

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)	
PROCEDURAL RULE AMENDMENTS TO)	R14-21
IMPLEMENT ELECTRONIC FILING AND)	(Rulemaking – Procedural)
ALLOW FOR PUBLIC REMARKS AT)	
BOARD MEETINGS: PROPOSED)	
AMENDMENTS TO 35 ILL. ADM. CODE)	
101-130)	

NOTICE OF FILING

John Therriault, Clerk
 Illinois Pollution Control Board
 James R. Thompson Center
 100 W. Randolph, Suite 11-500
 Chicago, IL 60601
(Electronically)

Chief Legal Counsel
 Illinois Dept. of Natural Resources
 One Natural Resources Way
 Springfield, IL 62702-1271
(Via First-Class Mail)

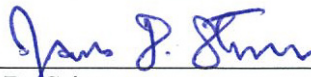
Matthew J. Dunn, Chief
 Environmental Enforcement / Asbestos
 Litigation Division
 Illinois Attorney General's Office
 500 S. Second Street
 Springfield, IL 62706
(Via First-Class Mail)

Mark Powell, Hearing Officer
 Illinois Pollution Control Board
 James R. Thompson Center
 100 W. Randolph, Suite 11-500
 Chicago, IL 60601
(Via First-Class Mail)

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board the Illinois Environmental Protection Agency's ENTRY OF APPEARANCE and FIRST-NOTICE COMMENTS in the above-captioned rulemaking, a copy of which is herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
 PROTECTION AGENCY

By: 
 James D. Stivers
 Assistant Counsel
 Division of Legal Counsel

DATED: August 19, 2014
 James D. Stivers #6293885
 Illinois Environmental Protection Agency
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 1021 N. Grand Ave. East
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 Springfield, IL 62794-9276
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FIRST-NOTICE COMMENTS

NOW COMES the Illinois Environmental Protection Agency (“Illinois EPA”), by its attorneys, and respectfully submits its first-notice comments in the above-captioned rulemaking, in which the Board proposes changes to its procedural rules to, among other things, implement electronic filing and increase public participation in its rulemakings. The Illinois EPA very much appreciates and supports the Board’s efforts to codify an electronic service and filing process and to encourage public participation in its rulemakings. While the Illinois EPA is concerned about the potential fiscal and administrative impacts of several provisions of the Board’s proposed rule, we thank the Board for the opportunity to offer comments on these aspects of its proposal.

Copyright-Protected, Incorporation by Reference (IBR) Materials

Among the changes proposed by the Board in the above-captioned rulemaking is an amendment to Section 101.302(h)(4) of the Board’s procedural rules that would require the Illinois EPA and other rulemaking proponents to “file four paper originals of any document that is protected by copyright law [17 USC 101 et seq.] and proposed pursuant to Section 5-75 of the IAPA [5 ILCS 100/5-75] to be incorporated by reference.” Procedural Rule Amendments to Implement Electronic Filing and Allow for Public Remarks at Board Meetings: Proposed Amendments to 35 Ill. Adm. Code 101-130, R14-21, slip op. at 47, (June 5, 2014). While the Illinois EPA recognizes that the Board’s procedural rules currently require rulemaking

proponents to file an original and nine copies of IBR materials and that the Board's proposed filing requirement for IBR materials could, therefore, be styled as a lessening of the current filing requirement, the Board has routinely granted the Illinois EPA's request to waive the nine-copy filing requirement for copyright-protected IBR materials in the past and has allowed the Illinois EPA to simply file a single copy of copyright-protected IBR materials. Consequently, if the Board stops granting those waivers, as it mentions having considered, the Illinois EPA will effectively have to file three more copies of copyright-protected IBR materials than it has been the past practice of the Board to require. For the reasons described below, the Illinois EPA respectfully requests that the Board (i) continue granting waivers of its nine-copy filing requirement for copyright-protected IBR material until it completes the above-captioned rulemaking and (ii) amend its proposed rule so that the Illinois EPA is required to file only one copy of copyright-protected IBR materials and is not required to file a copy if the document has already been incorporated by reference in another Board rulemaking or is otherwise already in the Board's possession.

1. REQUIRE FILING OF ONLY ONE COPY OF COPYRIGHT-PROTECTED IBR MATERIALS.

While the Agency appreciates the Board's concerns about providing sufficient public access to IBR materials, providing three extra copies of copyright-protected IBR documents that may cost thousands of dollars for a single rulemaking creates a significant financial burden for the Illinois EPA, and ultimately the State, but provides very little in the way of increased access to those materials for members of the public and interested parties. For example, the Illinois EPA is currently in the process of developing a public water supply rulemaking proposal that will require it to incorporate by reference over 100 copyright-protected documents. If the Illinois EPA were required to supply the Board with four copies of each of those documents at the

standard rates quoted on the internet and by sales representatives, the cost to the Illinois EPA would be more than \$31,000. This figure may not even fully capture the cost to the Illinois EPA. After all, if it becomes cost-prohibitive for the Illinois EPA to incorporate national consensus standards and other widely-used, copyright-protected materials, then the Illinois EPA may need to consider developing its own standards in lieu of those standards, which will significantly increase the time needed to complete, and the administrative expense of completing, Board rulemaking proposals. In addition, the copyright-protected materials that the Illinois EPA typically incorporates by reference are widely available and widely used national consensus standards that codify industry practices and procedures. The Illinois EPA uses these standards precisely because they are so widely known, widely available, and widely used and have been vetted by state and federal regulators and members of the regulated community. Furthermore, the Illinois EPA also maintains, and makes available to members of the public, copies of copyright-protected IBR materials in its library in Springfield. Because IBR materials are already widely available to the regulated community and members of the public through numerous channels, little is gained by requiring an additional three copies of these costly materials to be submitted to the Board.

In support of its proposed change to Section 101.302(h)(4), the Board asserts that it needs these additional copies of IBR materials to comply with its legal obligations. Specifically, it asserts that it may need: (i) one copy for members of the public that request those materials, (ii) one copy for the Joint Committee on Administrative Rules (JCAR), (iii) one copy for the appellate court record, and (iv) one copy for compliance with the Illinois Administrative Procedure Act (IAPA). *Id.* at 5. However, it is not necessary for the Illinois EPA to supply the Board with multiple copies of copyright-protected IBR documents in order for the Board to

satisfy these requirements. For example, the duty to make IBR materials available to members of the public (i.e., the duty listed in romanette (i) above) flows from the duty under Section 5-75 of the IAPA to make “a copy” of IBR documents available to the public (i.e., duty listed under romanette (iv) above). Consequently, the obligations listed in romanettes (i) and (iv) are redundant and could be satisfied with a single copy of the copyright-protected IBR document. Likewise, there is no need for the Illinois EPA to supply the Board with an extra copy that the Board could use to satisfy its Freedom of Information Act duties, because a copyright-protected IBR document, such as a consensus standard, should be exempt from disclosure under subdivision (1)(g) of Section 7 of the Freedom of Information Act as “. . . commercial . . . information obtained from a person or business [i.e., the publisher of the standard] where . . . [the] information . . . [is] furnished under a claim that . . . [it is] proprietary [i.e., under a copyright claim] . . . , and . . . [the] disclosure . . . would cause competitive harm to the person or business [i.e., because disclosure of the material through FOIA requests would diminish the market demand for the standard]” 5 ILCS 140/7(1)(g). Likewise, it appears that a separate copy is not needed to comply with the obligation listed in romanette (ii) (i.e., the duty to supply JCAR with a copy of copyright-protected materials that are to be incorporated by reference). Based on conversations with other State agencies, it appears that JCAR does not generally require agencies to submit originals of copyright-protected IBR materials. Instead, JCAR simply asks agencies to provide a copy of the title and copyright pages of copyright-protected IBR documents because it realizes how expensive those materials can be for agencies to provide.

In addition, JCAR and appellate courts likely compel the production of full original copies of copyright-protected IBR materials only rarely. Due to the extreme infrequency with which JCAR or the appellate courts make those requests, it would be much more cost-effective

for the State of Illinois to pay for copies of IBR materials for the appellate courts and JCAR only upon demand by those entities, rather than requiring the primary rulemaking proponent—that is, the Illinois EPA—to pay for copies of materials that may never be requested or required. For these reasons, the Illinois EPA again respectfully requests that the Board amend its proposed rule so that the Illinois EPA is required to submit only one original of each copyright-protected document that is to be incorporated by reference in a Board rule or, if permitted by the publisher, one copy of that document.

2. REQUIRE FILING OF COPYRIGHT-PROTECTED IBR MATERIALS ONLY IF THOSE MATERIALS HAVE NOT BEEN INCORPORATED BY REFERENCE AND ARE NOT OTHERWISE IN THE POSSESSION OF THE BOARD.

The Illinois EPA also requests that the Board require the filing of copyright-protected IBR materials only if those materials have not already been incorporated by reference in another Board rule or are not otherwise already in the Board's possession. In many cases, when the Illinois EPA obtains a copy of material for its own library, it also obtains a copy for the Board's library. If a copy of a copyright-protected document that is to be incorporated by reference is already in the Board's possession, the Illinois EPA should not be required to supply the Board with additional copies of that document.

Other Filing Requirements

In its proposed amendments to Section 101.302(d), the Board has authorized filing by e-mail. However, in so doing, the Board has also added a restriction that “prior approval by the Clerk or hearing officer applies *only to the specified filing.*” (emphasis added) The Illinois EPA has greatly benefitted from facsimile and e-mail filings because technical problems sometimes prevent use of the COOL system. Therefore, the Illinois EPA respectfully requests that the Board not limit the authorization to use e-mail filing and, instead, authorize the Clerk or a hearing

officer to allow e-mail filing in a docket as he or she sees fit. This change would save the Illinois EPA, the Board, and other participants time spent on the phone or in email traffic processing individual approvals.

E-Mail Service

The Illinois EPA is strongly in favor of the option to serve documents on participants to proceedings via email. As the Board stated in its opinion and order, this practice has been allowed by hearing officers on a case-by-case basis for some time. However, in its proposal, the Board has added a condition that service via e-mail may only be used if the recipient has consented to e-mail service in the proceeding and has not revoked the consent. *See* Section 101.1060(a). Past practice indicates that participants have been serving all parties en masse via e-mail without permission. Thus, the Illinois EPA inquires of the Board how this requirement will be enforced. As an alternative, the Illinois EPA suggests that the Board consider allowing e-mail service in all filings without limitation. This would reduce costs to all participants and would keep participants from having to routinely check the docket to see who may have revoked e-mail service permission.

Time-Stamped Affidavits and Certificates of E-Mail Service

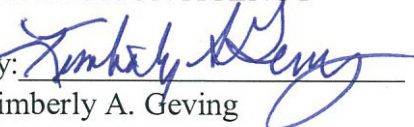
To facilitate the service of documents by electronic mail, the Board has, among other things, proposed adding Section 101.1060 and Appendix H to its procedural rules. In those provisions, the Board expressly requires an affidavit or certificate of e-mail service to be filed with any document to be served electronically, and the Board requires the affidavit or certificate to include the "time of the e-mail transmission." *See, e.g.*, 35 Ill. Adm. Code 101.1060(e)(4). One issue with this requirement is that a person who certifies the time of an e-mail message's transmission cannot know, at the time he or she makes that certification, whether his or her e-

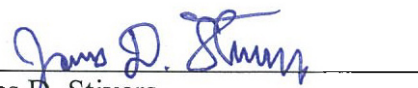
mail message will actually be transmitted at the certified time. In short, this requirement encourages persons to certify under oath the time of an event's occurrence (i.e., the time of a message's transmission) when the actual time of the event's occurrence cannot be known until after the certification is made. This requirement also goes beyond what state and federal courts typically require for their electronic filing programs. Again, while the Illinois EPA appreciates the efforts of the board to create a streamlined set of requirements for the electronic service of documents in Board proceedings, the Illinois EPA respectfully requests that the Board amend its proposed rules so that the filer is required to certify only the date (and not the time) when an e-mail transmission is made. If there is a need to certify the time of a transmission for the reasons the Board describes in its proposal, then the Illinois EPA would respectfully request that the Board simply have the affidavit or certification certify that the document was filed before a specific time.

Again, the Illinois EPA thanks the Board for the opportunity to submit these comments on its proposed rule.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: 
Kimberly A. Geving
Assistant Counsel
Division of Legal Counsel

By: 
James D. Stivers
Assistant Counsel
Division of Legal Counsel

DATED: August 19, 2014
Illinois Environmental Protection Agency
Division of Legal Counsel
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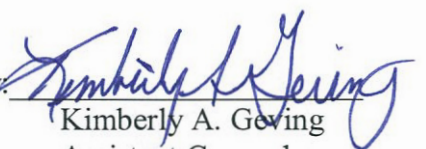
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APPEARANCE

The undersigned, as one of its attorneys, hereby enters her entry of Appearance on behalf
of the Illinois Environmental Protection Agency.

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: 
Kimberly A. Goving
Assistant Counsel
Division of Legal Counsel

DATED:

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Springfield, Il 62794-9276
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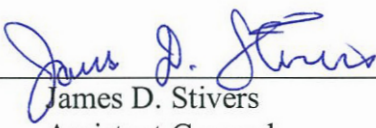
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)

ENTRY OF APPEARANCE

The undersigned hereby enters his appearance as an attorney on behalf of the Illinois Environmental Protection Agency.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By:  _____
James D. Stivers
Assistant Counsel
Division of Legal Counsel

DATED: August 19, 2014
James D. Stivers #6293885
Illinois Environmental Protection Agency
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CERTIFICATE OF SERVICE

I, the undersigned, an attorney, state that I have served the attached Illinois Environmental Protection Agency's ENTRY OF APPEARANCE and FIRST-NOTICE COMMENTS upon the following persons:

John Therriault, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 W. Randolph, Suite 11-500
Chicago, IL 60601
(Electronically)


Chief Legal Counsel
Illinois Dept. of Natural Resources
One Natural Resources Way
Springfield, IL 62702-1271
(Via First-Class Mail)

Matthew J. Dunn, Chief
Environmental Enforcement / Asbestos
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Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: 
James D. Stivers
Assistant Counsel
Division of Legal Counsel

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