

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
)
TRIENNIAL REVIEW OF WATER QUALITY) R11-18
STANDARDS FOR BORON, FLUORIDE) (Rulemaking – Water)
AND MANGANESE: AMENDMENTS)
TO 35 ILL. ADM. CODE 302.Subparts B, C, E)
and F and 303.312)

RECEIVED
CLERK'S OFFICE
MAY 30 2012
STATE OF ILLINOIS
Pollution Control Board

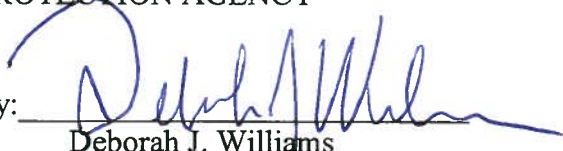
NOTICE OF FILING

TO: John Therriault, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street, Suite 11-500
Chicago, Illinois 60601

SEE SERVICE LIST

PLEASE TAKE NOTICE that I have filed today with the Office of the Clerk of the Illinois Pollution Control Board the First Notice Comments of the Illinois Environmental Protection Agency, a copy of which is herewith served upon you.

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: 
Deborah J. Williams
Assistant Counsel

1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276
(217) 782-5544

Dated: May 25, 2012

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)	
)	
TRIENNIAL REVIEW OF WATER QUALITY)	R11-18
STANDARDS FOR BORON, FLUORIDE)	(Rulemaking – Water)
AND MANGANESE: AMENDMENTS)	
TO 35 ILL. ADM. CODE 302.Subparts B, C, E)	
and F and 303.312)	

**FIRST NOTICE COMMENTS OF THE ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY**

The Illinois Environmental Protection Agency (“Illinois EPA” or “Agency”), by and through its attorney, Deborah J. Williams, hereby submits its comments on the First Notice Opinion and Order issued by the Illinois Pollution Control Board (“Board”) on March 15, 2012 in the above-captioned rulemaking proceeding. In support thereof, the Illinois EPA states as follows:

Procedural Background

On December 2, 2010, the Agency filed a rulemaking proposal with the Board containing proposed amendments to the Board’s water quality standards regulations. The Board found that the Illinois EPA’s proposal met the procedural requirements of 35 Ill. Adm. Code 102.202 and accepted the proposal for hearing at its December 16, 2010 meeting.

Hearings were held on the Agency’s proposal on June 21, 2011 in Springfield and on July 26, 2011 in Chicago. On May 23, 2011, the Agency submitted the pre-filed testimony of Brian Koch which was presented at the June 21, 2011 Springfield hearing.

See, Exhibit 1. In addition to testimony of the Agency, the Board also received testimony in support of the Agency's proposal at the June hearing from James L. Machin, P.E. of TRC on behalf of Marathon Petroleum. See, Exhibit 7. Testimony of Leonard Hopkins on behalf of Southern Illinois Power Cooperative was pre-filed in advance of the July 26, 2011 hearing. See, Exhibit 8. The Board has also received public comments from the City of Effingham and Marathon Petroleum in support of the Agency's proposal and from City of Springfield, Office of Public Utilities, City Water Light and Power ("CWLP").

Prior to the June 21, 2011 hearing, the Board distributed questions for the Agency witnesses. See, Exhibit 4. The Agency answered most of the Board's questions on the Record at the hearing and provided follow-up information addressing the remaining questions in Post-Hearing Comments filed on August 19, 2011. The Agency's Post-Hearing Comments also addressed questions raised at the July 26, 2011 hearing by counsel for the Sierra Club. The Agency's Post-Hearing comments requested one amendment to the initial rulemaking proposal which changed the proposed methods for evaluating attainment with cyanide water quality standards to Available Cyanide, USEPA Method OIA-1677 or Cyanide Amenable to Chlorination, Standard Methods 4500-CN-G (40 C.F.R. 136.3). No other post-hearing comments were received by the Board's September 9, 2011 deadline.

On March 15, 2012 the Board issued a First Notice Opinion and Order which reflected most of the changes proposed by the Agency with a few minor edits by the Board on the issue of derived water quality standard publication and incorporation by reference of the proposed cyanide methods. These comments will address the Board's

derived water quality criteria publication proposal and a few non-substantive typographical errors identified in the first notice publication in the *Illinois Register*. See, 36 Ill. Reg. 5713 (April 13, 2012).

Agency Comments on the Board's First Notice Opinion

Illinois EPA wants to express thanks to the Board and its staff for the efforts in developing this proposed rulemaking. In particular, the Agency is supportive of the Board's proposal for adoption of new water quality standards for boron, fluoride and manganese and a corrected water quality standard for zinc. The Agency is looking forward to the Board finalizing these new standards so they can be submitted to U.S. EPA for approval. Only after the Board has adopted these standards and U.S. EPA has approved them can the Agency begin to update its Clean Water Act Section 305(b) assessments and Section 303(d) impaired waters listings to reflect the new criteria.

Illinois EPA also appreciates the Board's efforts at raising possible issues with the Agency's original cyanide proposal and believes the questions asked by the Board have led to improvements in the proposed language at first notice. The Board's decision to include the revised cyanide methods as updates in the incorporations by reference in Sections 301.106(b) and 302.510(a) is also an improvement on the proposal submitted by the Agency.

The Board solicited additional comments at first notice on some issues and these First Notice Comments provide additional feedback on the Board's proposal regarding publication of derived water quality criteria, identify a few typographical errors identified in the first notice publication, and address a proposed amendment being submitted by Illinois Environmental Regulatory Group.

Derived Water Quality Criteria Publication Proposal

The Board's regulations at 35 Ill. Adm. Code Sections 302.595 and 302.669 require quarterly publication of a derived water quality criteria list in the *Illinois Register*. In addition to the published list of criteria, a similar list is available on the Agency's website. See, <http://www.epa.state.il.us/water/water-quality-standards/water-quality-criteria.html>. The Agency submitted a proposal to eliminate the *Illinois Register* publication requirement and rely on a website publication in order to save State resources and to provide a superior method of public notice to the audience for the information. The Agency attempted to provide additional justification for its proposal and suggestions to address the Board's concerns in its post-hearing comments.

As indicated in the Board's opinion, the Agency "stated that it was willing to consider other options to address the Board's concerns expressed in R88-21(A) as long as the administrative burden on the Agency would be reduced. The Agency explained that the only option to which it is opposed is a requirement to publish in both the *Illinois Register* and its website since that would increase the administrative burden on the Agency. PC5 at 16." First Notice Opinion and Order (March 15, 2012) Slip. Op. at 16. The Board has concluded that "new issues may be raised by ceasing *Illinois Register* publication." Slip. op at 20. The Agency understands the Board's concerns and is willing to continue publication in the *Illinois Register*. However, the Agency would like to comment on the specific language proposed by the Board at first notice to achieve this publication requirement.

In its First Notice Opinion the Board states that it “will revise the frequency of publication from quarterly to annually, or whenever the listing is updated (whichever occurs first).” Id. at 21. The Board states that reducing the publication frequency from quarterly to annually will reduce the administrative burden and cost to Illinois EPA. Id. The relevant language being proposed for Section 302.669 is:

The Agency shall develop and maintain a listing of toxicity criteria pursuant to this Subpart. This list shall be made available to the public and updated whenever a new criterion is derived ~~periodically~~ but no less frequently than annually~~quarterly~~ or,¹ and shall be published when updated in the Illinois Register and the Agency’s website at <http://www.iepa.state.il.us>.²

The Board’s proposal has added the phrase “whenever a new criterion is derived” and deleted the term “periodically” in the first phrase of the second sentence. The Agency sees this new language as placing a greater burden on Illinois EPA than the current language. The Agency is willing to change its current practice and both update its list and publish an updated list in the *Illinois Register* any time a new criterion is calculated. The Agency would also be willing to update its list on an annual basis rather than on a quarterly basis if that is the Board’s preference. But by requiring both, the new proposal adds a layer of complexity to the Agency’s role that will make it more difficult to meet this obligation than the current requirement. Instead of asking a staff person to track a quarterly or annual publication requirement, staff will have to track a rolling 12 months from the time the last updated criteria publication was made. If the proposed publication requirement was either to publish annually or to publish when derived, this change

¹In the Illinois Register publication the “or” after “annually” has been omitted. This “or” does not appear in Section 502.595 in either the Board or Secretary of State versions and appears to have been an error in the First Notice Order.

² The same amendments are proposed for Section 302.595 but in that Section the first sentence (which is not being amended) reads slightly differently when it says “The Agency shall maintain a listing of toxicity criteria and values derived pursuant to this Subpart.”

would reduce the administrative burden on the Illinois EPA, but the Board's proposal as drafted actually increases the burden. Of the two options, the Agency believes it would be more appropriate and more helpful to the public to publish the derived water quality listing at the time a criteria is updated rather than annually. Because the Agency maintains the current information on its website, there is little benefit to ensuring that a list has been published in the last twelve months. If the Board is not comfortable with this option or an annual publication only alternative, the Agency prefers to retain the existing quarterly publication requirement and withdraw any proposed amendments to these Sections.

Another concern Illinois EPA would like to raise with the Board's First Notice Opinion relates to the issue of publication on the Agency's website. The Board opinion says "Additionally, the Board will not require IEPA to maintain these criteria on its website, leaving that option to the Agency's judgment." This seems to run counter to the actual language in the proposal which requires the list to be "published" at the Agency's website. The Agency intends to continue providing information to the public on its website regarding existing derived water quality criteria. However, the Agency agrees with the Board that this should be left to the Agency's judgment and therefore should not be made a part of the regulation so long as the *Illinois Register* publication requirement exists. To create a legal requirement to "publish" on Agency's website as well as in the *Illinois Register* will only create additional confusion regarding the official version and the controlling date of publication.

It may have been the Board's intent to not require publication on the website but to simply identify the Agency's website for informational purposes. The Agency

believes inclusion of the Illinois EPA's homepage in this manner is unnecessary and only creates more confusion if there is not a legal requirement tied to the website listing. The Board's language regarding publication on the Agency's website also creates a new burden on the Agency because it would change the current manner of providing the listing informally on the website to a formal "publication" without any corresponding decrease in burden to publish in the *Illinois Register*. Illinois EPA's position is that the Board should simply delete reference to the Agency's website from the regulation and allow the Agency to make the public aware of the availability of the unofficial listing as it has done in the past.

Typographical Errors in Secretary of State Publication

The Agency has found two examples of typographical errors in the Secretary of State's first notice publication where the language was listed correctly in the Board's First Notice Opinion and Order.

In Section 302.208(a), the Agency proposal and the Board's First Notice Order contain the following amendment: "...to calculate attainment of the chronic ~~metals~~ standards." This strikethrough of the term "metals" does not appear in the official first notice publication and as a result, the official proposed rule language still implies that all parameters within the chronic standards provisions are metals.

The Agency has also noted a few places where the Agency proposed edits, which the Board adopted for first notice, to the footnotes in Section 302.208 changing milligram per liter or microgram per liter to "milligramss per liter" or "microgramss per liter." This addition of an underlined "s" is missing from Sections 302.208(e) for "microgramss" and in Section 302.208(g) for "microgramss" and "milligramss". This change was

proposed for accuracy and for consistency with the remainder of Part 302 and should be re-inserted into the Board's second notice version.

Comments of Illinois Environmental Regulatory Group

Shortly before the first notice filing deadline, the Illinois Environmental Regulatory Group ("IERG") shared with the Agency some minor language amendments it planned to propose to the Board. The amendments address to the proposed reorganization of language in the introductory paragraphs of Section 302.208. As indicated in the Statement of Reasons, the intent of the proposed changes was to increase clarity and not to substantively change the regulations or how they are implemented by the Agency. The Agency has reviewed IERG's proposed changes and does not believe those changes would impact the Agency's current or future interpretation of the regulations. For this reason, the Agency does not object to inclusion of IERG's changes and suggests the Board do so at second notice.

As a result of reviewing the IERG proposal, the Agency discovered an error in the language submitted in its proposal in Section 302.208(a). In order to make this language more accurate and consistent with the language in the rest of Section 302.208, the Agency would propose that the Board delete the term "applies" and replace it with "has been approved by the Agency." The proposed amendment is identified below by double underlining and double-strikethrough fonts.

Section 302.208 Numeric Standards for Chemical Constituents

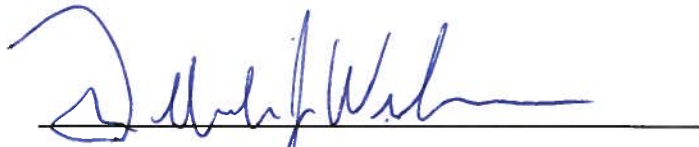
- a) The acute standard (AS) for the chemical constituents listed in subsection (e) shall not be exceeded at any time except for those waters for which a zone of initial dilution (ZID) ~~applies~~ has been approved by the Agency pursuant to Section 302.102~~as provided in subsection (d).~~

Conclusion

Illinois EPA appreciates the Board's time and efforts in this rulemaking proceeding and hopes the Board will take into account the Agency's concerns with proposed Sections 502.595 and 502.669. In addition, the Illinois EPA hopes the Board's schedule accommodates an expeditious conclusion of the first notice process including the required hearing on the failure of the Department of Commerce and Economic Opportunity to conduct an Economic Impact Study. The Agency is looking forward to the Board's Second Notice Opinion and to finalizing the new water quality standards contained herein.

Respectfully submitted,

By:



Deborah J. Williams
Assistant Counsel
Division of Legal Counsel

Date: May 25, 2012

Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
)
) R11-8
)
) TRIENNIAL REVIEW OF WATER QUALITY)
) STANDARDS FOR BORON, FLUORIDE) (Rulemaking- Water)
) AND MANGANESE: AMENDMENTS)
) TO 35 ILL. ADM. CODE 302.Subparts B,C, E)
) and F and 303.312)

CERTIFICATE OF SERVICE

I, the undersigned, an attorney, state that I have served the attached First Notice Comments of the Illinois Environmental Protection Agency upon the following persons:

John Therriault, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street, Suite 11-500
Chicago, Illinois 60601

Thomas H. Shepherd
Assistant Attorney General
Environmental Bureau
69 W. Washington Street, Suite 1800
Chicago, Illinois 60602

Kathleen Crowley, Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street, Suite 11-500
Chicago, Illinois 60601

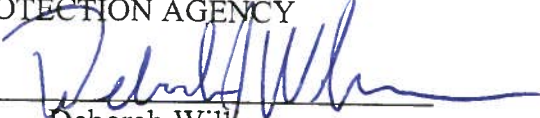
Office of Legal Services
Illinois Department of Natural
Resources
One Natural Resources Way
Springfield, Illinois 62702-1271

Christine G. Zeman
Special Assistant Corporation Counsel
Office of Public Utilities
800 E. Monroe, 4th Floor, Municipal Bldg.
Springfield, Illinois 62757-0001

Kathleen C. Bassi
Amy Antonioli
SCHIFF HARDIN, LLP
233 South Wacker Drive, Suite 6600
Chicago, Illinois 60606

by mailing a true copy thereof in an envelope duly addressed bearing proper first class postage and deposited in the United States mail at Springfield, Illinois on May 25, 2012.

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: 
Deborah Williams
Assistant Counsel
Division of Legal Counsel

THIS FILING IS SUBMITTED ON RECYCLED PAPER