ILLINOIS POLLUTION CONTROL BOARD

P.C. #8

IN THE MATTER OF:	)	
	)	
REVISION OF THE BOARD'S	)	**R-20**
PROCEDURAL RULES: 35 ILL. ADM.	)	**(Rulemaking – Procedural)**
CODE 101 – 130	)	

COMMENT BY WEBBER & THIES, P.C.

The following comments are provided in response to the Board's Proposed Opinion and Order of March 16, 2000. These comments were intended to be included with the comments filed by the Environmental Law Section of the Illinois State Bar Association (ISBA), but were precluded from being included due to unforeseen technical difficulties. Therefore, the following comments should be viewed as personal to the undersigned and not as part of the ISBA's comments or endorsed by ISBA.

In general, the Board is to be commended for its willingness to respond to prior public comments in docket R97-8. The proposal put forth by the Board in this docket is markedly superior to its predecessor. However, in the opinion of the undersigned, some problems remain. The following comments reflect areas in which the Board is urged to reconsider some problems associated with the prior proposal and perpetuated in the new proposal.

1. The Board is again urged to include a conversion table (preferably annotated) from the old to new rules, at least where the transition is not self-evident. This would be of particular help to citizens unfamiliar with Board rule history.

2. Sect. 101.300, particularly 101.300(b)(2), perpetuates a problem noted with respect to the first docket: it is unclear how these paragraphs interrelate. For instance,: what is the significance of the phrase, "For purposes of filing deadlines," in par. (b)(2)

when that phrase is missing from pars. (b)(1) and (3)? If a document is brought in at 4:35 P.M. in person, does (b)(1) rather than (b)(3) apply? If the latter, a document brought in on the deadline day will be late (it will be marked as filed the next day). If a filer arrives at the Board's offices at 4:31 P.M., can he (under par. (b)(2)) take the elevator down to the U.S. Post Office on the ground floor and timely mail it back upstairs?

3. Sect. 101.400(b) allows an attorney to withdraw at any time upon filing a notice of withdrawal. We continue to urge the Board to either require the attorney to seek permission to withdraw, or require the party to either assume the costs of the delayed hearing, or file a waiver of right to counsel (unless its new attorney simultaneously files a notice of substitution of counsel) and/or provide a waiver of deadline as a precondition to allowing withdrawal of counsel where looming statutory and/or hearing deadlines are implicated. The Board has declined to make this change, observing that "if a party feels that attorney withdrawal would have a prejudicial impact, the party may file a motion for relief." In this, the Board misses the point: the unrepresented party will be highly unlikely to even know how to file such a motion, let alone know that he/she is entitled to do so. The consequences of late withdrawals of counsel historically have been a string of unchecked delays, canceled hearings and higher costs to the Board[1] and litigants.[2] While the Board may have adequate funds for hearings right now, it hasn't always been so

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At last check, a Notice of Hearing published in a Chicago newspaper costs almost $1,000. Each last-minute hearing cancellation thus costs hundreds of dollars and requires a new notice period, adding several weeks' additional staff time to the process.

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Where a party "fires" his/her attorney shortly before hearing, an opposing party almost certainly will have already incurred legal, transportation and other hearing preparation expenses.

fortunate and is unlikely to forever be so fortunate. Yanking one's attorney the day before a hearing is one way a party can delay the inevitable, drive up its opponent's costs and deny its opponent timely justice. A motion for relief (*e.g.*, to continue with the hearing notwithstanding that the party opponent is now unrepresented by counsel), whether directed to the Board or to the Hearing Officer at the 11th hour is doomed to fail, as a practical matter, due at least in part to the Board's calendar. Note the Board's implicit recognition of this problem in its response to the AGO's comments regarding Sect. 101.508. Other species of possible relief (*e.g.*, a motion to require the party opponent to bear the financial costs of delay) have historically been exceedingly rarely granted by the Board and should functionally be considered unavailable.

4. The undersigned was disappointed to note that the Board's comments to Sect. 103.300 failed even to reference extensive comments filed in docket R97-8 objecting to the original proposed Sect. 103.300(d). In Sect. 103.300(d), the Board retains the notion from the original proposal that if the State and a respondent in an enforcement case strike a deal and agree to a stipulation and settlement, the State need not put on a *prima facie* case even if a third party (*i.e.*, a co-respondent) files a timely written demand for hearing under subsect. 103.300(c). Note that complainants in citizen enforcement suits are not entitled to this evidentiary end run. The result, predictably, is a sham hearing under subsect. 103.300(c), at which the co-respondent is treated as a meddlesome member of the "public" and provided an opportunity merely to give "written statements" and, if the Board allows, "oral testimony"; there is no right to examine the State or the settling respondent, no right to challenge the quality of the proposed stipulation or the adequacy of the proposed settlement, just a vehicle to allow the "public" to sound off. Such a non-

contested case-type hearing amounts to little more than window-dressing and effectively precludes the co-respondent from forcing the State to show its case, prove its allegations against the settling respondent or defend the qualitative adequacy of the proposed settlement. This forces the co-respondent to try to put on the State's case in a third party action against the original respondent using unwilling State witnesses and without the benefit of the State's personnel and technical resources. Since the Board has specifically rejected the contention that relieving the State complainant of its burden of proof and of going forward under these circumstances violates section 31(c) of the Act, it has provided a powerful incentive for corrupting the adjudicatory process by favoring well-heeled and/or well-connected co-respondents in an unjust closed-door rush to settle with the State on terms favorable to the settling party and prejudicial to remaining co-respondents.

5. The Board has declined to follow earlier suggestions that it adopt, in Part 104, new stand-alone provisions governing Solid Waste Determinations (SWDs), rather than continue to employ the Adjusted Standards (AS) mechanisms of Part 104, subpart D (104.400 *et seq.*). The Board invited comments although it noted that it has done several SWDs under the AS procedures. The problem with the AS procedures is that (1) there is no mention of SWDs being governed by them (indeed, by the express terms of Sect. 104.100(a), SWDs are presumably excluded) and (2) the AS process is fundamentally different from a SWD. Under the AS process, the petitioner seeks to demonstrate that it should be made subject to an environmental standard that is different from an otherwise-applicable general standard; see Sect. 104.400(a). In a SWD, the petitioner seeks to escape environmental regulation altogether with respect to a specific solid waste stream; it is not seeking an adjustment, but an exclusion. A stand-alone SWD procedure could

parallel the AS procedure, but omit the irrelevant baggage of an AS, such as "level of justification", comparative descriptions of "efforts that would be necessary" to comply with one standard as opposed to another, *etc.* In a SWD situation, the only issue is whether a waste stream should be deemed outside the ambit of RCRA by virtue of its no longer having hazardous characteristics. A streamlined SWD process will greatly advance the State's goals of encouraging recycling, reclamation and reuse, goals that are presently frustrated by the federal "waste derived" rule and hampered by an arduous AS procedure. There is insufficient time in which to place before the Board a full-blown regulatory proposal as part of this docket, but your commenter would be willing to assist the Board in any rulemaking proceeding directed to this purpose.

Respectfully submitted,

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