage of the term "proof" is vague. Since "proof" is not defined, Springfield believes that a third party, such as a cross-connection control device

inspector or a licensed plumber must provide certification that a building is plumbed in accordance with the IPC. The comments estimate the cost of compliance with this requirement to be \$3.5 million, based on an inspection cost of \$75 per connection and 46,000 connections. Springfield questions the value of the information considering the cost involved in obtaining such information.

- b) Springfield's comments express concern regarding the CCC survey requirements at Section 608.202(b) and (c). The comments note that it would be physically impossible for its personnel to conduct a door-to-door type survey every 24 months. Further, the comments note that a survey done from the records maintained by the purveyor would be of little or no value for cross-connection purposes. Springfield maintains that the only viable alternative to comply with the survey requirements would be to mail a questionnaire. The comments estimate the cost of complying with these requirements to be \$150,000 per year, which would include five full-time employees, office space, and a vehicle.
- c) Springfield's comments voice concern regarding the hazard determination requirement at Section 608.302(a)(3). The comments note that the proposed definitions of the terms "high hazard" and "low hazard" do not provide adequate guidance to the water suppliers to make the hazard determination. Further, the comments note that it would require at least 3 full time employees to implement this requirement. Springfield has estimated the cost of the hazard determination program at existing connections to be over \$150,000 per year until the initial survey is completed. The ongoing cost to continue the program has been estimated to be \$50,000 to \$100,000 per year. Additionally, the comments estimate the minimum consumer cost of installing CCC devices to be \$1.8 million, based on the assumption that 50 percent of the 3000-4000 commercial, industrial, and institutional establishments would require either a RPZ principle device or a double detector check valve assembly.
- d) Springfield notes that according to the EcIS, the proposed regulations have no benefits to balance the cost. Further, the comments note that the implementation of the proposed regulations would result in a large rate increase since the estimated annual cost of the CCC program would exceed 10 percent of the department budget. Finally, the comments note that its water supply will not be protected from cross-connection contamination unless the proposed regulations are enforced by a State Agency on State of Illinois establishments since such establishments are exempt from city ordinances.

PC #100 DuPage Mayors and Managers Conference

The DuPage mayors conference which represents over 800,000 residents of DuPage county expressed serious concern regarding the proposed CCC regulations. The comments note that the municipalities represented by the conference will be severely impacted by the regulation as proposed. Regarding the specific aspects of the proposed regulations, the comments ask the Board to consider the issues raised by the Village of Downers Grove (PC #97).

PC #101 Richard H. Solomon, P.E.

(See PC #93).

PC #102 Mary Lou Cowlshaw

This comment is addressed to the Board by State Representative Cowlshaw of the 41st District. Essentially, Representative Cowlshaw requests the Board to send her a copy of the Board's response to Richard Solomon's comments (PC #101). Representative Cowlshaw also requests the Board to enlighten her as to why the Agency, Illinois Department of Public Health and the Board are engaged in duplicative activities regarding cross-connection control.

PC #103 AWWA Illinois Section - Small Systems Regulatory Subcommittee

The AWWA's Small Systems Regulatory Subcommittee (AWWA) expressed general concerns regarding the proposed regulations and provided comments on the issues identified in the Board's First Notice opinion. The AWWA's comments note that even though small systems have a relatively smaller number of high hazard connections, the need to make the initial survey and maintain records will require additional funding. The comments request the Board to clarify the definition of "Public water supply service line" and add the definition of "Private water supply line" to reflect the extent of the PWS. The comments recommend that the point of installation of the CCC device should be as close as practicable to the entry point to the private water service line.

Regarding the specific issues identified in the Board's opinion, the AWWA's comments indicate that it agrees for the most part with the proposed requirements.

PC #104 City of Greenville

The City of Greenville expressed serious concern regarding the proposed requirement that all PWS adopt and implement an active CCC program. Particularly, the comments note that

inspecting private plumbing systems and testing backflow preventers will result in a high cost burden on the municipalities, which may constitute a State reimbursable mandate. In this regard, the City of Greenville states that under the State law (225 ILCS 320) municipalities will have to hire licensed plumbers to inspect private plumbing systems. Also, the comments note that the proposed regulations will shift the authority and responsibility to enforce the State Plumbing Code from the Illinois Department of Public Health to local units of government.

PC #105 Illinois Municipal League

The Illinois Municipal League (League), which represents over 1000 municipalities in the State, expressed serious concern regarding the proposed regulations and urged the Board to withdraw the proposal. The issues raised by the League's comments are summarized as follows:

- a) The League states that the Board has no statutory authority to require local governments to adopt an ordinance. The comments note that the Board may adopt a state regulation requiring municipal governments or water users to comply with the provisions of the regulation, but the Board may not require municipalities to adopt ordinances to implement or enforce a set of state regulations. The League notes that the implications of the proposed requirement relating to the adoption of ordinances by PWS are clearly unconstitutional.
- b) The comments note that the proposed requirement at Section 608.202(a) that requires municipalities to adopt the Illinois Plumbing Code exceeds the Board's statutory authority. The League asserts that there is no state law that requires the adoption of the state plumbing code by municipalities. However, municipalities have the option to adopt the plumbing code.
- c) The League questions the Board's position regarding the implications of the State Mandates Act (SMA). The comments note that the SMA requires all state agencies and the General Assembly to comply with the Act. Further, the comments state that if the Board ignores the dictate of the SMA, its regulation may be without force of law and declared invalid. The League also notes that it disagrees with the Agency's position that the proposed rule is exempt from the SMA because it is a re-enactment of a presently existing rules adopted prior to the effective date of the SMA.
- d) The League states that the Board has not fully complied with its statutory mandate under the Environmental Protection Act to consider the economic reasonableness when adopting regulations. In this regard, the comments note that the

Board has not given due consideration to the issues of costs and benefits as addressed by the EcIS.

DISCUSSION

The Board will not attempt to recite the specifics of all of these arguments presented in this rulemaking. It is not in fact any one argument that persuades the Board of the correctness of today's action, but rather their sum.

Neither will the Board attempt to summarize the issues and observations of all the participants in the quite extensive record in this proceeding; interested persons are directed to the record itself. Several issues bear note and a discussion of these issues follows.

Economic Reasonableness

The economic information provided in the EcIS as well as by the participants indicates that the cost of implementing the requirements of this proposal are significant. Mr. Douglas Kane, who assisted in the preparation of the EcIS, testified at the EcIS hearing that 28 municipalities were contacted to get estimates of the cost of implementation of the rules. (Tr.3 at 26-27.) Mr. Kane testified that only one of the municipalities had done an extensive study of the costs while six municipalities gave "educated guesses". The remaining communities only made general comments that it would be expensive to implement. (Tr.3 at 28.) Specifically Mr. Kane testified that Galesburg was the only municipality which had presented the issue to the planning department and performed a comprehensive cost estimate for implementing these rules. (Tr.3 at 29.)

Mr. Kane stated:

Their [Galesburg] conclusion was that the first year start-up costs for implementing the proposed rules would be \$80,000 for a system that has 12,000 customers and that the ongoing annual costs would be \$40,000. If you put that out, to extend that, that comes to \$6.50 a connection for the first year start-up costs and about \$3.25 for the annual costs. The other municipalities that we talked to, City of Springfield indicated that the ongoing costs would be in the neighborhood of \$50,000. North Chicago said that perhaps \$10,000 initially. Glencoe, that has all residential connections, said that a survey would cost them about [\$] 1,200. Peoria indicated that the ongoing costs would be somewhere in the neighborhood of \$62,000. Macomb estimated that its costs would be \$5,000. Decatur, that its ongoing costs would be \$30,000. The

rest of the municipalities indicated that they had either not looked at the subject yet or that they didn't have any idea of what it would cost them. (Tr.3 at 29-30.)

Mr. Kane stated that they used that information to estimate the broad range in the EcIS of annual start-up costs of \$3 to \$5 per customer and \$1 to \$3 for the ongoing annual costs. (Tr.3 at 30.) The estimated cost to water purveyors of this regulation, according to the EcIS, is \$22 million to \$57 million over 10 years. (EcIS at xv.)

The Agency did point to several problems in the EcIS, including the fact that the information from the municipalities was estimated. The Agency also indicated several problems with the EcIS regarding the state mandates issue which will be discussed in more detail later in this opinion. The Board agrees that the EcIS did not provide specific information on the costs of the program and the EcIS did not fully address all the issues. However, the cost of implementing this program is still substantial.

The City of Springfield provided updated economic information in its December 18, 1992, public comment. (PC 99.) Springfield asserts that the cost of having a cross-connection control device inspector or a licensed Illinois plumber certify that a building's plumbing is done in accordance with the plumbing code, to comply with proposed Section 608.201(a)(1)(B), will cost the owner between \$50 and \$100. Further, if a device must be installed the cost would range between \$300 and \$6000, for a potential cost of over \$3.5 million in Springfield. (PC 99 at 1-2.) Springfield estimates that the cost of performing and upkeeping a survey of the public water supply distribution system would be \$150,000 annually. (PC 99 at 2.) Springfield further states that to identify all businesses in Springfield which require a device and the overseeing of the installation of the devices will cost it \$150,000 a year until all installation is complete. An additional \$50,000 to \$100,000 annually after installation is complete for Springfield and a cost to the community of \$1,800,000. (PC 99 at 3.) Springfield also points out that retrofitting fire sprinkler systems will cost the community \$645,559. (PC 99 at 4.) The estimated annual cost of this program would exceed 10% of the City Water Light and Power Water Division's annual budget. (PC 99 at 5.)

Section 27(a) of the Act provides that in promulgating regulations under the Act the Board shall take into account "the technical feasibility and economic reasonableness of measuring or reducing the particular type of pollution". Section 27(b) of the Act provides that "the Board shall, in its written opinion, make a determination, based upon the evidence in the public hearing

record, as to whether the proposed regulation has any adverse economic impacts on the people of the State of Illinois."

The benefit of this program is the protection of the public from the potential harm of a backflow event. According to the EcIS, for low hazard connections, most fire safety systems, and domestic uses there are no "supported expected benefits". (EcIS at xxii-xxiii.) In fact the incidents of backflow contamination are often confined to the source. Further, the EcIS reports that in a ten year period examined there were illnesses but no deaths recorded in those states that have tracked contamination events. (EcIS at xxii-xxiii.) In summary, the EcIS estimated annual compliance costs for Illinois to be many millions of dollars, while expected benefits were considerably less (EcIS at xv-xxiii).

The Board finds that the record does not support proceeding at this time with this proposal. The economic information in this record clearly establishes that the cost of implementing and maintaining this program is significant. The benefits of this program do not balance against the substantial cost. The Board notes that the EcIS and several public comments have indicated that it may be more economical to vest regulation of cross-connection solely in the IDPH's Illinois Plumbing Code. Water purveyors and users would then have a single set of rules, a single enforcement mechanism, and a single enforcement agency.⁴ Further, although the Agency challenges the validity of the EcIS, the Agency did not address the economic information provided by Springfield in its comments.

The Board also takes note of the fact that public water supplies are being called upon to comply with federal and state regulations under the Safe Drinking Water Act (SDWA). The SDWA regulations are requiring extensive new monitoring for parameters in drinking water. Thus, public water suppliers are facing substantial new costs to meet the SDWA requirements.

State Mandates Act

The issue as to whether or not the adoption of the proposal would impose a state mandate on local governments was discussed in the first notice opinion and order. However, because of some misreading of the Board's position we will briefly discuss this

⁴The Board notes that the Illinois Plumbing Code was recently amended. The IPC requirements for cross-connection control are very similar to the requirements in the instant proposal. However, the IPC is essentially a "construction code" which mandates plumbing standards at one point in time. The IPC does not contain the extensive on-going record-keeping and device testing of the instant proposal.

issue again. The Board notes that as this proceeding is being dismissed, this issue is moot. The State Mandates Act (Ill. Rev. Stat. 1991, ch. 85, Sec. 2201 et. seq.) defines a state mandate as any state initiated statutory or executive action that requires a local government to establish, expand or modify its activities in such a way as to necessitate additional expenditures from local revenues. The costs directly attributable to the mandate are reimbursable, except under specified circumstances.

The requirements in the proposal that allegedly create the new service mandates have been identified in the EcIS. These requirements include cross-connection control prescribed at Sections 608.202 and 608.302, and recordkeeping specified at Sections 608.501 and 608.502. The Agency believes that the proposed regulations do not create any service mandates as they are merely a re-enactment of presently existing rules adopted prior to the effective date of the State Mandates Act (PC 48). The Agency specifically refers to its own Technical Policy Statements adopted in Dec. 17, 1978, under the existing Board regulations for cross-connection control (35 Ill. Adm. Code 607.104).

The IOWSG believes (PC 38 and 43) that the State Mandates Act will result in arbitrary and discriminatory treatment of the investor owned water supplies and their customers. According to the IOWSG, public water supplies owned by local governments will not be required to comply with the cross-connection control program unless the legislature appropriates monies to cover compliance costs, as required by the State Mandates Act. However, the IOWSG would be required to comply with the new regulations. The IOWSG therefore maintains that adoption of the instant proposal would negate the purpose of this proceeding, which is to develop uniform regulations for cross-connection control.

The IOWSG has questioned (PC 52 and 53) the Agency's argument that the proposed regulations are the re-enactment of the existing regulations and stated that the policy statement adopted by the Agency is not legally binding since it has not been formally adopted by the Board. In addition, the IOWSG has noted that the provisions regarding cross-connection control adopted by the Agency prior to enactment of the State Mandates Act were only recommendations to public water supplies and none of the provisions were framed in mandatory language until 1984.

The DENR's witness, Mr. Lee Zelle, stated that the regulations create new service mandates since public water supplies are not required to implement a comprehensive cross-connection control program under the existing Board regulations at 35 Ill. Adm. Code 607.104. According to Mr. Zelle, the intent of the existing Board regulations is to control cross-connections

between two or more water supply systems (defined as "interconnections" under the proposed regulations) and not all connections to the public water supply distribution system (Tr.3 at 32-33).

The Board does not agree with Mr. Zelle's contention that the intent of the existing Board regulation (Section 607.104) is to control only cross-connections between two or more water supply systems. Clearly, Mr. Zelle was referring to Section 607.104(a) which states:

"No physical connection shall be permitted between the potable portion of a supply and any other water supply not of equal or better bacteriological and chemical quality as determined by inspection and analysis by the Agency, except as provided for in subsection (d)."

However, Mr. Zelle overlooked Section 607.104(b) which clearly prohibits cross-connections:

"There shall be no arrangement or connection by which an unsafe substance may enter a supply."

The Agency maintains that its Technical Policy statements required implementation of most provisions of the proposal prior to the enactment of the State Mandates Act. The IOWSG, however, maintains that the proposal consists of numerous "new" service mandates which local governments will not need to comply with absent reimbursement from the state.

The Board is authorized by the Environmental Protection Act to adopt regulations to protect health and the environment from water pollution episodes. Presently, Section 607.104(b) prohibits cross-connections. The instant proposal attempted to clarify the current regulations. The record in this proceeding does not clearly indicate whether the adoption of this proposal would create any new service mandates. The Board must rely on its specific authority to promulgate regulations. Although the Board must analyze the state mandate issue, the Board cannot fail to proceed with a regulation because it may impose such a mandate. The reimbursement for any mandate created must come from the legislature, not the Board. The Board can only indicate its findings on whether a proposal creates the mandate.

Other Issues

Another issue raised during first notice comment period regards whether the Board may require the adoption of an ordinance or conditions of service to comply with its regulations. The NAWC argues that the Board lacks the authority to order investor-owned water utilities to adopt tariffs or conditions of service. NAWC asserts that the Public Utilities

Act gives the Illinois Commerce Commission exclusive authority over tariffs and conditions of service of Illinois utilities. (PC 96 at 4.) Further, the NAWC argued that such an ordinance would be unenforceable against public water utilities. The Board notes this issue, but because the proposal is being dismissed for other reasons we will not discuss the issue.

CONCLUSION

The Board appreciates that a considerable amount of effort has been expended by the Agency, public participants, and the Board in this proceeding. However, the record lacks sufficient detail in several areas and thus, does not support adoption of the instant proposal at this time. The Board notes that protecting the public from cross-connections is necessary, and that Section 607.104 of the Board's public water supply rules currently regulates cross-connections. In addition, cross-connections are regulated by the Illinois Plumbing Code promulgated by the Illinois Department of Public Health. The Board encourages the participants to review the opinion and perhaps file a new proposal which better addresses the issues which have been raised in R87-37. The instant proposal is hereby closed and docket R87-37 is dismissed.

ORDER

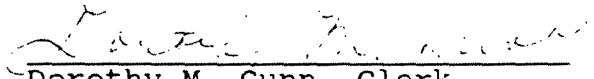
The Board hereby dismisses the R87-37, proposed amendments to Title 35, Subtitle F: public water supplies Chapter 1: Pollution Control Board, 35 Ill. Adm. Code 608 Cross-connection Standards, and this docket is hereby closed.

IT IS SO ORDERED.

Board Member Joan Anderson concurs.

Section 41 of the Environmental Protection Act (Ill. Rev. Stat. 1991, ch. 111 1/2, par. 1041) provides for the appeal of final Board orders within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements. (See also, 35 Ill. Adm. Code 101.246, Motions for Reconsideration.)

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 7th day of December, 1993, by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board