ILLINOIS POLLUTION CONTROL BOARD
July 9, 2014

IN THE MATTER OF:	)	
	)	
AMENDMENTS TO PRIMARY DRINKING	)	R15-23
WATER STANDARDS	)	(Rulemaking - Water)
35 ILL. ADM. CODE 611	)	

ORDER OF THE BOARD (by D. Glosser):

On May 20, 2015, the Illinois Environmental Protection Agency (IEPA) filed a new rulemaking to amend the fluoride drinking water standard in the Board's rules. IEPA included a statement of reasons (SR) and a motion for expedited review. IEPA also filed a motion asking the Board to adopt the proposal as an emergency rule (Emergency) while proceeding with an expedited review.

On June 4, 2015, the Board accepted the proposal without commenting on the merits of the proposal and directed the Clerk to provide first notice of the proposal and granted the motion for expedited review. The Board reserved ruling on the motion to adopt an emergency rule and sought additional comment on the justification for the emergency rule.

The Board finds that the record does not support a conclusion that the failure to immediately adopt a fluoride standard constitutes a threat to the public health, safety, or welfare. Therefore, the Board denies the motion for emergency rulemaking. The Board discusses its decision below.

The Board first provides background and then summarizes IEPA's motion for emergency rulemaking. The Board next summarizes each of the comments. The Board then summarizes the legal background on emergency rulemaking before discussing its decision.

BACKGROUND

On June 4, 2015, the Board reserved ruling on the motion for emergency rulemaking and sought additional justification for the emergency rule proposal. The Board specifically asked IEPA to address the following:

1) Provide the number of households or individuals served by the community water suppliers that add fluoride;

2) Provide the basis upon which the calculations of savings were made;

3) Address whether, and if so, why, the prospect of community water suppliers not realizing the estimated cost savings for a 5 month period reasonably constitutes a threat to the public interest, safety or welfare;

4) Provide specific hardships or detrimental effects to community water suppliers that are more likely than not to result if an emergency rule is not granted; and

5) Indicate what, if any, significant public health impacts would result to the customers of community water systems if the amount of fluoridation were reduced as proposed.

The Board also invited the community water suppliers and the public to provide comment. The Board accepted comment until June 25, 2015.

The Board received five comments:

Kyla Jacobsen, Utilities Director, City of Elgin Water Department (PC 1)
Molly Nocerino (PC 2)
William J. Soucie, M.S., Operations Director, Central Lake County Joint Action Water Agency (PC 3)
Randolph Pankiewicz, Manager Water Quality and Environmental Compliance, Illinois American Water (PC 4)
IEPA (PC 5).

IEPA'S PROPOSAL FOR EMERGENCY RULEMAKING

IEPA is asking that the Board adopt the amendment to Section 611.125 as an emergency amendment. IEPA explains that the Board's rules at Section 611.125 require all community water supplies to maintain a fluoride ion concentration of 0.9 to 1.2 milligrams per liter (mg/L) in the community water supply distribution system. SR. at 1; 35 Ill. Adm. Code 611.125. IEPA continues that the state requirement is based on a statutory fluoridation requirement found in the Public Water Supply Regulation Act, 415 ILCS 40 (2014). SR. at 1. A statutory change in 2011 removed the fluoridation range from the statute and replaced it with a reference to the optimal fluoridation levels recommended by the United States Department of Health and Human Services (HHS). On May 1, 2015, HHS adopted a recommended fluoridation ion concentration of 0.7 mg/L. SR. at 1, 4. IEPA proposes to change the Board's rules to adopt the current HHS recommendation, which will reduce a community water supply's cost of having to meet the existing higher fluoridation levels. IEPA recommends the Board amend the rules to reflect a fluoridation ion concentration of 0.7 mg/L. SR. at 1. IEPA notes that the current standard is 0.9 to 1.2 mg/L, based on HHS's previous recommendation. Emergency at 2.

IEPA states that the Public Water Supply Regulation Act, 415 ILCS 40/7a, requires the Illinois Department of Public Health (IDPH) to adopt regulations requiring the addition of fluoride based on the recommendation on optimal fluoridation levels for community water supplies as proposed and adopted by HHS. Emergency at 2. IEPA opines that until the Board changes its fluoride requirement found in Section 611.125, community water supplies across the state will be required to maintain a fluoride concentration between 0.9 to 1.2 mg/L despite the HHS recommendation and any regulations promulgated by IDPH. *Id*.

IEPA regulates 1,744 community water supplies of which approximately 817 add fluoride to their water to meet the standard in Section 611.125. Emergency at 2. IEPA projects that the new standard will reduce or eliminate costs associated with fluoride addition. *Id*. Those cost reductions are projected to be 20% to 30%, or in dollars, $8,000 to $10,000 for moderately sized treatment plants. *Id*. IEPA indicates that one private community water supplier indicated that revising the fluoride standard will save it approximately $150,000 a year, and the City of Chicago estimates a savings of almost $1,000,000. *Id*. IEPA estimates that the saving per year on a statewide basis is $2,100,000. *Id*.

IEPA believes that the Board's rulemaking process, even if expedited, may take up to six months or more. Emergency at 3. IEPA opines that delaying the effectiveness of the new fluoride requirement in Section 611.125 by six months will cost community water supplies approximately $1,050,000. *Id*. IEPA notes that the majority of community water supplies are publicly owned and supported by taxpayer dollars. The remainder are mostly privately owned water supplies that serve public customers. *Id*. IEPA opines that the continued increased fluoridation costs for all these community water supplies reasonably constitute a threat to the public interest or welfare.

PUBLIC COMMENTS

Kyla Jacobsen, Utilities Director, City of Elgin Water Department (PC 1)

Ms. Jacobsen indicated that Elgin has approximately 31,000 residential service connections and 32,303 overall. PC 1. The new fluoride standard will result in an approximate annual savings of $11,000 out of a $2,000,000 water treatment chemical budget, and that amount is not significant. *Id*. Ms. Jacobsen does not believe that the delay of 5 months in application of the new fluoride standard constitutes an emergency. *Id*.

Molly Nocerino (PC 2)

Ms. Nocerino comments that the current fluoridation rates of 0.9 to 1.2 mg/L "**are no longer considered safe or effective** by the federal government." PC 2 (emphasis in original). Ms. Nocerino states that fluoride is found to have caused fluorosis in 41% of children aged 12-15. *Id*. Ms. Nocerino opines that "[t]his undoubtedly a [sic] threat to public interest and welfare." *Id*. Ms. Nocerino argues that because Section 7a of the Public Water Supply Regulation Act, 415 ILCS 40/7a, requires IDPH to adopt regulations requiring the addition of fluoride based on the recommendation on optimal fluoridation for community water levels as proposed and adopted by HHS, the current version of Section 611.125 "is in direct violation" of Illinois law. *Id*.

William J. Soucie, M.S., Operations Director, Central Lake County Joint Action Water Agency (PC 3)

The Central Lake County Joint Action Water Agency (CLCJAWA) serves Lake Michigan water to 210,000 people in Lake County. PC 3 at 1. Mr. Soucie writes in support of IEPA's request for an emergency rule. *Id*. Mr. Soucie offers that public water suppliers make

every effort to assure efficient production of high quality drinking water. *Id*. Mr. Soucie explains that after years of research and study, the evidence supporting continued fluoridation of water is strong, but the same positive health effects can be achieved with a lower level of fluoride. *Id*.

Mr. Soucie states that 98.5% of the people receiving water from public water suppliers in Illinois, or 12,682,543 people, receive fluoridated water, including those serviced by CLCJAWA. PC 3 at 1. Mr. Soucie indicates that the cost is approximately $52,000 per year for fluoridation, and the change in standards will result in an annual savings of $15,600. *Id*. Mr. Soucie speculates that there could also be savings to suppliers who are replacing equipment. *Id*. at 2.

Mr. Soucie argues that the threat to public interest is the "unnecessary cost expenditure made by Illinois water supplies" and at CLCJAWA that cost is $15,600 annually. PC 3 at 2.

Randolph Pankiewicz, Manager Water Quality and Environmental Compliance, Illinois American Water Company (PC 4)

Illinois American Water Company (ILAWC) is a water supplier providing water to approximately 280,000 customers throughout Illinois. PC 4 at 1. The new standard adopted by HHS has been used by many states for over a year, and ILAWC asks that the new level become effective as soon as possible. *Id*. The scientific research on fluoridation is based on factors that include the fact that many additional sources of fluoride are used. *Id*. Mr. Pankiewicz states that the current level of fluoride does not pose a threat to public welfare, but the lower level is the optimum level to provide benefits of fluoridation. *Id*. Mr. Pankiewicz indicates that the cost reduction attributable to adoption of the revised standard will be an approximate annual savings of $150,000. *Id*. This cost savings could be used to address other needs of the utility. *Id.*

IEPA (PC 5)

IEPA estimates that approximately 11,825,891 people are served by community water suppliers that add fluoride. PC 5 at 1. The City of Chicago estimates an annual cost savings of $1,000,000 and Illinois Aqua estimates an annual savings of $633,666. PC 5 at Exh. 1 and 2. IEPA estimates a cost savings of $2,100,000 "for the entire population of the State". *Id*. at 2. IEPA argues that mandating community water supplies to spend approximately $1,000,000 every six months to meet an outdated standard is a threat to the public's interest and welfare. IEPA specifies two reasons in support of its argument. First, IEPA argues that legislation establishes that the fluoride level is to be based on HHS recommendations, and the current Board requirement exceeds that recommendation. *Id*. Second, IEPA opines that requiring community water suppliers to expend taxpayer dollars to meet a requirement that is inconsistent with state law and federal recommendations is against the public's interest. *Id*.

As most community water supplies in Illinois are publicly owned, and funded by taxpayer dollars, IEPA speculates that communities could use the money saved by immediate compliance with a lower fluoride requirement on other aspects of water supply. IEPA further speculates the water suppliers could possibly pass the savings on to the taxpayers through rate

reductions. PC 5 at 3. IEPA states it did not base its motion for an emergency rule on the argument that the rule is needed to avoid significant public health impacts. *Id*. Rather, the basis for IEPA's request for an emergency rule is "that unnecessary expenditure of taxpayer dollars for increased fluoridation costs related to an outdated standard constituted a threat to the public interest or welfare." *Id*. IEPA asserts that this is especially true as the fluoride requirement is not a health-based requirement. *Id*.

STATUTORY AND LEGAL BACKGROUND

When adopting emergency rules, the Board must follow the dictates of both the Act, 415 ILCS 5 *et seq.* (2014) and the Illinois Administrative Procedures Act (IAPA), 5 ILCS 5/100 *et seq.* (2014).

Section 27 (a) and (c) of the Act provides in part:

(a) The Board may adopt substantive regulations as described in this Act.

* * *

> In promulgating regulations under this Act, the Board shall take into account the existing physical conditions, the character of the area involved, including the character of surrounding land uses, zoning classifications, the nature of the existing air quality, or receiving body of water, as the case may be, and the technical feasibility and economic reasonableness of measuring or reducing the particular type of pollution.

(c) On proclamation by the Governor, pursuant to Section 8 of the Illinois Emergency Services and Disaster Act of 1975, that a disaster emergency exists, or when the Board finds that a severe public health emergency exists, the Board may, in relation to any proposed regulation, order that such regulation shall take effect without delay and the Board shall proceed with the hearings and studies required by this Section while the regulation continues in effect.

> When the Board finds that a situation exists which reasonably constitutes a threat to the public interest, safety or welfare, the Board may adopt regulations pursuant to and in accordance with Section 5-45 of the Illinois Administrative procedure Act. 415 ILCS 5/27(a) and (c) (2014).

Section 5-45 of the IAPA provides in part:

(a) "Emergency" means the existence of any situation that any agency finds reasonably constitutes a threat to the public interest, safety, or welfare.

(b) If any agency finds that an emergency exists that requires adoption of a rule upon fewer days than is required by Section 5-40 and states in writing its reasons for that finding, the agency may adopt an emergency rule

> without prior notice or hearing upon filing a notice of emergency rulemaking with the Secretary of State under Section 5-70. The notice shall include the text of the emergency rule and shall be published in the Illinois Register. Consent orders or other court orders adopting settlements negotiated by an agency may be adopted under this Section. Subject to applicable constitutional or statutory provisions, an emergency rule becomes effective immediately upon filing under Section 5-65 or at a stated date less than 10 days thereafter. The agency's finding and a statement of the specific reasons for the finding shall be filed with the rule. The agency shall take reasonable and appropriate measures to make emergency rules known to the persons who may be affected by them.
>
> (c) An emergency rule may be effective for a period of not longer than 150 days, but the agency's authority to adopt an identical rule under Section 5-40 is not precluded. * * * 5 ILCS 100/5-45(a)-(c) (2014).

The IAPA goes on to provide that, after filing, emergency rules will be reviewed by the Joint Committee on Administrative Rules (JCAR). Under Section 5-120, JCAR examines an emergency rule "to determine whether the rule is within the statutory authority on which it is based and whether the rule is in proper form." 5 ILCS 100/5-120(a) (2014). If JCAR determines a rule is non-compliant, JCAR may file an objection, to which the adopting agency can respond. If JCAR is not satisfied with the response, it can take various actions, including suspension of the rule. 5 ILCS 100/5-120 and 5-125.

As the Board has stated:

> While emergency rulemaking by the Board is not unprecedented, it is not an ordinary occurrence. During the past 20 years, the Board has been requested to adopt emergency rules only a dozen or so times. As discussed below, in some instances, the Board has been presented with sufficient evidence and argument to allow it to find that "a situation exists which reasonably constitutes a threat to the public interest, safety or welfare" within the meaning of Section 27(c) of the Act and Section 5-45 of the IAPA. In other instances, the Board has not, resulting in use of the regular rulemaking process to address the situation presented. Emergency Rulemaking Regarding Regulations of Coke/Bulk Terminals: New 35 Ill. Adm. Code 213, R14-20, slip op. at 42 (Jan. 23, 2014).

Below the Board offers some further background on Board decisions on emergency rulemaking as well as court decisions.

Public Water Supply Regulations, R85-14

On August 15, 1985, the Board adopted an emergency rule that allowed IEPA to issue permits for water main extensions to roughly 100 public water supplies even though those facilities were on "restricted status." *See* Proposed Amendments to Public Water Supply Regulations, 35 Ill. Adm. Code 602.105 and 602.106, R85-14 (Aug. 15, 1985). The Board found

the emergency relief necessary based almost entirely upon reasons of economic hardship. *See* Public Water Supply, R85-14, slip op. at 1-2.

Under Board regulations, "restricted status" is a designation given by IEPA to a public water supply when the facility cannot be issued a construction permit without causing a violation. IEPA is required to periodically publish a list of those water supplies that are subject to restrictive status. *See* Public Water Supply, R85-14, slip op. at 7. The emergency rule provided that IEPA could not deny a construction permit for any of three specified grounds relating to the public water supply's concentration of fluoride, combined radium 226 and radium 228, or gross alpha particle activity. *Id*. at 1. Correspondingly, if the facility's only violations fell within these parameters, IEPA could not include the public water supply on the restricted status list. *Id*. at 7.

In its order, the Board first found that the "overwhelming" weight of evidence in the record demonstrated that this "regulatory relief can be granted with minimal risk of adverse impact to the health of the consumers of this water." *See* Public Water Supply, R85-14, slip op. at 1. Next, the Board determined that "emergency relief" was warranted for five reasons. First, economic development had "halted" in these communities to the extent it required permits for extension of water service. *Id*. Second, much of the "May 15-November 15 construction season" had elapsed and there was "no certainty" that a permanent rule could be adopted before November 15. *Id*. Third, certain communities would "lose previously planned development" and others in "economically depressed areas" would be "placed at a competitive disadvantage in attracting new development." *Id*. at 2. Fourth, at least one community had been unable to extend water service "consistent with its perceived needs for improved fire-fighting capability." *Id*. Finally, installing treatment technologies or developing alternative water sources could be "prohibitively costly and difficult or impossible to immediately finance absent expansion of a community's tax base." *Id*. The Board found this to be a situation that reasonably constitutes a threat to the public interest, safety, and welfare. *Id*. The Board accordingly adopted the emergency rule, to last a maximum of 150 days or until January 12, 1986. *Id*.

Stage II Gasoline Vapor Recovery Rule, Metro-East, R93-12

On May 20, 1993, the Board adopted emergency rules to delay the compliance deadline in the Board's Stage II vapor recovery regulations from May 1 to October 15, 1993. *See* Emergency Rule Amending the Stage II Gasoline Vapor Recovery Rule in the Metro-East Area, 35 Ill. Adm. Code 219.586(d), R93-12 (May 20, 1993). The original deadline, May 1, 1993, was the date by which specified gasoline dispensing facilities in the Metro-East ozone nonattainment area were required to install vapor collection and control equipment commonly known as "Stage II equipment." Stage II Emergency Rule, R93-12, slip op. at 1. On May 3, 1993, IEPA filed the emergency rulemaking proposal to push back the compliance deadline. *Id*.

The Board had adopted the Stage II rules in August 1992 as part of fulfilling Illinois' obligations under the Clean Air Act (CAA). *See* Stage II Emergency Rule, R93-12, slip op. at 2-4. The Stage II requirements, however, would become inapplicable once the United States Environmental Protection (USEPA) promulgated standards for vehicle-based (onboard) vapor recovery. *Id*. at 4. USEPA failed to meet the CAA requirement of promulgating the onboard

vapor recovery standards by November 1991. This failure resulted in a federal court ordering USEPA to adopt the standards. *Id*. In the meantime, absent onboard standards, nonattainment areas like Metro-East remained subject to the Stage II requirements. *Id*.

In its emergency rulemaking proposal, IEPA estimated that installing Stage II systems at the Metro-East's roughly 400 affected service stations would cost approximately $14 million. *See* Stage II Emergency Rule, R93-12, slip op. at 4 (May 5, 1993). This cost, IEPA continued, would be imposed on "an economically depressed area of the State for what theoretically should be a relatively short period of time," *i.e.*, until USEPA adopts onboard vapor recovery standards. *Id*. On May 5, 1993, two days after receiving IEPA's proposal, the Board solicited additional information.

In adopting the emergency rule on May 20, 1993, the Board first stated that emergency rulemaking is "justified when there is a threat to the public interest." Stage II Emergency Rule, R93-12, slip op. at 8 (May 20, 1993). The Board found that those Metro-East stations that "should have complied" with Stage II requirements by May 1, 1993, "would suffer extreme economic hardship if forced to comply at this time." *Id*. These facilities, the Board continued, would be subject to "intolerable uncertainty until the USEPA provides guidance" and to "legal action by IEPA, or any citizen, if they fail to comply" with the Stage II requirements. *Id*. The Board therefore adopted the emergency rules, delaying the Stage II compliance deadline from May 1, 1993 to October 15, 1993. *Id*.

7.2 Psi Reid Vapor Pressure, Metro-East, R95-10

On February 23, 1995, the Board adopted emergency rules to delay the compliance deadline in the Board's gasoline volatility rule from May 1 to June 1, 1995. *See* Emergency Rule Amending 7.2 PSI Reid Vapor Pressure Requirement in the Metro-East Area, 35 Ill. Adm. Code 219.585(a), R95-10 (Feb. 23, 1995). Under the gasoline volatility rule, beginning May 1, 1995, all "supply facilities" (*e.g.*, refiners, distributors, bulk terminals) in the Metro-East ozone nonattainment area were required to lower gasoline Reid Vapor Pressure (RVP) during the ozone season to 7.2 pounds per square inch (psi). *See* Reid Vapor Pressure Emergency Rule, R95-10, slip op. at 1. Retail and wholesale facilities, on the other hand were not required to comply until one month later, by June 1, 1995. *Id*. IEPA, on February 14, 1995, filed the emergency rulemaking proposal for the one-month delay of the compliance deadline. *Id*.

As part of fulfilling Illinois' duties under the CAA, the Board in September 1994 had adopted the rule requiring reduced gasoline volatility each year during the ozone season. *See* Reid Vapor Pressure Emergency Rule, R95-10, slip op. at 1-2. IEPA's emergency rulemaking proposal stated that the hardship on the petroleum refining industry was due to "the interplay of the federal and state gasoline volatility rules." *Id*. at 2. USEPA regulations required (1) supply facilities nationwide to have 9.0 psi RVP gasoline beginning May 1 each year and (2) both supply and retail facilities—in southern tier nonattainment areas—to have 7.2 psi RVP gasoline beginning on June 1 of each year. Accordingly, on May 1, Metro-East supply facilities were required to have 7.2 psi RVP gasoline under the Illinois rule "when the rest of the country [was] only required to have 9.0 psi RVP gasoline." *Id*. at 2-4.

In adopting the emergency rule, the Board first found that the one-month delay for Metro-East would have "little environmental effect" because the federal 9.0 psi RVP standard would be in effect. *See* Reid Vapor Pressure Emergency Rule, R95-10, slip op. at 4. There would be some small loss in actual emissions reductions during May, but IEPA believed this would not require adjusting the emissions reduction credit taken by Illinois in fulfilling CAA requirements. *Id*. at 5. IEPA maintained that the petroleum refining industry did not distinguish between the Metro-East and St. Louis areas for marketing gasoline and that there was limited storage capacity for petroleum products. *Id*. at 3-5. The Board agreed with IEPA that failing to delay the compliance deadline by one month would require Metro-East refiners, distributors, and bulk terminals to supply and sell 7.2 psi RVP gasoline to the majority of the market in May when that gasoline would be required in only a fraction of the market. *Id*. at 4-5. The Board found that the economic hardship on the petroleum industry "is real." Reid Vapor Pressure Emergency Rule, R95-10, slip op. at 5.

Citizens for a Better Environment v. IPCB

In Citizens for a Better Environment v. IPCB, 152 Ill. App. 3d 105 (1st Dist. 1987), the First District Appellate Court vacated the Board's emergency rules. The Board had adopted the emergency rules in response to legislative action. Specifically, the General Assembly enacted Section 39(h) of the Act to prohibit depositing hazardous waste streams in permitted sites without specific authorization from IEPA. Section 39(h) was enacted in 1981 but became effective on January 1, 1987. Citizens, 152 Ill. App. 3d at 107-08. The Board, in February 1986, opened a docket to solicit rulemaking proposals on how to implement Section 39(h). *Id*. at 108.

No rulemaking proposals were filed with the Board. In June 1986, the Board proposed rules to implement Section 39(h) and held four days of hearings on its proposal. Citizens, 152 Ill. App. 3d at 108. After hearings, the Board requested public comment on its legal authority to adopt emergency rules. In early October 1986, the Board proposed emergency rules to implement Section 39(h) and allowed an 11-day period for public comment. *Id*. Later in October, the Board adopted the emergency rules. In turn, Citizens for a Better Environment and, on behalf of IEPA, the People of the State of Illinois appealed, maintaining that the Board lacked the authority to adopt emergency rules because there was no "emergency" as defined by the IAPA. *Id*. at 108-09.

The appellate court found that the Board had failed to justify emergency rulemaking, reasoning:

> [A]n "emergency" is present, which would justify the employment of the emergency rulemaking procedures under section 5.02 [of the IAPA (now Section 5-45)], when there *exists* a situation which reasonably constitutes a *threat* to the public interest, safety, or welfare. Stated differently, the need to adopt emergency rules in order to alleviate an administrative need, which, by itself, does not threaten the public interest, safety, or welfare, does not constitute an "emergency." Citizens 152 Ill. App. 3d at 109-10 (emphasis in original).

DISCUSSION

IEPA states it did not base its motion for an emergency rule on the argument that the rule is needed to avoid significant public health impacts. PC 5 at 3. Instead IEPA's request for an emergency rule is based on the premise "that unnecessary expenditure of taxpayer dollars for increased fluoridation costs related to an outdated standard constituted a threat to the public interest or welfare." *Id*. IEPA asserts that this is especially true as the fluoride requirement is not a health-based standard. *Id*. IEPA estimates an approximate $2,000,000 annual savings for the entire population of Illinois. PC 5 at 2.

In support of IEPA's request, CLCJAWA indicates that the savings for lowering the fluoride requirement will reduce expenditures by $15,600 on an annual basis (PC 3), and ILAWC will realize an approximate annual savings of $150,000 (PC 4). Both suggest that the savings could be used for other projects and that the revised fluoride requirement is the optimum level for the health benefits. Ms. Nocerino questions the safety and effectiveness of the current fluoride requirement. The City of Chicago will save approximately $1,000,000 annually (PC 5 Exh. 1). In contrast, Elgin indicated a savings of approximately $2,000 and does not believe an emergency exists.

As stated above, under Section 27(c) of the Act "[w]hen the Board finds that a situation exists that reasonably constitutes a threat to the public interest, safety or welfare, the Board may adopt regulations pursuant to and in accordance with Section 5-45" of the IAPA. 415 ILCS 5/27(a) and (c) (2014). Based on the Board's prior decisions, as well as the court's views on emergency rulemaking, the Board is unconvinced that the savings to public water suppliers in this instance constitutes a threat to public interest, safety, or welfare. The Board has already proposed the new fluoride requirement for first notice (*see* 39 Ill. Reg. 8691 (June 26, 2015)) and scheduled two hearings (July 30 and August 19). This hearing schedule will allow the Board to adopt the rule before the end of 2015. Thus, at this point the savings would be for a period of less than 5 months and would be less than $1,000,000; however, the record does not identify how these savings impact the public interest, safety or welfare.

The Board's decision is supported by the court's view in Citizens, where the court found the Board failed to show that ambiguity in Section 39(h) or potential appeals amount to a "threat to the public." Citizens 152 Ill. App. 3d at 109-10. The court acknowledged that appeals require expending public funds, which impacts the public, but this "does not threaten the safety or welfare of the public." *Id*.

A more recent court decision on emergency rules is Champaign-Urbana Public Health District v. ILRB, 354 Ill. App. 3d 482 (4th Dist. 2004), which relies upon Citizens. In Champaign-Urbana, the Fourth District Appellate Court found that emergency rules of the Illinois Labor Relations Board (ILRB) were invalid. ILRB had adopted the emergency rules to implement statutory changes for determining whether a majority of employees favored collective representation. Champaign-Urbana, 354 Ill. App. 3d at 490-91. The Fourth District could not see how ILRB's emergency rules were "necessary to counter a threat to the public interest, safety, or welfare." Champaign-Urbana, 354 Ill. App. 3d at 490. The appellate court pointed out that the union could have obtained representation of the employees by (1) means other than the

method provided through the new legislation or (2) simply waiting until after the rules were promulgated to use the new method. Further, regardless of the immediate effective date of the legislative amendment, the court found no facts in the record to show that "without the emergency rules the public would be confronted with a threatening situation." *Id.*

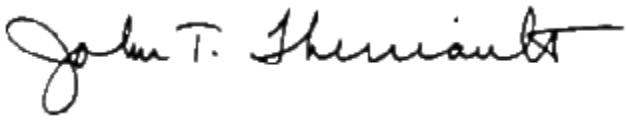
According to the appellate court, the reason for adopting an emergency rule:

> should be truly emergent and persuasive to a reviewing court and considerations of administrative and fiscal convenience alone do not satisfy that standard. Agencies may not adopt emergency rules to eliminate an administrative need that does not threaten the public interest, safety, or welfare. Champaign-Urbana, 354 Ill. App. 3d at 491, quoting 2 Am. Jur. 2d Administrative Law § 210 (2004).

Based on the facts presented in this rulemaking, the Board finds that an immediate effective date of the amended fluoride requirement is not necessary to address an emergency. As indicated above, the permanent rule should be in place before the end of the calendar year and while the commenters speculate about what may be done with the cost savings, the record does not identify how those cost savings will alleviate any threat to the public interest, safety, or welfare. The Board finds that the loss of cost savings alone in this context is not sufficient to establish a threat to the public interest, safety, or welfare. Therefore, the Board denies the motion for emergency rulemaking.

IT IS SO ORDERED.

I, John T. Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on July 9, 2015, by a vote of 5-0.



John T. Therriault, Clerk
Illinois Pollution Control Board