

ILLINOIS POLLUTION CONTROL BOARD
December 6, 2012

IN THE MATTER OF:)
)
PROPOSED AMENDMENT TO 35 ILL.) R13-9
ADM. CODE 101.108(d) CONFORMING TO) (Rulemaking – Procedural)
P.A. 93-509 RE BOARD MAJORITY)

Proposed Rule. Second Notice.

OPINION AND ORDER OF THE BOARD (by C.K. Zalewski):

Today the Board proposes amended rules for second notice review by the Joint Committee on Administrative Rules (JCAR) under the Administrative Procedure Act (APA), 100 ILCS 5/5-1 et seq. (2010). There are no substantive changes in these rules from those proposed in the Board's September 20, 2012 first notice order, as no public comments have been received. The first notice publication in the *Illinois Register* appeared at 36 Ill. Reg. 14971 (Oct. 12, 2012). The publication started a 45-day public comment period under the APA, and no public comments have been received.

This docket proposes a single amendment to the Board's existing procedural rule codified at 35 Ill. Adm. Code 101.108(d) "Board Proceedings." The purpose of today's action is to make clear that the affirmative vote of a 3 member majority of this 5 member Board is required to adopt a Board decision. The Board proposes to amend 35 Ill. Adm. Code 101.108(d) to read:

Board decisions will be made at meetings open to the public. Except as provided in subsection (e) of this Section [relating exclusively to Section 34 (d) proceedings], 4 members of the Board constitute a quorum, and 3 4 affirmative votes are required to adopt a Board decision. (added language is underlined, and deleted material is stricken-through)

This amendment would conform the Board's procedural rule to the current version of Section 5(a) of the Environmental Protection Act, as amended by Public Act 93-509, eff. Aug. 11, 2003. The Board proposes that these rules become effective upon filing with the Secretary of State.

The Board is not required to hold a public hearing to amend its procedural rules pursuant to Section 26 and 27 of the Act. 415 ILCS 5/26 and 27 (2010). The Board has not held a hearing on the proposed rule, as no hearing was requested during the first notice period. *See* Section 5-40 of the Administrative Procedure Act (APA), 100 ILCS 5/5-40 (2010).

DISCUSSION

The Board's last comprehensive review of its procedural rules was completed in December 21, 2000. *See* Revision of the Board's Procedural Rules: 35 Ill. Adm. Code 101-130, R00-20 (Dec. 21, 2000), completing the work begun in the predecessor docket Revision of the

Board's Procedural Rules: 35 Ill. Adm. Code 101-130, R97-08 (closed Mar. 16, 2000). The current version of Section 101.108 was adopted in the R00-20 proceeding, effective January 1, 2001, and has not been amended since then.

Section 101.108(d) currently provides:

Board decisions will be made at meetings open to the public. Except as provided in subsection (e) of this Section [relating exclusively to Section 34 (d) proceedings], 4 members of the Board constitute a quorum, and 4 affirmative votes are required to adopt a Board decision.

This was consistent with Section 5 of the Act, which provided for a 7 member Board¹. The Board's membership was reduced to 5 in P. A. 93-509, amending Section 5(a) of the Act to read in pertinent part:

If there is no vacancy on the Board, 4 members of the Board shall constitute a quorum to transact business; otherwise, a majority of the Board shall constitute a quorum to transact business, and no vacancy shall impair the right of the remaining members to exercise all of the powers of the Board. *Every action approved by a majority of the members of the Board shall be deemed to be the action of the Board.* The Board shall keep a complete and accurate record of all its meetings. 415 ILCS 105/5(a) at para. 12. (2010)(emphasis added)

The Board had not previously amended Section 101.108(d) of the procedural rules, as it has viewed the simple 3 member majority requirement of amended Section 5 of the Act as “trumping” the outdated 4 member majority requirement contained in the pre-existing, unamended rules. As a recent (now-filled) vacancy on the Board created potential for public confusion, the Board believed it prudent to proceed with a proposal.

ORDER

The Board directs the Clerk to cause submission of the following rules to JCAR for second notice review under the APA. New language is indicated by underlining, and language to be deleted by strike-through.

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

PART 101
GENERAL RULES

¹ The Act initially provided for a 5 member Board. In 1983, the Board's size was increased to 7 members. *See* P.A. 83-770, eff. Sept. 24, 1983.

SUBPART A: GENERAL PROVISIONS

Section	
101.100	Applicability
101.102	Severability
101.104	Repeals
101.106	Board Authority
101.108	Board Proceedings
101.110	Public Participation
101.112	Bias and Conflict of Interest
101.114	Ex Parte Communications

SUBPART B: DEFINITIONS

Section	
101.200	Definitions Contained in the Act
101.202	Definitions for Board's Procedural Rules

SUBPART C: COMPUTATION OF TIME, FILING, SERVICE OF DOCUMENTS, AND STATUTORY DECISION DEADLINES

Section	
101.300	Computation of Time
101.302	Filing of Documents
101.304	Service of Documents
101.306	Incorporation of Documents by Reference
101.308	Statutory Decision Deadlines and Waiver of Deadlines

SUBPART D: PARTIES, JOINDER, AND CONSOLIDATION

Section	
101.400	Appearances, Withdrawals, and Substitutions of Attorneys in Adjudicatory Proceedings
101.402	Intervention of Parties
101.403	Joinder of Parties
101.404	Agency as a Party in Interest
101.406	Consolidation of Claims
101.408	Severance of Claims

SUBPART E: MOTIONS

Section	
101.500	Filing of Motions and Responses
101.502	Motions Directed to the Hearing Officer
101.504	Contents of Motions and Responses
101.506	Motions Attacking the Sufficiency of the Petition, Complaint, or Other Pleading

101.508	Motions to Board Preliminary to Hearing
101.510	Motions to Cancel Hearing
101.512	Motions for Expedited Review
101.514	Motions to Stay Proceedings
101.516	Motions for Summary Judgment
101.518	Motions for Interlocutory Appeal from Hearing Officer Orders
101.520	Motions for Reconsideration
101.522	Motions for Extension of Time

SUBPART F: HEARINGS, EVIDENCE, AND DISCOVERY

Section	
101.600	Hearings
101.602	Notice of Board Hearings
101.604	Formal Board Transcript
101.606	Informal Recordings of the Proceedings
101.608	Default
101.610	Duties and Authority of the Hearing Officer
101.612	Schedule to Complete the Record
101.614	Production of Information
101.616	Discovery
101.618	Admissions
101.620	Interrogatories
101.622	Subpoenas and Depositions
101.624	Examination of Adverse, Hostile or Unwilling Witnesses
101.626	Information Produced at Hearing
101.628	Statements from Participants
101.630	Official Notice
101.632	Viewing of Premises

SUBPART G: ORAL ARGUMENT

Section	
101.700	Oral Argument

SUBPART H: SANCTIONS

Section	
101.800	Sanctions for Failure to Comply with Procedural Rules, Board Orders, or Hearing Officer Orders
101.802	Abuse of Discovery Procedures

SUBPART I: REVIEW OF FINAL BOARD OPINIONS AND ORDERS

Section	
101.902	Motions for Reconsideration

- 101.904 Relief from and Review of Final Opinions and Orders
 101.906 Judicial Review of Board Orders
 101.908 Interlocutory Appeal

- 101.APPENDIX A Captions
- | | |
|--------------------|------------------------------------------|
| 101.ILLUSTRATION A | Enforcement Case |
| 101.ILLUSTRATION B | Citizen's Enforcement Case |
| 101.ILLUSTRATION C | Variance |
| 101.ILLUSTRATION D | Adjusted Standard Petition |
| 101.ILLUSTRATION E | Joint Petition for an Adjusted Standard |
| 101.ILLUSTRATION F | Permit Appeal |
| 101.ILLUSTRATION G | Underground Storage Tank Appeal |
| 101.ILLUSTRATION H | Pollution Control Facility Siting Appeal |
| 101.ILLUSTRATION I | Administrative Citation |
| 101.ILLUSTRATION J | General Rulemaking |
| 101.ILLUSTRATION K | Site-specific Rulemaking |
- 101.APPENDIX B Appearance Form
 101.APPENDIX C Withdrawal of Appearance Form
 101.APPENDIX D Notice of Filing
 101.APPENDIX E Certificate of Service
- | | |
|--------------------|-------------------------|
| 101.ILLUSTRATION A | Service by Non-Attorney |
| 101.ILLUSTRATION B | Service by Attorney |
| 101.ILLUSTRATION B | Service by Attorney |
- 101.APPENDIX F Notice of Withdrawal (Repealed)
 101.APPENDIX G Comparison of Former and Current Rules (Repealed)

AUTHORITY: Implementing Sections 5, 7.1, 7.2, 26, 27, 28, 29, 31, 32, 33, 35, 36, 37, 38, 40, 40.1, 40.2, 41, and 58.7 of the Environmental Protection Act (Act) [415 ILCS 5/5, 7.1, 7.2, 26, 27, 28, 29, 31, 32, 33, 35, 36, 37, 38, 40, 40.1, 40.2, 41, and 58.7] and authorized by Sections 26 and 27 of the Act [415 ILCS 5/26 and 27].

SOURCE: Filed with Secretary of State January 1, 1978; codified 6 Ill. Reg. 8357; Part repealed, new Part adopted in R88-5A at 13 Ill. Reg. 12055, effective July 10, 1989; amended in R90-24 at 15 Ill. Reg. 18677, effective December 12, 1991; amended in R92-7 at 16 Ill. Reg. 18078, effective November 17, 1992; old Part repealed, new Part adopted in R00-20 at 25 Ill. Reg. 446, effective January 1, 2001; amended in R04-24 at 29 Ill. Reg. 8743, effective June 8, 2005; amended in R06-9 at 29 Ill. Reg. 19666, effective November 21, 2005; amended in R07-17 at 31 Ill. Reg. 16110, effective November 21, 2007; amended in R10-22 at 34 Ill. Reg. 19566, effective December 3, 2010; amended in R12-22 at 36 Ill. Reg. 9211, effective June 7, 2012; amended in R13-9 at 37 Ill. Reg. _____, effective _____.

SUBPART A: GENERAL PROVISIONS

Section 101.108 Board Proceedings

- a) Board proceedings can generally be divided into two categories: rulemaking proceedings and adjudicatory proceedings.
- b) The following are examples of Board rulemaking proceedings: Identical-in-Substance, Clean Air Act/Fast Track, Federally Required Rulemaking, General Rulemaking, and Site-Specific Rulemaking. Procedural rules for these types of proceedings can be found at 35 Ill. Adm. Code 102.
- c) The following are examples of Board adjudicatory proceedings: Enforcement Proceedings (35 Ill. Adm. Code 103), Variance Petitions (35 Ill. Adm. Code 104), Adjusted Standard Petitions (35 Ill. Adm. Code 104), Permit Appeals (35 Ill. Adm. Code 105), Leaking Underground Storage Tank Appeals (35 Ill. Adm. Code 105), Pollution Control Facility Siting Appeals (35 Ill. Adm. Code 107), and Administrative Citations (35 Ill. Adm. Code 108).
- d) Board decisions will be made at meetings open to the public. Except as provided in subsection (e) of this Section, 4 members of the Board constitute a quorum, and 3 affirmative votes are required to adopt a Board decision.
- e) At a hearing pursuant to Section 34(d) of the Act to determine whether a seal should be removed, *at least one Board Member shall be present, and those Board Members present may render a final decision without regard to the requirements of Section 5(a) of the Act* [415 ILCS 5/34(d)].

(Source: Amended at 37 Ill. Reg. _____, effective _____)

IT IS SO ORDERED.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on December 6, 2012, by a vote of 5-0.



John Therriault, Assistant Clerk
Illinois Pollution Control Board