

ILLINOIS POLLUTION CONTROL BOARD

April 12, 2017

IN THE MATTER OF:)
)
PROCEDURAL RULE AMENDMENTS:) R 17-18
PROPOSED AMENDMENTS TO 35 ILL.) (Rulemaking - Procedural)
ADM. CODE 101 THROUGH 130.)

Proposed Rule. Second Notice.

ORDER OF THE BOARD (by J.A. Burke, K. Papadimtriu):

The Board proposes these procedural rule amendments for second-notice review by the Joint Committee on Administrative Rules (JCAR) under the Illinois Administrative Procedure Act (5 ILCS 100/5-40(c) (2014)). The amendments aim to review and streamline the Board's procedural rules. The Board is in the process of reviewing all its rules to streamline, update and overhaul its regulations. The Board initiated this review because some rules were no longer current due to changing technology and the passage of time, and with the additional impetus provided by Governor Rauner's Executive Order 2016-13.

The Board recently amended certain procedural rules, but had not examined others in some time. This proceeding proposes changes to all 10 parts of the Board's procedural rules, which are located in Title 35 of the Illinois Administrative Code: Part 101—General Rules; Part 102—Regulatory and Informational Hearings and Proceedings; Part 103—Enforcement; Part 104—Regulatory Relief Mechanisms; Part 105—Appeals of Final Decisions of State Agencies; Part 106—Proceedings Pursuant to Specific Rules or Statutory Provisions; Part 107—Petition to Review Pollution Control Facility Siting Decisions; Part 108—Administrative Citations; Part 125—Tax Certifications; and Part 130—Identification and Protection of Trade Secrets and Other Non-Disclosable Information.

In this opinion, the Board first provides a brief procedural history before addressing comments received during the first-notice public comment period. The second-notice rule amendments appear in the appendix following this opinion and order.

PROCEDURAL HISTORY

The Board adopted a first-notice opinion and order on January 19, 2017. The first-notice amendments were published in the *Illinois Register* on February 10, 2017 (41 Ill. Reg. 1293-1571).

The Board provided an overview of this rulemaking in its first notice opinion. *See Procedural Rules Amendments: Proposed Amendments to 35 Ill. Adm. Code 101 through 130, R17-18, slip op. at 1-3 (Jan. 19, 2017)*. The Board's proposal updates the quorum requirements in Section 101.108(d) reflecting recent legislation in P.A 99-0934, effective February 24, 2017.

During the 45-day public comment period, the Board received comments from the Joint Committee on Administrative Rules (PC 1), David A. Joens, Director of the Illinois State Archives and Chairman of the State Records Commission (PC 2), the Illinois Environmental Protection Agency (Agency) (PC 3), and the Illinois Attorney General's Office (AGO) (PC 4 and PC 5). No commenter opposes any significant aspect of the first-notice proposal.

DISCUSSION

The Board discusses each topic and addresses related points brought up by commenters below.

E-mail Service of Documents

The Board asked for comment on whether agencies could provide an email address for initial service under Section 101.304(g), before an attorney files an appearance. *See* R17-18 slip op. at 2. The AGO responded that, although no dedicated email account exists, the AGO can create an email account. PC 4 at 1. Alternatively, the AGO suggests that the Board maintain a list of email addresses on its website. *Id.* at 1. While the Board maintains email addresses in COOL when an attorney has filed an appearance for a specific case, Section 101.304(g) provides addresses for service on agencies, rather than specific agency attorneys, for the initial filing. Currently, the Board's rules include street addresses. The Board suggested adding email addresses to Section 101.304(g) as the Board moves to electronic service of all documents. The Board encourages the AGO to supply an email address to the Board for initial filings.

The Agency provided the Board with an email address to be included in Section 101.304(g) and the Board will include the address. The Agency also asks that multiple e-mail addresses be used to reduce potential for lost e-mails. PC 3 at 2, 6. As allowed in Supreme Court rules, the Board amends Section 101.400(a)(4)(B) to note that up to two secondary e-mail addresses may be included for service by e-mail.

Rejecting Documents that do not Comply with Procedural Rules

In Sections 101.302(l) and 105.118, the AGO suggests allowing refiling of a record when the Clerk or hearing officer rejects the record. Refiling, in this way, would avoid sanctions when errors can be easily fixed. PC 4 at 2. To date, the Board has not sanctioned a party based on record filing; and while the Board maintains the ability to impose sanctions, it is unlikely that the Board would impose sanctions for clerical errors.

Similarly, the Agency asks the Board to clarify what reasons may cause a record to be rejected by the Clerk or hearing officer. PC 3 at 7. The Board will base any rejection on its rules. For example, the Agency must follow the record filing requirements in Section 105.212, 105.302, and 105.410. Additionally, Section 105.116 requires the record must be arranged chronologically or by category, sequentially numbered with the prefix "R", and contain an index of documents and page ranges. The Agency must also certify the record. The Board may reject a record for any of these reasons or other violations of Board rules on Agency records.

Filing on Electronic Storage Devices

Director Joens of the Illinois State Archives is concerned about the Board's long-term storage of filings submitted on portable electronic devices. PC 2 at 2. For example, properly maintained compact discs only have a life expectancy of ten years. *Id.* The Board will not use filed devices for long-term storage. Rather, the Board's Clerk's Office will promptly transfer electronically filed documents to COOL, which will also provide the public with internet access to the document during the proceeding.

Renewal of Alternative Thermal Effluent Limitations

The Agency generally supports the Board's proposed revisions to Section 106.1180, however, the Agency requests a public hearing to gather additional comments on the substantive language amendments in subsections (c) and (d). PC 3 at 2. The Agency does not raise any substantive concerns in its filing. The Board also did not receive any other comments on these amendments during the 45-day public comment period. Further the language proposed by the Board is codifying Board decisions in these types of determinations. The Board therefore finds a public hearing unnecessary and keeps the amendments as proposed at first notice.

Settlements of National Pollutant Discharge Elimination System Enforcement Cases

The Board proposed deleting the requirement in Section 103.306(a) to publish notice in the *Environmental Register* of a proposed settlement involving an NPDES permit. The Agency states that the deleted language should be retained to satisfy federally-mandated public participation requirements. PC 3 at 5-7. The AGO expresses a similar concern. *See* PC 5 at 1-2.

The Board has published the *Environmental Register* less frequently over the last several years such that publication in the *Environmental Register* may not suffice. To address the comments, the Board amends Section 103.300(b) to require 30 days notice for settlements involving an NPDES permit:

Unless the Board, ~~in its discretion,~~ concludes that a hearing will be held, the Board will cause notice of the proposed stipulation and settlement, and request for relief, to be published and sent, as is required for hearing, by the Clerk's office. The notice will include a statement that any person may file with the Clerk ~~of the Board.~~

- 1) ~~A~~ written demand for a hearing within 21 days after publication of the notice. The written demand for hearing must ~~clearly~~ state that a public hearing is requested and ~~must~~ ~~should~~ indicate the assigned Board Docket number and respondent's name in the matter; or.
- 2) In the case of proposed stipulations and settlements that relate to NPDES permits, a written comment or demand for hearing within 30 days of publication. The written demand for hearing must state that a public hearing is requested and must indicate the assigned Board Docket number and respondent's name in the matter.

Adjusted Standard Petitions

Proposed Section 104.419 states the Board may order an amended petition or dismiss a petition for lack of sufficient information. The Agency asks, to promote efficiency, that the Board makes this determination as soon as possible after the initial filing and preferably before the Agency files its recommendation. PC 3 at 8. The Board intends to make its determination as soon as practicable, consistent with available Board resources.

Conflicts of Interest

The Agency requests that the Board include language complying with Section 128 of the Clean Air Act for Illinois' State Implementation Plan submittals. PC 3 at 2-3, citing 42 U.S.C. § 7428. The Board adds subsection (d) to Section 101.112:

- d) In accordance with Section 128 of the federal Clean Air Act, at least a majority of Board members must represent the public interest, and must not derive any significant portion of their income from persons subject to permits or enforcement orders under the Clean Air Act or Illinois Environmental Protection Act. Any potential conflicts of interest by Board members must be adequately disclosed.

Sections that are Repetitive, Unduly Burdensome, or in need of Updating

The Agency comments on sections that require updating. PC 3 at 2-7. The Board will make the following amendments.

The Board amends Section 101.302(k) to make clear that, along with federal regulations and statutes, Illinois statutes and regulations readily available to the Board also need not be included in appendices.

To address a grammatical concern, Section 101.400(a)(3) is amended to state “[n]o Board order is required for an out-of-state attorney to appear and no motion to appear pro hac vice is necessary.”

The Agency requests that, in Section 101.518, deadlines to file interlocutory appeals run from the date the transcript is posted and not the date of the hearing. The Board notes that this is a Board procedural rule and parties may ask for more time to file an appeal. The Board therefore declines to amend this section.

To clarify how clerical errors of Board final opinions and orders may be amended pending appeal, the Board amends Section 101.904(a) to state “[w]hile the appeal is pending, the mistakes may be corrected only with permission of the appellate court.”

The Board made non-substantive amendments based on comments received by JCAR. The Board also made non-substantive edits for consistency.

CONCLUSION

The Board proposes procedural rule amendments for second-notice review.

ORDER

The Board directs the Clerk to submit these proposed amendments to JCAR for second-notice review. First notice additions retained at second notice appear single-underlined, and deletions appear with single-strikethroughs. For changes made at second notice, additions appear with double-underline, and deletions appear with double-strikethroughs.

IT IS SO ORDERED.

I, Don A. Brown, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on April 12, 2017, by a vote of 5-0.

A handwritten signature in black ink that reads "Don A. Brown". The signature is written in a cursive, flowing style.

Don A. Brown, Assistant Clerk
Illinois Pollution Control Board