

TITLE 35: ENVIRONMENTAL PROTECTION

SUBTITLE A: GENERAL PROVISIONS

CHAPTER II: ENVIRONMENTAL PROTECTION AGENCY

PART 166

PROCEDURES FOR PERMIT AND CLOSURE PLAN HEARINGS

SUBPART A: INFORMATIONAL PERMIT AND  
CLOSURE PLAN HEARINGS

Section

- 166.101 Purpose
- 166.110 Applicability
- 166.120 Definitions
- 166.130 Notice
- 166.140 Hearing Officer
- 166.150 Hearing Board
- 166.160 Conduct of Hearing
- 166.170 Questions
- 166.180 Contents of the Record
- 166.190 Access to the Record
- 166.191 Closure of the Record
- 166.192 Contents of Responsiveness Summary
- 166.193 Severability

SUBPART B: CONTESTED CASE PERMIT HEARINGS

Section

- 166.201 Purpose
- 166.202 Applicability
- 166.203 Definitions
- 166.210 Commencement of a Contested Case Permit Hearing
- 166.220 Notice
- 166.221 Form of Documents
- 166.222 Filing of Documents
- 166.223 Service of Documents and Proof of Service
- 166.224 Motions
- 166.225 Computation of Time
- 166.226 Pre-Hearing Conferences
- 166.227 Discovery
- 166.228 Admissions
- 166.230 Hearing Officer
- 166.235 Intervention
- 166.240 Conduct of the Hearing
- 166.250 Rules of Evidence
- 166.255 Burden of Proof
- 166.260 Testimony and Cross-Examination of Witnesses
- 166.265 Official Notice

- 166.270 Records in Other Proceedings
- 166.275 Documentary Evidence
- 166.276 Exhibits
- 166.280 Transcript of Hearing
- 166.285 Proposed Finding of Fact and Conclusions of Law
- 166.290 Proposal for Decision
- 166.291 Contents of the Record
- 166.292 Decision in Contested Case
- 166.295 Sanctions
- 166.296 Ex parte Consultations
- 166.297 Right to Legal Counsel

**AUTHORITY:** Implementing and authorized by Section 4 of the Environmental Protection Act (Ill. Rev. Stat. 1985, ch. 111-1/2, par. 1004) and Section 5-10(a)(1) of the Illinois Administrative Procedure Act (Ill. Rev. Stat., 1991, ch. 127, par. 1005-10(a)(1)).

**SOURCE:** Adopted and codified at 7 Ill. Reg. 7084, effective June 15, 1983; old Part repealed, new Part adopted at 11 Ill. Reg. 16550, effective October 15, 1987; amended at 42 Ill. Reg. 15991, effective August 1, 2018.

#### **SUBPART A: INFORMATIONAL PERMIT AND CLOSURE PLAN HEARINGS**

##### **Section 166.101 Purpose**

This Subpart is intended:

- a) to set forth the practice and procedures to be followed by the Illinois Environmental Protection Agency (Agency) in conducting informational permit and closure plan hearings;
- b) to provide opportunity for the public to understand and comment on permit and closure plan applications and associated actions of the Agency;
- c) to establish procedures by which the Agency consults interested or affected segments of the public;
- d) to enable the Agency to fully consider and respond to public concerns;
- e) to encourage cooperation between the Agency and other governmental bodies;
- f) to foster openness among the Agency, other governmental bodies and the public; and
- g) to comply with State and federal requirements.

##### **Section 166.110 Applicability**

This Subpart sets forth the procedures to be followed by the Illinois Environmental Protection Agency in informational hearings which concern applications for permits and for the approval or amendments of closure plans submitted to the Agency under the provisions of 35 Ill. Adm. Code 725.

##### **Section 166.120 Definitions**

- a) Unless defined in Subsection (b) of this Section, words shall have the meaning as defined in Section 3 of the Environmental Protection Act (Ill. Rev. Stat. 1985, ch. 111-1/2, par. 1003);
- b) The following definitions shall apply to this rulemaking:

"Applicant" means a person who applies for a permit.

"Closure Plan" means a plan or amendment to plan to close a hazardous waste facility as required under 35 Ill. Adm. Code 725.

"Director" means the Director of the Illinois Environmental Protection Agency.

"Hearing" means a proceeding which is held after notice to interested persons in which testimony is taken by oath or affirmation and a verbatim record of all testimony is kept.

"Hearing Officer" means a person duly designated by the Director to preside over a hearing.

"Informational Hearing" means a hearing which is not required by law to be held, but which is held for the purpose of informing the public of a proposed Agency action or when the Agency wished to gather information or comments from the public prior to making a final decision on a matter.

"Interested person" means any person who may be affected by the outcome of the permit or closure plan decision.

"NPDES" means the National Pollutant Discharge Elimination System for issuing, establishing conditions for, and denying permits under the Federal Water Pollution Control Act, as amended, (33 U.S.C. 1342) and its implementing regulations.

"Permit" means permission or authorization granted by the Agency, to construct, alter, extend, or operate any air pollution source or control equipment, waste water treatment works, landfill, public water supply, or other facility including their appurtenances and equipment pursuant to Pollution Control Board rules.

### **Section 166.130 Notice**

- a) Notice of hearing shall be given at least 45 days before the date of hearing by prominent placement at a dedicated page on the Agency's website. The notice shall remain on the Agency's website for the duration of the public comment period. If the Agency's website is unavailable for a prolonged period of time, the comment period will be extended for an equivalent amount of time. If, pursuant to the Act or other applicable law, newspaper notice is required for the type of permit or closure plan at issue, notice shall also be given by advertisement in a newspaper of general circulation in the affected geographical area.
- b) If the Director of the Agency or his/her designee determines, for a particular permit or closure plan, that additional notice would serve the interests of the public or of the Agency, notice shall also be by advertisement in a newspaper of general circulation in the affected geographical area or by notice in the Illinois Register. In making this determination, the Agency shall consider public interest.
- c) A copy of the Notice and the closure plan or proposed permit and fact sheet shall be provided by electronic mail or mailed to:
  - 1) The State's attorney of the county in which the facility is located;

- 2) The Chairman of the County Board of the county in which the facility is located;
  - 3) Each member of the General Assembly from the legislative district in which the facility is located;
  - 4) The chief executive officer and the clerk of each municipality, any portion of which is within three miles of the facility; and
  - 5) Persons on a mailing list developed by the Agency that includes those who requested to be included on such a list.
- d) The notice shall include the following information:
- 1) The date, time, and place of the public hearing;
  - 2) The purpose of the hearing;
  - 3) The name and address of each permit or closure plan applicant and the location or address of the facility for which the permit or closure plan is sought;
  - 4) The type of permit sought and the applicable federal and State regulations that require or authorize the granting of the permit or closure plan by the Agency;
  - 5) A brief description of the activities or operations at the facility for which the permit is requested;
  - 6) Identification of the Agency Bureau sponsoring the hearing, and any other sponsor if the hearing is jointly sponsored;
  - 7) The name of any waterway to which any discharge is to be made and a short description of the location of each such discharge on the waterway under any proposed NPDES permit, if applicable;
  - 8) A statement of issues to be considered;
  - 9) The name, address, and telephone number of the Agency contact person from whom additional information regarding the hearing may be obtained; and
  - 10) A statement of applicable Pollution Control Board rules governing the issuance of the permit or closure plan that is the subject of the hearing.

(Source: Amended at 42 Ill. Reg. 15991, effective August 1, 2018)

#### **Section 166.140 Hearing Officer**

- a) The Hearing Officer shall be designated by the Director of the Agency.

- b) The Hearing Officer shall have all authority necessary to conduct a fair and orderly hearing including, but not limited to, the power to:
  - 1) Schedule the hearing;
  - 2) Require prior submission of expert testimony and written exhibits;
  - 3) Require participants to state their position with respect to the issuance of the permit;
  - 4) Administrator oaths and affirmations;
  - 5) Examine witnesses to clarify testimony;
  - 6) Rule on the admissibility of evidence offered;
  - 7) Require persons who testify to do so under oath;
  - 8) Establish the time for making written submissions and closure of the record; and
  - 9) Continue a hearing from day-to-day or adjourn it to a later date, after considering the availability of the hearing location and the wishes of the participants.

### **Section 166.150 Hearing Board**

- a) When conducting NPDES permit hearings or whenever necessary to provide advice due to the complexity of the issues involved in the hearing the Director shall designate a Hearing Board to assist the Hearing Officer in the conduct of the hearing, to give the Hearing Officer necessary technical and legal advice and to solicit information for the Agency's decision from the hearing participants.
- b) The Hearing Officer shall chair the Hearing Board.
- c) Hearing Board members may question any witness during the course of the hearing.
- d) Hearing Board members shall provide specialized, and technical advice within their expertise to assist the Hearing Officer, as necessary with any report or recommendation which the Hearing Officer may be required to submit with respect to the hearing.

### **Section 166.160 Conduct of Hearing**

- a) The Hearing Officer shall make an opening statement which shall include the following points:
  - 1) The purpose of the hearing;
  - 2) Issues involved in the permit decision to be made by the Agency;
  - 3) Proposed Agency action or draft permit;
  - 4) Tentative date of final decision; and
  - 5) A statement as to what form of questioning is permitted under this Subpart.
- b) The Hearing Officer shall allow relevant statements by any person.
- c) The Hearing Officer shall admit relevant written statements and exhibits into the record.
- d) The Hearing Officer may make a closing statement and shall set a date when the hearing record will close.

### **Section 166.170 Questions**

The Hearing Officer shall allow relevant questions by any person who makes a statement at the hearing.

### **Section 166.180 Contents of the Record**

The Hearing Officer shall prepare a record of each hearing held under the provisions of these rules.

- a) Hearings may be recorded and transcribed by a court reporter who will provide a copy of the transcript for the record. Copies of the transcript may be obtained from the court assessed in accordance with Access to Information of the Illinois Environmental Protection Agency (35 Ill. Adm. Code 160).

- b) If not recorded and transcribed by a court reporter hearings shall be tape-recorded by the Agency. On request of any person copies will be provided with costs assessed in accordance with Access to Information of the Illinois Environmental Protection Agency (35 Ill. Adm. Code 160).
- c) The hearing record shall include:
  - 1) A copy of the permit or closure plan application;
  - 2) A copy of all notices issued pursuant to the permit review process;
  - 3) A copy of the draft permit or closure plan, if any;
  - 4) A copy of the fact sheet, if any;
  - 5) A copy of the transcript, all written statements submissions and exhibits;
  - 6) A list of all persons who made written or oral statements or provided written submissions and exhibits;
  - 7) A copy of any report or recommendation made by the Hearing Officer or Hearing Board; and
  - 8) A copy of the responsiveness summary.

### **Section 166.190 Access to the Record**

Any person may inspect and copy the hearing record pursuant to Access to Information of the Illinois Environmental Protection Agency (35 Ill. Adm. code 160).

### **Section 166.191 Closure of the Record**

Unless the Hearing Officer provides otherwise, the hearing record shall be closed 30 days after the date of the last hearing. The comment period may be extended upon good cause shown or by agreement of the parties, however, statutory time limitations of Title X (Section 39 through 40.1) of the Environmental Protection Act shall take precedence over any extension of the comment period.

### **Section 166.192 Contents of Responsiveness Summary**

- a) Responsiveness summary shall be prepared by the Agency. The responsiveness summary shall include:
  - 1) An identification of the public participation activity conducted;
  - 2) Description of the matter on which the public was consulted;
  - 3) An estimate of the number of persons present at the hearing;
  - 4) A summary of all the views, significant comments, criticisms, and suggestions, whether written or oral, submitted at the hearing or during the time the hearing record was open;
  - 5) The Agency's specific response to all significant comments, criticisms, and suggestions; and
  - 6) A statement of Agency action, including when applicable the issuance or denial of the permit or closure plan.
- b) The responsiveness summary shall be available to the public upon request to the Agency.

### **Section 166.193 Severability**

If any portion of Subpart A of this Part is for any reason held to be unconstitutional or violative of law by a court of competent jurisdiction, such decision shall not affect or impair the validity of the remaining portion of this Subpart A.

## **SUBPART B: CONTESTED CASE PERMIT HEARINGS**

## **Section 166.201 Purpose**

This Subpart is intended:

- a) to set forth the practice and procedures to be followed by the Illinois Environmental Protection Agency in conducting contested case permit hearings, and;
- b) to comply with the purpose and intent of the Illinois Administrative Procedure Act (Ill. Rev. Stat. 1991, ch. 127, par. 1001-1 et seq.) in conducting contested case permit hearings.

## **Section 166.202 Applicability**

This Subpart shall apply to all hearings held by the Agency in contested case permit hearings.

## **Section 166.203 Definitions**

"Agency" is the Illinois Environmental Protection Agency.

"Appearance" means a formal written application to the Agency Hearing Officer, with the name, address, and telephone number of interested person or his/her attorney requesting to be made a party in the matter.

"Applicant" means a person who initiates an action requiring a contested case permit hearing.

"Business" includes business, profession, occupation, and/or calling of every kind.

*"Contested Case" means an adjudicatory proceeding, not including rate making, rule-making, quasi-legislative, informational or similar proceedings, in which the individual legal rights, duties or privileges of a party are required by law to be determined by an agency only after an opportunity for a hearing. (Section 3.02 IAPA) This does not include Agency procedures for permit hearings held pursuant to Subpart A of this Part.*

"Director" means the Director of the Illinois Environmental Protection Agency.

"Hearing" means a proceeding which is held after notice to interested persons or parties, in which testimony is taken by oath or affirmation and a verbatim record of all testimony is kept.

"Hearing Officer" means a person duly designated as a Hearing Officer by the Director to preside over the hearing.

"IAPA" means the Illinois Administrative Procedure Act.

"Interested person" means any person who may be adversely affected by the outcome of a hearing.

"Party" may be an Applicant or Respondent.

"Permit" means permission or authorization granted by the Agency to construct, alter, extend, or operate any air pollution source or control equipment, waste water treatment works, landfill, public water supply, or other facility including their appurtenances and equipment pursuant to Pollution Control Board rules.

"Person" means any individual, partnership, co-partnership, firm, company, corporation, association, joint stock company, trust, estate, political subdivision, federal or state agency, or other legal entity, or their legal representative, agent or assigns.

"Respondent" means an interested person who has filed appearance with the Agency Hearing Officer to participate in hearing proceedings.

"State" means the State of Illinois.

### **Section 166.210 Commencement of a Contested Case Permit Hearing**

In cases where the Agency is required by Section 39 of the Environmental Protection Act to hold an adjudicatory proceeding concerning a permit application required by law to be determined by the Agency only after notice and the opportunity for a hearing, the Director shall order the Agency Hearing Officer to hold a contested case hearing under the provisions of this Subpart.

### **Section 166.220 Notice**

- a) Notice of permit hearing shall be placed in a public newspaper of general circulation in the area in which the facility for which the permit is requested is located or as otherwise required by law.
- b) Notice shall be published once weekly for three successive weeks, and the first notice of a hearing shall be given at least 45 days before the date of the hearing.
- c) A copy of the Notice and the proposed permit and fact sheet shall be mailed to:
  - 1) The State's attorney of the county in which the facility is located;
  - 2) The Chairman of the County Board of the county in which the facility is located;
  - 3) Each member of the General Assembly from the legislative district in which the facility is located;
  - 4) The chief executive officer and the clerk of each municipality, and portion of which is within three miles of the facility;
  - 5) Persons on a mailing list developed by the Agency which includes those who requested in writing to be included on such a list and to all persons who have provided comments or testimony at any previous informational hearing regarding the subject permit application; and
- d) The notice shall include the following information:
  - 1) The date, time, and place of the public hearing;
  - 2) The purpose of the hearing;
  - 3) The name and address of each permit applicant and the location or address of the facility for which the permit is sought;
  - 4) The type of permit sought and the applicable federal and state regulations which require or authorize the granting of such permit by the Agency;
  - 5) A brief description of the activities or operations at the facility for which the permit is requested;
  - 6) Identification of the Agency Division sponsoring the hearing;
  - 7) A statement of issues to be considered;
  - 8) The name, address and telephone number of the Agency Hearing Officer, to whom appearances may be sent or from whom copies of the rules may be obtained.
  - 9) A statement of applicable rules under which the permit hearing will be conducted.

### **Section 166.221 Form of Documents**

- a) Except for exhibits, documents shall be typewritten or printed.
- b) Except for exhibits, documents shall be cut or folded so as not to exceed a width of 8-1/2 inches and a length of 11 inches. Whenever practical, all exhibits of a documentary character shall conform to these requirements.
- c) Documents shall clearly show the file or docket number of the proceeding and shall clearly describe their nature, e.g., "Motion," "Appearance," etc.
- d) Pleadings, written motions, and appearances shall be dated and signed and shall contain the name, address and telephone number of the party filing the document or, if represented by an attorney, the name, business address and phone number of such attorney.

#### **Section 166.222 Filing of Documents**

- a) All documents required to be filed with the Hearing Officer shall be addressed to the Hearing Officer at the following address:  
Illinois Environmental Protection Agency  
2200 Churchill Road  
Springfield, Illinois 62706  
Attention: Agency Hearing Officer
- b) The date that a document is filed for the record is the date the document is mailed to or personally served upon the Hearing Officer.

#### **Section 166.223 Service of Documents and Proof of Service**

- a) Service of pleadings, motions or other documents shall be made by personal delivery or by certified mail. One copy shall be served to each party who has filed an appearance and to the Hearing Officer with proof of service.
- b) Proof of service shall be filed with the Hearing Officer before action will be taken on any pleading.
- c) The proof of service shall show the date, time and manner of service any may be by written acknowledgement of service, by certificate of the person effecting the service, or by certified mail with a return receipt.
- d) Service by certified mail is complete upon receipt or returned as refused. The time for any response shall commence seven (7) days after receipt or refusal.
- e) The Hearing Officer shall maintain a service list of the names and addresses of all parties and interested persons.

#### **Section 166.224 Motions**

- a) Unless made during a hearing or a pre-hearing conference, motions shall be made in writing, and shall set forth the relief or order sought and shall be served on all other parties of record. Motions based on a matter which does not appear on record shall be supported by affidavit. Motions shall be ruled upon the day of such hearing or prior to such hearing after the period of response in subsection (a).
- b) Written motions shall be titled as to the party making the motion and the nature of the relief sought. Such title shall be in capital letters and shall be placed either below the caption or to the right of the caption beneath the docket number.
- c) Amendments to all pleadings and motions shall be allowed upon proper motion in accordance with subsection (a) at any time during the proceeding.
- d) Any party to a hearing may respond to any motion. Responses shall be in writing and shall be filed within ten (10) days of service of the motion.

## **Section 166.225 Computation of Time**

Computation of time shall begin with the first business day following the day on which the act, event or development initiating such period of time occurs. Time shall run until the end of the last day or the next following business day if the last day is Saturday, Sunday or legal holiday. Where the permit of time is five days or less, Saturdays, Sundays and legal holidays shall always be excluded in the computation of time.

## **Section 166.226 Pre-Hearing Conferences**

- a) A pre-hearing conference may be scheduled at the Hearing Officer's discretion or at the request of any party whenever any of the purposes listed below would be effectuated. This conference shall be for the purpose of considering:
  - 1) The setting of the date, time and location of the hearing.
  - 2) The simplification of issues of fact and law;
  - 3) The necessity or desirability of amending pleadings or documents for the purpose of clarification, amplification, or limitation;
  - 4) The possibility of making admissions of fact or stipulations concerning the foundation for testimony or exhibits or use of matters of public record, to avoid unnecessary introduction of proof;
  - 5) The limitation of the number of witnesses, including experts;
  - 6) The usefulness of prior mutual exchange between or among parties of prepared testimony and exhibits; and
  - 7) Such other matters as may aid in the simplifications of the evidence and disposition of the proceeding.
- b) After a pre-hearing conference, the Hearing Officer shall provide all parties with a statement which recites:
  - 1) Any ruling on motions or other action taken by the Hearing Officer;
  - 2) Any agreements made by the parties as to any of the matters considered; and
  - 3) Those issues remaining for hearing.
- c) A certified court reporter may be present to transcribe the proceedings at a pre-hearing conference. All costs related to the court reporting services shall be borne by the party requesting such service.

## **Section 166.227 Discovery**

- a) Regarding any matter not privileged under Sections 7 and 7.1 of the Environmental Protection Act (Ill. Rev. Stat. 1985, ch. 111 1/2, pars. 1007 and 1007.1), the Hearing Officer shall order discovery upon written request of any party. Subject to the requirements of this section, the Hearing Officer may order:
  - 1) The production of the names and addresses of persons having knowledge of relevant facts;
  - 2) The production of the names and addresses of all witnesses whom the party intends to call at the hearing and the subject matter of their expected testimony;
  - 3) The taking of a deposition of any witness, including expert witnesses, expected to testify at the hearing;
  - 4) The answering of the interrogatory or request to admit of any party; and
  - 5) The production of evidence within the control or possession of any party for the purposes of inspection, copying or duplication.
- b) The inadmissibility of the testimony at the hearing is not a ground for objection if the information sought appears reasonably calculated to lead to the discovery of admissible evidence or is relevant to the subject matter involved in the pending action.

- c) At any time the Hearing Officer may on his own initiative, or on motion of any party or witness, examine documents in camera in order to resolve disputed privilege questions or issue a protective order to deny, limit, condition or regulate discovery to prevent unreasonable delay, expense, harassment, or oppression, or to protect materials from disclosure by the party obtaining such materials consistent with the provisions of Sections 7 and 7.1 of the Environmental Protection Act (Ill. Rev. Stat. 1985, ch. 111 1/2, pars. 1007 and 1007.1).
- d) All depositions and interrogatories taken pursuant to this rule shall be for purposes of discovery only, except as herein provided.
  - 1) The depositions and interrogatories may be used for purposes impeachment and as admissions of the deposed or interrogated party.
  - 2) Any party who has reason to believe that any potential witness will not be available for testimony at the hearing shall promptly so notify all other parties, and may move that an evidence deposition be taken. A motion for an evidence deposition shall be granted when, under circumstances such as hospitalization and unavoidable absence from the State, the Hearing Officer determines that the witness will not be able to testify at the hearing. An evidence deposition shall be presided over by the Hearing Officer. The party shall in the Notice of Deposition designate the deposition as an evidence deposition. If a discovery deposition is desired, it shall be taken before the evidence deposition, unless the parties stipulate otherwise. The notice, order, or stipulation to take a desposition shall specify whether the deposition is to be a discovery deposition or an evidence deposition. In the absence of such a specification a deposition is a discovery desposition only.
- e) Upon transcription of the deposition, it shall be made available to the deponent for examination and signature, unless examination and signature are waived by the deponent. Any changes in form or substance which the deponent desires to make shall be entered upon the deposition by the court reporter with a statement of the reasons given by the deponent making them. The deposition shall then be signed by the deponent unless the deponent is ill or cannot be found or refuses to sign, in which event the court reporter's certification shall state the reason for the omission of the signature. Copies of the transcripts shall be available to all parties at their expense.
- f) A party at a hearing may object to those portions of and deposition which contain evidence pursuant to Section 166.250 of this Subpart that would be excluded if the witness were testifying in person.
- g) Failure to comply with any ruling shall subject the person to sanctions under Section 166.295 of this Subpart.

### **Section 166.228 Admissions**

- a) At least 21 days prior to a hearing, a party may serve on any other party a written request for the admission of the truth of any specified relevant fact or for admission of the genuineness of any relevant documents described in the request. Copies of the documents shall be served with the request unless copies have already been furnished.
- b) Each of the matters of fact and the genuineness of each document of which admission is requested is admitted unless, within 7 days after service thereof, the party to whom the request is directed serves upon the party requesting the admission either:
  - 1) A sworn statement denying specifically the matters of which admission is requested or setting forth in detail the reasons why those matters cannot be truthfully admitted or denied; or
  - 2) Written objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper in whole or in part.

- c) If written objections to part of the request are made, the remainder of the request shall be answered within 7 days after service of the request. If only part of the request can be answered as true or the request for admission requires qualification of a matter, the party shall specify the part that is true and deny the remainder.
- d) Any objections to a request or to an answer shall be heard by the Hearing Officer upon motion of the party making the request. The Hearing Officer shall grant the motion for good cause such as the admission has already been made or the admission for a privileged fact.

### **Section 166.230 Hearing Officer**

- a) The Hearing Officer shall be designated by the Director of the Agency.
- b) The Hearing Officer shall have all authority necessary to conduct a fair and orderly hearing including, but not limited to, the power to:
  - 1) Schedule the hearing, depositions and prehearing conferences;
  - 2) Rule on motions and requests;
  - 3) Administer oaths and affirmations;
  - 4) Rule or reserve ruling on the admissibility of evidence offered and amendments to pleadings;
  - 5) Establish the time for making written submissions and closure of the record; and
  - 6) Impose sanctions in accordance with Section 166.295 of this Subpart.
- 7) The Hearing Officer may ask any questions of the parties to assure a full and complete record.

### **Section 166.235 Intervention**

- a) A person desiring to intervene shall file with the Hearing Officer a petition to intervene, accompanied by any pleadings or motions the person may wish to file at the same time. The petition shall be served on all parties at least 15 days prior to the hearing, unless a different time period is allowed by the Hearing Officer, but in no case shall intervention be allowed less than seven days prior to the hearing.
- b) Intervention shall be allowed when:
  - 1) The petitioner can show an interest which may not be adequately represented by the parties to the proceedings; or
  - 2) The petition may adversely affected by the Agency's final administrative decision; or
  - 3) The petition is another agency or department of the United States or the State of Illinois which has an interest in the subject of the hearing before the Agency.
- c) Any party may object to the petition to intervene by filing a notice of objection with the Hearing Officer within seven (7) days of service of the petition. The notice shall state the party's reasons for objecting and shall be served upon all parties and the persons petitioning to intervene.
- d) In determining whether to allow intervention, the Hearing Officer shall consider whether there are other remedies available to the petitioner and whether the intervention will:
  - 1) Unduly delay the hearing;
  - 2) Be unduly burdensome to any party;
  - 3) Enlarge the scope of the proceedings;
  - 4) Insert new issues into the proceedings.
- e) The intervenor shall have the right to present evidence and cross-examine witnesses only with respect to those issues which are within the scope of the intervention.

### **Section 166.240 Conduct of the Hearing**

- a) All testimony taken at hearings shall be under oath or affirmation.
- b) All motions and objections made during a hearing shall be stated in writing or orally on the record, including the grounds for such objections. The Hearing Officer shall rule on said motions either in writing or orally on the record, and shall state the grounds for such ruling.
- c) The parties shall proceed at all stages of the hearing including opening and closing statements, the offering of evidence, and examination of witnesses, in the order in which they appear in the pleadings unless otherwise agreed by the parties. In consolidated cases or where intervention has been granted the Hearing Officer shall designate the order.
- d) The following shall be the order of the hearing.
  - 1) Presentation, argument, and disposition of motions preliminary to a hearing on the merits of the matters raised in the complaint;
  - 2) Presentation of opening statements;
  - 3) Applicant's case in chief;
  - 4) Objector/Respondent case in chief;
  - 5) Statement from the public, if authorized by the Hearing Officer;
  - 6) Objector's/Respondent's closing argument, which may include legal argument;
  - 7) Applicant's closing argument, which may include legal argument;
  - 8) Presentation and argument of all motions prior to submission of the transcript to the Hearing Officer; and
  - 9) A schedule for submission of briefs to the Hearing Officer.

#### **Section 166.250 Rules of Evidence**

- a) *Irrelevant, immaterial or unduly repetitious evidence shall be excluded. The rules of evidence and privilege as applied in civil cases in the circuit courts of Illinois shall be followed. However, evidence not admissible under such rules of evidence may be admitted, (except where precluded by statute), if it is of type commonly relied upon by reasonably prudent persons in the conduct of their affairs.*
- b) *Objections to evidentiary offers may be made and shall be noted in the record.*
- c) *When a hearing is expedited and the interests of the parties will not be prejudiced, any part of the evidence may be received in written form. (Section 12(a) IAPA)*

#### **Section 166.255 Burden of Proof**

- a) The proponent of any matter asserted shall have the burden of proof to establish by a preponderance of evidence that the matter asserted is more probably true than not true.
- b) When a party has the burden of proof and establishes the matter asserted by the quantum of evidence required in Section 166.255(as of this Subpart, the party has made a prima facie case, and the burden of disproving the matter asserted goes to the opposing party; by the same quantum required in Section 166.255(a).

#### **Section 166.260 Testimony and Cross-Examination of Witnesses**

- a) All parties may cross-examine any other party's witness. The scope of cross-examination shall be defined by the scope of direct examination.
- b) Employees of one party required by order of the Hearing Officer to attend a hearing may be examined as if under cross-examination.
- c) If the Hearing Officer determines that a witness is hostile or unwilling, the party calling the witness may examine the witness as if under cross-examination.
- d) Questions calling for an opinion of an expert witness need not be hypothetical in form.

## **Section 166.265 Testimony and Cross-Examination of Witnesses**

- a) *Notice may be taken of matters of which the circuit courts of this state may take judicial notice.*
- b) *Notice may also be taken of generally recognized technical or scientific facts within the Agency's specialized knowledge.*
- c) *Parties shall be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the material officially noticed, including any staff memoranda or data, and they shall be afforded an opportunity to contest the material so noticed. (Section 12(c)IAPA)*

## **Section 166.270 Records in Other Proceedings**

- a) The Hearing Officer shall order the record, or any part thereof, of any relevant proceeding before the Agency of governmental department or subdivision, incorporated into the record of the present proceeding.
- b) When a party or intervenor desires to offer in evidence any portion of the record in any other proceeding, such portion shall be offered in the form of an exhibit.

## **Section 166.275 Documentary Evidence**

- a) Relevant scientific or technical articles, treatises, or materials may be introduced into evidence by stipulation of the parties, or subject to qualification of the author and subject to refutation or disputation through any introduction of comparable documentary evidence or expert testimony.
- b) Any writing or record made as a memorandum of any act, transaction, occurrence or event shall be admissible as evidence of the act, transaction, occurrence or event provided it was made in the regular course of the business to make such a memorandum or record at the time thereafter.
- c) All other circumstances of the making of the writing or record, including lack of personal knowledge by the maker, may be shown to affect its weight but shall not affect its admissibility.

## **Section 166.276 Exhibits**

- a) Proposed exhibits shall be reviewed or exchanged at the pre-hearing conference or otherwise prior to the hearing if the Hearing Officer so requires in order to expedite the proceeding.
- b) The exhibits shall be marked for identification in accordance with the following standard markings:
  - 1) P = Permit Applicant or Petitioner;
  - 2) R = Respondent or Objector
- c) Other additional markings may be used for clarity.

## **Section 166.280 Transcript of Hearing**

- a) After the transcript is received from the court reporter, the Hearing Officer will send copies of the transcript to the parties. Suggested corrections to the transcript is received by the parties.
- b) Any person may inspect and copy the hearing record pursuant to Access to Information of the Illinois Environmental Protection Agency (35 Ill. Adm. Code 160).

### **Section 166.285 Proposed Finding of Fact and Conclusions of Law**

- a) If the Hearing Officer finds it necessary in order to render a decision due to the complexity of the case, the Hearing Officer shall require and establish a schedule for the filing of briefs, proposed findings of fact and conclusions of law.
- b) All proposed findings of fact and conclusions of law shall:
  - 1) Be in writing and served upon all other parties;
  - 2) Be accompanied by a supporting statement or brief; and
  - 3) State specifically all matters officially noticed.

### **Section 166.290 Proposal for Decision**

- a) After the hearing is concluded, the Hearing Officer or when the Hearing Officer incapacitated or otherwise unable to prepare a proposal for decision a designated Agency employee who has read the record shall file with the Director or the Director's designee and serve upon the parties a proposal for decision based exclusively on:
  - 1) Evidence and arguments presented during the course of the hearing or otherwise made a part of the record;
  - 2) Stipulations of fact; and
  - 3) Matters officially noticed.
- b) The Proposal for Decision shall be final in form and dispositive of all issues in the case.
- c) The Proposal for Decision shall contain:
  - 1) A short statement of the nature of the proceedings;
  - 2) Complete references to the specific statutes or regulations at issue;
  - 3) A list of exhibits admitted in evidence;
  - 4) Specific findings on each issue of fact necessary to the proposed decision;
  - 5) Specific conclusions on each issue of law necessary to the proposed decision based upon the findings of fact and applicable constitutional principles, statutes, and rules or regulations;
  - 6) An appropriate recommendation for the disposition of the entire contested case including a statement of reasons based upon the findings of fact and conclusions of law;
  - 7) No substantive finding of fact or conclusion of law nor any recommendation in the proposal for decision shall be binding upon the Director.

### **Section 166.291 Contents of the Record**

The hearing record shall include:

- a) A copy of the permit application;
- b) A copy of all notices issued pursuant to the permit review process;
- c) A copy of the draft permit, if any;
- d) A copy of the fact sheet, if any;
- e) A copy of the Record of any previous informational hearing held by the Agency on the matter.
- f) All pleadings (including all notices and responses thereto), motions, and rulings;
- g) The hearing record;
- h) Evidence received;
- i) A statement of matters officially noticed pursuant to Section 166.265;
- j) Offers of proof, objections and rulings thereon;
- k) Proposed findings and exceptions;
- l) All staff memoranda or data submitted to the Hearing Officer or members of the Agency in connection with their consideration of the case;

- m) Any stipulations, settlement agreements, or consent orders entered into by any of the parties prior to the hearing;
- n) Any communication prohibited by Section 15 of the IAPA but such communications shall not form the basis for any finding of fact;
- o) Proposed finding of fact and conclusions of law;
- p) Proposal for decision; and
- q) Director's Final Order.

### **Section 166.292 Decision in Contested Case**

- a) Within ten (10) days after service of the proposal for decision, the parties may file with the Director exceptions and proposed findings of fact and may present a brief to the Director; the Director thereafter shall issue a Final Decision or Order.
- b) The Director's Final Decision or Order adverse to a party in a contested case shall be in writing or state in the record;
  - 1) *The final decision shall include findings of fact and conclusions of law, separately stated;*
  - 2) *Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings.*
  - 3) *If, in accordance with Section 166.285, a party submitted proposed findings of fact, the decision shall include a ruling upon each proposed finding.*
- c) *Parties or their Agents appointed to receive service of process shall be notified either personally or by registered or certified mail of any decision or order. Upon request a copy of the decision or order shall be delivered or mailed forthwith to each party or the party's attorney of record. (Section 14 IAPA)*

### **Section 166.295 Sanctions**

- a) If a party refuses to comply with any provision of this Subpart B or fails to comply with any order entered under these rules, the Hearing officer shall enter any of the following orders when necessary to obtain compliance without prejudicing the rights of any other party:
  - 1) That further proceedings be stayed until there is compliance with the order or rules;
  - 2) That the offending party be debarred from filing any other pleading relating to any issue to which the refusal or failure relates;
  - 3) That the offending party be debarred from maintaining any particular claim or defense relating to that issue;
  - 4) That a witness be barred from testifying concerning that issue; and
  - 5) That any portion of the offending party's pleadings relating to that issue be stricken.
- b) If a party or person refuses to answer any question propounded at deposition, the deposition shall be completed on other matters or adjourned, as the proponent of the question may prefer. Thereafter, on notice to all persons affected thereby, the proponent may move the Hearing Officer for an order compelling an answer. The Hearing Officer shall then issue an order compelling an answer if the party continues to refuse to answer.
- c) If a party fails to answer any interrogatory or request to admit served upon it, the proponent of the interrogatory or request to admit may on notice move for an order compelling an answer. If the Hearing Officer finds that the refusal or failure was without substantial justification, such as the inability to answer due to illness or lack of information or the information requested in irrelevant or privileged, the Hearing Officer shall require the party or person to answer.

### **Section 166.296 Ex parte Consultations**

Agency Hearing Officers and staff shall observe the requirements of Section 15 of the IAPA as follows:

*Neither agency members, employees nor hearing examiners shall, after notice of hearing in a contested case or licensing to which the procedures of a contested case apply under this Act, communicate, directly or indirectly, in connection with any issue of fact, with any person or party, or in connection with any other issue with any party or his representative, except upon notice and opportunity for all parties to participate. However, agency member may communicate with other members of the Agency, and an Agency member or hearing examiner may have the aid and advice of one or more personal assistants. (Section 15 IAPA)*

### **Section 166.297 Right to Legal Counsel**

- a) Any party may appear and be heard through an attorney at law authorized to practice in the State of Illinois.
- b) In any proceeding before the Agency, a natural person may appear and be heard on his own behalf.