

ILLINOIS POLLUTION CONTROL BOARD
January 26, 1987

IN THE MATTER OF:)
)
PETITIONS FOR SITE-SPECIFIC) R 82-27
RULE CHANGES) R 82-36 Consol.
) R 83-37

PROPOSED RULE. FIRST NOTICE.

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

This matter comes before the Board on a December 16, 1982, regulatory proposal filed by the Illinois Environmental Protection Agency ("Agency"). While hearings are not required under Section 26 of the Environmental Protection Act ("Act"), hearings were held on June 23, 1983, in Springfield. The Agency filed an amended proposal on January 16, 1986. On April 10, 1986, the Board, by Interim Order, made public a complete draft of the procedural rules in order to solicit public comments. This April 10, 1986, draft of the procedural rules incorporated the Agency's amended proposal. The Agency filed comments regarding the Board's draft procedural rules, including the proposed site-specific regulations, on June 25, 1986, (P.C. #4). The Board, by this Opinion and Order, proposes a modified version of the Agency's proposal for first notice.

The Agency's proposal would create a new subpart to Part 102 of the existing procedural regulations that would specifically govern "site-specific" regulatory proposals and rules not of general applicability. The Agency's rationale for proposing "site-specific" rules is that: 1) This category of proceeding has become a large and growing segment of the Board's rulemaking docket; 2) Informational deficiencies in many petitions continue to be a common problem; 3) Conflicts between state and federal program requirements and law frequently are not adequately addressed; and 4) The "parties" to site-specific proceedings frequently are not sufficiently aware of the applicable requirements and "burden of proof." The Agency amended proposal provides for a segment of rules applicable to all proposals, with subsequent sections for criteria specific to a particular media: Sections 102.220 to 223 for general rules; Sections 102.240 to 259 for Subtitle B: Air Pollution; Sections 102.260 to 279 for Subtitle C: Water Pollution; Sections 102.280 to 299 for Subtitle D: Mine Pollution; Sections 102.300 to 319 for Subtitle E: Agriculture Related Pollution; Sections 102.320 to 339 for Subtitle F: Public Water Supply; Sections 102.340 to 359 for Subtitle G: Waste Disposal; and Sections 102.360 to 379 for Subtitle H: Noise Pollution. The actual numbering and placement of the rules has been modified in the Board's proposal.

At this stage of the proceeding, only general rules and rules specific to Subtitle C: Water Pollution are presently proposed.

Of the comments received after the April 10, 1986, distribution of the Board's draft procedural rules, only the Agency's comments addressed the site-specific portion of the draft. That comment noted a recent appellate court decision involving an appeal from a denial of a site-specific regulatory proposal which affected the Agency's previous statements regarding burden of proof.

The Board has determined that there are compelling reasons to promulgate specific procedural rules that would apply to site-specific rules or rules not of general applicability. As the Agency has noted, this category of rules comprises a large portion of the Board's rulemaking docket. Many of these petitions are factually deficient and the Board is often placed in the difficult position of having to make a decision with inadequate information. Proponents also find themselves in difficult circumstances because they are often unsure what information is necessary for a petition. To this end, the rules proposed today provide specific informational requirements. And, consequently, determining the adequacy of a petition will no longer be as subjective as it currently is. Also, the issue of consistency of the relief with federal law will be addressed early in the proceeding.

The information required in the proposed rules is detailed and specific. It is based, in large part, on the information required in Part 104 for variances. In certain respects, however, the proposed rules are more rigorous. The Board does not believe that these informational requirements are oppressive or burdensome to petitioners because site-specific regulations usually provide long-term relief from general regulations. Consequently, the Board's record for decision must encompass a broader perspective than a record supporting variance relief.

The Board's first notice proposed language generally follows the Agency's proposal but does deviate in some significant respects. Each section will be briefly discussed and changes from the Agency proposal will be addressed.

Subpart G: Proposal of Site-Specific Rules and Rules Not of General Applicability - The title has been reworded to include site-specific regulations and rules not of general applicability, rather than "exceptions." The proposed rules are intended to apply to a growing category of rules not of general applicability that are often difficult to categorize only as "site-specific." Such rules could be process specific, or provide an environmentally equivalent alternative standard, as well as the more common exclusion from regulation. The term "exception" has

been deleted because that term has often been used to apply to Board adjusted standard procedures contemplated by Section 28.1 of the Act or otherwise provided for elsewhere in the Board's rules (thermal demonstrations, SO₂ demonstrations, CSO proceedings).

Section 102.220 Proposal of Regulations Not of General Applicability - This section outlines the procedure for filing regulatory proposals and provides guidance on the general scope of such a proposal. Copies are to be filed with the Board, Agency and Department of Energy and Natural Resources (DENR). The Agency's amended proposal provided for service to the United States Environmental Protection Agency ("USEPA"). As not all proposed rules are subject to USEPA review or approval, this requirement was deleted.

Section 102.221 Contents of Proposal - This section provides, in general terms, the requirements and guidelines for an informationally adequate regulatory proposal. Subsection (a) requires the language and placement of the regulatory proposal be provided. Subsection (b) requires a statement of reasons and incorporates the specific factual information requirements outlined in the Subpart.

Subsection (c) is a revised version of the Agency's proposed Section 102.285 Unique Conditions. The Board significantly modified this language and moved it from the water specific portion of the rules as it applies to all media. The Agency's proposal created a criteria of "uniqueness" for site-specific relief. The Board believes that uniqueness is too vague a concept to be a meaningful guide or criteria. The statutory language of Section 27(a) of the Act provides a listing of relevant considerations. The appropriate scope of analysis, where a site-specific relaxation of a general rule is sought, should be whether the general rule is technically unfeasible or economically unreasonable for that facility. Documentation may include information on other similar pollution sources' ability to comply with the general rule.

Subsection (d) provides a "safety valve" for a proponent where, under special circumstances, the relevancy of certain of the information required for an adequate petition is outweighed by the cost of obtaining that information.

Section 102.222 Dismissal for Inadequacy - This section provides a mechanism for dismissing regulatory proposals where such proposals are factually inadequate. As previously noted, factual insufficiency is a recurring problem with site-specific regulatory proposals. The lack of specific informational requirements or levels of justification have been cited by at least one appellate court as a serious deficiency in the site-specific process. In re: Petition for Site-Specific Groundwater

Quality Standards by Central Illinois Public Service Company, 491 N.E.2d 175 (1986). As a solution to this problem, today's proposal specifically enumerates what information is required for an adequate petition (Sections 102.221, 102.260 - 264) and provides a dismissal mechanism when that information is not provided. Such a dismissal would, of course, be discretionary with the Board and would be exercised in a similar fashion to variance proceedings. First, one or more "more information orders" would be issued, specifically requesting the necessary information. Dismissal would then be appropriate if the information was not provided or explanation of why the information would not be relevant in light of the cost of obtaining such information, pursuant to Section 102.221(d).

By specifically listing what information is necessary for an adequate petition, a proponent has notice of what is required. The dismissal mechanism will provide the Board with a tool for managing its regulatory docket and ensuring that only informationally sufficient petitions go to hearing. A dismissal pursuant to Section 102.223 would not be on the merits of the proposal and would be without prejudice. It should be understood that the information to be submitted with the petition is the minimum necessary to go to hearing (which in most proceedings will not be sufficient for the Board to reach a decision on the merits).

Section 102.223 Conduct of Proceeding - The title proposed by the Agency has been changed from "Hearings" to "Conduct of Proceeding" as this title better describes the broader content of the section. Subsection (a) follows the Act's criteria for ordering a proposal to hearing, as well as the Board's discretionary practice of waiving the signature requirement. Subsection (b) follows the Act's minimum hearing requirements for rules of general and specific applicability.

Subsection (c) cites the Board's statutory and regulatory authority and criteria for adopting regulations. Subsection (c) also prescribes the burden in a rulemaking proceeding. In a rulemaking proceeding, there is no particular legal burden on a participant to go forward with evidence or to persuade. The "burden" is actually on the Board to make a decision that is not arbitrary and capricious and is based solely on the regulatory record and those facts which are appropriate to take administrative notice of. The Board disagrees with the Agency that the regulatory proponent carries a legal burden of proof. The Board believes that the Agency's proposed language would promote proceedings that would be too adversarial in nature. The Board notes, for example, that the proponent does not provide the EcIS. The Board is not convinced that this is the best way to structure this type of proceeding, especially when, under the Agency's proposed language (which the Board does not propose), the Agency would carry no burden or responsibility to

participate. The Board has, in its proposed language, placed the burden of persuasion on the "record." While this language, at first glance, may be somewhat confusing, the Board believes that it does adequately convey the requirement that decisions be based on the regulatory record. First notice comments are specifically requested on this issue.

Subsection (d), (e) and (f) outline certain administrative aspects related to consolidation of proposals, appointment of a hearing officer and conduct of hearings.

Section 102.260 Description of Facility - This section requires a description of the facility, including precise geographical location, facility activity and process, type of waste produced or discharged and current or proposed treatment option. In subsection (a), the Board has added the requirement of a map showing the location of the facility and other nearby relevant physical features.

Section 102.261 Description of Affected Area - Section 102.261 requires a complete assessment of not only the receiving waters but also present and future uses thereof. An identification or delineation of the affected waters in terms of extent, i.e., river mileage, watershed area, lake surface acreage, groundwater aquifer segment, etc., must be considered in the proposal. Water quality uses identified in the general use standards, and any additional beneficial purposes, must be discussed under subsection (b). Subsection (c) concerns the general vicinity of the impacted area. Examples of factors would include the following: urban or rural, industrial or agricultural, population density, recreational uses, etc. Important land uses must be considered in the petition in order that the Board is fully informed prior to the hearing. Subsection (d) relates back to Section 102.221(a) in that it requires that consideration be given to the practical effect of the proposal.

Section 102.262 Assessment of Environmental Impact - This section deals with the environmental impact of the proposal. The format of this particular section is a four-tiered approach to the concept of use attainability. Subsection (a) addresses aquatic uses presently available, the causes of any present impairment, and in the inherent characteristics of the waters that could support other future uses. The next three subsections focus on water quality and present and potential uses under three scenarios: present operational impact, possible impact under full compliance, and possible impact under compliance with proposed rule change. Section 102.262 requires a comprehensive assessment of contingent environmental impacts, not simply a conclusory contrast between the status quo and the predicted impact if the proposal were implemented. The reference to "higher level uses other than currently designated" is a reminder that improvement is more desirable than merely preventing further

degradation as long-term environmental goal. The intent of this section is to identify the incremental change from existing conditions resulting from varying levels of compliance. Section 102.262 is designed to require the proponent to approach the issue of environmental impact from several differing angles.

Section 102.263 Consistency with Federal Law - This section imposes the requirement that the proponent reconcile the proposal with applicable federal regulations. This requirement is borrowed from the variance procedure in Part 104, specifically Section 104.122. This section will require a proponent to focus early in the proceeding on the issue of consistency with federal law.

Section 102.264 Evaluation of Control Options - This section requires a description of available treatment or control options, thus allowing an informed analysis of possible incremental changes in environmental impact.

Sections Not Proposed - Certain rules proposed by the Agency have been deleted in their entirety from the Board's first notice proposal. The Agency proposed a Section 102.243 Costs of Proceeding, which would require that a proponent pay all hearing costs associated with a proposal. The Board is without specific authority to impose this cost on a proponent under current Illinois law. Town of Ottawa and Village of Naplate v. PCB, 129 Ill. App. 3d 121, 472 N.E.2d 150 (3rd Dist. 1984).

The Agency also proposed a section that permitted a proponent to request a "negative declaration" of economic impact from DENR. As such determinations are solely within the discretion of the DENR and governed by a separate statute, the Board declines to propose rules or guidelines governing this process.

As a final matter, the Board has placed the proposed site-specific rules in Subpart G, thus displacing existing Subpart G and Section 102.400. This section is reproposeed as Subpart H. No substantive changes are made or intended.

ORDER

The following rules are proposed for first notice. The Clerk of the Board is directed to file these proposed rules with the Secretary of State.

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

PART 102
REGULATORY AND OTHER NONADJUDICATIVE
HEARINGS AND PROCEEDINGS

SUBPART A: GENERAL PROVISIONS

Section
102.101 Applicability
102.102 Adoption of Regulations

SUBPART B: PROPOSAL OF REGULATIONS

Section
102.120 Proposal of Regulations
102.121 Authorization of Hearing
102.122 Notice of Hearing
102.123 Proposal of RCRA Amendments
102.124 Notice of Site-Specific RCRA Proposals

SUBPART C: DISCOVERY

Section
102.140 Discovery

SUBPART D: HEARINGS

Section
102.160 Authority of Hearing Officer
102.161 Examination of Witnesses
102.162 Prior Submissions
102.163 Written Submissions
102.164 Record

SUBPART E: ECONOMIC IMPACT HEARINGS

Section
102.180 Hearings on the Economic Impact Study of New Proposals
102.181 Hearings on the Economic Impact Study of Existing
Regulations

SUBPART F: BOARD ACTION

Section
102.200 Revision of Proposed Regulations
102.201 Notice of Adopted Regulations
102.202 Adoption of RCRA Amendments

SUBPART G: OTHER PROCEEDINGS
PROPOSAL OF SITE-SPECIFIC RULES AND EXCEPTIONS
NOT OF GENERAL APPLICABILITY

Section	
<u>102.220</u>	<u>Other Proceedings Proposal of Regulations Not of General Applicability</u>
<u>102.221</u>	<u>Contents of Proposal</u>
<u>102.222</u>	<u>Conduct of Hearing</u>
<u>102.223</u>	<u>Dismissal for Inadequacy</u>
<u>102.260</u>	<u>Description of Facility</u>
<u>102.261</u>	<u>Description of Affected Area</u>
<u>102.262</u>	<u>Assessment of Environmental Impact</u>
<u>102.263</u>	<u>Consistency with Federal Law</u>
<u>102.264</u>	<u>Evaluation of Control Options</u>

SUBPART H: OTHER PROCEEDINGS

Section	
<u>102.400</u>	<u>Other Proceedings</u>

APPENDIX Old Rule Numbers Referenced

AUTHORITY: Implementing Sections 5, 22.4(a), 27 and 28 of the Environmental Protection Act (Ill. Rev. Stat. 1985, ch. 111¹/₂, pars. 1005, 1022.4(a), 1027 and 1028) and Section 4 of "AN ACT in relation to natural resources, research, data collection and environmental studies" (Ill. Rev. Stat. 1985, ch. 96¹/₂, par. 7404) and authorized by Section 26 of the Environmental Protection Act (Ill. Rev. Stat. 1985, ch. 111¹/₂, par. 1026).

SOURCE: Originally adopted as Chapter 1: Procedural Rules, Part II: Regulatory and Other Nonadjudicative Hearings and Proceedings, in R70-4, 1 PCB 43, October 8, 1970; codified at 6 Ill. Reg. 8357; amended in R84-10 at 9 Ill. Reg. 1398, effective January 16, 1985; as amended in R82-36 at _____ Ill. Reg. _____, effective _____.

SUBPART G: OTHER PROCEEDINGS
PROPOSAL OF SITE-SPECIFIC RULES AND EXCEPTIONS
NOT OF GENERAL APPLICABILITY

<u>Section 102.220</u>	<u>Other Proceedings Proposal of Regulations Not of General Applicability</u>
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The Board may conduct such other nonadjudicative or informational hearings as may be necessary to accomplish the purposes of the

Act: Such other hearings shall be conducted according to these rules to the extent applicable. Any person or group of persons may submit a written proposal for the adoption, amendment or repeal of a substantive regulation not of general applicability as it applies to a specific site or sites, geographical location, activity or common issue. Ten (10) copies of each proposal shall be filed with the Clerk and one copy each with the Agency, and the Department of Energy and Natural Resources.

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

Section 102.221 Contents of Proposal

- a) The proposal shall identify the regulations which are to be addressed by the proposed amendment and the language to be added, deleted or repealed.
- b) Except as otherwise provided in the Act, the proposal shall include a statement of the reasons and facts supporting the proposal and the purpose and effect of the proposal as provided in this Subpart. The minimum information required by this Subpart shall be addressed in the proposal.
- c) In the event that the proposed rule would displace the applicability of a general rule to the pollution source, the proposal shall include a statement with supporting documentation as to why the general rule is not technically feasible or economically reasonable for the particular pollution source. Such documentation may include relevant information on other similar pollution sources ability to comply with the general rule.
- d) Where special circumstances may render any information requested in this Subpart inapplicable, for reasons of expense of data collection in relation to the relevancy of the data or other similar reasons, the petitioner shall include a justification for such inapplicability.

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

Section 102.222 Dismissal for Inadequacy

Failure of the petitioner to satisfy the information requirements for petitions under this Subpart or failure to respond to Board requests for additional information shall render a petition subject to dismissal for inadequacy.

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

Section 102.223 Conduct of Proceeding

- a) If the Board finds that a proposal is supported by an adequate statement of reasons, is accompanied by a petition signed by at least 200 persons, is not plainly devoid of merit, and does not deal with a specific subject on which a hearing has been held within the preceding 6 months, the Board shall schedule a public hearing for consideration of the proposal. The Board may also in its discretion schedule a public hearing upon any proposal without regard to the above conditions.
- b) No decision shall be made on the merits of a proposal until after a public hearing within the area of the State concerned. In the case of non site-specific regulations, hearings shall be held in at least two areas of the state.
- c) The burden of persuasion shall be upon the record. The Board may adopt the proposal in its discretion in accordance with Section 27 of the Act. Adoption or revision of the proposal shall be in accordance with Subpart F.
- d) The Board may consolidate two or more proposals for the purposes of hearing and decision.
- e) If a hearing is authorized by the Board, the Chairman shall designate an attending Board member. The Board member may serve as Hearing Officer if also otherwise qualified.
- f) Hearings shall be scheduled in accordance with Section 102.122. Hearings shall be conducted in accordance with Subpart D.

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

[Proposals pertaining to Subtitle B: Air Pollution
Sections 102.240 to 102.259 reserved for Air Pollution]

[Proposals pertaining to Subtitle C: Water Pollution]

Section 102.260 Description of Facility

All proposals shall describe the facility for which the change is sought including:

- a) The location, either by street or county road, or by legal description and a map adequate to identify the facility's location and other nearby relevant physical features;
- b) The activity performed at the facility and processes and materials used;
- c) The waste material produced or discharged including quantity, in terms of volume or flow rate, and content, in terms of concentration or mass load, of pertinent physical, thermal, chemical, biological, bacterial, and radioactive properties; and
- d) The type of treatment or control and the components of the treatment system or control equipment currently employed or proposed.

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

Section 102.261 Description of Affected Area

All proposals shall describe:

- a) The extent of the receiving waters affected by the proposal;
- b) The present and anticipated future public and private uses of and access to the affected waters;
- c) The nature of the surrounding land uses, zoning and population characteristics; and
- d) The other facilities that might benefit from or be adversely affected by the proposal within the affected area.

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

Section 102.262 Assessment of Environmental Impact

- a) All proposals shall describe:
 - 1) The aquatic uses currently being achieved in the affected waters;
 - 2) The causes of any impairment in the aquatic uses; and

- 3) The aquatic uses which might be attained based on the physical, chemical and biological characteristics of the affected waters.
- b) All proposals shall describe the condition of and the environmental impact upon the affected waters under current operations with respect to:
 - 1) The attainment of and compliance with presently applicable water quality standards;
 - 2) The ability to support currently designated uses as contained in Subtitle C, 35 Ill. Adm. Code 303; and
 - 3) The ability to support any higher level uses other than currently designated in Subtitle C, 35 Ill. Adm. Code 303.
 - c) All proposals shall describe the condition of and the environmental impact upon the affected waters if the proposal were adopted with respect to:
 - 1) The attainment of and compliance with presently applicable water quality standards;
 - 2) The ability to support currently designated uses as contained in Subtitle C, 35 Ill. Adm. Code 303; and
 - 3) The ability to support any higher level uses other than currently designated in Subtitle C, 35 Ill. Adm. Code 303.

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

Section 102.263 Consistency with Federal Law

- a) All proposals shall indicate whether relief can be granted consistent with the Clean Water Act (33 U.S.C. 1251 et seq.), U.S.E.P.A. water quality guidelines and standards, any other federal regulation or any wastewater treatment management plan certified and approved pursuant to Section 208 of the Clean Water Act.
- b) Any proposal requesting relief from a specific water quality standard contained in Subtitle C, 35 Ill. Adm. Code 302, use designation contained in Subtitle C, 35 Ill. Adm. Code 303 or Section 304.105, or necessitating relief or relaxation of any such rule in order to realize the benefit intended by the proposal shall include a statement of the proposal's consistency with

U.S.E.P.A. water quality standards and use designation criteria as contained in 40 CFR 131. Such statement shall include an identification of the pertinent technical evaluations relative to use attainability, comprehensive pollutant source control strategies, and the social and economic implications consistent with the intent of 40 C.F.R. 131 and the technical criterial promulgated thereunder.

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

Section 102.264 Evaluation of Control Options

All proposals shall describe the treatment or control options including costs and efficiencies, as to:

- a) The present levels of control;
- b) The past efforts to obtain compliance with applicable regulations; and
- c) Any available or proposed control options including the elimination of the source.

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

[Proposals pertaining to Subtitle D: Mine Pollution
Sections 102.300 to 102.319 reserved for Mine Pollution]

[Proposals pertaining to Subtitle E:
Agriculture Related Pollution
Sections 102.320 to 102.339 reserved for
Agriculture Related Pollution]

[Proposals pertaining to Subtitle F: Public Water Supply
Sections 102.340 to 102.359 reserved for Public Water Supply]

[Proposals pertaining to Subtitle G: Waste Disposal
Sections 102.360 to 102.379 reserved for Waste Disposal]

[Proposals pertaining to Subtitle H: Noise Pollution
Sections 102.380 to 102.399 reserved for Noise Pollution]

SUBPART H: OTHER PROCEEDINGS

Section 102.400 Other Proceedings

The Board may conduct such other nonadjudicative or informational hearings as may be necessary to accomplish the purposes of the Act. Such other hearings shall be conducted according to these rules to the extent applicable.

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

IT IS SO ORDERED.

Board Members J. Dumelle and B. Forcade concurred.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 26th day of January, 1987, by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board