

ILLINOIS POLLUTION CONTROL BOARD
June 8, 1989

IN THE MATTER OF:)
)
PROCEDURAL RULES REVISION)
35 ILL. ADM. CODE) R88-5 (A)
101, 106 (Subpart G), and 107)

ADOPTED RULE. FINAL ORDER.

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

This matter is before the Board for adoption of some new procedural rules. On September 8, 1988, the Board proposed for first notice revisions of some of its procedural rules. That proposal included proposed new general rules (35 Ill. Adm. Code 101), new rules covering regulatory proceedings (35 Ill. Adm. Code 102), and new rules for adjusted standards proceedings (35 Ill. Adm. Code 106). The Board also proposed repeal of existing Parts 101, 102, and 107. (Part 107 currently contains rules pertaining to sanctions. Rules on sanctions have been proposed as part of the new Part 101 general rules.) An opinion supporting the proposed rules was adopted on September 22, 1988. The proposed rules were published in the Illinois Register on September 23, 1988 at 12 Ill. Reg. 14822, 14853, 14865, 14886, 14918, and 14933. Merit hearings were held on October 13, 1988 in Springfield, and on October 21, 1988 in Chicago. The first notice comment period closed on Monday, November 7, 1988.

On January 19, 1989 the Board took two actions on this procedural rules revision. First, the docket was split into two dockets. Docket R88-5(A) includes the proposed rules in Part 101 (general provisions), the proposed rules in Subpart G of Part 106 (adjusted standard proceedings), and the proposed repeal of Part 107. Docket R88-5(B) will include the proposed rules for regulatory proceedings (Part 102) and non-substantive revisions to Subparts D, E, and F of Part 106. This split of the docket was done to allow Parts 101, 106 (Subpart G), and 107 to proceed to second notice while the Board further considers the comments on Part 102 received at hearing and during the first notice comment period. The Board anticipates taking further action on Part 102 in the near future.

The Board wishes to acknowledge the contributions of attorney assistants Elizabeth Schroer Harvey and John M. Vandlik, as well as the rest of the Board's legal staff, to the drafting of these rules and the supporting opinion.

The second action taken on January 19 was the proposal for second notice of the rules in R88-5(A). The second notice order was withheld from submission to the Joint Committee on Administrative Rules (JCAR) to allow interested persons to comment on the rules. That public comment period ended on Wednesday, February 8, 1989.

The Board received fifteen comments during the 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 week and five weeks late. The Board did not accept these comments and did not consider them in adopting these rules. Finally, the Board received six public comments during the "second notice" comment period which ended on February 8, 1989. (P.C. #35 - 40.) Except for the eight late comments, the Board has considered all of the comments when revising the proposed rules. To the extent that the public comments address the proposed revisions to Part 102 (regulatory proceedings), those comments will also be considered when the Board takes further action in R88-5(B).

On March 2, 1989, the Board proposed the rules in Part 101 and Subpart G of Part 106 and the repeal of Part 107 for second notice. The rules were then submitted to the Joint Committee on Administrative Rules (JCAR) for second notice review. The second notice period expired on May 8, 1989. On May 9, 1989 JCAR issued its Certification of No Objection to Subpart G of Part 106 (adjusted standards) and to the repeal of existing Part 101 (general rules) and Part 107 (sanctions). JCAR issued its Certification of Objection to the rules in new Part 101 on May 9, 1989. The Board's response to that objection is discussed below.

Please note that this opinion contains only the Board's comments on the rules as they are adopted. The Board's responses to first and second notice comments are contained in the March 2, 1989 opinion and order, and will not be repeated here. Substantive changes agreed to with JCAR will be discussed in the opinion.

JCAR Objection

On May 9, 1989 JCAR issued its Certification and Statement of Objection to new Part 101 (general rules). As previously noted, the second notice period expired on May 8, 1989. JCAR did not request an extension of the review period. Despite the fact that JCAR action occurred one day after the second notice period ended, the Board will formally respond to the objection. The Board does so in a spirit of cooperation with the members of JCAR, although it could simply ignore the objection and adopt the rules. Ill. Rev. Stat. 1987, ch. 127, par. 1007.06(c); 1 Ill. Adm. Code 100.510(b).

JCAR first objected to Sections 101.241(c), 101.243(a), and 101.245 based upon its contention that those rules do not contain standards for determining what constitutes "material prejudice" as that term relates to discretionary determinations by the Board and its hearing officers. However, the Board finds that the phrase "material prejudice" is indeed the standard by which the Board and its hearing officers make the determinations specified in the rules. The term "material" is defined in the definitions section (Section 101.101), and the word "prejudice" has its ordinary meaning. If the Board or its hearing officer finds "material prejudice" when applying the facts of a case, then it will do whatever is specified in the rules. The Board declines to provide standards for its standards. Therefore, the Board refuses to modify or withdraw Sections 101.241(c), 101.243(a), or 101.245.¹

Second, JCAR objected to Section 101.106(a), stating that the rule fails to state the standards to be used in determining whether materials from another Board docket will be allowed to be incorporated into the record of a pending Board proceeding. Again, the Board finds that the rule does contain the standard to be used in determining whether to allow incorporation of other material. The rule specifically states that the person seeking incorporation "shall demonstrate to the Board or the hearing officer that the material to be incorporated is relevant to the proceeding." Section 101.101 specifically defines "relevant" as "having any tendency to make the existence of any fact that is of consequence to the determination of the proceeding more probable or less probable than it would be without that information." The Board maintains that Section 101.106(a) contains all standards and policies relating to the incorporation of material from other Board dockets. Therefore, the Board refuses to modify or withdraw Section 101.106(a).

Third, JCAR objected to Section 101.120, based upon its contention that the rule does not contain relevant Board policies on filing fees, detailed in a December 15, 1988 Board resolution. The two "policies" which JCAR states are missing from Section 101.120 are: (1) the Board's interpretation of the statutory language "petition for variance" as meaning only variances filed pursuant to Section 35(a) of the Environmental Protection Act (Act), Ill. Rev. Stat. 1987, ch. 111¹/₂, par. 1035(a), thus exempting provisional variances from filing fees; and (2) the Board's interpretation of "petition for review of permit" as applying to all actions brought pursuant to Section 40

¹The Board notes that on page 2 of the Statement of Objection, JCAR states that it also objects to Section 101.247(c) for the same reasons. That section is not listed earlier in the objection. The Board's response would be the same for Section 101.247(c) as for the other sections.

of the Act. The Board first points out that Section 101.120(b)(3) does indeed contain the phrase "or any petition for review pursuant to Section 40 of the Act", thus incorporating the second "policy" which JCAR stated was missing from the rule. Second, the Board "policies" which are allegedly not set out in the rule are Board interpretations of statutory language establishing filing fees. Because of the nature of the Board's statutory mandate, the Board often interprets statutory language and its own rules in its opinions, orders, and resolutions. It would be literally impossible to include all such interpretations in rules. The Board does not believe that the interpretations at issue here are Board "policies" which would hinder a person's ability to pay the statutorily-mandated filing fees. The Board declines to withdraw or modify Section 101.120.

PART 101 - GENERAL RULES

Subpart A: General Provisions

This Subpart sets out some of the basic requirements and procedures for all Board proceedings. Section 101.100 "Applicability" states that Part 101 is applicable to all proceedings conducted by the Board, and clarifies that Part 101 is to be read in conjunction with the Board's other procedural rules in 35 Ill. Adm. Code 102 through 120. Subsection (b) states that in the absence of a specific provision in the procedural rules, the parties or participants may argue that a provision of the Code of Civil Procedure, Ill. Rev. Stat. 1987, ch. 110, par. 1-101 et seq., or the Illinois Supreme Court Rules, Ill. Rev. Stat. 1987, ch. 110A, par. 1 et seq., provide guidance for the Board or hearing officer. This provision codifies current practice, with the goal of achieving consistency throughout all types of Board proceedings. Subsection (c) of Section 101.100 provides that the procedural rules are in addition to the provisions of the Illinois Administrative Procedure Act, Ill. Rev. Stat. 1937, ch. 127, par. 1001 et seq., unless otherwise provided by the Act. Again, this merely codifies current practice and statutory requirement.

Section 101.101 contains definitions of terms used in Part 101. The Board has added a definition of "undue delay" to satisfy JCAR concerns.

Section 101.102 "Filing of Documents" includes the Board's correct Chicago address, and provides that filing of documents with the Clerk may be done by certified, registered, or First Class mail, by messenger service, or personally at the Board's Chicago office. Filing by electronic transmission, such as telefax machine or computer modem, is prohibited, unless the Board specifically requests such a filing. While the Board is aware that some court systems are experimenting with electronic filing, the Board's staffing levels cannot presently accommodate such experimentation. This prohibition allows for better recordkeeping and tracking of filed documents, since all filings

will be accepted at one central point, at the receptionist's desk. Any document which is filed by telefax without the Board's request will be ignored and no action taken on it.

Section 101.102 changes current practice by providing that filing, inspection, and copying of documents may be done in the Clerk's office from 8:30 a.m. to 4:30 p.m., instead of until 5:00 p.m. This change allows staff to complete the duties associated with filing and inspection before the Board's offices close. Board offices will continue to be open until 5:00 p.m. for phone calls, etc.

Subsections (d) and (e) of Section 101.102 address the issue of when a document is considered "filed." Subsection (d) provides that the time of filing of any document will be the date on which it is date-stamped by the Clerk, unless date-stamped after any due date. If the document is received after any due date, the time of mailing will be deemed the time of filing. Proof of the date of mailing will be the certificate of service, made pursuant to Section 101.143. The date of the postmark will not be the relevant date. The Board sees that this provision could be abused, but believes that a certificate of service (which is made by affidavit of a non-attorney and by certificate of an attorney) is the best way to prove mailing. It is true that a person could "misstate" the date of mailing, but he or she would do so under oath. It is equally possible that an envelope could be metered with a date prior to the date it is actually mailed, but that action would not be done under oath. This "time of filing" rule of subsection (d) is based upon Supreme Court Rule 373. Please note that even a statutory appeal period is subject to the "mailed is filed unless received before the due date" rule. The Agency argued in its first notice comments that an appeal must be actually received by the Clerk within the statutory appeal time, and that any use of a mailbox rule in that situation would impermissibly extend the appeal time. (P.C. #19.) However, the Supreme Court of Illinois recently held that notices of appeal mailed within the 30-day period and received thereafter are timely filed. Although that case involved the application of Supreme Court Rule 303, the court specifically noted that Rule 373 has a "pro-mailing policy" which should be applied where possible. The court noted that a liberal "pro-mailing policy" is more equitable, since it places law firms which may lack access to messenger services on an equal footing with firms that have such access. Harrisburg-Raleigh Airport Authority v. Department of Revenue Nos. 66381, 66544 (cons.). The Board agrees with the court's reasoning, and believes that this rule is the most equitable procedure. The Board notes that there may be some disadvantages to this rule, and that several comments urged the use of a "received is filed" rule. However, the use of a "received is filed" rule puts persons not located in the Chicago area at a severe disadvantage, because they do not have the option of using a messenger service or personal delivery to file documents at the Clerk's Chicago office. Subsection (e) has been added to state that the Board or the hearing officer may

accelerate a filing schedule upon written notice to the participants or parties. This will allow the Board or hearing officer to specify that a required document must actually arrive in the Clerk's office by a certain date, if application of subsection (d) would result in undue delay.

Subsection (d) also provides that a statutory decision time does not begin to run until the initial filing in a deadline proceeding (such as a permit appeal) is actually received by the Clerk. For example, if a permit appeal must be filed by March 1, and it is mailed on March 1, it will be considered timely filed. However, the 120-day decision time will not begin until the appeal is actually date-stamped by the Clerk.

"Form of Documents", Section 101.103, provides guidance on the form and number of copies of documents to be filed with the Clerk. The Board notes that the requirement of the original and nine copies of most documents filed with the Clerk may seem like a lot of copies, but believes that the requirement is necessary. The original is kept by the Clerk and seven copies are distributed to the Board members, leaving only two copies for review by staff and the public and to serve as "extras". The Board believes that Section 101.103(e), which allows for a waiver of the filing requirements upon written motion to the Board, is the proper remedy for situations where a person truly cannot comply with these requirements. Subsection (g) requires that all original documents be signed by the person filing the document and include that person's business address and telephone number. The Clerk will refuse to accept for filing any document which does not comply with subsection (g).

Section 101.104 sets limits on the length of briefs which may be filed in Board proceedings without prior approval; the Board has become increasingly burdened with excessively lengthy pleadings. Briefs in support of or in opposition to any motion are limited to 15 pages. Post-hearing briefs, briefs submitted in response to a Board order, and public comments submitted in lieu of a brief are limited to 50 pages, and reply briefs shall not exceed 25 pages. This rule is based upon Rule 28 of the Federal Rules of Appellate Procedure. The page limits do not include appendixes containing regulations, cases, and other relevant material. The Board believes that page limitations are necessary. The number of proceedings before the Board continues to grow, and the Board wishes to encourage brevity where possible. In a specific situation where the limitations truly do not allow for sufficient discussion of the issues, the remedy is a motion to exceed the limitations. The Board points out that a motion to exceed should be filed with the Board or the hearing officer before the brief is filed, not concurrently. Subsection (c) articulates the factors considered when ruling upon a motion to exceed. In the event that a brief which exceeds the limitations of Section 101.104 is filed without prior approval of the Board or the hearing officer, the portion which exceeds the limitations will not be considered.

Section 101.105 "Waivers" requires that all waivers of a deadline for Board action be filed as a separate document. This will enable the Clerk to better monitor these waivers, instead of having to read every document filed, in search of a possible waiver. Section 101.105 also requires all waivers to be open waivers or those to a calendar date certain. The Board believes that this provision will enable the Board to meet its decision deadlines while allowing petitioners to waive those deadlines when they choose. Given the volume of decision deadline cases pending before the Board, and the endless possible variations of contingent waivers, it would be close to impossible to track decision deadlines if the Board accepted contingent waivers, even on a case-by-case basis. The section does allow the Board to accept waivers in some other form (such as an emergency oral waiver) in rare cases.

Section 101.106 "Incorporation Of Prior Proceedings" provides that a request for incorporation of any portion of the record of another Board proceeding must be a separate written request (not requested within another document). The person seeking incorporation shall file four copies of the material to be incorporated. This allows one copy for the Clerk's official files, one copy for each of the downstate offices, and one copy for the file of the Board member assigned to the proceeding. The section also requires the person seeking incorporation to give notice of the request to all identified parties or participants. (Please note that only notice of the request is required, not service of a copy of the material.) Subsection (b), which sets forth the weight the Board will give incorporated material, provides for consideration of the circumstances under which the material was developed, including the past and current opportunity for cross-questioning. If a person feels that the Board may overlook some important cross-questioning, that person is free to request incorporation of that material.

Section 101.107 sets out procedures for appearances and withdrawals. The rule requires attorneys to file separate written appearances and notices of withdrawal. Attorneys may not simply appear by means of a pleading. "Substitution of Attorneys", Section 101.108, requires any attorney who substitutes for an attorney of record to file a written appearance, and identify the attorney for whom the substitution is made. These rules will enable Board staff to more easily keep track of who represents a particular person in a Board proceeding.

Section 101.109 "Computation of Time" provides that computation of any period of time prescribed by rule of the Act begins on the next calendar day. The old rule stated that computation of time begins on the next business day. This change was made to conform the rule to the statutory mandate of Section 1.11 of "An Act to revise the law in relation to the construction of statutes." (Ill. Rev. Stat. 1987, ch. 1, par. 1012.)

Subpart B: Filing And Photocopying Fees

Section 101.120 implements the new filing fee provisions of P.A. 85-1331. These provisions are found at Section 7.2 of the Act. The rule requires that a person filing an action for which a filing fee is required by the Act (petitions for site-specific regulation, variance, review of a permit, to contest a local government siting decision, and for adjusted standard) must pay that fee at the time the petition is presented to the Clerk for filing. The Clerk will refuse to accept any petition which is not accompanied by the required fee. At this time, the fee is statutorily set at \$75. As stated earlier, the Board interprets the statutory language "petition for variance" as meaning only variances filed pursuant to Section 35(a) of the Act; thus exempting provisional variances from filing fees.

"Photocopying Fees", Section 101.121, provides information on fees for photocopying of files, records, and data. Section 101.122 "Forms of Payment" specifies that both filing fees and photocopying fees may be paid by money order or check. Cash will be accepted, but is strongly discouraged. Subsection (c) provides for issuance of a sanction order in cases where a check written for a fee is not honored by the maker's bank.

Subpart C: Service

Section 101.141 "Service of Initial Filings" allows service of initial filings in almost all types of Board proceedings to be made by First Class mail, in addition to by personal delivery, messenger service, or by registered or certified mail. However, initial complaints in enforcement proceedings may not be served by First Class mail, but must be served personally, by messenger service, or by registered or certified mail. This provision continues the current requirements in enforcement cases (see 35 Ill. Adm. Code 103.123), and is analogous to the requirements of the Code of Civil Procedure. The Board believes that it is necessary to have proof of actual receipt of the complaint initiating an enforcement action, not merely proof of the initiation of service. First Class mail cannot provide such proof of receipt, and thus service must be made by one of the four enumerated methods which do provide proof of receipt. Section 101.142 allows service of subsequent filings by United States mail, by messenger service, or personally. Section 101.143 sets out requirements for proof of service.

Subsection (c) of Section 101.144 "Effective Date of Service" states that there is a rebuttable presumption that service by First Class mail is complete four days after mailing. This is a change from the prior wording that service by First Class mail is presumed complete four days after mailing. Where evidence indicates the actual service was made sooner or later than the presumed four days from mailing, that evidence can be presented to prove the actual date of service.

Subpart D: Public Information

There are four types of information in terms of that information's availability to the public. Section 101.160 states that all files maintained by the Clerk will be open to reasonable public inspection, except: 1) internal communications between and among Board members and staff; 2) trade secret material pursuant to Section 7.1 of the Act and 35 Ill. Adm. Code 120; and 3) material which is stamped "Not Subject to Disclosure" by Board order, pursuant to Section 7 of the Act and Section 101.161 "Non-Disclosable Information". (Please note that trade secrets and non-disclosable information are two separate types of information and are governed by different rules.) Several changes have been made to subsection (b) of Section 101.161 to satisfy JCAR concerns. First, the phrase "upon the request of a Board member" has been deleted, so that material will be stamped "not subject to disclosure" only upon written application at the time the material is filed. The provision for stamping material not subject to disclosure upon the request of a Board member was merely a carry-over from the old rule, which included internal communications. Internal communications are now automatically exempt from public disclosures under Section 101.160(b)(1), and thus the provision is unnecessary. Second, the phrase "by affidavit" has been added to clarify how an application is to be verified. Finally, the words "data and" have been deleted as redundant.

Subpart E: Board Meetings

Section 101.180 "Board Meetings" gives general information on Board meetings. Section 101.181 states that no document received by the Clerk after 4:30 p.m. two days before a scheduled Board meeting will be placed on the agenda for that meeting. Instead, any such filing will appear on the agenda for the next regularly scheduled Board meeting. ("4:30 p.m. two days before a scheduled Board meeting", in the context of a Thursday Board meeting, means 4:30 p.m. on Tuesday, not 4:30 p.m. on Monday.) The Board will make exception to this rule only when it finds that undue delay or material prejudice will result. That determination will be made upon motion by a Board member at the meeting, without hearing or briefing by the parties or participants. The purpose of the deadline is to allow Board members and staff at least one day to review all filings before any action is taken.

Subpart F: Ex Parte Contacts

Section 101.200 sets forth prohibitions on ex parte contacts on contested and non-contested cases. (A contested case is defined in Section 101.101 as "an adjudicatory proceeding, not including regulatory, quasi-legislative, informational, or similar proceedings.") This section clarifies that ex parte communications in contested cases are prohibited only with respect to the substance of the proceeding. Subsection (c)

specifically states that this section does not preclude Board members, hearing officers, and Board staff from receiving informal complaints about individual pollution sources, or forbid administrative contacts on a pending proceeding. In response to JCAR concerns, a sentence has been added to subsection (d) to state some of the ways in which an ex parte contact may be made part of the record.

Subpart G: Hearings

"Authority of Hearing Officer", Section 101.220, sets out the hearing officer's duties and powers. The hearing officer must conduct a fair hearing, take all necessary action to avoid delay, maintain order, and ensure development of a clear, complete, and concise record. The hearing officer has all powers necessary to achieve these objectives and the section lists several specific areas of authority. Please note that the list is merely an example of the hearing officer's powers, and does not limit those powers. Among other things, the section specifically allows the hearing officer to require pre-filed testimony, regulate the course of the hearing (including establishing reasonable limits on the testimony and questioning of witnesses), establish a schedule for discovery, and rule upon motions, objections, and evidentiary questions. The section also states that the hearing officer has the power to issue subpoenas and to compel the answering of interrogatories or other discovery requests without Board direction. Note, however, that parties should conduct discovery among themselves, with intervention by the hearing officer necessary only if a problem arises. Additionally, the Board points out that it does not believe that either the hearing officer or the Board has the authority to order the production of evidence which does not already exist or cannot be compiled without imposition of an undue burden.

Section 101.221 "Hearing Decorum" governs the recording, either audio or visual, of Board hearings. The section gives any person a right to record a hearing, subject to rules prescribed by the hearing officer. However, if the hearing officer determines that recording is disruptive or detrimental to proper development of the record, he or she may limit or prohibit recording. The Board finds that its hearings are not subject to the Open Meetings Act. Ill. Rev. Stat., 1987, ch. 102, par. 41 et seq. The statute requires all meetings of public bodies to be public meetings, with a corresponding right to record those public meetings. A meeting is defined as "any gathering of a majority of a quorum of the members of a public body held for the purpose of discussing public business." (Ill. Rev. Stat. 1987, Ch. 102, par. 41.02.) The Board finds that this definition applies to Board meetings, but not to Board hearings, since hearings are only very rarely attended by a "majority of a quorum" of Board members. Additionally, hearings are not held for the purpose of discussing public business, but are held for information gathering purposes. Thus, the Board finds that the Open Meetings Act does not apply to its hearing. However, the

subsection governing recording of hearings has been written to give any person the right to record, subject to rules prescribed by the hearing officer. Only if the hearing officer finds that recording is disruptive or detrimental to proper development of the record may he or she limit or prohibit recording. The Board believes that these provisions will allow recording of most Board hearings while also allowing the hearing officer to control the hearing.

Subpart H: Motion Practice

This Subpart includes filing and timing requirements for general motions and more specific types of motions, such as motions attacking jurisdiction, motions for summary judgment, and motions for reconsideration. Section 101.241(b) "Filing Of Motions And Responses" provides that a participant (if a regulatory proceeding) or a party (if a contested case) may file a response to a motion within seven days after service of a motion. The phrase "participant or party" is used because this Part applies to all Board proceedings, and does not extend any right to respond to a non-party in a contested case. Subsection (b) also states that unless material prejudice or undue delay would result, neither the Board nor the hearing officer will grant any motion before the expiration of the 7-day response period. Please note that this provision does not preclude the Board from denying a motion within that period, since ordinarily the denial of a motion will not prejudice the responding party or participant. However, in most cases the Board or the hearing officer will not take any action on a motion until after the 7-day response period has passed. Only in cases where undue delay or material prejudice would result (for example, where a statutory decision deadline is approaching) will the Board or hearing officer grant a motion before expiration of the response period.

Section 101.243 "Motions Attacking Jurisdiction Or Sufficiency Of the Pleadings" requires all motions to strike or dismiss challenging the sufficiency of any pleading to be filed within 21 days after service of the challenged document. In a regulatory proceeding, however, such motions must be filed within 30 days of the Board order formally accepting the regulatory proposal for hearing. (See Application of Procedural Amendments of P.A. 85-1048 to Newly-filed and Pending Regulatory Proceedings, RES 89-1, PP. 5-6 (January 5, 1989).) Subsection (b) requires all motions challenging the jurisdiction of the Board to be filed before the movant files any other document. This provision ensures that jurisdictional objections are raised "up front", while allowing a party who is joined during the pendency of a proceeding to raise such objections at that party's first opportunity.

The Board has added subsection (d) to Section 101.246 "Motions For Reconsideration" in order to fulfill an agreement with JCAR. This new subsection sets out the types of things the Board

will consider when ruling upon a motion for reconsideration. Those factors include, but are not limited to, possible error in the Board's decision and facts in the record which may have been overlooked.

"Disposition of Motion", Section 101.247, sets forth the types of motions on which a hearing officer may rule. All motions on which the hearing officer is empowered to rule should ordinarily be directed to the hearing officer, not the Board. This section also establishes the fact that no interlocutory appeal of a hearing officer ruling may be taken to the Board unless the Board grants a motion to do so. The hearing officer may also refer a ruling to the Board if he or she feels that such action is necessary to prevent harm to the public interest or to avoid unusual delay or expense. A continuing objection to a hearing officer ruling must be restated at the close of hearing or in post-hearing submissions. Subsection (c) provides that all hearing officer orders remain in effect during the pendency of any appeal to the Board. The filing of a motion, or any related appeal of the ruling on that motion, shall not stay the proceeding or extend the time for the performance of any act. Again, these provisions allow the Board to ensure that proceedings move forward at a reasonable pace.

Subpart I: Discovery

Section 101.260 "Subpoenas" provides for the issuance of subpoenas in both contested cases and regulatory proceedings. Subsection (a) states that upon request by any party to a contested case, the Clerk will issue subpoenas for attendance of witnesses at a hearing or deposition. Subsection (b) requires participants in a regulatory proceeding to file a motion for subpoena with the hearing officer or the Board. This distinction between "automatic" issuance of subpoenas in contested cases and discretionary issuance in regulatory proceedings is based upon the Board's review of Section 5(e) of the Act. The Board concludes that Section 5(e) requires it to issue a subpoena upon the request of any party to a variance, enforcement or permit review proceeding, a proceeding to remove a seal, and any proceeding to review a final determination made pursuant to the Act or Board regulation. On the other hand, the issuance of a subpoena in a regulatory proceeding is discretionary. The Board believes that although it must issue a subpoena in adjudicatory cases it does have the necessary authority to review that subpoena and rule upon any motion to quash the subpoena. The Board or hearing officer may quash or modify a subpoena if it

finds that the subpoena is unreasonable, oppressive, or irrelevant.²

The Board notes in connection with this Subpart that it does not believe that it or its hearing officers currently have authority to subpoena or order the production of information which does not already exist in the required form or cannot be compiled without imposition of an undue burden. Likewise, because of the language of Section 5 of the Act, the Board finds that it does not have the authority to use its discovery powers in any way except in connection with a pending Board proceeding. In other words, the Board's discovery authority cannot be used to gather information to be used in developing a regulatory proposal. Without legislative action, the language of Section 5(e) of the Act (that the Board's discovery authority may be used "in connection with any hearing") precludes the use of the Board's discovery powers to gather data for use in developing a regulatory proposal.

Subpart J: Sanctions

This Subpart contains rules governing sanctions for refusal to comply with procedural rules. Board orders, or hearing officer orders, or for abuse of discovery procedures. Rules regarding sanctions were formerly found in Part 107, which the Board has today repealed.

During the proposal of this rulemaking, the Board received several comments alleging that the Board has no authority to order the payment of expenses incurred in obtaining an order for sanctions, as is provided by Section 101.280(a)(7). The Board finds that it does indeed have such authority, however. The appellate court has both explicitly and implicitly recognized the Board's authority to impose sanctions. Illinois Environmental Protection v. Celotex Corporation (3d Dist. 1988), 168 Ill. App. 3d 592, 522 N.E. 2d 888, 119 Ill. Dec. 226; Alton Packaging Corporation v. Pollution Control Board (5th Dist. 1986), 146 Ill. App. 3d 1090, 497 N.E. 2d 864; 100 Ill. Dec. 686. The Celotex court explicitly upheld the Board's promulgation of procedural rules on sanctions identical to Supreme Court Rule 219, including

"The Board notes that the statutory standard for subpoenas and orders to produce information "reasonably necessary to the resolution of the matter under consideration" has been stated as "relevant" in these regulations. This change has been made for purposes of JCAR review. Since the Section 101.101 definition of "relevant" includes the requirement that the information or witness be related to the establishment of any fact which is of consequence to the determination of the proceeding, the Board believes that the relevancy standard is equivalent to the statutory standard of Section 5(e) of the Act.

dismissal of an action. The Board's former rules on sanctions did not discuss the imposition of costs except as a sanction for failure or refusal to answer a discovery question, although Supreme Court Rule 219 does. Compared with a sanction like dismissing an action, imposing costs is a relatively light sanction. Since the Board has authority to order an execution (dismissal with prejudice), the authority to order a slap on the wrist (imposition of costs) is clear. The Board has the power to impose sanctions so that it may control proceedings and manage its docket, and finds that it has authority to order the payment of costs.

In both Sections 101.280 and 101.281 the phrase "the Board may order" sanctions or suppression of information has been changed to "the Board will order" such action. This change is made to satisfy JCAR concerns. The Board believes that this is not a substantive change, and that the language of these sections now reflects the Board's intent more clearly. The focus of a sanction determination pursuant to Section 101.280 is whether a party or person has unreasonably refused or failed to comply with procedural rules or a Board or hearing officer order. If the Board finds an unreasonable refusal or failure, it will order sanctions. Likewise, the issue under Section 101.281 is whether information was obtained through an abuse of discovery procedures.

Also pursuant to an agreement with JCAR, the Board has added subsection (b) to Section 101.280. This new subsection states that in deciding what sanction to impose, the Board will consider factors including, but not limited to, the relative severity of the refusal or failure to comply, the past history of the proceeding, and the degree to which the proceeding has been delayed or prejudiced.

At hearing and in its written comments, the Agency stated a concern that the Board needs to apply meaningful sanctions in an even-handed way to all parties and participants. The Agency believes that such sanctions should be adhered to in the vast majority of cases where violations occur, with exceptions only when necessary to avoid injustice. Several other comments articulated a concern that sanctions might be applied only against the regulated community and not against the Agency. The Board stresses that it will apply sanctions as often as necessary, and that all participants and parties are subject to sanctions for violations of procedural rules, Board and hearing officer orders, and discovery procedures.

Subpart K: Relief From and Review of Final Orders

This Subpart contains procedures for motions for reconsideration, relief from final orders, judicial review of final Board orders, stays of Board orders, and interlocutory appeals.

Appendices

The Board has added five appendices to Part 101. The appendices set forth forms to be used as examples when appearing before the Board. Appendix A gives examples of captions to be used in the various types of Board proceedings. Appendix B gives a sample appearance form, while Appendix C is an example of a notice of withdrawal of appearance. Appendix D is a sample "notice of filing" to be attached to all documents filed with the clerk. Finally, Appendix E includes examples of certificates of service.

The Board notes that the various forms contained in the appendices are not mandatory. Several comments reflected a concern that persons appearing before the Board, especially those unrepresented by counsel, still be allowed to file variances, permit appeals, public comments, and other filings by other means such as letter. The Board has included these forms merely as guides, not as required forms. Indeed, the forms are especially directed to those not represented by counsel, for help only. Board staff often receives questions on the correct form of various documents, and the forms are intended to be examples. The Board will continue to accept filings in the form of letters. The Board also received a comment on illustration F of Appendix A, which provides a sample caption for administrative citations. That comment is correct that administrative citation cases were formerly captioned "In the Matter of", rather than listing a complainant and a respondent. This has been changed to reflect that administrative citations are a type of enforcement case, not a regulatory proceeding.

PART 106, SUBPART G: ADJUSTED STANDARDS

The Board's amendments add a new Subpart G to 35 Ill. Adm. Code 106. This new Subpart imposes procedural requirements for adjusted standard proceedings that are held pursuant to Section 28.1 of the Act as amended by P.A. 85-1048 (effective January 1, 1989). On the whole, the requirements of Subpart G speak for themselves. However, the Board will broadly outline the workings of an adjusted standard proceeding as held in accordance with the proposed Subpart.

The Board received numerous questions and comments at hearing concerning the proposed rules for adjusted standards. In addition, many persons filed written comments subsequent to the Board's Orders of September 22, 1988 and January 19, 1989. The comments that the Board has received are varied in nature and often quite detailed. Except for those public comments which the Board has expressly excluded the Board has considered all comments received; the Board does not find it necessary to discuss the substance of all comments in this Opinion.

It has been suggested that the Board does not need to adopt procedural rules for adjusted standards but that the current

variance procedure need only be amended slightly to accommodate adjusted standards. (P.C. #35.) While Section 28.1 of the Act provides that adjusted standards are adjudicatory proceedings, an adjusted standard is not a variance. A variance acts as a temporary shield against enforcement of a regulatory provision while the variance recipient works toward achieving compliance with that provision. Conversely, an adjusted standard proceeding may result in a Board-adopted standard as an alternative to a particular regulation-based standard, and an adjusted standard could apply to a person for an indefinite period of time.

Public Act 85-1048 amended Section 28.1 to allow adjusted standards from any Board regulation regardless of whether that regulation expressly provides for an adjusted standard proceeding. Prior to P.A.85-1048 adjusted standards could only be obtained from regulations which expressly provided an adjusted standard option. Given this new, sweeping applicability of adjusted standards, it is necessary to promulgate general procedures which apply to adjusted standard proceedings. Also, Section 28.1(d) itself requires the Board to adopt adjusted standard procedures.

Also, there apparently is some confusion over whether the rules of Subpart G of Part 106 apply to regulatory proceedings. (P.C #35.) Just as adjusted standards are not variances, they are also not regulatory proceedings. Although standards adopted by the Board through an adjusted standard procedure have similar force and effect as standards adopted via the regulatory process, adjusted standard proceedings are exempt from the "rule-making provisions of the Illinois Administrative Procedure Act and Title VII of [the] Act". Section 28.1(a) of the Act. Consequently, the rules of Part 106, Subpart G, only apply to those persons seeking an adjusted standard pursuant to Section 28.1.

Section 106.701 Applicability

Section 106.701 "Applicability" provides that the proposed procedures of Subpart G will not apply to proceedings conducted pursuant to existing Subparts A, B, C, D, E or F of Part 106. It further provides that the requirements of 35 Ill. Adm. Code 101 do apply to proceedings conducted pursuant to Subpart G. In other words, one must read Subpart G in conjunction with Part 101 to determine all of the procedural requirements for an adjusted standard proceeding. In the event that the requirements of Part 101 conflict with those of Subpart G, the provisions of Subpart G govern in an adjusted standard proceeding.

Section 106.703 Joint or Single Petition

An adjusted standard proceeding begins with the filing of a petition. A petition may be filed either singly or jointly with the Agency. Section 106.703 requires that petitions for adjusted standards which are filed with the Board must be served upon ENR as well as the Agency.

Section 106.704 Request to Agency to Join as Co-Petitioner

Pursuant to Section 106.704, any person who wishes to file an adjusted standard petition may request that the Agency join as a co-petitioner. The Agency is not required to act as a co-petitioner if requested. The Board believes that it is appropriate for the Agency to decline to co-petition in the event that the Agency is faced with a lack of resources with which to investigate and co-petition. Therefore, a simple statement to that effect is the minimum that would be required under this Section for the Agency's response to a request to co-petition. If the Agency is requested to be a co-petitioner it may require information from the petitioner in order to evaluate the request.

Section 106.705 Petition Contents

Section 106.705 sets forth detailed requirements for the contents of a petition. These informational requirements are the minimum necessary to ensure a proper evaluation of an adjusted standard request. However, subsection (1) provides a mechanism which enables a petitioner to initially file a petition that does not address all of the informational requirements. Yet, the Board may still require the petitioner to meet the petition requirements of Section 106.705. All the factual information asserted in the petition must be verified by affidavit accompanying the petition. The petition must also either request or waive a public hearing.

Section 106.808 states that the burden of proof in an adjusted standard is on the petitioner. If a petitioner fails to provide the Board with the necessary information to enable the Board to make a decision on the petition, the petitioner does so at its own risk. As stated in subsection (1), the Board may require the petitioner to provide additional information in its petition to more fully address the petition requirements of Section 106.705 or to aid the Board in its decision-making process. If the petitioner fails to do so, the Board may dismiss the petition pursuant to Section 106.902. The Board has utilized such more-information Orders in dealing with deficient variance petitions. There is no apparent reason why such a mechanism not be successfully applied to an adjusted standard proceeding.

Also, the petition must show that the proposed adjusted standard may be granted consistent with federal law. Both Section 28.1(c)(4) of the Act and proposed Section 106.903(a) require this. In addition, the petitioner must identify any procedural requirements, such as a hearing, which are mandated by federal law and necessary for ultimate federal approval of the adjusted standard.

If the Agency is not a co-petitioner, it must file a response. In that response, the Agency must address the

petition's assertions which must include the statements concerning federal law. If the Agency believes that the petition is deficient, the Agency shall identify how it is deficient in the response.

Section 106.715 (see following) expressly allows for amended petitions and amended responses. This makes it clear that the petitioner may amend its petition to address Agency concerns which are identified through informal communications with the Agency or by way of an Agency response filed pursuant to Section 106.714.

In summary, there are methods to correct deficient petitions for adjusted standards. If the petitioner does not ultimately provide the Board with adequate information to support its request for an adjusted standard, such a request will be denied and the regulation of general applicability or a standard equivalent to that regulation will apply to that person.

Subsection (e) of Section 106.705 requires that all compliance alternatives with the corresponding costs for each alternative be discussed. The intent behind this subsection is to ensure that the Board is fully informed as to all options of compliance with the regulation of general applicability. This naturally includes cost information. Obviously, other persons may disagree with the cost conclusions of the petitioner. Subsection (e) requires disclosure of estimates upon which the petitioner is drawing its conclusions. This will enable other persons, and more importantly the Board, to independently evaluate whether the petitioner has presented adequate justification for an adjusted standard.

Commenters had suggested that the required cost information should only relate to the "least costly" compliance alternative. The Board is not looking for detailed itemized cost data for the compliance alternatives in an initial petition, although such information may be required later by the Board; broad estimates of costs may be acceptable. The Board's requirement ensures that the petitioner itself, at least on a general level has evaluated the costs for each compliance alternative. Furthermore, if the commenters are willing to provide cost information regarding the least costly compliance alternative, it would not be much of a burden to give the Board cost estimates for the other alternatives. In other words, if the petitioner did not have cost estimates for each compliance alternative, then it could not conclude which of those alternatives was the "least costly" alternative.

Section 106.707 Federal Procedural Requirements

A petitioner must ensure compliance with any procedural requirements pursuant to federal law. A petitioner does not have a duty to ensure that the Board acts in compliance with federal procedural requirements. However, this does not relieve the

petitioner from the duty to inform the Board of applicable federal requirements pursuant to Section 106.705(i), or to carry out federal requirements which the petitioner itself is capable of fulfilling.

Sections 106.711 Petition Notice and 106.712 Proof of Petition Notice

Sections 106.711 and 106.712 implement Section 28.1(d) of the Act (P.A. 85-1048), which places the burden of the initial noticing of a petition on the petitioner. Within 14 days after filing of a petition, the petitioner must cause the publication of a notice stating that an adjusted standard petition has been filed with the Board. The notice is to be an advertisement in a newspaper of general circulation in the area likely to be affected by the petitioner's activity which is the subject of the adjusted standard request. The publication of the petition notice is accomplished at the petitioner's own expense. Among other requirements, the petition notice must state that any person may request that a hearing be held in the proceeding by filing a hearing request within 21 days of the date of the notice's publication. Within 30 days of the filing of a petition, the petitioner must file proof of the petition notice publication.

Section 106.713 Request for Public Hearing

Section 106.713 provides that any person may request a hearing on any adjusted standard proceeding. Such a hearing request must be filed within 21 days after the publication of the petition notice. If the Board receives a timely request, it will hold a hearing in the proceeding. In addition, if the Board determines that a hearing would be advisable, it will hold a hearing irrespective of whether it has received a hearing request from the petitioner or a member of the public.

Section 106.714 Agency Response

Section 106.714 "Agency Response" provides that not later than 30 days after the filing of the petition the Agency must file a response if it is not a co-petitioner. At a minimum, the response must address and respond to the petition with respect to informational requirements of a petition. Also, the Agency may include in its response any information which the Agency believes is relevant to the Board's consideration of the proposed adjusted standard.

Section 106.715 Amended Petition and Amended Response

Section 106.715 expressly provides that a petitioner may amend its petition and correspondingly the Agency shall file an amended response. Such amendments may be made prior to the close of a hearing, if a hearing is held in the proceeding. Alternatively, if no hearing is held, amendments may occur

anytime prior to the Board's decision. However, the Agency is given 30 days to issue its amended response. If the Agency does not wish to change its position after considering the petitioner's amendment, such may be stated in its "Amended Response". Also, the Agency may amend its previously filed response even if the petitioner has not amended its petition. In such an instance, an Agency response may only be amended prior to the close of the hearing if a hearing is held or prior to the Board's decision if a hearing is not held.

As amendments to the petition and response may change facts, positions, or issues previously presented to the Board, such amendments may properly be a basis for the Board to: hold a hearing when one was previously considered unnecessary; grant a continuance of a previously scheduled hearing; postpone a decision on the proceeding; require the re-noticing of a petition in a newspaper; or cause other appropriate actions to be taken.

Sections 106.801 Hearing Scheduled and 106.802 Hearing Notice

If a hearing is held in an adjusted standard proceeding, it will be held in the county likely to be affected by the petitioner's activity which is the subject of the proposed adjusted standard. In accordance with the requirements of Section 28.1(d), notice of the hearing will be given by advertisement in a newspaper of general circulation at least 20 days prior to the date of the hearing. The Clerk of the Board will cause the publication of the hearing notice.

Section 106.803 Pre-Hearing Submission of Testimony and Exhibits

Although the pre-hearing submission of testimony and exhibits is not automatically required, the hearing officer may impose such a requirement if it would provide for a more efficient hearing. The Board received comments that the pre-hearing submissions should be subject to modification at hearing. Subsection (b) provides a mechanism for making changes to pre-hearing submissions. If such changes are non-substantive or would not materially prejudice another person's participation at hearing, they may be allowed by the hearing officer. For pre-hearing submissions to have any value, they must be reliable. Hence, changes at hearing to pre-hearing submissions must be limited or at least scrutinized. Obviously, if a situation develops where pre-hearing submissions are wholly unreliable the hearing officer may vacate the order which required the pre-hearing filing of testimony and exhibits. Then, a person's hearing presentation would not be bound in any way by any pre-hearing submission.

Section 106.805 Admissible Evidence

Section 106.805(e) provides that any person may introduce evidence at hearing and any person may ask questions of any person who testifies at hearing. Section 106.807 provides that

subsequent to the hearing, any person may file comments which present his or her views concerning the record before the Board.

Section 28.1(a) states that adjusted standard determinations are "adjudicatory determinations". However, the Act does not define particular "parties" for an adjusted standard proceeding. This further indicates that public participation need not be limited in scope. In other words, adjusted standard proceedings are not contested cases between two or more distinct parties. Yet, at the same time, the "adjudicatory" language may not be ignored.

As a result, Section 106.805 sets forth a standard for admissible evidence which is equivalent to that currently used in the contested case proceedings of enforcement actions, permit appeals, and variances. It is also consistent with the requirements of Section 12 of the Illinois Administrative Procedure Act (APA). Ill. Rev. Stat. 1987, ch. 127, par. 1012. In addition, the opportunity for cross-examination of any person who testifies is afforded by Subpart G. This, too, comports with the Board's current procedures as well as Section 12 of the APA.

Section 106.806 Order of Hearing

Subpart G provides for broad public participation in an adjusted standard hearing. The level of such public participation is patterned after that which is found in the current rulemaking procedures. Adjusted standard proceedings result in the establishment of environmental standards. Such standards have the same force and effect as those which are promulgated as rules. It follows naturally that the public should have participation rights in an adjusted standard proceeding which are equivalent to those afforded in rulemakings. It would seem inconsistent with the intent of the Act to allow adjusted standard proceedings to become forums which effectively exclude the public from meaningful participation in the determination of environmental standards. Consequently, the procedures of Subpart G provide opportunities for the public to meaningfully contribute to the adjusted standard decision-making process.

Section 106.807 Post-hearing Comments

Section 106.807 requires that no new information may be entered into the record by way of post-hearing comments. The post-hearing comments are intended to address, comment upon, or argue from the record which has been built by the hearing process. The post-hearing comment procedure is not an additional mechanism by which to build the evidentiary portion of the record.

Although some commenters did not wish to be bound by such a requirement, the Board must, at some time during a proceeding, draw the line as to when it closes the evidentiary portion of the

record. That line is now drawn prior to the submission of post-hearing comments.

The timing of the submission of post-hearing comments may be staggered pursuant to hearing officer order to reflect the petitioner's burden of proof. For example, the hearing officer may require that the petitioner file comments first. Then, other persons would file their comments, and the petitioner's rebuttal comments would be filed last.

Additionally, the Board received comments that 14 days is too short of a time period in which to file post-hearing comments. This mischaracterizes the requirement of the proposed Section. The 14-day time period only applies if the hearing officer does not set a different comment deadline. This reflects the Board's intent that the proceedings not be prolonged unnecessarily once the evidentiary record has been closed.

Section 106.902 Dismissal of Petition

Section 106.902 provides that at any time during an adjusted standard proceeding, the Board may dismiss a petition upon several bases. If the Board determines that the petition is frivolous, duplicative, or deficient with respect to the petition's contents, petition verification, proof of service, or petition notice. Also, if the Board determines that the petitioner is not pursuing disposition of the petition in a timely manner the Board may order a dismissal.

Section 106.903 Board Decision

At hearing, the burden of proof is on the petitioner to prove, by a preponderance of the evidence, the applicable level of justification for an adjusted standard proceeding. If the regulation of general applicability, from which an adjusted standard is sought, specifies the level of justification for an adjusted standard, then that standard will be applicable. If the regulation of general applicability is silent concerning the level of justification, then the standard imposed by Section 106.903(a) will govern. The standard set forth by subsection (a) is identical to that imposed by Section 28.1(c) of the Act. (P.A.85-1048).

If the petitioner proves the applicable level of justification for an adjusted standard then the Board may, consistent with Section 27(a) of the Act, grant the adjusted standard. The use by Section 106.903 of the permissive term "may" is statutory in origin. Section 28.1(c) of the Act (P.A. 85-1048). Consequently, even if the petitioner meets its burden of proof regarding the applicable level of justification, the Act does not require the Board to adopt the proposed adjusted standard. To conclude otherwise would frustrate both the plain meaning of the Act and the mandate to consider factors set forth by Section 27(a). As in the Act, Subpart G provides that the

Board may impose conditions on the granting of an adjusted standard.

In the case of the Clean Air Act regulation of general applicability, the Board, as a final determination, must either adopt the proposed adjusted standard, if the applicable level of justification has been proven, or adopt a standard the same as that imposed by the regulation of general applicability. Section 106.903(c). This provision is found in Section 28.1(f) of the Act. (P.A. 85-1048). In a Clean Air Act regulation/adjusted standard proceeding where the petitioner has failed its burden of proof, the record need not justify the adoption of the standard of the regulation of general applicability.

It is clear from the Act that the Board must adopt either the standard imposed by the regulation of general applicability or the proposed adjusted standard when a proceeding involves the Clean Air Act. It is equally clear that the burden of proof in an adjusted standard proceeding is on the petitioner. Section 28.1(c) of the Act, (P.A. 85-1048). The petitioner for an adjusted standard certainly will not prove that the regulation of general applicability should be applied to the petitioner. Neither does the Act provide for such a proof. Consequently, Section 106.903(c) hinges the imposition of the standard of the regulation of general applicability upon the failure by the petitioner to prove the applicable level of justification for the proposed adjusted standard.

Section 106.905 Appeal of Board Decisions

Section 106.905 addresses an appeal of the Board's final decision. The Section merely restates the language of Section 28.1(g) of the Act which provides that appeal may be pursued Pursuant to Section 41 of the Act. Since Section 28.1 of the Act does not specifically name "parties" to an adjusted standard Proceeding the Board believes that an appeal of an adjusted standard decision would be available to any person, as it is in a rulemaking context. The Board cannot see a distinction between the public's interest in an appeal of an environmental standard which was promulgated as a rule as opposed to one which was adopted pursuant to an adjusted standard proceeding. The Act has Provided for broad public participation in the adoption and appeal of environmental standards. There is no apparent reason to deviate from that theme for adjusted standard proceedings. Ultimately, though, it is for the courts to decide who has Standing to appeal a Board decision made pursuant to Section 28.1 of the Act.

Section 106.907 Effect of Filing a Petition

Section 106.907(a) states that if the Board does not adopt the proposed adjusted standard, the regulation of general applicability remains applicable to the pollution source. Section 28.1(e) of the Act (P.A. 85-1048) states that the

operation of the regulation from which the adjusted standard is sought is stayed, pending the Board's final decision, as to the petitioner, if the petition is filed within 20 days after the effective date of that regulation.

However, if the regulation of general applicability implements in whole or in part the Clean Air Act, a petitioner becomes exempt from that regulation if a petition is filed within 20 days of the effective date of the regulation. Section 28.1(f) of the Act (P.A. 85-1048). This provision is also set forth by Section 106.907(b).

ORDER

For the reasons set forth in the opinion, the Board refuses to modify its rules in response to the objection of the Joint Committee on Administrative Rules. A notice of this response will be published in the Illinois Register.

The Board hereby adopts, as final, the following amendments to be filed with the Secretary of State. These amendments include the repeal of current 35 Ill. Adm. Code 101 and 107.

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

GENERAL RULES

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Illustration A Service By Non-Attorney
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AUTHORITY: Implementing Sections 5, 7.1, 7.2, 27, 28, 29, 31, 32, 33, 35, 36, 37, 38, 40 and 41 of the Environmental Protection Act (Ill. Rev. Stat. 1987, ch. 111¹/₂, pars. 1005, 1007.1, 1007.2, 1027, 1028, 1029, 1031, 1032, 1033, 1035, 1036, 1037, 1038, 1040 and 1041, as amended by Public Acts 85-1048 and 85-1331); and Section 4 of "An Act in relation to natural resources, research, data collection and environmental studies," (Ill. Rev. Stat. 1987, ch. 96¹/₂, par. 7404); and authorized by Section 26 of the Environmental Protection Act (Ill. Rev. Stat. 1987, ch. 111¹/₂, par. 1026).

SOURCE: Filed with Secretary of State January 1, 1978; codified 6 Ill. Reg. 8357; Part repealed, new Part adopted in R88-5(A) at 13 Ill. Reg. _____ effective _____.

NOTE: Capitalization denotes statutory language.

SUBPART A: GENERAL PROVISIONS

Section 101.100 Applicability

- a) This Part governs the practices and procedures of the Pollution Control Board, and contains rules which are applicable to all proceedings conducted by the Board. This Part should be read in conjunction with 35 Ill. Adm. Code 102 through 120, which contain rules applicable to specific proceedings conducted by the Board. The provisions of this Part apply to 35 Ill.

Adm. Code 102 through 120; however, in the event of a conflict between the rules of this Part and subsequent Parts, the more specific requirement of the subsequent Part applies.

- b) The provisions of the Code of Civil Procedure (Ill. Rev. Stat. 1987, ch. 110, par. 1-101 et seq.) and the Illinois Supreme Court Rules (Ill. Rev. Stat. 1987, ch. 110A, par. 1 et seq.) do not expressly apply to proceedings before the Board. However, in any absence of a specific provision in these procedural rules to govern a particular situation, the parties or participants may argue that a particular provision of the Code of Civil Procedure or the Illinois Supreme Court Rules provides guidance for the Board or hearing officer.
- c) The provisions contained in this Part and in 35 Ill. Adm. Code 102 through 120 are in addition to the provisions of the Illinois Administrative Procedure Act (Ill. Rev. Stat. 1987, ch. 127, par. 1001 et seq.), unless otherwise provided by the Act.

Section 101.101 Definitions

The definitions of the Environmental Protection Act (Ill. Rev. Stat. 1987, ch. 111 1/2, par. 1001 et seq.) apply to this Part unless otherwise provided. The following definitions also 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.

"Clean Air Act" means the federal Clean Air Act (42 U.S.C. 7401 et seq. (1988)).

"Clean Water Act" means the federal Clean Water Act (33 U.S.C. 1251 et seq. (1988)).

"Clerk" means the Clerk of the Board.

"Contested case" means an adjudicatory proceeding, including but not limited to enforcement, variance, permit appeal, adjusted standard, and administrative citation proceedings, but not including regulatory, quasi-legislative, informational, or similar proceedings.

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

"DNS" means the Illinois Department of Nuclear Safety.

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

"Evidence" means a paper, drawing, map, chart, report, study, or other tangible thing produced and submitted at hearing, or testimony received at hearing.

"Initial filing" means the filing which initiates a Board proceeding. For example, the initial filing in an enforcement proceeding is the complaint; in a permit appeal is a petition for review, and in a regulatory proceeding is the proposal. There is only one initial filing in each Board proceeding.

"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, 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.

"Party" means a person authorized by the Act to bring, defend, or intervene in a contested case before the Board.

"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.

"Procedural rules" means the Board's procedural rules, contained in 35 Ill. Adm. Code 101 through 120.

"Registered agent" means a person registered with the Secretary of State for the purpose of accepting service of notices for any entity, or a person otherwise authorized in writing as an agent for the purpose of accepting service of notices for that entity in Board proceedings.

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

"RCRA" means the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 (42 U.S.C. 6901 et seq. (1988)).

"SDWA" means the federal Safe Drinking Water Act (42 U.S.C. 300f et seq. (1988)).

"Site-specific rule" means a proposed or adopted regulation, not of general applicability, which applies only to a specific facility or geographic site.

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

"USEPA" means the United States Environmental Protection Agency.

Section 101.102 Filing Of Documents

- a) Documents and requests permitted or required to be filed with the Board or its Clerk shall be addressed and mailed to or filed with the Clerk at 100 West Randolph Street, State of Illinois Center, Suite 11-500, Chicago, Illinois 60601. Filing, inspection, and copying of documents may be done in the Clerk's office from 8:30 a.m. to 4:30 p.m. Monday through Friday, except for national and state legal holidays. The Board offices are open from 8:30 a.m. to 5:00 p.m. Monday through Friday, except for national and state legal holidays.
- b) Filings received after 4:30 p.m. will be date-stamped the following business day.
- c) Documents may be filed with the Clerk by certified, registered, or First Class mail, by messenger service, or personally at the Board's Chicago office. Filing by electronic transmission, such as telefax machine or computer modem, will not be accepted, except when specifically requested by the Board.
- d) The time of filing of documents will be the date on

which they are date-stamped by the Clerk, unless date-stamped after any due date. If received after any due date, the time of mailing shall be deemed the time of filing. Proof of mailing shall be made pursuant to Section 101.143. However, the time for a decision deadline pursuant to Sections 38, 40, 40.1, and 41 of the Act does not begin until the date on which the initial filing in such a proceeding is date-stamped by the Clerk.

- e) Notwithstanding subsection (d), the Board or the hearing officer may accelerate a filing schedule to prevent undue delay, upon written notice to the participants or parties. The notice will specify a date by which the document must be received in the Clerk's office.

Section 101.103 Form Of Documents

- a) Documents shall clearly show the title of the proceeding in which they are filed. Appendix A of this Part sets forth examples of proper captions. Documents shall bear a heading which clearly describes the nature of the relief sought, such as, but not limited to "Petition for Amendment to Regulation," "Complaint," "Petition for Variance," "Petition for Review," "Motion," or "Public Comment."
- b) Except as otherwise provided, the original and nine (9) copies of all documents shall be filed with the Clerk. Only the original and four (4) copies of any discovery motion, deposition, interrogatory, answer to interrogatory, or subpoena need be filed with the Clerk.
- c) After the filing of the initial document in a proceeding, all filings, including exhibits, shall include the Board docket number for the proceeding in which the item is to be filed. If the filing is a document, the docket number shall appear on the first page of the filing. For filings which are not documents, the docket number shall appear on a readily visible portion of the filing.
- d) Documents, excluding exhibits, shall be typewritten or reproduced from typewritten copy and double-spaced on unglazed white paper of greater than 12 pound weight and measuring 8" x 10 1/2" or 8 1/2" x 11". Reproductions may be made by any process that produces legible black-on-white copies. All documents shall be fastened on the left side or in the upper left hand corner. The left margin of each page shall be at least 1 1/2 inches and the right margin at least one inch.

- e) The requirements of subsections (b), (c), and (d) may be waived by the Board upon written request. A request for a filing waiver shall be presented to the Board in the form of a motion accompanied by affidavits necessary to verify any factual assertions contained in the motion. If the Board finds that compliance with the filing requirements would impose an undue burden, the Board will grant the motion.
- f) Exhibits, where possible, shall be reduced to conform to the size requirements of subsection (d). However, one non-conforming copy may be filed with the Clerk's office.
- g) The original of each document filed shall be signed by the party or by its authorized representative or attorney. All documents shall bear the business address and telephone number of the attorney filing the document, or of the party who appears on his or her own behalf. The Clerk will refuse to accept for filing any document which does not comply with this subsection.
- h) Except as otherwise provided by Sections 1 through 4 of "AN ACT in relation to the reproduction of public records on film and the destruction of records so reproduced" (Ill. Rev. Stat. 1987, ch. 116, pars. 35-38), or by leave of the Board, documents on microfiche are not acceptable for filing.

Section 101.104 Length Of Briefs

- a) No brief in support of or in opposition to any motion shall exceed 15 pages without prior approval of the Board or hearing officer. This limit does not include appendices containing relevant material.
- b) No post-hearing brief or response brief, brief submitted in response to a Board order, or public Comment submitted in lieu of a brief shall exceed 50 pages without prior approval of the Board or hearing officer. No reply brief shall exceed 25 pages. These limits do not include appendices containing relevant material.
- c) In considering any motion to exceed these limits, the Board or the hearing officer will take into account factors such as, but not limited to, the complexity of the proceeding, the number of issues involved, and the length of the record.

Section 101.105 Waivers

A waiver of a deadline for final Board action, as specified in Sections 38, 40, 40.1 and 41 of the Act, shall be filed as a

separate document. The waiver shall be clearly titled as such, identify the proceeding by name and docket number, and be signed by the party or by his authorized representative or attorney. The waiver shall be an open waiver or a waiver until a calendar date certain. However, the Board reserves the right to accept waivers in other forms where it finds it necessary to prevent undue delay or material prejudice. A contingent waiver is not acceptable.

Section 101.106 Incorporation Of Prior Proceedings

- a) Upon the separate written request of any person or on its own initiative, the Board or hearing officer may incorporate materials from the record of another Board docket into any proceeding. The person seeking incorporation shall file with the Board four copies of the material to be incorporated. The person seeking incorporation shall demonstrate to the Board or the hearing officer that the material to be incorporated is relevant to the proceeding. Notice of the request shall be given to all identified participants or parties by the person seeking incorporation.
- b) The Board will give the incorporated matter the appropriate weight in light of the following factors: the standard of evidence under which the material was previously presented to the Board; the present purpose for incorporating the material; and the past and current opportunity for cross-examination of the matters asserted within the incorporated material.

Section 101.107 Appearances And Withdrawals

- a) Any person entitled to participate in Board proceedings shall appear as follows:
 - 1) A natural person on his or her own behalf or by an attorney at law licensed and registered to practice in the State of Illinois, or both.
 - 2) A corporation, when a respondent in an enforcement case pursuant to 35 Ill. Adm. Code 103, by an attorney at law licensed and registered to practice in the State of Illinois. In all other proceedings, a corporation may appear through any officer, employee, or representative, or by an attorney at law licensed and registered to practice in the State of Illinois, or both.
 - 3) Any other person, including a unit of local government, through any officer, employee, or representative, or by an attorney licensed and registered to practice in the State of Illinois, or both.

- b) Attorneys not licensed and registered to practice in the State of Illinois may request to appear on a particular matter on motion filed with the Board.
- c) An attorney appearing in a representative capacity shall file a separate written notice of appearance with the Clerk, together with proof of service and notice of filing on all parties and participants or their representatives. A sample appearance form appears in Appendix B.
- d) An attorney who has appeared in a representative capacity and who wishes to withdraw from that representation shall file a notice of withdrawal with the Clerk, together with proof of service and notice of filing on all participants or their representatives. A sample notice of withdrawal appears in Appendix C.

Section 101.108 Substitution Of Attorneys

Any attorney who substitutes for an attorney of record shall file a written appearance pursuant to Section 101.107(c). That appearance shall identify the attorney for whom the substitution is made.

Section 101.109 Computation Of Time

Computation of any period of time prescribed by this Chapter or the Act shall begin with the first calendar day following the day on which the act, event or development occurs and shall run until the end of the last day, or the next business day if the last day is a Saturday, Sunday or national or state legal holiday.

SUBPART B: FILING AND PHOTOCOPYING FEES

Section 101.120 Filing Fees

- a) A person filing an action for which a filing fee is prescribed by the Act shall pay that fee at the time the petition is presented to the Clerk for filing.
- b) The types of petitions for which fees are required and the amount of those fees are as follows:
 - 1) PETITION FOR SITE-SPECIFIC REGULATION, \$75;
 - 2) PETITION FOR VARIANCE, \$75;
 - 3) PETITION FOR REVIEW OF PERMIT or any petition for review pursuant to Section 40 of the Act, \$75;
 - 4) PETITION TO CONTEST LOCAL GOVERNMENT DECISION PURSUANT TO SECTION 40.1 OF THE ACT, \$75; and

5) PETITION FOR ADJUSTED STANDARD PURSUANT TO SECTION 28.1 OF THE ACT, \$75. (Section 7.2 of the Act.)

- c) The Clerk will refuse to accept any petition which is not accompanied by the required fee. The fee must be paid in the form specified in Section 101.122.

Section 101.121 Photocopying Fees

- a) All files, records, and data may be copied at Board offices in Chicago UPON PAYMENT OF REASONABLE REPRODUCTION FEES TO BE DETERMINED BY THE BOARD. (Section 7 of the Act.)
- b) The Board will contract for any copying that would impose a substantial administrative burden on the Board. The person requesting such copies will be charged the reproduction charges incurred by the Board.
- c) Requests for copies will be honored in as timely a manner as possible. Requests for copies by mail will be honored. However, the Board reserves the right to charge the requesting party for the mailing costs incurred by the Board.

Section 101.122 Forms Of Payment

- a) Filing fees and photocopying fees may be paid by money order or check. Cash payments will be accepted, but are strongly discouraged.
- b) All checks and money orders shall be made payable to the Illinois Pollution Control Board.
- c) In the event that a check is not honored by petitioner's bank, the Board will enter a sanction order in that proceeding. Sanctions may include, but are not limited to, dismissal of the action for non-payment, or re-computation of any decision deadline to exclude the time in which the filing fee remains uncollected.

SUBPART C: SERVICE

Section 101.140 Applicability

This Subpart applies to all Board proceedings generally. However, to the extent that 35 Ill. Adm. Code 102 through 120 conflict with or supplement this Subpart, that more specific Part governs.

Section 101.141 Service Of Initial Filings

A copy of all initial filings in any Board proceeding shall be served upon all persons, required by this Chapter to be served, or their registered agent. 35 Ill. Adm. Code 102 through 120 set forth more specifically who must be served in any given type of Board proceeding. Service of all initial filings shall be made personally, or by registered, certified, or First Class mail, or by messenger service. However, initial complaints in enforcement proceedings pursuant to 35 Ill. Adm. Code 103 must be served personally, by registered or certified mail, or by messenger service.

Section 101.142 Service Of Subsequent Filings

After initial filings are served pursuant to Section 101.141, all subsequent filings shall be served personally, or by United States mail, or by messenger service.

Section 101.143 Proof Of Service

- a) Service of filings is proved by:
 - 1. In case of service by personal delivery, by certificate of the attorney, or affidavit of the person other than an attorney, who made delivery; or
 - 2. In case of service by messenger service, by messenger service receipt; or
 - 3. In case of service by registered or certified mail, by registered or certified mail receipt; or
 - 4. In case of service by First Class mail, by certificate of attorney, or affidavit of person other than attorney, which states the date, time, and place of mailing, the complete address which appeared on the envelope, and the fact that proper postage was prepaid.
- b) A sample certificate of service appears in Appendix E of this Part.

Section 101.144 Effective Date Of Service

- a) In the case of service by personal delivery, service is complete on the date of that personal delivery.
- b) In the case of service by registered or certified mail, or by messenger service, service is complete on the date specified on the registered or certified mail receipt or the messenger service receipt.
- c) There is a rebuttable presumption that service by First Class mail is complete four days after mailing.

SUBPART D: PUBLIC INFORMATION

Section 101.160 Public Information

- a) The Clerk will maintain files containing all information submitted to or produced by the Board or any of its members relating to matters within the Board's jurisdiction. Without limiting the foregoing, the files will include: pleadings, motions, notices, minutes, transcripts, exhibits, orders and opinions, proposed and adopted regulations, communications to or from the Board or any Board member, the Environmental Register and other Board releases, business records, informal complaints, and internal communications filed at the request of any Board member with consent of the author of that communication.
- b) All files maintained by the Clerk will be open to reasonable public inspection and copying, except the following material:
 - 1) Internal communications between and among Board members and staff (except as provided in subsection(a));
 - 2) Material protected from public disclosure under the trade secret provisions of 35 Ill. Adm. Code 120; and
 - 3) Material which is stamped "Not Subject to Disclosure" by Board order, pursuant to Section 101.161.
- c) The Clerk shall maintain a list of all files open to public inspection.

Section 101.161 Non-Disclosable Information

- a) Only the following materials may be stamped "Not Subject to Disclosure" by the Board:
 - 1) INFORMATION WHICH CONSTITUTES A TRADE SECRET;
 - 2) INFORMATION PRIVILEGED AGAINST INTRODUCTION IN JUDICIAL PROCEEDINGS;
 - 3) INFORMATION CONCERNING SECRET MANUFACTURING PROCESSES OR CONFIDENTIAL DATA SUBMITTED BY ANY PERSON UNDER THE ACT; AND
 - 4) Income and earnings data when not an issue in the proceeding. (Section 7(a) of the Act.)

- b) Material will be stamped "Not Subject to Disclosure" only upon written application at the time the material is filed. Procedures governing the identification and protection of trade secrets are found in 35 Ill. Adm. Code 120. An application for non-disclosure other than pertaining to trade secrets shall contain the following:
- 1) Identification of the precise material, or parts of material, for which non-disclosure is sought;
 - 2) Indication of the particular non-disclosure category into which the material falls; and
 - 3) A concise statement of the reasons for requesting non-disclosure. The application shall be verified by affidavit and contain such information as will inform the Board of the nature of material for which non-disclosure is sought, the reasons why non-disclosure is necessary, and the number and title of all persons familiar with such information, and how long the material has been limited from disclosure.
- c) A single copy of the material for non-disclosure shall be filed with the Clerk with the application and shall be available for examination only by Board members, Board assistants, Environmental Scientists of the Board's Scientific/Technical Section, the assigned hearing officer, the Clerk, and the Assistant Clerk. This material may also be made available to officers, employees, or authorized representatives of this State or the United States as provided in Section 7(e) of the Act. If any agency of this State or the United States is a participant in the proceeding in which the application for non-disclosure is made, the applicant shall serve those agency participants with notice of the application for non-disclosure. The Board will rule on the application and inform the applicant of its decision. Public inspection of the material for non-disclosure shall be barred until the application has been disposed of by the Board and the time for appeal has run. The Board may enter conditional non-disclosure orders allowing withdrawal by the applicant of the material covered by such order, at which time the Board's ruling on the application shall be based on the record excluding the material so withdrawn.
- d) All material found not subject to disclosure is governed by the procedures and protections of 35 Ill. Adm. Code 120.Subpart C.

Section 101.162 Publications

- a) At least once each month, the Board will publish an Environmental Register containing reports of Board activities and notices of meetings and hearings. One copy will be sent to any person without charge, upon request.
- b) Copies of the Act and regulations in effect will be provided without charge, by mail and at the Board's Chicago office.
- c) The Board will regularly compile its decisions and orders into volumes, which subscribers may buy and receive by mail at a reasonable cost.

SUBPART E: BOARD MEETINGS

Section 101.180 Board Meetings

- a) All decisions of the Board will be made at meetings open to the public. Four members of the Board constitute a quorum. Four affirmative votes are required for any final determinations of the Board, except in a proceeding to remove a seal under Section 34(d) of the Act.
- b) THE BOARD WILL HOLD AT LEAST ONE MEETING EACH MONTH AND WILL ADOPT AT THE BEGINNING OF EACH CALENDAR OR FISCAL YEAR A SCHEDULE OF MEETINGS WHICH SHALL APPEAR AT LEAST ONCE IN ITS MINUTES AND IN THE ENVIRONMENTAL REGISTER. SPECIAL MEETINGS MAY BE CALLED BY THE CHAIRMAN OR BY ANY TWO BOARD MEMBERS UPON DELIVERY OF 24 HOURS WRITTEN NOTICE TO THE OFFICE OF EACH MEMBER. PUBLIC NOTICE OF ALL MEETINGS WILL BE GIVEN AT LEAST 24 HOURS IN ADVANCE OF EACH MEETING BY POSTING AT THE BOARD'S OFFICES. IN EMERGENCIES IN WHICH A MAJORITY OF THE BOARD CERTIFIES THAT EXIGENCIES OF TIME REQUIRE, THE REQUIREMENTS OF PUBLIC NOTICE AND 24 HOUR WRITTEN NOTICE TO MEMBERS MAY BE DISPENSED WITH, AND BOARD MEMBERS WILL RECEIVE SUCH NOTICE AS IS REASONABLE UNDER THE CIRCUMSTANCES. (Section 5 of the Act.)
- c) The Board will keep a complete and accurate record of all meetings including the votes of individual members on all adjudications and proposed regulations.
- d) No oral argument will be heard at any Board meeting, except by leave of the Board.

Section 101.181 Agenda For Board Meetings

Unless the Board determines that undue delay or material prejudice will result, no document received by the Clerk after 4:30 p.m. two days before a scheduled Board meeting will be placed on the agenda for that Board meeting. Any such filing

will appear on the agenda for the next regularly scheduled Board meeting.

SUBPART F: EX PARTE CONTACTS

Section 101.200 Ex Parte Contacts

- a) Contested Case Proceedings. No Board member, hearing officer, or employee of the Board shall communicate ex parte with any person not employed by the Board with respect to the substance of any contested case proceeding pending before the Board. Ex parte contacts with respect to individual pollution sources which may become the subject of such a proceeding are permissible to the extent that information so received is relevant to and received within a rulemaking proceeding, but caution shall be exercised by Board members and employees to avoid prejudging the merits of any potential case.
- b) Regulatory Proceedings. Board members and employees should not permit ex parte contacts designed to influence his or her action in any regulatory proceeding after docketing and authorization of hearings. Whenever practicable, communications shall be in writing and addressed to the Board rather than to individual members.
- c) Nothing in this Section shall preclude Board members, hearing officers, or employees from receiving informal complaints about individual pollution sources, or forbid such administrative contacts as would be appropriate for judges and other judicial officers.
- d) In the event that an ex parte contact does occur, Board members and employees shall make that contact a matter of public record, in order that the information on which the Board bases its decision can be subject to scrutiny and to rebuttal. An ex parte contact may be made a matter of public record in several ways, including, but not limited to, inclusion of a memo in the public file or announcement on the record at a public hearing.

SUBPART G: HEARINGS

Section 101.220 Authority Of Hearing Officer

The hearing officer shall have 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 shall 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 prior 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 pursuant to Section 101.261;
- i) Initiate, schedule and conduct a pre-hearing conference;
- j) Issue subpoenas pursuant to Section 101.260;
- k) Exclude late-filed briefs and comments from inclusion in the record for decision;
- l) Rule upon motions as specified in Section 101.247;
- m) Rule upon objections and evidentiary questions; and
- n) Establish a schedule for discovery, including a date by which discovery must be completed.

Section 101.221 Hearing Decorum

- a) Hearings should be conducted with fitting dignity and decorum. Any person may record the proceedings by tape, film, or other means. The hearing officer may prescribe rules to govern such recordings. If the hearing officer determines that recording is disruptive or detrimental to proper development of the record, he or she may limit or prohibit recording. If a witness refuses to testify on the grounds that he or she may not be compelled to testify if any portion of the witness' testimony is to be broadcast or televised or if motion pictures are to be taken of the witness while the witness is testifying, the hearing officer will

prohibit such recording during the testimony of the witness. The hearing officer shall make witnesses aware of this provision before the hearing begins.

- b) Participants in proceedings before the Board shall at all times conduct themselves with the same degree of dignity and respect that they would before a court.
- c) Board hearings are not "meetings" within the provisions of the Open Meetings Act. (Ill. Rev. Stat. 1987, ch. 102, par. 41 et seq.)

SUBPART H: MOTION PRACTICE

Section 101.240 Applicability

This Subpart applies to all Board proceedings generally. However, to the extent that 35 Ill. Adm. Code 102 through 120 conflict with or supplement this Subpart, that more specific Part governs.

Section 101.241 Filing Of Motions And Responses

- a) All motions shall be in writing, unless made orally on the record during a hearing, and shall state whether directed to the Board or to the hearing officer. If the motion is directed to the Board, ten copies shall be filed with the Clerk. If the motion is directed to the hearing officer, three copies shall be filed with the Clerk and one copy served upon the hearing officer. All other participants shall be served pursuant to Section 101.142.
- b) Within 7 days after service of a motion, a participant or party may file a response to the motion. If no response is filed, such participant or party shall be deemed to have waived objection to the granting of the motion, but such waiver of objection does not bind the Board or the hearing officer in the decision of the motion. Unless undue delay or material prejudice would result, neither the Board nor the hearing officer will grant any motion before expiration of the 7-day response period.
- c) The moving person shall not have the right to reply, except as permitted by the Board or the hearing officer to prevent material prejudice.

Section 101.242 Contents Of Motions And Responses

- a) All motions shall clearly state the reasons for and grounds upon which the motion is made and shall contain a concise statement of the relief sought. Facts asserted which are not of record in the proceeding

shall be supported by affidavit. A brief may be included.

- b) All responses shall clearly state the position of the responding person and the reasons for that position. Facts asserted which are not of record in the proceeding shall be supported by affidavit. A brief may be included.

Section 101.243 Motions Attacking Jurisdiction Or Sufficiency Of The Pleadings

- a) All motions to strike or dismiss challenging the sufficiency of any pleading filed with the Board shall be filed within 21 days after the service of the challenged document, unless the Board determines that material prejudice would result. In the case of a regulatory proceeding pursuant to 35 Ill. Adm. Code 102, however, motions challenging the sufficiency of a regulatory proposal shall be filed within 30 days of the Board order formally accepting that proposal for hearing.
- b) All motions challenging the jurisdiction of the Board shall be filed prior to the filing of any other document by the moving participant or party, unless the Board determines that material prejudice will result. Such participant or party will be allowed to appear specially for the purpose of making such motion.
- c) A person may participate in a proceeding without waiving any jurisdictional objection if such objection is timely raised pursuant to subsection (b).

Section 101.244 Motions For Summary Judgment

A motion for summary judgment prior to hearing may be made by any party to an enforcement proceeding pursuant to Title VIII of the Act or a permit appeal pursuant to Title X of the Act. Specific rules for such motions for summary judgment are found in 35 Ill. Adm. Code 103 (enforcement proceedings) and 35 Ill. Adm. Code 105 (permit appeals).

Section 101.245 Motions Preliminary To Hearing

- a) All motions preliminary to hearing shall be presented to the Board or the hearing officer at least 21 days prior to the date of hearing, unless allowed by the Board or the hearing officer to prevent material prejudice. The Board or the hearing officer may direct that the scheduled hearing proceed during the pendency of the motion. The Board may defer ruling upon any motion, except a motion pursuant to Section 101.243, until its decision on the merits of the case.

- b) No motion to continue a hearing in a proceeding with a deadline for Board action, as specified in the Act, will be granted unless the motion to continue is accompanied by a waiver of that decision deadline. The waiver shall conform with the requirements of Section 101.105.

Section 101.246 Motions For Reconsideration

- a) Any motion for reconsideration or modification of a final Board order shall be filed within 35 days of the adoption of the order.
- b) Any response to a motion for reconsideration or modification shall be filed within 14 days from the filing of the motion.
- c) A timely-filed motion for reconsideration or modification stays the effect of the final order until final disposition of the motion. The time for appeal of the Board order runs anew after the Board rules upon the motion unless otherwise provided.
- d) In ruling upon a motion under this Section, the Board will consider factors including, but not limited to, error in the decision and facts in the record which are overlooked.

Section 101.247 Disposition Of Motion

- a) The hearing officer may rule upon all motions except any motion to dismiss, motion to decide a proceeding on the merits, motion to strike any claim or defense for insufficiency or want of proof, motion claiming lack of jurisdiction, motion for consolidation, motion for Summary judgment, or motion for reconsideration. The hearing officer will refer all such motions to the Board. If the hearing officer refuses to act upon any motion, he or she will refer such motion to the Board within 5 days of the filing of any response.
- b) No interlocutory appeal of a motion may be taken to the Board from a ruling of the hearing officer, except by allowance of the Board after written motion. Notwithstanding, when in the judgment of the hearing officer immediate appeal of any order is necessary to prevent harm to the public interest or to avoid unusual delay or expense, the hearing officer may refer the ruling promptly to the Board and notify the parties and participants. A continuing objection to a hearing Officer ruling must be restated at the close of hearing or in post-hearing submissions.

- c) Unless otherwise ordered by the Board to prevent material prejudice, neither the filing of a motion, the certification of a question to the Board, nor any appeal to the Board of a hearing officer order shall stay the proceeding or extend the time for the performance of any act. All hearing officer orders shall remain in effect during the pendency of any appeal to the Board.

SUBPART I: DISCOVERY

Section 101.260 Subpoenas

- a) Upon request by any party to a contested case, the Clerk shall issue subpoenas for the attendance of witnesses at a hearing or deposition. Subpoena forms are available at the Board's Chicago office. The person requesting the subpoena is responsible for completing the subpoena and serving it upon the witness.
- b) Upon written motion by any participant in a regulatory proceeding pursuant to 35 Ill. Adm. Code 102, the hearing officer or Board may issue subpoenas for the attendance of witnesses at a hearing or deposition. The movant is responsible for serving the subpoena upon the witness if the motion is granted.
- c) Service of the subpoena must be completed 7 days before the date of the required appearance. A copy of the subpoena shall be filed with the Clerk after service upon the witness and served upon the hearing officer.
- d) Subpoenas may include a command to produce books, papers, documents, or other tangible things designated therein and relevant to the matter under consideration.
- e) The hearing officer or the Board, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance, may quash or modify the subpoena if it is unreasonable, oppressive, or irrelevant. The hearing officer or the Board will rule upon motions to quash or modify material requested in the subpoena pursuant to subsection (d) in accordance with the standards articulated in Section 101.261.
- f) If the witness is a non-resident of the state, the hearing officer or Board may provide for payment of the witness' reasonable expenses by the person requesting the subpoena.
- g) Each witness subpoenaed by a party or participant under this Section is entitled to receive witness fees from

that party or participant as provided in Section 47 of "AN ACT concerning fees and salaries and to classify the several counties of this state with reference thereto." (Ill. Rev. Stat. 1987, ch. 53, par. 65.)

- h) Any witness subpoenaed for a deposition may be required to attend only in the county in which he or she resides or maintains an office address, or in any other other place ordered by the Board.
- i) Failure of any witness to comply with a subpoena shall subject the witness to sanctions under this Part, or to judicial enforcement of the subpoena. The Board may, upon proper motion by the participant or party requesting the subpoena, request the Attorney General to pursue such judicial enforcement of the subpoena on behalf of the Board.

Section 101.261 Production Of Information

The hearing officer may at any time on his or her own motion, or on motion of any participant, or at the direction of the Board, order the production of information which is relevant to the matter under consideration. The hearing officer will deny, limit, or condition the production of information when necessary to prevent undue delay, undue expense, harassment, or oppression or to protect materials from disclosure consistent with the provisions of Sections 7 and 7.1 of the Act and 35 Ill. Adm. Code 101.161 and 120.

SUBPART J: SANCTIONS

Sections 101.280 Sanctions For Refusal To Comply With
Procedural Rules, Board Orders, Or Hearing
Officer Orders

- a) If a party or any person unreasonably refuses to comply with any provision of 35 Ill. Adm. Code 101 through 120 Or fails to comply with any order entered by the Board or the hearing officer, including any subpoena issued by the Board or hearing officer, the Board will order sanctions. In addition to remedies elsewhere specifically provided, the sanctions may include, among others, the following:
 - 1) That further proceedings be stayed until the order or rules are complied with, except where the non-complying party is the petitioner in a petition for variance or permit appeal, such proceeding may be dismissed prior to the date on which decision is due;
 - 2) That the offending person be barred from filing any other pleading relating to any issue to which the

refusal or failure relates;

- 3) That the offending person be barred from maintaining any particular claim, counter claim, third-party complaint, or defense relating to that issue;
 - 4) That a witness be barred from testifying concerning that issue;
 - 5) That, as to claims or defenses asserted in any pleading to which that issue is material, a judgment by default be entered against the offending person or that the proceeding be dismissed with or without prejudice;
 - 6) That any portion of the offending person's pleadings relating to that issue be stricken and, if appropriate, judgment be entered as to that issue;
 - 7) That the offending person pay the amount of reasonable expenses incurred in obtaining an order pursuant to this Section.
- b) In deciding what sanction to impose the Board will consider factors including, but not limited to, the relative severity of the refusal or failure to comply, the past history of the proceeding, and the degree to which the proceeding has been delayed or prejudiced.

Section 101.281 Sanctions For Abuse Of Discovery Procedures

The Board or the hearing officer will order that information obtained through abuse of discovery procedures be suppressed. If a person wilfully obtains or attempts to obtain information by an improper discovery method, wilfully obtains or attempts to obtain information to which that person is not entitled, or otherwise abuses discovery rules, the Board will enter any order provided for in this Subpart.

SUBPART K: RELIEF FROM AND REVIEW OF FINAL ORDERS

Section 101.300 Motions for Reconsideration

Motions for reconsideration or modification of a final Board order shall be filed within 35 days of the order, pursuant to Section 101.246. Responses to such motions are also governed by Section 101.246.

Section 101.301 Relief From Final Orders

- a) Clerical mistakes in orders or other parts of the

record and errors therein arising from oversight or omission may be corrected by the Board at anytime on its own initiative or on the motion of any party and after such notice, if any, as the Board orders. Such mistakes may be so corrected by the Board before any appeal is docketed in the appellate court. Thereafter, while the appeal is pending, such mistakes may be corrected only with leave of the appellate court. Any corrected order will be mailed to all parties and participants in that proceeding.

- b) On written motion, the Board may relieve a party from a final order entered in a contested case, for the following:
 - 1) Newly discovered evidence which existed at the time of hearing and which by due diligence could not have been timely discovered; or
 - 2) Fraud (whether intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; or
 - 3) Void order, such as an order based upon jurisdictional defects.
- c) A motion under this Section does not affect the finality of a Board order or suspend the operation of a Board order. The motion must be filed in the same proceeding in which the order was entered but is not a Continuation of the proceeding. The motion must be supported by affidavit or other appropriate showing as to matters not of record. All parties or participants in the proceeding shall be notified by the movant as provided by Section 101.141(a).
- d) A motion under subsection (b) shall be filed with the Board within one year after entry of the order except that a motion pursuant to subsection (b)(3) shall be filed within a reasonable time after entry of the order.
- e) Any response to a motion under this Section shall be filed within 14 days of the filing of the motion.

Section 101.302 Judicial Review Of Final Board Orders

- a) Judicial review of final Board orders shall be pursuant to Sections 29 and 41 of the Act (Ill. Rev. Stat. 1987, ch. 111 1/2, pars. 1029 and 1041), Rule 335 of the Rules of the Supreme Court of Illinois (Ill. Rev. Stat. 1987, ch. 110A, par. 335) and the Administrative Review Law (Ill. Rev. Stat. 1087, ch. 110, pars. 3-101 et seq.)

- b) For purposes of judicial review, Board action becomes final upon adoption of the Board's final order in a proceeding, or upon subsequent Board action if any motion for reconsideration is filed pursuant to Section 101.246.

Section 101.303 Stay Procedures

The procedure for stay of any Board order during appeal shall be as provided in Rule 335 of the Rules of the Supreme Court of Illinois.

Section 101.304 Interlocutory Appeals

- a) When the Board, in making an interlocutory order not otherwise appealable, finds pursuant to Rule 308 of the Illinois Supreme Court Rules (Ill. Rev. Stat. 1987, ch. 110A, par. 308) that the order involves a question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, the Board may so state in writing, identifying the question of law involved, on its own motion or on motion of any party.
- b) Appeal of such interlocutory order by the Board shall be in accordance with Rule 308 of the Supreme Court of Illinois.

Appendix A Captions

Illustration A General Rulemaking

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the matter of:)	
)	
Revision of the Fluoride)	
Drinking Water Standard:	)	(Rulemaking)
Amendments to 35 Ill. Adm.)	
Code XXX.XXX)	

Illustration B Site-specific Rulemaking

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the matter of:)	
)	
Petition of ABC Company for	)	R
Site-Specific Air Regulation:	)	(Site-Specific
35 Ill. Adm. Code XXX.XXX	)	Rulemaking)

Illustration C Adjusted Standard Petition

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the matter of:)	
)	
Petition of ABC Company (and	)	AS
the Illinois Environmental	)	(Adjusted standard)
Protection Agency) for Adjusted)	
Standard from 35 Ill. Adm. Code)	
XXX.XXX)	

Illustration D Permit Appeal Or Variance

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

ABC Company,)	
)	
Petitioner,)	
)	
v.)	
	)	PCB
Illinois Environmental	)	(Permit Appeal or
Protection Agency,	)	Variance)
)	
Respondent.)	

Illustration E Enforcement Case

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

Illinois Environmental)	
Protection Agency, (or other)	
person's name),)	
)	
Complainant,)	
)	
v.	)	PCB
	)	(Enforcement)
ABC Company,)	
)	
Respondent.)	

Illustration F Administrative Citation

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

Illinois Environmental)	
Protection Agency (or unit of)	
local government),)	
)	
Complainant,)	
)	
v.	)	AC-
	)	(Administrative
ABC Company,	)	Citation)
	)	IEPA Number
Respondent.)	

Appendix B Appearance Form

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

Applicable Caption)	
(see Appendix A))	
)	
	)	docket number
)	
)	
)	

APPEARANCE

I hereby file my appearance in this proceeding, on behalf of ABC Company.

Attorney's Name

Name of Attorney and Firm
Address
Telephone Number

Appendix C Withdrawal Of Appearance Form

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

Applicable Caption)	
(see Appendix A))	
)	
	)	docket number
)	
)	
)	

NOTICE OF WITHDRAWAL OF APPEARANCE

I hereby give notice of withdrawal of my appearance as representative of ABC Company in this proceeding.

Attorney's Name

Name of Attorney and Firm
Address
Telephone Number

Appendix D Notice of Filing

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

Applicable Caption)	
(see Appendix A))	
)	
	)	docket number
)	
)	
)	

NOTICE OF FILING

TO: (List all persons served.)

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board the [specify what document was filed] of [name of persons filing the document], a copy of which is herewith served upon you.

Date	<u>Name of Attorney or Other Representative</u>
Name	
Address	
Telephone Number	

Appendix E Certificates Of Service

Illustration A Service by Non-Attorney

PROOF OF SERVICE

I, the undersigned, on oath state that I have served the attached [describe document served], by [describe method of service], upon the following persons:

(list persons served)

_____ [signature]

Notary Seal

SUBSCRIBED AND SWORN TO BEFORE
ME this ____ day of _____, 19__.

Notary Public

Illustration B Service By Attorney

CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served the attached [describe document served], by [describe method of service), upon the following persons:

(list of persons served)

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

PART 106
HEARINGS PURSUANT TO SPECIFIC RULES

SUBPART G: ADJUSTED STANDARDS

<u>Section</u>	
<u>106.701</u>	<u>Applicability</u>
<u>106.702</u>	<u>Definitions</u>
<u>106.703</u>	<u>Joint or Single Petition</u>
<u>106.704</u>	<u>Request to Agency to Join As Co-Petitioner</u>
<u>106.705</u>	<u>Petition Contents</u>
<u>106.706</u>	<u>Petition Verification</u>
<u>106.707</u>	<u>Federal Procedural Requirements</u>
<u>106.708</u>	<u>Incorporated Material</u>
<u>106.709</u>	<u>Motions</u>
<u>106.710</u>	<u>Service of Filings</u>
<u>106.711</u>	<u>Petition Notice</u>
<u>106.712</u>	<u>Proof of Petition Notice</u>
<u>106.713</u>	<u>Request for Public Hearing</u>
<u>106.714</u>	<u>Agency Response</u>
<u>106.715</u>	<u>Amended Petition and Amended Response</u>
<u>106.801</u>	<u>Hearing Scheduled</u>
<u>106.802</u>	<u>Hearing Notice</u>
<u>106.803</u>	<u>Pre-Hearing Submission of Testimony and Exhibits</u>
<u>106.804</u>	<u>Discovery</u>
<u>106.805</u>	<u>Admissible Evidence</u>
<u>106.806</u>	<u>Order of Hearing</u>
<u>106.807</u>	<u>Post-hearing Comments</u>
<u>106.808</u>	<u>Burden of Proof</u>
<u>106.901</u>	<u>Board Deliberations</u>
<u>106.902</u>	<u>Dismissal of Petition</u>
<u>106.903</u>	<u>Board Decision</u>
<u>106.904</u>	<u>Opinion and Order</u>
<u>106.905</u>	<u>Appeal of Board Decisions</u>
<u>106.906</u>	<u>Publication of Adjusted Standards</u>
<u>106.907</u>	<u>Effect of Filing a Petition</u>

Appendix A Old Rule Numbers Referenced

AUTHORITY: Implementing Sections 5, 14.2(c), 22.4, 27, 28 and 28.1 and authorized by Section 26 of the Environmental Protection Act (Ill. Rev. Stat. 1987, ch. 111¹/₂, pars. 1005, 1014.2(c), 1022.4, 1027, 1028, 1028.1 and 1026).

SOURCE: Filed with Secretary of State January 1, 1978; amended at 4 Ill. Reg. 2, page 186, effective December 27, 1979; codified at 6 Ill. Reg. 8357; amended in R85-22 at 10 Ill. Reg. 992, effective February 2, 1986; amended in R86-46 at 11 Ill. Reg. 13457, effective August 4, 1987; amended in R82-1 at 12 Ill. Reg. 12484, effective July 13, 1988; amended in R88-10 at 12 Ill. Reg.

12817, effective July 21, 1988; amended in R88-5(A) at ___ Ill. Reg. _____, effective _____.

NOTE: Capitalization denotes statutory language.

SUBPART G: ADJUSTED STANDARDS

Section 106.701 Applicability

The procedures set forth in this Subpart apply to any person seeking an adjusted standard pursuant to Section 28.1 of the Illinois Environmental Protection Act, (Ill. Rev. Stat. 1987, ch. 111^{1/2}, par. 1001 et seq.), except as otherwise provided in Subparts A, B, C, D, E, and F. This Subpart shall be read in conjunction with 35 Ill. Adm. Code 101 which contains procedures generally applicable to Board proceedings. In a proceeding held pursuant to this Subpart, the requirements of this Subpart shall apply in the event of conflict between the requirements of 35 Ill. Adm. Code 101 and those of this Subpart.

(Source: Added at Ill. Reg.
effective)

Section 106.702 Definitions

For the purpose of this Subpart, words and terms shall have the meanings as defined in 35 Ill. Adm. Code 101.101, unless otherwise provided.

(Source: Added at Ill. Reg.
effective)

Section 106.703 Joint or Single Petition

A person begins an adjusted standard proceeding by filing a petition for an Adjusted Standard (petition) either jointly with the Illinois Environmental Protection Agency (Agency) or singly. One original and nine copies of the signed petition shall be filed with the Clerk of the Board. A filing fee shall be paid at the time of the filing of the petition in accordance with the requirements of 35 Ill. Adm. Code 101.120 and 101.122. One copy of the petition shall also be served on the Agency and the Department of Energy and Natural Resources (ENR). Such service on the Agency and ENR shall be initiated on or before the date the petition is filed with the Board and shall be conducted in accordance with 35 Ill. Adm. Code 101.141.

(Source: Added at Ill. Reg.
effective)

Section 106.704 Request to Agency to Join As Co-Petitioner

- a) The Agency may act as a co-petitioner in any adjusted standard proceeding.

- b) Any person may request Agency assistance in initiating a petition for adjusted standard. In response to a request to act as co-petitioner, the Agency may require the person to submit to the Agency any background information in the person's possession relevant to the adjusted standard which is sought. The Agency shall notify the person in writing of its determination either to join as a co-petitioner, or to decline to join as a co-petitioner. If the Agency declines to join as a co-petitioner, the Agency shall state the basis for this decision.
- c) Decisions made by the Agency pursuant to this Section are not appealable to the Board.
- d) Subsequent to the filing of the petition and prior to hearing, the Board will grant the Agency co-petitioner status upon joint motion of the Agency and the petitioner who originally filed the petition.

(Source: Added at Ill. Reg. ,
effective)

Section 106.705 Petition Contents

The petition shall be captioned in accordance with 35 Ill. Adm. Code 101. Appendix A. If the Agency is a co-petitioner, the petition shall so state. The petition shall contain headings corresponding to the informational requirements of each subsection of this Section. The following information shall be contained in the petition:

- a) A statement describing the standard from which an adjusted standard is sought. This shall include the Administrative Code citation to the regulation of general applicability imposing the standard as well as the effective date of that regulation.
- b) A statement which indicates whether the regulation of general applicability was promulgated to implement, in whole or in part, the requirements of the Clean Water Act (33 U.S.C. 1251 et seq. (1988)), Safe Drinking Water Act (42 U.S.C. 300f et seq (1988)), Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. 9601 et seq (1988)), Clean Air Act (42 U.S.C. 7401 et seq. (1988)), or the State programs concerning Resource Conservation and Recovery Act (RCRA), Underground Injection Control (UIC), or National Pollutant Discharge Elimination System (NPDES).
- c) The level of justification as well as other information or requirements necessary for an adjusted standard as specified by the regulation of general applicability, or a statement that the regulation of general applicability

does not specify a level of justification or other requirements (Section 28.1 of the Act);

- d) A description of the nature of the petitioner's activity which is the subject of the proposed adjusted standard. The description shall include the location of and area affected by the petitioner's activity. This description shall also include the number of persons employed by the petitioner's facility at issue, age of that facility, relevant pollution control equipment already in use, and the qualitative and quantitative nature of emissions, discharges or releases currently generated by the petitioner's activity;
- e) A description of the efforts which would be necessary if the petitioner were to comply with the regulation of general applicability. All compliance alternatives, with the corresponding costs for each alternative, shall be discussed. The discussion of costs shall include the overall capital costs as well as the annualized capital and operating costs.
- f) A narrative description of the proposed adjusted standard as well as proposed language for a Board order which would impose the standard. Efforts necessary to achieve this proposed standard and the corresponding costs shall also be presented. Such cost information shall include the overall capital cost as well as the annualized capital and operating costs;
- g) The quantitative and qualitative impact of the petitioner's activity on the environment if the petitioner were to comply with the regulation of general applicability as compared to the quantitative and qualitative impact on the environment if the petitioner were to comply only with the proposed adjusted standard. To the extent applicable, cross-media impacts shall be discussed. For the purposes of this Section, cross-media impacts shall mean impacts which concern environmental subject areas other than those addressed by the regulation of general applicability and the proposed adjusted standard. Also, the petitioner shall compare the qualitative and quantitative nature of emissions, discharges or releases which would be expected from compliance with the regulation of general applicability as opposed to that which would be expected from compliance with the proposed adjusted standard. For the purposes of this subsection, the term qualitative means a narrative description of character, and the term quantitative means a numerically based description;
- h) A statement which explains how the petitioner seeks to justify, pursuant to the applicable level of

justification, the proposed adjusted standard;

- i) A statement with supporting reasons that the Board may grant the proposed adjusted standard consistent with federal law. The petitioner shall also inform the Board of all procedural requirements applicable to the Board's decision on the petition which are imposed by federal law and not required by this Subpart. Relevant regulatory and statutory authorities shall be cited;
- j) A statement requesting or waiving a hearing on the petition; and
- k) The petition shall cite to supporting documents or legal authorities whenever such are used as a basis for the petitioner's proof. Relevant portions of such documents and legal authorities other than Board decisions, State regulations, statutes, and reported cases shall be appended to the petition.
- l) If any informational requirement prescribed by subsections (a) through (k) is determined by the petitioner to be either not applicable or unduly burdensome, the petitioner need not fulfill that informational requirement in the petition which is initially filed, provided that an explanation detailing the rationale for such a determination and the determination itself is set forth in the appropriate portion of the petition. If the Board is not convinced that the unfulfilled informational requirement is either not applicable or unduly burdensome, then the Board will require the petitioner to fully comply with the informational requirements set forth by this Section. Notwithstanding this provision, the Board may require the petitioner to provide the Board with additional material which will aid the Board in its resolution of the adjusted standard proceeding.

(Source: Added at Ill. Reg.
effective

Section 106.706 Petition Verification

All material facts asserted within the petition shall be verified by affidavits. Such affidavits shall be filed with the Petition.

(Source: Added at Ill. Reg.
effective

Section 106.707 Federal Procedural Requirements

It shall be the duty of the petitioner to ensure compliance with any procedural requirements identified pursuant to Section

106.705(i) to the extent that such requirements do not require Board action.

(Source: Added at Ill. Reg.
effective)

Section 106.708 Incorporated Material

Incorporation of material from the record of another Board docket shall be accomplished in accordance with 35 Ill. Adm. Code 101.106.

(Source: Added at Ill. Reg.
effective)

Section 106.709 Motions

The filing of motions and responses to motions shall be conducted in accordance with 35 Ill. Adm. Code 101.Subpart H.

(Source: Added at Ill. Reg.
effective)

Section 106.710 Service of Filings

All filings in an adjusted standard proceeding shall be served upon the petitioner, the Agency, and the ENR as well as other persons as required by the Board or Hearing Officer. Proof of such service shall accompany each filing and shall be of the form as prescribed by 35 Ill. Adm. Code 101.143.

(Source: Added at Ill. Reg.
effective)

Section 106.711 Petition Notice

- a) WITHIN FOURTEEN DAYS AFTER THE FILING OF A PETITION, THE PETITIONER SHALL CAUSE, at its own expense, THE PUBLICATION OF A NOTICE BY ADVERTISEMENT IN A NEWSPAPER OF GENERAL CIRCULATION IN THE AREA LIKELY TO BE AFFECTED by the petitioner's activity which is the subject of the adjusted standard proceeding. (Section 28.1 of the Act, Ill. Rev. Stat. 1987, ch.111^{1/2}, par. 1028.1). The title of the notice shall be in the form as follows: "Notice of Petition by [petitioner's name] for an Adjusted Standard before the Illinois Pollution Control Board."
- b) The notice shall contain the name and address of the petitioner and the statement that the petitioner has filed with the Illinois Pollution Control Board a petition for an adjusted standard. The notice shall also provide the date upon which the petition was filed, the Board docket number, the regulatory standard (with appropriate Administrative Code citation) from which an

adjusted standard is sought, the proposed adjusted standard, and a general description of the petitioner's activity which is the subject of the adjusted standard proceeding, and the location of that activity. This information shall be presented so as to be understood in accordance with the context of this Section's requirements. The concluding portion of the notice shall read as follows:

"Any person may cause a public hearing to be held in the above-described adjusted standard proceeding by filing a hearing request with the Illinois Pollution Control Board within 21 days after the date of the publication of this notice. The hearing request should clearly indicate the docket number for the adjusted standard proceeding, as found in this notice, and shall be mailed to the Clerk of the Board, Illinois Pollution Control Board, 100 W. Randolph, Suite 11-500, Chicago, Illinois 60601."

- c) Subsequent to the filing of a petition, the Board will publish notice in the Environmental Register that it has received a petition for an adjusted standard. The notice will include the petitioner's name, filing date, and a brief narrative description of the proposed adjusted standard as well as the standard imposed by the regulation of general applicability (accompanied by the appropriate Administrative Code Citation) from which the adopted standard is sought.

(Source: Added at Ill. Reg.
effective)

Section 106.712 Proof of Petition Notice

Within 30 days after the filing of the petition, the petitioner shall file a certificate of publication, issued by the publisher of the petition notice certifying the publication of that notice. The certificate shall be issued in accordance with Section 1 of "AN ACT to revise the law in relation to notices" (Ill. Rev. Stat. 1987, ch.100, par. 1).

(Source: Added at Ill. Reg.
effective)

Section 106.713 Request for Public Hearing

Any person may request that a public hearing be held in an adjusted standard proceeding. Such requests shall be filed not later than 21 days after the date of the publication of the

petition notice in accordance subsections (a) and (b) of Section 106.711. Requests for hearing should make reference to the Board docket number assigned to the proceeding. A copy of each timely hearing request will be mailed to the petitioner, Agency, and ENR by the Clerk.

(Source: Added at Ill. Reg.
effective)

Section 106.714 Agency Response

- a) The Agency shall file a response not later than 30 days after the filing of a petition, if the Agency is not a co-petitioner to the petition. The response shall recommend either a grant or denial of the proposed adjusted standard, and it shall set forth rationale which supports the Agency's conclusion. In its response, the Agency may present any information which the Agency believes is relevant to the Board's consideration of the proposed adjusted standard. If the Agency recommends a denial of the petition due to informational deficiencies within the petition, the response shall identify the types of information needed to correct the deficiencies.
- b) At a minimum, the Agency shall address and respond to the petition with respect to each issue raised by the requirements of subsections (a) through (j) of Section 106.705.
- c) The recommendation shall cite to supporting documents or legal authorities whenever such are used as a basis for the Agency's conclusion. Relevant portions of such documents and legal authorities other than Board decisions, State regulations, statutes and reported cases shall be appended to the recommendation if not already in the record of the proceeding.

(Source: Added at Ill. Reg.
effective)

Section 106.715 Amended Petition and Amended Response

The petitioner may amend its petition prior to the close of the hearing if a hearing is held or prior to the Board's decision if a hearing is not held. Such an amendment shall be in writing and filed with the Board unless made orally at hearing. If the petitioner amends the petition, the Agency shall respond to the amendment in writing or orally at hearing. In any event such an amended response shall be filed or given not later than 30 days subsequent to the amending of a petition. The Agency may amend its response even if the petitioner has not amended its petition. In such an instance, a response may only be amended Prior to close of the hearing if a hearing is held or prior to

the Board's decision if a hearing is not held. Written amendments to the petition or response need not repeat the entire unchanged portion of the original filing provided that a sufficient portion of the original filing is repeated so that the context of the amendment is made clear.

(Source: Added at Ill. Reg.
effective)

Section 106.801 Hearing Scheduled

- a) The Board will assign a hearing officer to an adjusted standard proceeding when:
 - 1) The Board receives a hearing request, pursuant to Section 106.713, not later than 21 days after the date of the publication of the petition notice in accordance with Section 106.711; or
 - 2) The Board IN ITS DISCRETION DETERMINES THAT A HEARING WOULD BE ADVISABLE. (Section 28.1 of the Act). Such a determination need not be evidenced by a Board opinion or order.
- b) The hearing officer will set a time and place for the hearing. The hearing officer will make an attempt to consult with the petitioner and the Agency prior to the scheduling of a hearing. Hearings are to be held in the County LIKELY TO BE AFFECTED by the petitioner's activity which is the subject of the proposed adjusted standard. (Section 28.1 of the Act).
- c) After the hearing has been scheduled, the hearing officer will notify the Clerk, petitioner, Agency, ENR and any person who has filed a timely hearing request of the time and place of the hearing.

(Source: Added at Ill. Reg.
effective)

Section 106.802 Hearing Notice

After receiving notification from the hearing officer pursuant to Section 106.801(c), the Clerk will cause the publication of a hearing notice BY ADVERTISEMENT IN A NEWSPAPER OF GENERAL CIRCULATION in the county in which the hearing is to be held. SUCH NOTICE SHALL BE PUBLISHED AT LEAST 20 DAYS BEFORE THE DATE OF THE HEARING. (Section 28.1 of the Act).

(Source: Added at Ill. Reg.
effective)

Section 106.803 Pre-hearing Submission of Testimony and Exhibits

- a) The hearing officer may require the pre-hearing submission of testimony and exhibits which are to be presented at hearing if the hearing officer determines that such a procedure will provide for a more efficient hearing. Consistent with the petitioner's burden of proof, the hearing officer may provide differing filing deadlines with respect to submissions of different persons. Pursuant to hearing officer order, rebuttal testimony and exhibits may be submitted prior to hearing. When such pre-hearing submission is required, an original and four (4) copies of each testimony and each exhibit shall be filed with the Board. The Agency, petitioner, ENR and any other person as required by the hearing officer shall each be served with one copy of each testimony and exhibit. Such service shall be initiated on or before the date that copies are filed with the Board. All testimony and exhibits shall be bound and labeled 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.

- b) 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.

- c) If pre-hearing submission of testimony is required, any testimony which is not filed prior to hearing pursuant to subsection (a) will be allowed only as time permits.

(Source: Added at Ill. Reg.
effective)

Section 106.804 Discovery

The issuance of subpoenas and the production of information will be accomplished pursuant to the procedures set forth by 35 Ill. Adm. Code 101. Subpart I.

(Source: Added at Ill. Reg.
effective)

Section 106.805 Admissible Evidence

- a) The hearing officer shall receive evidence which is admissible under the rules of evidence and privilege as applied in the courts of Illinois pertaining to civil actions except as this Section otherwise provides. The hearing officer may admit evidence which is not admissible under such rules if it is relevant and would be RELIED UPON BY REASONABLY PRUDENT PERSONS IN THE CONDUCT OF THEIR AFFAIRS. (Ill. Rev. Stat. 1987, ch. 127, par. 1012).
- b) When the admissibility of evidence depends upon an arguable interpretation of substantive law, the hearing officer shall admit such evidence.
- c) The hearing officer may order the record or any portion thereof of any relevant pending or prior proceeding before the Board or part thereof incorporated into the record of the present proceeding, in accordance with Section 106.708.
- d) Relevant scientific or technical articles, treatises or materials may be introduced into evidence subject to refutation or disputation through any introduction of comparable documentary evidence or expert testimony.
- e) Any person may testify at hearing provided that the person is sworn and subject to cross-examination. Cross-examination of any person who presents testimony may be conducted by any person. The hearing officer may limit such testimony and cross-examination pursuant to 35 Ill. Adm. Code 101.220.
- f) Information received at hearing will only be considered as substantive evidence in the Board's deliberations if it is presented as an exhibit or direct testimony, or if it is elicited from a a person under cross-examination. The Board will not consider, as substantive evidence, information which is presented in the form of a question during cross-examination.

(Source: Added at Ill. Reg.
effective)

Section 106.806 Order of Hearing

The following shall be the order of an adjusted standard hearing subject to modification by the hearing officer:

- a) Presentation, argument, and disposition of motions preliminary to a hearing on the merits of matters raised by the petition and

Agency response;

- b) Presentation of opening statements by petitioner, Agency, and any interested person;
- c) Testimony and exhibits by petitioner;
- d) Testimony and exhibits by Agency;
- e) Testimony and exhibits by interested persons;
- f) Testimony and exhibits by petitioner in rebuttal. This portion of the petitioner's case is limited to the rebutting of evidence presented by the Agency or any interested person during that part of the hearing described by subsections (d) and (e).
- g) Presentation and argument of all motions to be disposed of by the Board;
- h) Presentation of closing statements by the petitioner, Agency, and any interested person; and
- i) A schedule for the submission of post-hearing comments to the Board.

(Source: Added at Ill. Reg.
effective)

Section 106.807 Post-hearing Comments

The petitioner, Agency, ENR and any interested person may file post-hearing comments. The hearing officer may order any person to file such comments. Post-hearing comments shall be filed within fourteen (14) days after the close of the last hearing unless the hearing officer specifies a different date for submission of post-hearing comments. Consistent with the petitioner's burden of proof, the hearing officer may provide for differing filing deadlines with respect to post-hearing comments by different persons. Pursuant to hearing officer order, rebuttal post-hearing comments may be submitted. All post-hearing comments shall present arguments or comments based only on information contained in the record. Such comments may also present legal argument citing legal authorities. The Board will not consider any new information presented by post-hearing comments.

(Source: Added at Ill. Reg.
effective)

Section 106.808 Burden of Proof

The burden of proof in an adjusted standard proceeding is on the petitioner.

(Source: Added at Ill. Reg.
effective)

Section 106.901 Board Deliberations

In making its decision on an adjusted standard petition, the Board shall consider only the record of the adjusted standard proceeding.

(Source: Added at Ill. Reg.
effective)

Section 106.902 Dismissal of Petition

The Board may at any time dismiss a petition for any of the following reasons:

- a) The Board DETERMINES THAT THE PETITION IS FRIVOLOUS, DUPLICATIVE, or deficient with respect to the requirements of Section 106.705, 106.706, 106.710, and 106.712 (Section 28.1 of the Act); or
- b) The Board DETERMINES THAT THE PETITIONER IS NOT PURSUING DISPOSITION OF THE PETITION IN A TIMELY MANNER. (Section 28.1 of the Act).

(Source: Added at Ill. Reg.
effective)

Section 106.903 Board Decision

A PETITIONER MUST JUSTIFY AN ADJUSTED STANDARD CONSISTENT WITH SUBSECTION (A) OF SECTION 27 OF THE ACT. (Section 28.1 of the Act.)

- a) IF THE REGULATION OF GENERAL APPLICABILITY DOES NOT SPECIFY A LEVEL OF JUSTIFICATION FOR AN ADJUSTED STANDARD, THE BOARD MAY ADOPT THE PROPOSED ADJUSTED STANDARD IF THE PETITIONER PROVES (Section 28.1 of the Act) that:
 - 1) FACTORS RELATING TO THAT PETITIONER ARE SUBSTANTIALLY AND SIGNIFICANTLY DIFFERENT FROM THE FACTORS RELIED UPON BY THE BOARD IN ADOPTING THE GENERAL REGULATION APPLICABLE TO THAT PETITIONER (Section 28.1 of the Act);
 - 2) THE EXISTENCE OF THOSE FACTORS JUSTIFIES AN ADJUSTED STANDARD (Section 28.1 of the Act);

- 3) THE REQUESTED STANDARD WILL NOT RESULT IN ENVIRONMENTAL OR HEALTH EFFECTS SUBSTANTIALLY AND SIGNIFICANTLY MORE ADVERSE THAN THE EFFECTS CONSIDERED BY THE BOARD IN ADOPTING THE RULE OF GENERAL APPLICABILITY (Section 28.1 of the Act); AND
 - 4) THE ADJUSTED STANDARD IS CONSISTENT WITH ANY APPLICABLE FEDERAL LAW (Section 28.1 of the Act).
- b) If the regulation of general applicability specifies a level of justification for an adjusted standard, the Board may adopt the proposed adjusted standard, if the petitioner proves the level of justification specified by the regulation of general applicability.
 - c) IF THE REGULATION OF GENERAL APPLICABILITY IMPLEMENTS IN WHOLE OR IN PART THE REQUIREMENTS OF THE CLEAN AIR ACT, THE BOARD WILL ADOPT EITHER (Section 28.1 of the Act):
 - 1) The proposed adjusted standard if the petitioner proves the applicable level of justification; or
 - 2) A STANDARD THE SAME AS THAT IMPOSED BY THE REGULATION OF GENERAL APPLICABILITY, if the petitioner fails to prove the applicable level of justification. (Section 28.1 of the Act).
 - d) In adopting adjusted standards THE BOARD MAY IMPOSE SUCH CONDITIONS AS MAY BE NECESSARY TO ACCOMPLISH THE PURPOSES OF THE ACT (Section 28.1 of the Act).

(Source: Added at Ill. Reg.
effective)

Section 106.904 Opinion and Order

The Board shall issue a written opinion and order which sets forth the Board's decision and supporting rationale. Such opinions and orders SHALL BE MAINTAINED FOR PUBLIC INSPECTION BY THE CLERK OF THE BOARD. (Section 28.1 of the Act.)

(Source: Added at Ill. Reg.
effective)

Section 106.905 Appeal of Board Decisions

ANY FINAL ORDER OR DETERMINATION OF THE BOARD IN AN ADJUSTED STANDARD PROCEEDING MAY BE APPEALED TO THE APPELLATE COURT PURSUANT TO SECTION 41 OF THE ACT. (Section 28.1 of the Act).

(Source: Added at Ill. Reg.
effective)

Section 106.906 Publication of Adjusted Standards

- a) Subsequent to the Board's adoption of an adjusted standard, the Board will publish, in the Environmental Register, the name of the petitioner, date of the Order which adopted the adjusted standard, and a brief narrative description of the adopted adjusted standard.
- b) THE BOARD SHALL CAUSE THE PUBLICATION OF A LISTING OF ALL DETERMINATIONS MADE PURSUANT TO SECTION 28.1 OF THE ACT IN THE ILLINOIS REGISTER AND THE ENVIRONMENTAL REGISTER AT THE END OF EACH FISCAL YEAR. (Section 28.1 of the Act).

(Source: Added at Ill. Reg. effective)

Section 106.907 Effect of Filing a Petition

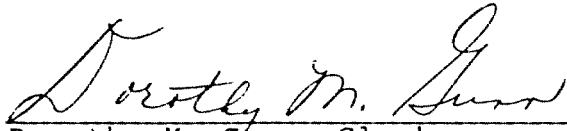
- a) IF ANY PERSON FILES A PETITION FOR AN INDIVIDUAL ADJUSTED STANDARD IN LIEU OF COMPLYING WITH THE APPLICABLE REGULATION WITHIN 20 DAYS AFTER THE EFFECTIVE DATE OF THE REGULATION, THE OPERATION OF THE REGULATION SHALL BE STAYED AS TO SUCH PERSON PENDING THE DISPOSITION OF THE PETITION; PROVIDED, HOWEVER, THAT THE OPERATION OF ANY REGULATION SHALL NOT BE STAYED IF THAT REGULATION WAS ADOPTED BY THE BOARD TO IMPLEMENT, IN WHOLE OR IN PART, THE REQUIREMENTS OF THE FEDERAL CLEAN AIR ACT, SAFE DRINKING WATER ACT OR COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT, OR THE STATE RCRA, UIC OR NPDES PROGRAMS. (Section 28.1 of the Act).
- b) WITHIN 20 DAYS AFTER THE EFFECTIVE DATE OF ANY REGULATION THAT IMPLEMENTS IN WHOLE OR IN PART THE REQUIREMENTS OF THE CLEAN AIR ACT, IF ANY PERSON FILES A PETITION FOR AN INDIVIDUAL ADJUSTED STANDARD IN LIEU OF COMPLYING WITH THE REGULATION, SUCH SOURCE WILL BE EXEMPT FROM THE REGULATION UNTIL THE BOARD MAKES A FINAL DETERMINATION ON THE PETITION. IF THE REGULATION ADOPTED BY THE BOARD FROM WHICH THE INDIVIDUAL ADJUSTED STANDARD IS SOUGHT REPLACES A PREVIOUSLY ADOPTED BOARD REGULATION, THE SOURCE SHALL BE SUBJECT TO THE PREVIOUSLY ADOPTED BOARD REGULATION UNTIL FINAL ACTION IS TAKEN BY THE BOARD ON THE PETITION. (Section 28.1 of the Act).

(Source: Added at Ill. Reg. effective ,)

IT IS SO ORDERED.

J. D. Dumelle was not present.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 8th day of June, 1989, by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board