



Illinois Water
Environment Association



IWWSG

TIME LIMITED WATER QUALITY STANDARDS

NEW SECTION 38.5 OF THE ENVIRONMENTAL
PROTECTION ACT

- Regulatory Relief: Variance
- Consistent with federal law
- Arbitrary and unreasonable hardship

- 415 ILCS 5/35(a)

- Board may impose Conditions
- 5 year limit (may extend from year to year)
- 415 ILCS 5/36

- Two step process:
- Board final order
- Transmittal to USEPA for review and approval

- 40 CFR 131.14 –Water Quality Standards Variances
- Allows States to adopt water quality standard variances
- A water quality standard variance is
- Subject to USEPA review
- Identifies the highest attainable condition applicable

- USEPA Authority –40 CFR 131.5
- USEPA reviews and either approves or disapproves state-adopted water quality standards
- Determines whether consistent with 40 CFR 131.14
- 40 CFR 131.5(a)(4)

- Public Act 99-937
- Introduced in April 2016
- House Floor Amendment added new Section 38.5

- Public Act 99-937
- Allows the Board to adopt, and conduct non-adjudicatory proceedings to adopt, a time-limited water quality standard for a watershed or one or more of the following:
 - Water bodies,
 - Waterbody segments, or
 - Dischargers
- 415 ILCS 5/38.5(a)

- Public Act 99-937
- Passed both Houses December 1, 2016
- Governor Approved on February 24, 2017
- Effective Date: February 24, 2017

- What is a Time Limited Water Quality Standard?
- “Time-Limited Water Quality Standard” has the meaning ascribed to the term “water quality standards variance” in 40 CFR 131.3(o)
- 415 ILCS 5/3.488

- What is a Water Quality Standards Variance?
- A time-limited designated use and criterion for a specific pollutant or water quality parameter that reflects the highest attainable condition during the term of the Water Quality Standards variance
- 40 CFR 131.3(o)

- Applicability
- A person who files a petition under Section 38.5
- A person who filed a petition for a Section 35 water quality standard variance pending on February 24, 2017
- 415 ILCS 5/38.5(b), (c)

- Applicability
- Dischargers seeking coverage during the time-limited water quality standard duration for criteria established by Board decision
- 415 ILCS 5/38.5(i)

- Timeline
- Person files a petition or has a water variance petition converted
- 415 ILCS 5/38.5(b)

- Timeline
- Illinois Environmental Protection Agency Response:
- Identifies discharger
- Identifies the watershed, water bodies, or waterbody segments
- Identifies the appropriate type of time-limited water quality standard
- Recommends, for the purposes of subsection (h), prompt deadlines
- 415 ILCS 5/38.5(e)

- Timeline
- Board final order establishes:
- Discharger or classes of dischargers
- Prompt deadlines to file petition

- 415 ILCS 5/38.5(f)

- Timeline
- Board must “as soon as practicable” evaluate the current petition to assess substantial compliance with 40 CFR 131.14, Section 38.5, and rules adopted pursuant to that section
- 415 ILCS 5/38.5(g)

- Timeline
- If Board determines no substantial compliance
- Interim order identifying deficiencies
- Amended petition due by deadline set in final order

- 415 ILCS 5/38.5(h)(3)

- Timeline
- If no substantial compliance after amended petition
- Board order denying petition
- 415 ILCS 5/38.5(h)(5)

- If no amended petition filed, Board will dismiss the petition
- 415 ILCS 5/38.5(h)(6)

- Timeline
- If Board determines substantial compliance
- Agency shall file a recommendation concerning the petition
- 415 ILCS 5/38.5(g)

- Case proceeds until Board
- denies petition or
- adopts time-limited water quality standard, and USEPA review
- 415 ILCS 5/38.5(h)(4)

- Stay
- Effectiveness of a water quality standard is stayed as to
- Petition for variance seeking relief under Section 35 of the Act
- Petition for a time-limited water quality standard within 35 days
- Any qualifying discharger identified by a Board order who files a petition before established deadline
- 415 ILCS 5/38.5(h)(1)

- Stay
- Stay continues until
- Petition is denied and all rights to judicial review are exhausted
- Time-limited water quality standard is adopted and USEPA review
- 415 ILCS 5/38.5(h)(2), (4)-(6)

- Stay
- If a person other than the three described previously files a petition for a time-limited water quality standard, then the effectiveness of the water quality standard from which relief is sought shall not be stayed as to that person
- 415 ILCS 5/38.5(h)(7)

- Rules
- IEPA shall propose rules within six months of effective date
- Board shall adopt rules no later than nine months after receiving IEPA proposal
- 415 ILCS 5/38.5(k)

- Rules
- Until rules effective, Board may adopt time-limited water quality standards to the full extent allowed under Section 38.5 and 40 CFR 131.14
- 415 ILCS 5/38.5(k)

- Hearings
- Open to public
- Comply with 40 CFR 131.14, including
- Public notice and participation requirements referenced in 40 CFR 25 and 40 CFR 131.20(b)
- Section 38.5
- Rules adopted under Section 38.5
- 415 ILCS 5/38.5(d)

- Judicial Review
- Petition for review within 35 days after the date the Board order was served
- Served on the date published to website
- 415 ILCS 5/38.5(j)



Illinois Environmental Protection Agency



Enforcement Process

Sec. 30. Investigations. The Agency shall cause investigations to be made upon the request of the Board or upon receipt of information concerning an alleged violation of this Act, any rule or regulation adopted under this Act, any permit or term or condition of a permit, or any Board order, and may cause to be made such other investigations as it shall deem advisable.

- 4(d) In accordance with constitutional limitations, the Agency shall have authority to enter at all reasonable times upon any private or public property for the purpose of:
 - (1) Inspecting and investigating to ascertain possible violations of this Act, any rule or regulation adopted under this Act, any permit or term or condition of a permit, or any Board order; or...

- Sec. 31. Notice; complaint; hearing.
- (a)(1) Within 180 days after becoming aware of an alleged violation of the Act, any rule adopted under the Act, a permit granted by the Agency, or a condition of such a permit, the Agency shall issue and serve, by certified mail, upon the person complained against a written notice informing that person that the Agency has evidence of the alleged violation.

- (2) A written response to the violations alleged shall be submitted to the Agency, by certified mail, within 45 days after receipt of notice by the person complained against, unless the Agency agrees to an extension.

- (3) If the person complained against fails to respond in accordance with the requirements of subdivision (2) of this subsection (a), the failure to respond shall be considered a waiver of the requirements of this subsection (a) and nothing in this Section shall preclude the Agency from proceeding pursuant to subsection (b) of this Section.

- (4) A meeting requested pursuant to subdivision (2) of this subsection (a) shall be held without a representative of the Office of the Illinois Attorney General or the State's Attorney of the county in which the alleged violation occurred, within 60 days after receipt of notice by the person complained against, unless the Agency agrees to a postponement. At the meeting, the Agency shall provide an opportunity for the person complained against to respond to each alleged violation, suggested resolution, and suggested implementation time frame, and to suggest alternate resolutions.

(5) If a meeting requested pursuant to subdivision (2) of this subsection (a) is held, the person complained against shall, within 21 days following the meeting or within an extended time period as agreed to by the Agency, submit by certified mail to the Agency a written response to the alleged violations.

- (6) If the person complained against fails to respond in accordance with the requirements of subdivision (5) of this subsection (a), the failure to respond shall be considered a waiver of the requirements of this subsection (a) and nothing in this Section shall preclude the Agency from proceeding pursuant to subsection (b) of this Section.

- (7) Within 30 days after the Agency's receipt of a written response submitted by the person complained against pursuant to subdivision (2) of this subsection (a) if a meeting is not requested or pursuant to subdivision (5) of this subsection (a) if a meeting is held, or within a later time period as agreed to by the Agency and the person complained against, the Agency shall issue and serve, by certified mail, upon the person complained against (i) a proposed Compliance Commitment Agreement or...

- (ii) a notice that one or more violations cannot be resolved without the involvement of the Office of the Attorney General or the State's Attorney of the county in which the alleged violation occurred and that no proposed Compliance Commitment Agreement will be issued by the Agency for those violations.

- (7.5) Within 30 days after the receipt of the Agency's proposed Compliance Commitment Agreement by the person complained against, the person shall either (i) agree to and sign the proposed Compliance Commitment Agreement provided by the Agency and submit the signed Compliance Commitment Agreement to the Agency by certified mail or (ii) notify the Agency in writing by certified mail of the person's rejection of the proposed Compliance Commitment Agreement. If the person complained against fails to respond to the proposed Compliance Commitment Agreement within 30 days as required under this paragraph, the proposed Compliance Commitment Agreement is deemed rejected by operation of law. Any Compliance Commitment Agreement entered into under item (i) of this paragraph may be amended subsequently in writing by mutual agreement between the Agency and the signatory to the Compliance Commitment Agreement, the signatory's legal representative, or the signatory's agent.

- (b) For alleged violations that remain the subject of disagreement between the Agency and the person complained against following fulfillment of the requirements of subsection (a) of this Section, and for alleged violations of the terms or conditions of a Compliance Commitment Agreement entered into under subdivision (a)(7.5) of this Section as well as the alleged violations that are the subject of the Compliance Commitment Agreement, and as a precondition to the Agency's referral or request to the Office of the Illinois Attorney General or the State's Attorney of the county in which the alleged violation occurred for legal representation regarding an alleged violation that may be addressed pursuant to subsection (c) or (d) of this Section or pursuant to Section 42 of this Act, the Agency shall issue and serve, by certified mail, upon the person complained against a written notice informing that person that the Agency intends to pursue legal action. Such notice shall notify the person complained against of the violations to be alleged and offer the person an opportunity to meet with appropriate Agency personnel in an effort to resolve any alleged violations that could lead to the filing of a formal complaint. The meeting with Agency personnel shall be held within 30 days after receipt of notice served pursuant to this subsection upon the person complained against, unless the Agency agrees to a postponement or the person notifies the Agency that he or she will not appear at a meeting within the 30-day time period. Nothing in this subsection is intended to preclude the Agency from following the provisions of subsection (c) or (d) of this Section or from requesting the legal representation of the Office of the Illinois Attorney General or the State's Attorney of the county in which the alleged violations occurred for alleged violations which remain the subject of disagreement between the Agency and the person complained against after the provisions of this subsection are fulfilled.

- Normal Illinois Enforcement Process Summary
- IEPA Becomes Aware of an Alleged Violations
 - ↓ 180 days after IEPA becomes aware ↓
- IEPA Issues Written Violation Notice (VN)
 - ↓ 45 days after receipt of VN ↓
- Company Submits Response to VN and Compliance Commitment Agreement (CCA)
 - ↓ 60 days after receipt of VN ↓
- Meeting with IEPA and Company Regarding VN and CCA
 - ↓ 21 days after meeting ↓
 - Company Submits 21-Day Letter
 - ↓ 30 days after receipt of 21-Day Letter ↓
 - IEPA Accepts or Rejects CCA
 - ↓ No time limit ↓
- Written Notice That Agency Intends To Pursue Legal Action
 - ↓ Within 30 days of receipt ↓
- Opportunity to Meet with Agency Regarding Referral
 - ↓ No time limit ↓
- Formal Complaint, Notice, and Summons

IEPA REFERRALS TO THE AGO

- 1. Agency has gone through Section 31 notice process. IEPA refers a case with summary of violations, supporting factual evidence, any documents, witnesses.
- 2. We review and assign to an attorney.
- 3. If evidence supports, accept case from IEPA. Request IEPA to update us with any additional evidence of alleged violations of the Act and Board regulations regarding the facility.

- 4. Assigned attorney reviews and notifies violator and offers meeting.
- 5. Purpose of meeting is to explain alleged violations and give violator opportunity to discuss and answer questions if any.
- 6. If ongoing violations, discuss compliance.

- 7. If we find evidence of past or ongoing violation, we ALWAYS file a complaint. If violator accepts offer of meeting, we typically have meeting before we file.
- 8. We file a complaint and seek injunctive relief pursuant to Section 42(e) of the Act and a civil penalty pursuant to Section 42(a) of the Act.
- 9. We ALWAYS seek a civil penalty.

- 10. We use Model Pleadings – we want consistency.

CASES BROUGHT ON AG'S OWN MOTION

- 1. Evidence obtained on AG request from IEPA or other source
- 2. Typically brought pursuant to Section 42(e) of the Act (non-emergency). These are matters that AG believes needs more immediate attention than waiting for the Section 31 process to complete.
- 3. Handled similar to matters referred by IEPA. Still invite meeting and still have IEPA witnesses as necessary and proceed against the violator in the same fashion as if referred by IEPA.

EMERGENCY REFERRALS BROUGHT UNDER SECTION 43(a)

- 1. Typically referred by IEPA as a result of a significant release that results in substantial harm or threat to humans and/or the environment.

- 2. A referral is made by IEPA within a day or so of the release. The AG's practice is to file a Motion for Immediate and Preliminary Injunction and a Complaint within 7 days of receipt. We immediately reach out to the violator and seek a meeting. Our goal is to have the violator immediately take any action to address any ongoing or potential threat to human health or the environment. We seek an Interim Agreed Order that resolves the Motion for Immediate and Preliminary Injunction. If quick agreement on the injunctive relief and order then MAY file the Complaint and Motion and ask the assigned Judge to enter the Agreed Order on the same day that we file. If no agreement, we proceed on Motion for Immediate and Preliminary Injunction and ask the Judge to order the relief we are seeking to address the ongoing substantial threat to human health and the environment.

- 3. Interim Agreed order typically requires: immediate shut down of equipment/facility; performance of root cause analysis by outside consultant that includes recommendations for corrective action; plan to address any releases to the environment; payment of IEPA costs; lists of chemicals used at facility; lists of contacts after release occurred; reporting; schedules for implementation of requirements in order. Many other pieces of information.

- IV. “PRODUCTIVE” APPROACH VS.
“PROLONGING” APPROACH

- A. Productive Approach
- 1. Be responsive – agree to meet soon
- 2. Consult environmental consultant, either in-house or outside.
- 3. Come to meeting with a plan for compliance
- 4. Obtain an attorney who practices in the area of Environmental Law.
- 5. Express interest in settling matter quickly. (Consider whether you want to pursue legal maneuvers)
- 6. Self report. Either before matter is referred, or after if you discover additional violations. We MAY include additional violations in consent order for original violations.

- B. Prolonging Approach
- 1. Ignore the AG
- 2. Deny violations.
- 3. Fight compliance.
- 4. File lots of motions – to dismiss, affirmative defenses, motions to reconsider. We do not give up.
- 5. Hire a criminal attorney, or one inexperienced in Environmental Law (spend time arguing about our Model settlement agreements)

Contact Information

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