

ILLINOIS POLLUTION CONTROL BOARD  
August 31, 1989

IN THE MATTER OF: )  
 )  
PROCEDURAL RULES REVISION )  
35 ILL. ADM. CODE 102 AND ) R88-5(B)  
106 (Subparts D, E, and F) )

PROPOSED RULE. SECOND FIRST NOTICE.

PROPOSED OPINION AND ORDER OF THE BOARD (by J. Theodore Meyer):

On September 8, 1988, the Board proposed for first notice revisions to Parts 101, 102, 106, and 107 of its procedural rules, found at Title 35 of the Illinois Administrative Code. Two public hearings were held, and written public comments were received. On January 19, 1989, the Board issued an order splitting the docket. R88-5(A) contained new rules in Part 101 (general provisions) and Subpart G of Part 106 (adjusted standard proceedings), and the repeal of Part 107 (sanctions, which are now covered in Part 101). Docket R88-5(B), which is the subject of this order, contains proposed new rules for regulatory proceedings (Part 102), the repeal of existing Part 102 rules, and revisions to Subparts D, E, and F of Part 106. (Please note that these Subparts are being revised only to update references to Part 102). This split of the docket was done to allow the rules in R88-5(A) to proceed to second notice while the Board further considered the diverse comments on Part 102. The Board subsequently adopted the rules in R88-5(A), and those rules (Part 101 and Subpart G of Part 106) became effective on July 10, 1989. The Board will now proceed with the rules in R88-5(B). Because it is impossible to complete the rulemaking process and adopt the R88-5(B) rules within one year after the date on which first notice began (September 23, 1988), the Board today proposes the revised rules for second first notice. See Ill. Rev. Stat. 1987, ch. 127, par 1005.01(d).

BACKGROUND

Many of the rules in this docket are proposed in response to SB 1834 (P.A. 85-1048), effective January 1, 1989, which made some fundamental changes to the Illinois environmental rulemaking system. Among other things, SB 1834 authorizes the Board to determine whether an economic impact study (EcIS) of any proposed regulation should be prepared by the Department of Energy and Natural Resources (ENR). The legislation also allows for a pre-hearing conference in rulemakings, to the extent consistent with deadlines for adoption of regulations mandated by state or federal law. Finally, SB 1834 establishes some different procedures for rulemakings involving federally required rules. The Board believes that these proposed rules, in conjunction with

the rules adopted in R88-5(A), will fully implement the provisions of SB 1834. The Board has also reorganized and tightened its existing rules.

The Board notes that several comments urged that the Board make only those changes statutorily required by SB 1834. These comments suggest that any problems with past Board procedure were cured by that legislation, and thus contend that the Board should only revise its rules to reflect legislative changes. However, as stated in the September 22, 1988 first notice opinion, and again in the March 2, 1989 second notice opinion in R88-5(A), the Board finds that its existing procedural rules need to be reorganized, tightened, and updated to reflect current Board practice. The Board continues to believe that the rules proposed today will streamline regulatory procedures without undermining the quality and integrity of those procedures or infringing upon public participation in the rulemaking process.

The Board received fifteen written comments during the 1988 first notice comment period. (Public Comments (P.C.) #11-25; please note that P.C. #1-10 pertain to an earlier proposal which was not adopted.) The Board also received eight comments after the close of the comment period. (P.C. #26-33.) These late comments were filed between one and five weeks later. As previously stated (see the March 2 and June 8, 1989 opinions in R88-5(A)), the Board will not accept these comments and has not considered them in proposing these rules for second first notice. Except for those eight late comments, the Board has considered all comments when revising the proposed rules.

This proposed opinion will touch upon each Subpart in the proposed rules, but will only discuss those rules which were the subject of comments, and those rules which have been revised. The Board wishes to initiate an era of brevity and succinctness in its opinions, which it hopes will be followed by those filing briefs, comments, and other pleadings with the Board. For more general information on these proposed rules, see the Board's September 22, 1988 first notice opinion in R88-5.

## PART 102--REGULATORY AND INFORMATIONAL HEARINGS AND PROCEEDINGS

### Subpart A: General Provisions

Several definitions in Section 102.101 "Definitions" have been reworded for clarity, and new definitions of "material", "participant", "person", "proponent", and "undue delay" have been added. The Board has deleted the section containing incorporations by reference, originally proposed as Section 102.102, because the rules as revised do not include any incorporations by reference. Therefore, the three remaining sections in this subpart have been renumbered. A new subsection (c) has been added to Section 102.102 "Types of Regulatory Proposals", which clarifies that the provisions of Subpart B

apply to all types of regulatory proposals, except identical in substance proposals. Finally, Section 102.103 "Waiver Of Requirements" has been reworded to specify that the Board can waive only non-statutory requirements upon a showing that a particular requirement would create an undue burden upon a person.

#### Subpart B: Regulations of General Applicability

This Subpart is a guide to the filing of a sufficient proposal of regulations of general applicability. Section 102.121 "Contents", which specifies what a proponent must provide with his or her proposal, has been slightly modified. In response to comments from several groups, subsection (d) now requires only a synopsis of the testimony which the proponent expects to present at hearing in support of his proposal. The proponent need not identify specific witnesses, but must provide a summary of the information which will be presented at hearing. The Board believes that this change, from the proposed requirement of actual copies of all testimony, will satisfy commenters' concerns that testimony submitted at the time of filing of the proposal might be incomplete or out of date by hearing. Since the proponent controls when the proposal is filed, it is reasonable to expect that he provide a synopsis of the supporting testimony at the beginning of the proceeding. This will enable the Board and interested persons to more fully understand the scope of the proposal, while allowing the proponent to identify specific witnesses and update testimony just before hearing. (See Section 102.280(a).) Additionally, the Board has deleted the requirement that the proponent include copies of all exhibits and references at the time of filing.

The Board has added three new subsections to Section 102.121. New subsection (e) requires the Illinois Environmental Protection Agency (Agency), when it is the proponent of a rule which it believes is federally required as defined in Section 28.2 of the Act, to provide a citation to the specific section of the specific federal act which requires the proposed rule. This will allow the Board and interested persons to easily see the basis of the proposed rule. Subsection (h) simply states that Section 28 of the Act requires all proponents other than the Agency, ENR, and the Department of Nuclear Safety (DNS) to provide a petition in support of the proposal signed by at least 200 persons. New subsection (i) requires that a proponent provide justification for the inapplicability of any information required by Subpart B. This will simplify the Board's review of a new proposal, and may reduce the necessity of a "more information order" if any missing information is explained.

As stated in the Board's September 22, 1988 Opinion in R88-5, the Board believes that these content requirements are reasonable expectations of the vast majority of proponents, and that the requirements are necessary to focus and expedite the regulatory process. The requirements simply mandate that a

proponent provide basic information "up front". Since the proponent controls when a proposal is filed, the support for a particular proposal should be in place before the proposal is filed. The Board recognizes that proposals are subject to change during the course of a proceeding, however, and believes that these rules as revised allow for such change.

Section 102.122 "Dismissal" states that failure of a proponent to satisfy the content requirements of Section 102.121 or failure to respond to Board requests for more information will render a proposal subject to dismissal for inadequacy. The Board may also dismiss a proposal where it finds that the proponent has failed to pursue disposition of the proposal in a timely manner. A new subsection (c) has been added to cross-reference 35 Ill. Adm. Code 101.243, which governs motions challenging the sufficiency of a proposal.

#### Subpart C: Site-Specific Regulations

This Subpart is the counterpart to Subpart B for site-specific regulations. Section 102.141 sets out the required contents of a proposal for site-specific regulations. Among other things, a proponent must identify the general regulations which the proposed amendment addresses. Please note that where a proponent seeks exemption from or modification of a rule of general applicability, the proposed site-specific rule may not be proposed as an amendment to that general rule. Instead, the site-specific rule should be proposed as its own section.

The new text of subsection (e) requires that the proponent describe the person or site for which regulatory change is sought, and the area affected by the proposed change. The proponent must also provide a detailed assessment of the environmental impact of the proposed change, and include a description of all available treatment or control options. This description should address all options which could control the pollutant regulated by the general rule, not just those options which the proponent feels are applicable to his facility or process. These requirements of subsection (e) are a summary of the rules previously proposed as Subpart D, addressing site-specific water rules. The Board has decided not to proceed with these rules, or with the specific requirements for air, land, and groundwater rules proposed as Subparts E, F, and G by ENR. This decision is based on the Board's belief that Section 102.141 will address the most common information problems in site-specific proposals, and that some of the requirements previously proposed were overly detailed for many proposals. If a proposal does not contain sufficient information for proper evaluation of the proposal, that missing information can be required by a more information order, just like any proposal of rules of general applicability. If that information is not provided, the proposal is subject to dismissal pursuant to Section 102.142. The Board expresses its appreciation to ENR for its work on specific requirements for air, land, and groundwater proposals, however.

Subpart D: Authorization, Scheduling, and Notice of Hearings

Subsection (b) of Section 102.160 "Authorization Of Hearing" has been added to provide for Board issuance of an order accepting a proposal for hearing. Such an order will be issued only after the Board determines that the requirements of the Act and Sections 102.121 and 102.141 have been met, as expressed in subsection (a). A filing fee must also be paid for all site-specific proposals. (Please note, however, that the Clerk will refuse to accept for filing any proposal which is not accompanied by any required filing fee. See 35 Ill. Adm. Code 101.120.) This order accepting a proposal for hearing starts the timeclock for purposes of any applicable EcIS study determination and first notice publication deadlines pursuant to Sections 27 and 28.2 of the Act.

Section 102.161 "Scheduling of Hearings" is new, although it contains some information previously found in other sections. Subsections (c), (d), and (e) establish a new procedure where the Board, after considering the number and complexity of issues involved in a regulatory proposal, will issue an order preliminarily specifying the number of hearings to be held on that proposal. This order may be combined with the order accepting a proposal for hearing, or may be a separate order. The Board may also choose to issue this order as part of its order determining whether an EcIS will be performed on that proposal. (See Subpart E.) If the proponent or any participant wishes to request a hearing beyond the number of hearings specified by the Board, that person must demonstrate, in a written motion to the Board, that failing to hold an additional hearing would result in material prejudice to the movant. The movant must show why an additional hearing, as opposed to the opportunity to submit written comments, is necessary. The Board will also consider whether the movant's request for an additional hearing is the result of a lack of diligence by the movant. Additionally, the Board will schedule an additional hearing or hearings on its own motion, if it finds that additional hearing would aid the Board in its decision on the proposal.

The Board believes that this new procedure, preliminarily specifying the number of hearings, will enable the Board and all participants to efficiently plan their participation in the proceeding. By establishing a standard for the grant of a motion for additional hearing, all participants will know what they must demonstrate to obtain additional hearing. The Board stresses that this procedure is not intended to exclude participation by interested persons or to unnecessarily limit hearings.

Subpart E: Economic Impact Study Determinations

This subpart is largely unchanged from the September 1988 proposal. Subsection (b) of Section 102.180 "Board Determinations" has been revised to specify that although in most proceedings the Board may determine that an EcIS should be

prepared at any time prior to the close of the record, this provision is not applicable to proceedings involving federally required rules. In other words, in required rule proceedings, the Board's EcIS determination made 60 days after the proposal is accepted for hearing is a final determination. A new subsection (d) has been added to Section 102.181 "Request For Determination" to clarify that no hearing will be held on any request for determination. Finally, Section 102.183 "Notice of Board Determination" has been revised to state that the Board's determination order is an interlocutory order, and can be appealed only pursuant to 35 Ill. Adm. Code 101.304. That section requires that the Board certify that the interlocutory order involves a question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the proceeding. The Board does not expect to certify its determination orders for appeal very often.

#### Subpart F: Certification Of Required Rules

This Subpart, proposed in response to several comments, establishes a new procedure for challenging an Agency certification that a proposed rule is a federally required rule. Section 102.200 requires the Agency, when it proposes a rule which it believes to be federally required, to so certify in its proposal. The certification must include citation to the specific section of the specific federal law to which the proposed rule will respond. Section 102.201 "Challenge To Agency Certification" allows any person to file an objection to an Agency certification within 21 days of the Board's order accepting the proposal for hearing. The objection shall state the reasons for the objection, and shall include all arguments which the objector wishes the Board to consider. A copy of the objection must be served on the Agency and ENR. The Agency may file a response to any objection within 10 days of the service of the objection. No reply by the objector will be allowed, unless the Board orders otherwise to avoid material prejudice. No hearing will be held on any objection to an Agency certification.

Pursuant to Section 102.202, the Board will rule on any objection within 60 days of its order accepting the proposal for hearing. The Board's ruling will be made in its order determining whether an EcIS will be prepared. In ruling upon the objection, the Board will consider all information in the record of that proceeding, including but not limited to the proposal, the objection, and the Agency response to the objection. The burden of proof is on the objector. The Board will give notice of its ruling to the objector, the Agency, ENR, and all persons on the notice list.

Please note that the timeframes in this proposed procedure track the timeframes for EcIS determinations. This is necessary because Section 28.2(e) of the Act requires the Board to publish first notice of all required rules in the Illinois Register no

later than six months from the date the Board determines whether an EcIS should be prepared. Additionally, Section 28.2(d) allows the Board to adopt a required rule without an EcIS if any EcIS ordered by the Board is not submitted within 6 months of the Board's decision that an EcIS should be prepared. Therefore, it is important to resolve any questions as to whether a proposed rule is a required rule at the beginning of the proceeding. The Board will not look kindly upon any request for extension of these time periods.

The Board requests comment on its authority to rule upon objections to an Agency certification, and on the proposed process itself. The Board notes that it must refer to any Agency certification in the first notice publication of the proposal. (Section 28.2(e) of the Act.) In the event that the Board were to find, upon objection, that a proposed rule is not a required rule, at first notice it would simply state that the Agency had certified the rule, but that the Board had found that the rule was not federally required.

#### Subpart G: Authority of Hearing Officer

Section 102.220 "Authority Of Hearing Officer" has been revised to be identical to 35 Ill. Adm. Code 101.220, except for the addition of subsection (o). The new subsection allows a hearing officer to admit testimony or exhibits which were not pre-submitted, if necessary to prevent undue delay or material prejudice. Subsection (b) of Section 102.221 "Notice And Service Lists" has been revised to state that in deciding whether to establish a separate service list for a regulatory proceeding, the hearing officer will consider factors including, but not limited to, the complexity of the proceeding and the number of participants. The Board again stresses that every regulatory proceeding has a notice list, and that any person may be included on that list simply by giving his or her name and address to the hearing officer. The option of establishing a service list in addition to the notice list allows the hearing officer to draw a distinction between those who simply wish to be notified of Board action on a specific proposal and those who wish to participate more fully in the proceeding. This option is especially helpful in proceedings which have a large notice list but a relatively small number of actual participants. The Board requests comment on whether the provision that the hearing officer may direct participants to serve all documents on all persons or the notice list might impose a burden on not-for-profit groups.

#### Subpart H: Pre-Hearing Conferences

This Subpart, which establishes procedures for pre-hearing conferences, is essentially unchanged from the 1988 first notice proposal. Subsection (c) of Section 102.242 "Pre-Hearing Order" has been reworded to clarify that if the participants in a pre-hearing conference agree to having a pre-hearing order entered, the hearing officer may require that the participants furnish the

text of a proposed order setting forth the substance of the agreements reached at the pre-hearing conference. The order shall identify which participants have agreed to the order. This provision is intended to address the possibility that all participants in a pre-hearing conference agree to have an order entered, but that not all participants agree to all aspects of the order. Please note that as stated in Section 27(e) of the Act and subsection (d) of Section 102.242, a pre-hearing order is not binding on nonparticipants in the pre-hearing conference.

#### Subpart I: Motions and Discovery

A sentence has been added to Section 102.260 "Motion Practice" to state that all motions and responses shall be served upon the proponent, the Agency, ENR, the Attorney General, and all persons on any service list established for that proceeding. Sections 102.261 and 102.262, concerning production of information and subpoenas, simply refer to 35 Ill. Adm. Code 101.261 and 101.260(b) through (i). These sections of Part 101 of the Board's procedural rules govern production of information and subpoenas in regulatory proceedings.

#### Subpart J: Regulatory Hearings

This Subpart deals with the conduct of hearings on regulatory proposals. Section 102.280 "Pre-Hearing Submissions Of Testimony And Exhibits" has been revised in response to comments received during the 1988 first notice comment period. Subsection (a) now requires the proponent to submit all written testimony and any related exhibits 21 days prior to the hearing at which the witness testifies, unless the hearing officer directs otherwise to prevent material prejudice or undue delay. (Please note that the provision allowing the hearing officer to "direct otherwise" is intended to allow the hearing officer to modify the timing of pre-submitted testimony, not to dispense with the requirement that the proponent pre-submit his supporting testimony.) Subsection (b) states that the hearing officer may require participants other than the proponent to pre-submit testimony and exhibits if the hearing officer determines that pre-submission will provide for a more efficient hearing. This is a change from the prior proposal, which required all participants and the proponent to pre-submit their testimony. The Board believes that in combination with the requirement that the proponent provide a synopsis of supporting testimony when the proposal is filed (see Section 102.121), requiring the proponent to pre-submit testimony and exhibits 21 days before hearing will give the Board and participants sufficient time to prepare for hearing, while allowing the proponent to update his supporting testimony in response to events after the filing of the proposal. Again, because the proponent controls when a proposal is filed, the Board believes that the proponent should be able to satisfy the synopsis and pre-submission of testimony requirements. The Board continues to feel that pre-submission of testimony and exhibits by all participants is important.



However, by giving the hearing officer the power to decide when to require pre-submission, proceedings will be conducted in response to the circumstances of the individual proceeding

Subsection (f) addresses the problem of modifications to pre-submitted testimony. The subsection, which is based on 35 Ill. Adm. Code 106.803, permits the hearing officer to allow modifications if the changes are either non-substantive or would not materially prejudice another person's participation at hearing. This provision will allow unavoidable modifications to pre-submitted testimony to be made at hearing, while providing a level of scrutiny to protect the reliability of pre-submitted testimony. Subsection (f) also provides that pre-submitted testimony will be entered into the record as if read, unless the hearing officer determines that it will aid public understanding to have the testimony read. The Board received several comments questioning this provision, based on the claim that Board hearings might become essentially "paper" hearings. The Board continues to believe that it is important to provide for testimony to be entered as if read, in situations where participants have been provided with the testimony in advance of hearing. This will result in more efficient hearings and provide incentive for those receiving pre-submitted testimony to prepare for hearing. However, the Board stresses that the hearing officer will have testimony read at hearing when he or she determines that it will aid public understanding to do so. Participants at hearing should not overlook this provision. The Board will not allow its hearing to become "paper" hearings, but neither will it allow hearings to become a waste of time and resources.

Section 102.282 "Admissible Information" has been modified to state that all information which is relevant and not repetitious or privileged shall be admitted by the hearing officer. The prohibition against privileged information was added in response to comments. Additionally, the section now provides that the hearing officer will rule on objections, without limiting the type of objections which may be made. The Board reiterates, however, that because of the broad standard of admissible information, some objections which may be appropriate in an adjudicatory hearing are not appropriate in regulatory proceedings.

#### Subpart K: Economic Hearings

This Subpart, which governs hearings on any EcIS prepared by ENR, is virtually unchanged from the 1988 proposal. The only changes are those necessary to conform the proposed rules with the Act.

#### Subpart L: Public Comments

Section 102.320 "Public Comments" has been revised in response to comments. The section now requires written comments

to be submitted within 14 days after the receipt of the hearing transcript in Board offices, instead of within 14 days after the close of hearing. This will allow participants the opportunity to review the hearing transcript before filing comments, and is in accord with the Board's current practice. Note, however, that the hearing officer or the Board may specify a different comment period to prevent material prejudice or undue delay. This provision allows the hearing officer or the Board to extend or limit the comment period, or to delay a comment period until after the close of all hearings on that proposal. The section has also been changed to require that written comments be served only upon participants on any service list, instead of all participants in the proceeding.

#### Subpart M: Board Action

This Subpart, which explains the various ways that the Board may adopt regulations, has been only slightly revised. Subsection (a) of Section 102.340 "Revision of Proposed Regulations" has been rewritten to specify that the Board may revise regulatory proposals before adoption based upon the record of the proceeding, or in response to suggestions and comments. The prior proposed language could have been interpreted as allowing revision only upon suggestion or comment. The requirement that the Board hold at least one public hearing on all proposals, except for procedural regulations, has been moved from Section 102.341 "Adoption Of Regulations" to Section 102.161. The previous requirement in Section 102.344 "Notice of Board Final Action" that the Board publish notice of its final action in the Illinois Register has been deleted. The Board is, of course, required by Section 5.01(c) of the Illinois Administrative Procedure Act (Ill. Rev. Stat. 1987, ch. 127, par. 1005.01(c)) to publish notice of its adopted rules in the Illinois Register. The change in the proposed rule was made to cover the situation where the Board decides not to propose or adopt a proposed rule. Those final actions are not published in the Illinois Register. Finally, the section previously proposed on adoption of RCRA rules has been deleted, since the substance of that section is contained in Section 102.345 "Adoption of Identical In Substance Regulations".

#### Subpart N: Motions For Reconsideration And Appeal

Subpart N, dealing with motions for reconsideration and appeal, is basically unchanged from the previous proposal. One new section has been added on correction of publication errors. Section 102.362 states that the Board may make technical corrections to proposed or adopted rules, as published in the Illinois Register or filed with the Secretary of State, only in accordance with 1 Ill. Adm. Code 100.240. The rules set out in that section are very narrow and allow for correction only in certain instances. No hearing need be held on corrections which may be pursuant to that section.

PART 106 - HEARINGS PURSUANT TO SPECIFIC RULES

The Board has made non-substantive changes to Sections 106.415, 106.506, 106.602, and 106.604. These changes merely update references to the existing Part 102 rules so that the Part 106 rules will contain references to the proposed new Part 102. Additionally, a reference in Section 106.602 to Part 103 (enforcement proceedings) has been updated to refer to the Board's new general procedural rules in Part 101.

ORDER

The Board hereby directs the Clerk of the Board to cause publication in the Illinois Register of the First Notice of the following amendments.

TITLE 35: ENVIRONMENTAL PROTECTION  
SUBTITLE A: GENERAL PROVISIONS  
CHAPTER I: POLLUTION CONTROL BOARD

PART 102  
REGULATORY AND INFORMATIONAL  
HEARINGS AND PROCEEDINGS

SUBPART A: GENERAL PROVISIONS

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102.101	Definitions
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SUBPART B: REGULATIONS OF GENERAL APPLICABILITY

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SUBPART E: ECONOMIC IMPACT STUDY DETERMINATIONS

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SUBPART F: CERTIFICATION OF REQUIRED RULES

Section

102.200 Agency Certification  
102.201 Challenge To Agency Certification  
  
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SUBPART G: AUTHORITY OF HEARING OFFICER

Section

102.220 Authority Of Hearing Officer  
102.221 Notice And Service Lists  
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SUBPART H: PRE-HEARING CONFERENCES

Section

102.240 Initiation And Scheduling  
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SUBPART I: MOTIONS AND DISCOVERY

Section

102.260 Motion Practice  
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Section

102.280 Pre-hearing Submission Of Testimony and Exhibits  
102.281 Transcript  
102.282 Admissible Information  
102.283 Presentation Of Testimony  
102.284 Questioning Of Witnesses  
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SUBPART K: ECONOMIC IMPACT HEARINGS

Section

102.300 Hearings On The Economic Impact Study Of New Proposals

102.301 Hearings On The Economic Impact Study Of Existing Regulations

SUBPART L: PUBLIC COMMENTS

Section  
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SUBPART M: BOARD ACTION

Section  
102.340 Revision Of Proposed Regulations  
102.341 Adoption Of Regulations  
102.342 First Notice Of Proposed Regulations  
102.343 Second Notice Of Proposed Regulations  
102.344 Notice Of Board Final Action  
102.345 Adoption Of Identical In Substance Regulation  
102.346 Adoption Of Emergency Regulations  
102.347 Adoption Of Peremptory Regulations  
102.348 Adoption Of Temporary Regulations

SUBPART N: MOTIONS FOR RECONSIDERATION AND APPEAL

Section  
102.360 Filing Of Motion For Reconsideration  
102.361 Disposition Of Motions For Reconsideration  
102.362 Correction of Publication Errors  
103.363 Appeal

AUTHORITY: Implementing Sections 5, 7.2, 13(c), 13.3, 17.5, 22.4(a), 22.4(d), 22.7(d), 27, 28, 28.2, 29, and 41 of the Environmental Protection Act (Ill. Rev. Stat. 1987, ch. 111½, pars. 1005, 1007.2, 1013(c), 1013.3, 1017.5, 1022.4(a), 1022.4(d), 1022.7(d), 1027, 1028, 1028.2, 1029, and 1041, as amended by Public Act 85-1048, effective January 1, 1989) and Section 4 of "AN ACT in relation to natural resources, research, data collection and environmental studies" (Ill. Rev. Stat. 1987, ch. 96½, par. 7404, as amended by P.A. 85-1048, effective January 1, 1989) and authorized by Section 26 of the Environmental Protection Act (Ill. Rev. Stat. 1987, ch. 111½, par. 1026).

SOURCE: Originally adopted as Chapter 1: Procedural Rules, Part II: Regulatory and Other Nonadjudicative Hearings and Proceedings, in R70-4, 1 PCB 43, October 8, 1970; codified at 6 Ill. Reg. 8357; amended in R84-10 at 9 Ill. Reg. 1398, effective January 16, 1985; Part repealed, new Part adopted in R88-5(B) at \_\_\_\_\_ Ill. Reg. \_\_\_\_\_, effective \_\_\_\_\_.

NOTE: Capitalization denotes statutory language.

SUBPART A: GENERAL PROVISIONS

Section 102.100 Applicability

This Part applies to all regulatory and informational hearings and proceedings, and shall be read in conjunction with 35 Ill. Adm. Code 101. Hearings conducted pursuant to this Part shall be quasi-legislative in nature. All testimony shall be sworn. All persons taking part in these hearings are participants, rather than parties as in contested cases.

Section 102.101 Definitions

The following definitions shall apply to this Part:

"Act" means the Environmental Protection Act (Ill. Rev. Stat. 1987, ch. 111 1/2, par. 1001 et seq.).

"Agency" means the Illinois Environmental Protection Agency.

"APA" means the Illinois Administrative Procedure Act (Ill. Rev. Stat. 1987, ch. 127, par. 1001 et seq.).

"Attorney General" means the Office of the Attorney General of the State of Illinois.

"Board" means the Illinois Pollution Control Board.

"Chairman" means the Chairman of the Board.

"Clerk" means the Clerk of the Board.

"Document" means pleading, notice, motion, affidavit, memorandum, brief, petition, or other paper required or permitted to be filed.

"DNS" means the Illinois Department of Nuclear Safety.

"Economic impact study" means the economic impact study performed by ENR pursuant to Board determination under Section 27 of the Act.

"ENR" means the Illinois Department of Energy and Natural Resources.

"Fire Marshal" means the Office of the State Fire Marshal.

"Identical in substance regulations" means STATE REGULATIONS WHICH REQUIRE THE SAME ACTIONS WITH RESPECT TO PROTECTION OF THE ENVIRONMENT, BY THE SAME GROUP OF AFFECTED PERSONS, AS WOULD FEDERAL REGULATIONS IF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY ADMINISTERED THE SUBJECT PROGRAM IN ILLINOIS. (Section 7.2 of the Act.)

"Identical in substance rulemakings" are those proceedings conducted pursuant to specific authorization of the Act, including but not limited to Sections 13(c), 13.3, 17.5, 22.4(a), 22.4(d) and 22.7(d).

"JCAR" means the Joint Committee on Administrative Rules.

"Material" means relating to any substantive issue that is of consequence to the determination of a proceeding.

"Participant" means any person, not including the Board or its staff but including the proponent, who takes part in a regulatory or other quasi-legislative proceeding before the Board. A person becomes a participant in any of several ways, including, but not limited to, filing a comment, being added to the notice list of a particular proceeding or testifying at hearing.

"Peremptory rulemaking" means ANY RULEMAKING WHICH IS REQUIRED AS A RESULT OF FEDERAL LAW, FEDERAL RULES AND REGULATIONS, OR AN ORDER OF A COURT, UNDER CONDITIONS WHICH PRECLUDE COMPLIANCE WITH THE GENERAL RULEMAKING REQUIREMENTS OF SECTION 5.01 OF THE APA AND WHICH PRECLUDE THE EXERCISE BY THE BOARD AS TO THE CONTENT OF THE RULE. (Section 5.03 of the APA.)

"Person" means any entity defined in Section 3.26 of the Act, including but not limited to any individual, partnership, company, corporation, political subdivision, or state agency.

"Proponent" means any person, not including the Board or its staff, who submits a regulatory proposal to the Board for the adoption, amendment, or repeal of a regulation.

"RCRA" means the Resource Conservation and Recovery Act of 1976 (42 U.S.C. 6901 et seq.).

"RCRA rules" means 35 Ill. Adm. Code 702, 703, 720, 721, 722, 723, 724, 725, 726, and 728.

"Relevant" means having any tendency to make the existence of any act that is of consequence to the determination of the proceeding more probable or less probable that it would be without the information.

"Required rule" means a rule that is NEEDED TO FULFILL THE REQUIREMENTS OF THE FEDERAL CLEAN WATER ACT (33 U.S.C. 1251 ET SEQ.), SAFE DRINKING WATER ACT, (42 U.S.C. 300f ET SEQ.), CLEAN AIR ACT (42 U.S.C. 7401 ET SEQ.), OR RESOURCE CONSERVATION AND RECOVERY ACT (42 U.S.C. 6901 ET SEQ.) OTHER THAN A RULE TO BE ADOPTED

UNDER SECTION 13(c), 13.3, 17.5, 22.4(a), 22.4(d), OR 22.7 OF THE ACT. (Section 28.2 of the Act.)

"Site-specific regulation" means a proposed or adopted regulation SPECIFIC TO INDIVIDUAL PERSONS OR SITES. (Section 27(a) of the Act.)

"Undue delay" means delay which is unwarranted, unjustified, improper, or is more delay than necessary.

"USEPA" means the United States Environmental Protection Agency.

#### Section 102.102 Types Of Regulatory Proposals

- a) The Act provides for three types of regulatory proposals:
  - 1) Identical in substance rulemakings, as defined in Section 102.101;
  - 2) Federally required rules, as defined in Section 102.101; and
  - 3) Other regulatory proposals, both of general applicability and not of general applicability.
- b) Regulations arising from these types of proposals may be adopted through four types of rulemaking:
  - 1) General rulemaking pursuant to Section 5.01 of the APA (Ill. Rev. Stat. 1987, ch. 127, par. 1005.01), and Sections 26 and 27 of the Act (Ill. Rev. Stat. 1987, ch. 111 1/2, pars. 1026-1027);
  - 2) Emergency rulemaking pursuant to Section 5.02 of the APA (Ill. Rev. Stat. 1987, ch. 127, par. 1005.02) and Section 27 of the Act;
  - 3) Peremptory rulemaking pursuant to Section 5.03 of the APA (Ill. Rev. Stat. 1987, ch. 127, par. 1005.03); and
  - 4) Temporary rulemaking pursuant to Section 27(b) of the Act.
- c) The provisions of Subpart B of this Part apply to all types of regulatory proposals except identical in substance proposals.

#### Section 102.103 Waiver Of Requirements

The Board may waive any of the non-statutory requirements of this Part upon a showing by a person that a particular requirement



would create an undue burden on that person.

Section 102.104 Other Proceedings

The Board may conduct such other noncontested or informational hearings as may be necessary to accomplish the purposes of the Act.

SUBPART B: REGULATIONS OF GENERAL APPLICABILITY

Section 102.120 Proposal

Any person may submit a regulatory proposal for the adoption, amendment, or repeal of a regulation. The original and nine (9) copies of each proposal shall be filed with the Clerk and one copy each with the Attorney General, the Agency and ENR.

Section 102.121 Contents

Each proponent shall provide:

- a) The language of the proposed regulation or amendment, including an identification of the existing regulatory language proposed to be amended or deleted. Language being added shall be indicated by underscoring and language being deleted shall be indicated by strike-outs. The proposed rule shall be drafted in accordance with 1 Ill. Adm. Code 100.Subpart C;
- b) A statement of the reasons supporting the proposal, including a statement of the facts which support the proposal, and a statement of the purpose and effect of the proposal. The statement shall discuss the applicable factors listed in Section 27 of the Act. Where the proposal covers more than one substantive point, the statement of reasons shall include statements in support of each point. The statement of reasons shall include a technical and economic justification for the proposal;
- c) Pursuant to Section 27 of the Act, A RECOMMENDATION OF WHETHER AN ECONOMIC IMPACT STUDY IS ADVISABLE. The recommendation shall describe, TO THE EXTENT REASONABLY PRACTICABLE, THE UNIVERSE OF AFFECTED SOURCES AND FACILITIES AND THE ECONOMIC IMPACT OF THE PROPOSED RULE. The recommendation shall also address the questions contained in the Analysis of Economic and Budgetary Effects of Proposed Rulemaking, set forth at 1 Ill. Adm. Code 220.Exhibit B, and identify issues to be addressed by any economic impact study;
- d) A synopsis of all testimony to be presented by the proponent at hearing;

- e) If the Agency is the proponent, and if the Agency believes that the proposed rule is a required rule pursuant to Section 28.2 of the Act, citation to the specific section of the specific federal act;
- f) Copies of any material to be incorporated by reference within the proposed regulation pursuant to Section 6.02 of the APA;
- g) Proof of service upon all persons required to be served pursuant to Section 102.120;
- h) Unless the proponent is the Agency, ENR, or DNS, a petition signed by at least 200 persons, pursuant to Section 28 of the Act and Section 102.160(a); and
- i) Where circumstances render any information required by this Subpart inapplicable, a justification for such inapplicability.

Section 102.122 Dismissal

- a) Failure of the proponent to satisfy the content requirements of Section 102.121 or failure to respond to Board requests for additional information will render a proposal subject to dismissal for inadequacy.
- b) Failure of the proponent to pursue disposition of the proposal in a timely manner will render a proposal subject to dismissal.
- c) Any person may file a motion challenging the sufficiency of a proposal pursuant to 35 Ill. Adm. Code 101.243.

Section 102.123 Proposal Of RCRA Amendments

In addition to satisfying the requirements of Section 102.121, any proposal to amend the RCRA regulations shall:

- a) Indicate whether it is made pursuant to the provisions of Section 22.4(a), 22.4(b) or 22.4(c) of the Act;
- b) Include a listing of all amendments to the corresponding federal regulations since the period encompassed by the last amendment of the Board's RCRA rules; and
- c) Include a certificate of service indicating that a copy of the proposal has been served on the United States Environmental Protection Agency (USEPA). Service shall be made at the following address:

Director, Waste Management Division  
USEPA, Region V  
230 South Dearborn Street  
Chicago, Illinois 60604

SUBPART C: SITE SPECIFIC REGULATIONS

Section 102.140 Proposal

Any person may submit a written proposal for the adoption, amendment or repeal of a substantive site-specific regulation. The original and nine (9) copies of each proposal shall be filed with the Clerk and one copy each served upon the Agency, ENR, and the Attorney General.

Section 102.141 Contents

- a) The proponent shall identify the regulations which are to be addressed by the proposed amendment and the language to be added, deleted, or repealed. Language being added shall be indicated by underscoring and language being deleted shall be indicated by strike-outs.
- b) The proponent shall provide a statement of reasons and facts supporting the proposal, and a statement of the purpose and effect of the proposal.
- c) The proposal shall also comply with all requirements set forth in Section 102.121.
- d) In the event that the proposed rule would replace the applicability of a general rule to the pollution source, the proposal shall specify, with supporting documentation, the reasons why the general rule is not technically feasible or economically reasonable for the person or site. Such documentation shall include relevant information on other similar persons' or sites' ability to comply with the general rule.
- e) The proposal shall describe the person or site for which regulatory change is sought and the area affected by the proposed change. The proposal shall also include a detailed assessment of the environmental impact of the proposed change, and include a description of all available treatment or control options.
- f) The proposal shall demonstrate that the Board may grant the requested relief consistent with federal law.
- g) Where circumstances render any information requested in this Subpart inapplicable, the proposal shall include a justification for such inapplicability.

Section 102.142 Dismissal

- a) Failure of the proponent to satisfy the content requirements for proposals under this Subpart or failure to respond to Board requests for additional information will render a proposal subject to dismissal for inadequacy.
- b) Failure of the proponent to pursue disposition of the proposal in a timely manner will render a proposal subject to dismissal.
- c) Any person may file a motion challenging the sufficiency of the proposal pursuant to 35 Ill. Adm. Code 101.243.

SUBPART D: AUTHORIZATION, SCHEDULING, AND  
NOTICE OF HEARINGS

Section 102.160 Authorization Of Hearing

- a) The Clerk shall assign a docket number to any proposal. All regulatory proposals will be placed on the Board agenda for determination of adequacy under the Act and Sections 102.121 and 102.141. IF THE BOARD FINDS THAT ANY SUCH PROPOSAL IS NOT PLAINLY DEVOID OF MERIT, DOES NOT DEAL WITH A SUBJECT ON WHICH A HEARING HAS BEEN HELD WITHIN THE PRECEDING 6 MONTHS, IS ACCOMPANIED BY AN ADEQUATE STATEMENT OF SUPPORTING REASONS AND A PETITION SIGNED BY AT LEAST 200 PERSONS, and meets the requirements of this Part, THE BOARD WILL SCHEDULE A PUBLIC HEARING FOR CONSIDERATION OF THE PROPOSAL. IF A PROPOSAL IS MADE BY THE AGENCY, ENR, OR DNS, THE BOARD SHALL SCHEDULE A PUBLIC HEARING WITHOUT REGARD TO THE ABOVE CONDITIONS. Pursuant to Section 28 of the Act, THE BOARD MAY ALSO IN ITS DISCRETION SCHEDULE A PUBLIC HEARING UPON ANY PROPOSAL WITHOUT REGARD TO THE ABOVE CONDITIONS. (Section 28 of the Act.) The proponent must cure any inadequacy identified by Board order before the proposal will proceed to hearing.
- b) If the Board determines that a proposal meets the requirements of subsection (a), and if any filing fee required by the Act and 35 Ill. Adm. Code 101.120 has been paid, the Board will issue an order accepting the proposal for hearing. Such an order will be construed as starting the timeclock for purposes of any applicable economic impact study and first notice publication deadlines pursuant to Sections 27 and 28.2 of the Act.
- c) When the Board authorizes a hearing, the Chairman will designate an attending Board member. A member of the Board may serve as hearing officer if otherwise

qualified, and such hearing need not be attended by another Board member.

- d) In the case of a proposed regulatory change under the provisions of 35 Ill. Adm. Code 302.211(j) or 304.141(c), the requirement of subsection (a) relating to a requirement of 200 signatures shall not apply. In such case only a single hearing shall be required, to be held in the affected county.
- e) The Board may consolidate proposals for hearing or decision.

Section 102.161 Scheduling Of Hearings

- a) Except as otherwise provided by the Act, no substantive regulation shall be adopted, amended or repealed by the Board until after at least one public hearing. In the case of site-specific rules, a public hearing shall be held in the affected county. In the case of state-wide regulations, public hearings shall be held in at least two counties of the state.
- b) The Board need not hold a hearing on a procedural regulation, except as provided by Section 5.01 of the APA.
- c) After consideration of the number and complexity of issues involved in a regulatory proposal, the Board will issue an order preliminarily specifying the number of hearings to be held on that proposal. This order may be combined with the order accepting the proposal for hearing (see Section 102.160) or the order making the economic impact study determination (see Subpart E), or may be a separate order.
- d) If the proponent or any participant wishes to request a hearing beyond the number of hearings specified by the Board pursuant to subsection (c), that person must demonstrate, in a written motion to the Board, that failing to hold an additional hearing would result in material prejudice to the movant. The movant must show why an additional hearing, as opposed to the opportunity to submit written comments pursuant to Section 102.320, is necessary.
- e) Notwithstanding subsection (d), the Board will schedule an additional hearing or hearings on its own motion, if it finds that additional hearing would aid the Board in its decision on the proposal.

Section 102.162 Notice Of Hearing

- a) The hearing officer will set a time and place for

hearing. The Clerk shall give notice of the date of the hearing as follows:

- 1) By notice in the Board's Environmental Register;  
and
  - 2) At least 20 days prior to the hearing date, by public advertisement in a newspaper of general circulation in the county in which the hearing is to be held. Where required by federal law, including but not limited to air pollution and RCRA proposals, newspaper notice shall be published at least 30 days prior to the hearing date.
- b) The hearing officer will give notice by mail to the proponent and to all persons who have submitted their names and addresses to the Clerk concerning the proposal.
- c) Hearings which are continued on the hearing record for a period of 45 days or less do not require notice that complies with subsections (a) and (b).

Section 102.163 Notice Of Site-Specific RCRA Proposals

- a) Public notice of hearings on site-specific RCRA proposals shall be given at least 30 days before the date of the hearing.
- b) In addition to the requirements of Section 28 of the Act and Section 102.211, the Board, at a minimum, will give notice of hearings on a site-specific RCRA proposal to the following persons:
  - 1) Federal agencies as designated by USEPA;
  - 2) Illinois Department of Transportation;
  - 3) Illinois Department of Conservation;
  - 4) Illinois Department of Energy and Natural Resources;
  - 5) Illinois Department of Public Health;
  - 6) The governor of any other state adjacent to the county in which the facility is located; and
  - 7) Elected officials of any counties, in other states, adjacent to the county in which the facility is located, and elected officials in any municipality, in another state, if it is the closest population center to the facility.

- c) In addition to the methods of notice by publication of Section 28 of the Act and Section 102.241, the Board will give notice by radio broadcast in the area of the facility. That notice will include the information required by subsections (d)(2) and (d)(4) through (d)(8) below.
  
- d) A hearing notice on a site-specific RCRA proposal will include the following information:
  - 1) The address of the Board office;
  - 2) Name and address of the proponent and, if different, of the facility for which the site-specific rule is sought;
  - 3) A brief description of the business conducted at the facility and the activity described in the petition;
  - 4) A description of the relief requested in the petition and the Board's docket number of the proceeding;
  - 5) Name, address and telephone number of the Clerk of the Board, from whom interested persons may obtain further information, including copies of the proposal;
  - 6) The name, address and telephone number of the Agency's representative in the rulemaking;
  - 7) A description of any written comment period or a statement that a comment period will be established in the future;
  - 8) A statement that the record in the rulemaking is available at the Board office for inspection, except those portions which are claimed or determined to be trade secrets, and that procedures are available whereby disclosure may be sought by the public pursuant to 35 Ill. Adm. Code 120.
  - 9) A statement that site-specific rules may be adopted pursuant to Title VII of the Act and 35 Ill. Adm. Code 102, and a reference to the Board regulations sought to be modified; and
  - 10) Any additional information considered necessary or proper.

SUBPART E: ECONOMIC IMPACT STUDY DETERMINATIONS

Section 102.180 Board Determinations

- a) Within 60 days of the date that the Board accepts a proposal for hearing pursuant to Section 28 of the Act and Section 102.160, the Board shall determine whether an economic impact study should be prepared.
- b) Notwithstanding subsection (a), AT ANY TIME PRIOR TO THE CLOSE OF THE RECORD DURING THE RULEMAKING PROCEEDING, THE BOARD MAY DETERMINE THAT AN ECONOMIC IMPACT STUDY SHOULD BE PREPARED, IF THE PROPOSAL HAS BEEN SUBSTANTIALLY MODIFIED OR IF INFORMATION IN THE RECORD INDICATES THAT AN ECONOMIC IMPACT STUDY WOULD BE ADVISABLE. (Section 27 of the Act.) However, this subsection is not applicable to proceedings involving required rules pursuant to Section 28.2 of the Act.
- c) IF THE BOARD DETERMINES THAT AN ECONOMIC IMPACT STUDY SHOULD BE CONDUCTED, ENR SHALL CONDUCT SUCH A STUDY IN ACCORDANCE WITH "AN ACT IN RELATION TO NATURAL RESOURCES, RESEARCH, DATA COLLECTION AND ENVIRONMENTAL STUDIES" (Ill. Rev. Stat. 1987, ch. 96 1/2, par. 7401 et seq.). THE BOARD MAY IDENTIFY SPECIFIC ISSUES TO BE ADDRESSED IN THE STUDY. (Section 27 of the Act.)

Section 102.181 Request For Determination

- a) WITHIN 21 DAYS OF THE DATE THAT THE BOARD ACCEPTS A PROPOSAL FOR HEARING PURSUANT TO SECTION 28 OF THE ACT AND SECTION 102.160, ANY PERSON MAY REQUEST THAT THE BOARD DETERMINE THAT AN ECONOMIC IMPACT STUDY SHOULD OR SHOULD NOT BE PREPARED. (Section 27 of the Act.)
- b) Such request shall be made in writing, and shall detail the reasons for the request. The request SHALL DESCRIBE, TO THE EXTENT REASONABLY PRACTICABLE, THE ECONOMIC IMPACT OF THE PROPOSED RULE. (Section 27 of the Act.) All material facts asserted in the request shall be verified by affidavit.
- c) The person filing the request shall file the original and nine (9) copies with the Clerk, and one copy each with the Agency, ENR, the Attorney General, and the proponent.
- d) No hearing will be held on any request filed pursuant to this Section.

Section 102.182 Basis For Board Determination

In determining whether an economic impact study should be performed, the Board will consider:

- a) Information in the record furnished by the proponent pursuant to Sections 102.121 and 102.141 and by any



person filing a request for determination pursuant to Section 102.231;

- b) ITS ASSESSMENT OF THE POTENTIAL ECONOMIC IMPACT OF THE RULE;
- c) THE POTENTIAL FOR CONSIDERATION OF THE ECONOMIC IMPACT ABSENT SUCH A STUDY;
- d) THE EXTENT, IF ANY, TO WHICH THE BOARD IS FREE UNDER THE STATUTE AUTHORIZING THE RULE TO MODIFY THE SUBSTANCE OF THE RULE BASED UPON THE CONCLUSIONS OF AN ECONOMIC IMPACT STUDY; and
- e) ANY OTHER CONSIDERATIONS THE BOARD DEEMS APPROPRIATE. (Sections 27 and 28.2 of the Act.)

#### Section 102.183 Notice Of Board Determination

The Board will issue a written interlocutory order giving the reasons for its determination. The proponent, the Agency, ENR, the Attorney General and any person who has asked to be placed on the notice list for the proposal will be given notice of the Board's determination. Orders entered pursuant to this Section may be appealed only pursuant to 35 Ill. Adm. Code 101.304.

#### SUBPART F: CERTIFICATION OF REQUIRED RULES

#### Section 102.200 Agency Certification

WHEN THE AGENCY PROPOSES A RULE WHICH IT BELIEVES TO BE A REQUIRED RULE as defined by Section 28.2(a) of the Act and Section 102.101, THE AGENCY SHALL SO CERTIFY IN ITS PROPOSAL, IDENTIFYING THE FEDERAL LAW TO WHICH THE PROPOSED RULE WILL RESPOND. (Section 28.2(e) of the Act.) Such certification shall include citation to the specific section of the specific federal law to which the proposed rule will respond.

#### Section 102.201 Challenge To Agency Certification

- a) If any person wishes to challenge the Agency's certification that a proposed rule is a required rule, that person shall file an objection to that certification within 21 days of the date of the Board's order accepting a proposal for hearing. Such objection shall state the reasons that the objector believes that the proposed rule is not a required rule, and shall include all arguments which the objector wishes the Board to consider. A copy of the objection shall be served upon the Agency and ENR.
- b) The Agency may file a response to any objection within 10 days of the service of that objection. No reply by

the objector will be allowed, unless the Board orders otherwise to avoid material prejudice.

- c) No hearing will be held on any objection filed pursuant to this Section.

Section 102.202 Board Determination

- a) The Board will rule upon any objection filed pursuant to this Subpart within 60 days of the date that the Board accepts a proposal for hearing. The Board's ruling will be made in its order determining whether an economic impact study will be prepared, issued pursuant to Section 102.180.
- b) In ruling upon an objection to an Agency certification, the Board will consider all information in the record of that proceeding, including but not limited to the proposal, the objection, and the Agency response to the objection. The burden of proof is on the objector.
- c) The Board will give notice of its determination to the objector, the Agency, ENR, and any person who has asked to be placed on the notice list for that proposal.

SUBPART G: AUTHORITY OF HEARING OFFICER

Section 102.220 Authority Of Hearing Officer

The hearing officer has the duty to conduct a fair hearing, to take all necessary action to avoid delay, to maintain order, and to ensure development of a clear, complete, and concise record. He or she will have all powers necessary to these ends, including (but not limited to) the authority to:

- a) Require and establish a schedule for, and notice and distribution of, any pre-hearing submission of testimony and written exhibits;
- b) Require all participants to state their position with respect to the proposal;
- c) Administer oaths and affirmations;
- d) Examine witnesses and direct witnesses to testify;
- e) Regulate the course of the hearing, including but not limited to controlling the order of proceedings;
- f) Establish reasonable limits on the duration of the testimony and questioning of any witness and limit repetitious or cumulative testimony and questioning;

- g) Issue, in the name of the Board, an order compelling the answering of interrogatories or other discovery requests;
- h) Order the production of evidence as specified in Section 102.261 and 35 Ill. Adm. Code 101.261;
- i) Initiate, schedule and conduct a pre-hearing conference as specified in Subpart H;
- j) Issue subpoenas pursuant to Section 102.262 and 35 Ill. Adm. Code 101.260;
- k) Exclude late-filed briefs and comments from inclusion in the record for decision;
- l) Rule upon motions as specified in 35 Ill. Adm. Code 101.247;
- m) Rule upon objections and evidentiary questions;
- n) Establish a schedule for discovery, including a date by which discovery must be completed; and
- o) Where pre-hearing submission of hearing testimony or exhibits has been required, allow the admission of testimony or exhibits which were not pre-submitted, if necessary to prevent undue delay or material prejudice.

Section 102.221 Notice And Service Lists

- a) The hearing officer shall maintain a notice list for each regulatory proceeding. The notice list will consist of those persons who have furnished their names and addresses for inclusion on the notice list for a specific proceeding. Notice of all Board action and hearing officer orders will be given to all persons included on the notice list.
- b) The hearing officer may establish a service list for any regulatory proceeding, in addition to the notice list. The hearing officer may direct participants to serve copies of all documents upon the persons listed on the service list. In deciding whether to establish a service list, the hearing officer will consider factors including but not limited to, the complexity of the proceeding and the number of participants.

Section 102.222 Effect Of Hearing Officer Ruling

All decisions, orders, and rulings made by the hearing officer remain in effect during the pendency of any appeal to the Board of that decision, order, or ruling.

SUBPART H: PRE-HEARING CONFERENCES

Section 102.240 Initiation And Scheduling

- a) TO THE EXTENT CONSISTENT WITH ANY DEADLINE FOR ADOPTION OF ANY REGULATIONS MANDATED BY STATE OR FEDERAL LAW, PRIOR TO INITIATING ANY HEARING ON A REGULATORY PROPOSAL, THE BOARD MAY ASSIGN A QUALIFIED HEARING OFFICER WHO MAY SCHEDULE A PRE-HEARING CONFERENCE BETWEEN THE PROPONENT AND ANY OR ALL OF THE POTENTIALLY AFFECTED PERSONS. (Section 27(e) of the Act.) The hearing officer may schedule a pre-hearing conference on his or her own motion, or on the motion of the proponent or any potentially affected person. A motion to schedule a pre-hearing conference shall be directed to the hearing officer.
- b) THE NOTICE REQUIREMENTS OF SECTION 28 of the Act and Section 102.161 SHALL NOT APPLY TO SUCH PRE-HEARING CONFERENCES. (Section 27(e) of the Act). However, the hearing officer will give notice to any person who has requested inclusion on the notice list of that proposal.

Section 102.241 Purpose

The purpose of a pre-hearing conference shall be:

- a) TO MAXIMIZE UNDERSTANDING OF THE INTENT AND APPLICATION OF THE PROPOSAL;
- b) TO REACH AGREEMENT ON ASPECTS OF THE PROPOSAL, IF POSSIBLE; AND
- c) TO ATTEMPT TO IDENTIFY AND LIMIT THE ISSUES OF DISAGREEMENT AMONG THE PARTICIPANTS TO PROMOTE EFFICIENT USE OF THE TIME AT HEARING. (Section 27(e) of the Act.)

Section 102.242 Pre-hearing Order

- a) NO RECORD OF THE PRE-HEARING CONFERENCE NEED BE KEPT, NOR SHALL ANY PARTICIPANT OR THE BOARD BE BOUND BY ANY DISCUSSIONS CONDUCTED AT THE PRE-HEARING CONFERENCE.
- b) Notwithstanding subsection (a), WITH THE CONSENT OF ALL PARTICIPANTS IN THE PRE-HEARING CONFERENCE, THE HEARING OFFICER MAY ENTER A PRE-HEARING ORDER DELINEATING ISSUES TO BE HEARD, AGREED FACTS, AND OTHER MATTERS.
- c) If the participants agree to having a pre-hearing order entered pursuant to subsection(b), the hearing officer may require that the participants furnish the text of a proposed order setting forth the substance of the agreements reached at the pre-hearing conference. The hearing officer will enter that order if he or she

agrees that it sets forth the substance of the agreement. The order shall identify which participants have agreed to the substance of the order.

- d) A PRE-HEARING ORDER SHALL NOT BE BINDING ON NONPARTICIPANTS IN THE PRE-HEARING CONFERENCE. (Section 27(e) of the Act.)

SUBPART I: MOTIONS AND DISCOVERY

Section 102.260 Motion Practice

Motion practice in regulatory proceedings is governed by 35 Ill. Adm. Code 101.Subpart H. All motions and responses shall be served upon the proponent, the Agency, ENR, the Attorney General, and all persons on any service list established pursuant to Section 102.221(b).

Section 102.261 Production Of Information

The production of information in regulatory proceedings is governed by 35 Ill. Adm. Code 101.261.

Section 102.262 Subpoenas

The issuance and enforcement of subpoenas in regulatory proceedings is governed by 35 Ill. Adm. Code 101.260(b) through (i).

SUBPART J: REGULATORY HEARINGS

Section 102.280 Pre-hearing Submission Of Testimony And Exhibits

- a) The proponent shall submit all written testimony and any related exhibits 21 days prior to the hearing at which the witness testifies, unless the hearing officer directs otherwise to prevent material prejudice or undue delay.
- b) The hearing officer may require the pre-hearing submission of testimony and any related exhibits by participants other than the proponent if the hearing officer determines that such a procedure will provide for a more efficient hearing.
- c) The original and four (4) copies of pre-submitted testimony and exhibits shall be filed with the Clerk. The Agency, ENR, and, if a participant, the Attorney General shall each be served with one copy of each testimony and exhibit. One copy shall also be served upon the proponent and each participant on any service list, unless otherwise specified or limited by the

hearing officer. Such service shall be initiated on or before the date that copies are filed with the Clerk.

- d) All testimony and exhibits shall be submitted in the form required by 35 Ill. Adm. Code 101.103 and labelled with the docket number of the proceeding, the name of the witness submitting the material or exhibit, and the title of the material or exhibit.
- e) The proponent and each participant who has pre-submitted testimony shall bring copies of that testimony and any exhibits to the hearing.
- f) Testimony submitted prior to hearing will be entered into the record as if read, unless the hearing officer determines that it will aid public understanding to have the testimony read. All persons testifying will be sworn and will be subject to examination. Modifications to previously submitted testimony and exhibits may be allowed by the hearing officer at hearing provided that such modifications are either non-substantive in nature or would not materially prejudice another person's participation at hearing. Objections to such modifications are waived unless raised at hearing.
- g) Where pre-hearing submission of testimony is required pursuant to subsection (a) and (b), any testimony which is not pre-submitted in a timely manner will be allowed only as time permits.

#### Section 102.281 Transcript

All testimony shall be recorded stenographically. When the transcript is filed with the Clerk, the hearing officer will receive and rule on typographical corrections and reporting errors from any person who may examine the transcript for accuracy. Failure of any witness to correct the transcript within 14 days after its receipt in Board offices constitutes a waiver of any right to correct.

#### Section 102.282 Admissible Information

All information which is relevant and not repetitious or privileged shall be admitted by the hearing officer. The hearing officer will rule on objections.

#### Section 102.283 Presentation of Testimony

- a) All witnesses at hearings shall be sworn.
- b) Testimony shall be in narrative form.

#### Section 102.284 Questioning Of Witnesses

All witnesses shall be subject to questioning by any person. Repetitious, irrelevant, harassing, or cumulative questioning will be prohibited by the hearing officer.

Section 102.285 Record For Decision

The record includes the transcript, all written testimony, all exhibits admitted at hearing, and all public comments, briefs and other information timely filed with the Clerk.

SUBPART K: ECONOMIC IMPACT HEARINGS

Section 102.300 Hearings On The Economic Impact Study Of New Proposals

- a) Before the final adoption of any proposal, the Board shall conduct at least one hearing on any economic impact study submitted by ENR on any proposed regulation, or proposed amendment to existing regulation, unless otherwise provided by the Act.
- b) IN THE CASE OF A REQUIRED RULE, IF THE ECONOMIC IMPACT STUDY IS NOT SUBMITTED TO THE BOARD WITHIN SIX (6) MONTHS OF THE BOARD'S DECISION THAT AN ECONOMIC IMPACT STUDY SHOULD BE CONDUCTED, THE BOARD MAY PROCEED TO ADOPT A REQUIRED RULE WITHOUT AN ECONOMIC IMPACT STUDY. However, TO THE EXTENT POSSIBLE CONSISTENT WITH SECTION 28.2(b) OF THE ACT, THE BOARD SHALL CONDUCT A HEARING ON THE ECONOMIC IMPACT OF THE PROPOSED REQUIRED RULE. (Section 28.2 of the Act.) This requirement may be fulfilled by considering economic impact at any merit hearing on the proposed required rule.
- c) Hearings held pursuant to this Section may be consolidated with any other hearings held pursuant to this Part.

Section 102.301 Hearings On The Economic Impact Study Of Existing Regulations

- a) WITHIN A REASONABLE TIME, BUT NOT MORE THAN 120 DAYS, AFTER EACH ECONOMIC IMPACT STUDY ON EXISTING REGULATIONS HAS BEEN FILED BY ENR, THE BOARD SHALL CONDUCT PUBLIC HEARINGS ON SUCH STUDY.
- b) AFTER CONCLUSION OF THE HEARINGS, THE BOARD SHALL PUBLISH ITS FINDINGS AND CONCLUSIONS ON THE AREAS COVERED BY THE STUDY AND THE TESTIMONY RECEIVED BY THE BOARD. The Board will satisfy this requirement by entering a written order.
- c) THE BOARD SHALL ALSO SPECIFICALLY DETERMINE WHETHER, AS A RESULT OF ITS FINDINGS AND CONCLUSIONS, ANY REGULATIONS OF THE BOARD SHALL BE MODIFIED OR REPEALED.

- d) IF THE BOARD CONCLUDES THAT MODIFICATION OR REPEAL MAY BE NECESSARY, IT SHALL PROPOSE SUCH MODIFICATION AS REGULATIONS AND CONDUCT FURTHER HEARINGS ON SAID MODIFICATION.
- e) ANY SUCH PROPOSED MODIFICATIONS SHALL NOT REQUIRE ANY ADDITIONAL ECONOMIC IMPACT STUDY. (Ill. Rev. Stat. 1987, ch. 96 $\frac{1}{2}$ , par. 7404(b).)

SUBPART L: PUBLIC COMMENTS

Section 102.320 Public Comments

Any person may submit written comments on any proposal within 14 days after the receipt of the transcript in Board offices or within 14 days after regulation revision under Section 102.340, unless otherwise specified by the hearing officer or the Board to prevent material prejudice or undue delay. Comments shall be filed with the Clerk and served upon the participants on any service list established by the hearing officer pursuant to Section 102.221. Comments which are not timely filed will not be considered, except as allowed by the hearing officer or the Board to prevent material prejudice.

SUBPART M: BOARD ACTION

Section 102.340 Revision Of Proposed Regulations

- a) The Board may revise the proposed regulations before adoption based upon the record or in response to suggestions made at hearing and in written comments made prior to second notice. No additional hearing on the revisions need be held.
- b) THE BOARD MAY MODIFY AND SUBSEQUENTLY ADOPT ANY PROPOSED REGULATIONS, OR AMENDMENTS TO EXISTING REGULATIONS WITHOUT ANY ADDITIONAL ECONOMIC IMPACT STUDY; PROVIDED THAT SUCH MODIFICATION BY THE BOARD DOES NOT SIGNIFICANTLY ALTER THE INTENT AND PURPOSE OF THE PROPOSED REGULATION WHICH WAS THE SUBJECT OF ENR'S ECONOMIC IMPACT STUDY. (Section 27(b) of the Act.)
- c) Unless otherwise provided in the Act, THE BOARD MAY REVISE PROPOSED REGULATIONS AFTER HEARING IN RESPONSE TO OBJECTIONS OR SUGGESTIONS MADE BY JCAR PURSUANT TO SECTIONS 5.01(b) AND 7.06(a) OF THE APA. THE BOARD MAY MAKE SUCH A REVISION WHERE IT FINDS:
  - 1) THAT SUCH OBJECTIONS OR SUGGESTIONS RELATE TO THE STATUTORY AUTHORITY UPON WHICH THE REGULATION IS BASED, WHETHER THE REGULATION IS IN PROPER FORM, OR WHETHER ADEQUATE NOTICE WAS GIVEN; and



- 2) THAT THE RECORD BEFORE THE BOARD IS SUFFICIENT TO SUPPORT SUCH A CHANGE WITHOUT FURTHER HEARING.  
(Section 28 of the Act.)

Section 102.341 Adoption Of Regulations

- a) IN ADOPTING ANY NEW REGULATION, EXCEPT A REQUIRED RULE OR AN IDENTICAL IN SUBSTANCE REGULATION, THE BOARD SHALL CONSIDER THOSE ELEMENTS DETAILED IN ANY ECONOMIC IMPACT STUDY PERFORMED BY ENR ON THAT REGULATION. THE BOARD SHALL, IN ITS WRITTEN OPINION, MAKE A DETERMINATION, BASED UPON THE ECONOMIC IMPACT STUDY AND OTHER EVIDENCE IN THE RECORD, AS TO WHETHER THE PROPOSED REGULATION HAS ANY ADVERSE ECONOMIC IMPACT ON THE PEOPLE OF THE STATE OF ILLINOIS. (Section 27(b) of the Act.)
- b) In the case of a required rule, the Board will follow the procedures of subsection (a), except as provided in Section 102.300(b).
- c) As provided by Sections 13(c), 13.3, 17.5, 22.4(a), 22.4(d), and 22.7(d) of the Act, the provisions of Title VII of the Act and Section 5 of the APA shall not apply to identical in substance rulemakings.

Section 102.342 First Notice Of Proposed Regulations

Except when otherwise directed by the Act, the Board shall give first notice of its proposed adoption, amendment, or repeal of regulations pursuant to Section 5.01 of the APA. The first notice period shall be at least 45 days, and shall begin on the day that first notice is published in the Illinois Register. The Board will accept written comments from any person concerning the proposed regulations during the first notice period.

Section 102.343 Second Notice Of Proposed Regulations

- a) Except when otherwise directed by the Act, the Board shall give second notice of its proposed adoption, amendment, or repeal of regulations to JCAR. The second notice period shall begin on the date written notice is received by JCAR, and shall expire 45 days after that date, except as provided by Section 5.01 of the APA. The Board will accept comments only from JCAR during the second notice period.
- b) After the beginning of the second notice period, no changes will be made to the proposed regulation, except in response to objections or suggestions from JCAR. Such changes will be made pursuant to Section 102.340(c).

Section 102.344 Notice Of Board Final Action

The Board will give notice of its final action on a proposal to the proponent, the Agency, ENR, the Attorney General, and all persons on the notice list. The Board will publish notice of its final action in the Environmental Register, and will enter a written opinion stating the reasons in support of its final action.

Section 102.345 Adoption Of Identical In Substance Regulation

- a) Prior to adopting identical in substance regulations, the Board will:
  - 1) Make available to the public a proposed Opinion and Order containing the text of the rules;
  - 2) Publish the proposed regulations in the Illinois Register;
  - 3) Serve a copy of the proposed Opinion and Order on the USEPA; and
  - 4) Receive written comments from the USEPA and other persons for at least 45 days after the date of publication in the Illinois Register.
- b) AFTER CONSIDERATION OF COMMENTS FROM THE USEPA, THE AGENCY, THE ATTORNEY GENERAL AND THE PUBLIC, THE BOARD SHALL ADOPT THE VERBATIM TEXT OF SUCH USEPA REGULATIONS AS ARE NECESSARY AND APPROPRIATE FOR AUTHORIZATION OF THE PROGRAM. EXCEPT AS PROVIDED IN SECTION 7.2 OF THE ACT, THE ONLY CHANGES THAT MAY BE MADE BY THE BOARD TO THE FEDERAL REGULATIONS ARE THOSE CHANGES THAT ARE NECESSARY FOR COMPLIANCE WITH THE ILLINOIS ADMINISTRATIVE CODE, AND TECHNICAL CHANGES THAT IN NO WAY CHANGE THE SCOPE OR MEANING OF ANY PORTION OF THE REGULATIONS. (Section 7.2(a) of the Act.)

Section 102.346 Adoption Of Emergency Regulations

- a) 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 IN ACCORDANCE WITH SECTION 5.02 OF THE APA. (Section 27(c) of the Act.)
- b) WHEN THE BOARD FINDS THAT A SEVERE PUBLIC HEALTH EMERGENCY EXISTS, THE BOARD MAY, IN RELATION TO ANY PROPOSED REGULATION, ORDER THAT SUCH REGULATION TAKE EFFECT WITHOUT DELAY. THE BOARD SHALL PROCEED WITH ANY REQUIRED HEARINGS WHILE THE REGULATION CONTINUES IN EFFECT. (Section 27(c) of the Act.)

Section 102.347 Adoption Of Peremptory Regulations

- a) WHEN THE BOARD FINDS THAT A PEREMPTORY RULEMAKING IS NECESSARY AND STATES IN WRITING ITS REASONS FOR THAT FINDING, THE BOARD MAY ADOPT PEREMPTORY RULEMAKING UPON FILING A NOTICE OF RULEMAKING WITH THE SECRETARY OF STATE PURSUANT TO SECTION 6.01 OF THE APA.
- b) NOTICE OF SUCH PEREMPTORY RULEMAKING WILL BE PUBLISHED IN THE ILLINOIS REGISTER. (Section 5.03 of the APA.)

Section 102.348 Adoption Of Temporary Regulations

- a) THE BOARD MAY ADOPT A PROPOSED REGULATION PRIOR TO ITS CONSIDERATION OF AN ECONOMIC IMPACT STUDY WHEN SUCH STUDY IS FILED WITH THE BOARD LESS THAN 120 DAYS IN ADVANCE OF A DATE ON WHICH A TEMPORARY NON-EMERGENCY REGULATION OR PROVISION THEREOF WOULD LAPSE PRIOR TO ADOPTION OF A PERMANENT REGULATION OR PROVISION THEREOF ON THE SAME SUBJECT, OR LESS THAN 120 DAYS IN ADVANCE OF A DEADLINE FOR ADOPTION OF THE REGULATION WHICH IS ESTABLISHED IN A STATE STATUTE. (Section 27 of the Act.)
- b) SUCH ADOPTED REGULATION SHALL BE EFFECTIVE UNTIL 180 DAYS AFTER THE ECONOMIC IMPACT STUDY REQUIRED PURSUANT TO THIS SECTION IS FILED WITH THE BOARD, AND IN NO EVENT SHALL A REGULATION ADOPTED PURSUANT TO THIS PROCEDURE STAY IN EFFECT FOR MORE THAN ONE YEAR. (Section 27 of the Act.)

SUBPART N: MOTIONS FOR RECONSIDERATION  
AND APPEAL

Section 102.360 Filing Of Motion For Reconsideration

Motion for reconsideration or modification of any Board order taking substantive action on a regulatory proposal shall be filed in accordance with 35 Ill. Adm. Code 101.246. The contents of such motions are governed by 35 Ill. Adm. Code 101.242.

Section 102.361 Disposition Of Motions For Reconsideration

- a) AFTER COMMENCEMENT OF THE SECOND NOTICE PERIOD, NO SUBSTANTIVE CHANGES MAY BE MADE TO A PROPOSED RULEMAKING UNLESS IT IS MADE IN RESPONSE TO AN OBJECTION OR SUGGESTION OF JCAR. (Section 5.01(b) of the APA.) Therefore, submission of second notice of a proposal to JCAR will preclude the Board from revising that proposal in response to a motion for reconsideration. However, the Board may resubmit a rule for first notice if necessary to prevent material prejudice.

- b) An adopted rule becomes effective upon the filing of that rule with the Secretary of State. Therefore, the Board is precluded from allowing a motion for reconsideration of a final order adopting a rule, if that rule has been filed with the Secretary of State.

Section 102.362 Correction Of Publication Errors

The Board may make technical corrections to proposed or adopted rules, published in the Illinois Register or filed with the Secretary of State, only in accordance with 1 Ill. Adm. Code 100.240. No hearing need be held on such corrections.

Section 102.363 Appeal

Any final Board order may be appealed to the appellate court within 35 days of the entry of that order, pursuant to Sections 29 and 41 of the Act.

TITLE 35 ENVIRONMENTAL PROTECTION  
SUBTITLE A: GENERAL PROVISIONS  
CHAPTER I: POLLUTION CONTROL BOARD

PART 106  
HEARINGS PURSUANT TO SPECIFIC RULES

SUBPART D: RCRA ADJUSTED STANDARD PROCEDURES

Section 106.415 Notice and Conduct of Hearing

- a) The Board will hold at least one public hearing prior to granting an adjusted standard.
- b) The hearing officer will schedule the hearing. The Clerk will give notice of hearing in accordance with 35 Ill. Adm. Code ~~102-124~~ 102.162.
- c) The proceeding will be in accordance with 35 Ill. Adm. Code ~~102-160 through 102-164~~ 102.Subpart J.

(Source: Amended at \_\_\_\_ Ill. Reg. \_\_\_\_\_, effective \_\_\_\_\_)

SUBPART E: AIR ADJUSTED STANDARD PROCEDURES

Section 106.506 Notice and Conduct of Hearing

- a) The Board will hold at least one public hearing prior to granting an adjusted standard.
- b) The hearing officer will schedule the hearing. The Clerk will give notice of hearing in accordance with 35 Ill. Adm. Code ~~102-122~~ 102.162.
- c) The proceedings will be in accordance with 35 Ill. Adm.

Code ~~102-160 through 102-164~~ 102.Subpart J.

(Source: Amended at \_\_\_\_ Ill. Reg. \_\_\_\_\_, effective \_\_\_\_\_)

SUBPART F: WATER WELL SETBACK EXCEPTION PROCEDURES

Section 106.602 Contents of Petition

- a) The petitioner shall file ten copies of the petition for exception with the Clerk of the Pollution Control Board (Board), and shall serve one copy upon the Agency.
- b) The petition shall contain the following information:
  1. A written statement, signed by the petitioner or an authorized representative, outlining the scope of the evaluation, the nature of, the reasons for and the basis of the exception, consistent with the level of justification contained in Section 14.2(c) of the Act.
  2. The nature of the petitioner's operations and control equipment; and
  3. Any additional information which may be required in Section 14.2(c) of the Act.
- c) In accordance with 35 Ill. Adm. Code ~~103-123~~ 101.143 the petition shall contain proof of service on owners required to be notified and provided with a copy of the petition as required by Section 14.2(c) of the Act.

(Source : Amended at \_\_\_\_ Ill. Reg. \_\_\_\_\_, effective \_\_\_\_\_)

Section 106.604 Notice and Conduct of Hearing

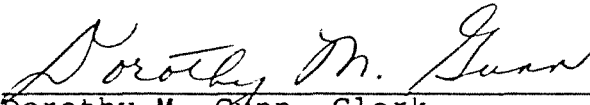
- a) The Board will hold at least one public hearing prior to granting an exception.
- b) The hearing officer will schedule the hearing. The Clerk will give notice of hearing in accordance with 35 Ill. Adm. Code ~~102-122~~ 102.162.
- c) The proceedings will be in accordance with 35 Ill. Adm. Code ~~102-160 through 102-164~~ 102.Subpart J.

(Source: Amended at \_\_\_\_ Ill. Reg. \_\_\_\_\_, effective \_\_\_\_\_)

IT IS SO ORDERED.

B. Forcade concurred, and J. Marlin was not present.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Proposed Opinion and Order was adopted on the 31<sup>st</sup> day of August, 1989, by a vote of 6-0.

  
\_\_\_\_\_  
Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board