BEFORE THE POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	
REVISION OF THE BOARD'S	)	PCB R00-20
PROCEDURAL RULES: 35 ILL.ADM.	)	(Rulemaking - Procedural)
CODE 101-130	)	

COMMENTS OF STEPHEN F. HEDINGER

Stephen F. Hedinger, of the Law Offices of Stephen F. Hedinger, hereby submits his comments to the First Notice Rulemaking in the above-identified docket.

General Comments:

1. This docket includes the Board's proposed modifications to its procedural rules. No provision is made, however, for pending or ongoing proceedings, and of which procedural rules will apply at what times during the pendency of the proceedings. Some of the Board's proposed modifications are significant and potentially of substantive impact. For instance, if it is adopted in the final rules this Board will modify its long-standing practice of not requiring that answers be filed to complaints, and instead the new rule will require that answers be filed, in the absence of which the complaint allegations will be deemed admitted. Will this rule apply to all existing actions currently pending before the Board? Similarly, provisions for discovery and other pre-hearing procedures have been modified, and in some instances greatly modified -- will these apply to pending actions? When the Illinois Supreme Court modified its rules regarding discovery several years ago, it specifically indicated that the new rules would apply only to actions filed on and after a specified date. It is recommended that this Board take a similar approach to these rules, and for purposes of consistency and clarity, the new rules should apply only to actions or proceedings commenced following the effective date of these rules.

2. This Board might consider adding a provision for the referral of cases, both adjudicatory and rulemaking, for alternative dispute resolution. Increasingly courts and administrative agencies throughout the United States, and including the federal courts and the United States Department of Justice, are utilizing dispute resolution mechanisms (and particularly variations of mediation) to simplify or eliminate the issues to be tried in complex civil cases, such as those typically before this Board. Many states, in fact, utilize third party neutrals to mediate both adjudicatory proceedings and differing positions of difficult regulatory proceedings. At this juncture in this Board's procedures, an appropriate provision might include authorization for the Board or its hearing officer to stay proceedings while the parties jointly, and through mutual agreement, present the dispute, or any portion of it, to a third party neutral to attempt to resolve such disputes without the necessity of this Board's decisionmaking. Since no statutory authority allows for this Board to force parties to participate in such alternative dispute resolution mechanisms, voluntary participation would have to be expected. This Board, though, could encourage such participation by specifically recommending the procedure to litigating parties, and providing a list of available neutrals to mediate or arbitrate the parties' dispute, or any part of it. The trend toward such alternative dispute resolution will likely grow substantially over the upcoming years, and this Board should consider adding now a provision that would easily allow for utilization of those resources in the near future.

§101.112/§101.114

Did the Board intend to include intern basis employees in §101.114, but exclude them in §101.112?

§101.200-Definitions

The proposed regulations have included a definition of "recycled paper" that includes a new standard to commence after July 1, 2000. Since that date will likely come and go before this rule becomes final, the definition should be reconsidered. Also, based upon personal experience, the Board should consider whether 45% deinked stock or postconsumer material paper is actually available in all markets in this State.

In addition, the definition of "registered agent" should correspond with the definition included in the Business Corporation Act (805 ILCS 5/5.05).

The term "negotiation waiver" within the definition of "notice to reinstate" should itself be defined.

The term "service list", in conformance with past Board practice, includes all persons included on a list who are interested in receiving service of documents. A significant hardship and expense, easily avoided, can and usually is experienced when multiple individuals within one organization are identified on the service list, requiring (apparently) service upon all individuals, even though they are all at the same address and/or within the same organization. This definition, and this Board's rules, should require that any persons or attorneys from an individual organization (such as a law firm, or a state agency, or the Illinois Attorney General's Office, or a private organization) be included on the service for the organization itself, leaving it to the organization to provide copies of particular documents for each individual within the organization interested in the docket.

§101.300(b) and (c):

Section 101.300(b)(2) sets forth the "mailbox rule" for these procedural rules. Unlike the Board's current rule, though, documents will automatically be deemed filed on the date they are postmarked even if they are received prior to their due date. Under current Board practice, only

those documents actually and physically received by the Board after their due date are deemed filed on the postmarked date. Is this change intended? Further, §101.300(c) includes, in its second sentence, a parenthetical concerning facsimile filings; this parenthetical belongs in §101.300(b), which concerns filing dates (§101.300(c) concerns service dates).

§101.302(b):

This provision states that service of documents on a hearing officer does not constitute filing with the Board. Does this rule intend to include documents "filed" during the course of a hearing? It is not uncommon for a party to submit to the hearing officer, on the record and in the course of a hearing, a written motion on some point at issue in the case at that stage. It would be incongruous for the parties to discuss the motion on the record with the hearing officer (who very well might be authorized to rule on the motion) on a particular day, but officially not having the motion filed until it is actually received in the Board's Chicago office at some later date. An exception should be made to this provision for documents submitted during the course of, and relevant to issues pertaining to, a hearing.

§101.302(h):

This provision requires a "signed" original and nine duplicate copies of documents to be served on the Board. By whom must the original be signed?

§101.302(j):

As other commentors have done, I must object to the significant reduction in available page lengths for documents to be served with the Board. Frequently issues are complex and numerous, and the page limits set forth may greatly reduce the opportunity to fully address relevant issues.

§101.306(b):

This provision should also include a requirement that the Board consider whether the parties who were involved with the incorporated materials or the same are similarly situated as the parties involved in the instant Board proceeding.

§101.403:

This provision concerns joinder of parties, and allows the Board, on motion, to add a person as a party if a complete determination of the controversy requires the person's attendance, or if it may be necessary for the Board to impose a condition on the person. It would seem that as a prerequisite to this Board's jurisdiction over anyone, the person must be chargeable with a violation of the Environmental Protection Act. There appears to be no authority for this Board to simply bring parties before it who have not voluntarily sought to be parties, and who are not charged with having committed any violation of the Environmental Protection Act.

§101.403(b)(2):

The third line down includes a typographical omission of the word "Practice" between the words "Corporation" and "of".

§101.500(b):

This requires a response to a motion within seven days of the motion's service, in the absence of which objection will be deemed to have been waived. This is an unduly harsh deadline, as it is under the Board's current practice. At least fourteen days should be allowed for any serious response to any serious motion, and in fact twenty-one or twenty-eight days would provide a much better quality of responses for this Board's consideration.

§101.502(a):

This provision, concerning hearing officer rulings on non-dispositive issues, indicates that objections are waived if not filed with the Board within seven days after the Board's receipt of the transcript. Are such fillings to be considered an appeal to the Board of hearing officer orders, as set forth in §101.518, or are these to be considered something different? Does this apply to objections to hearing officer rulings made prior to the hearing, but which were previously appealed? Further, §102.502(c) mentions a "certification of a question to the Board;" is this "certification" different than an appeal to the Board of a hearing officer order, or of an objection to be filed within seven days after the Board receipt of hearing transcript? Finally, do the parties know when the Board receives the transcript? Is it in all cases delivered to the parties at the same time as it is to the Board? Seven days is an unreasonably short amount of time within which to identify all hearing officer rulings for which objections will be addressed to the Board, and to commit those objections to a written form to be filed. Fourteen days, or even 21 days, would appear to be more appropriate. Further, does the Hearing Officer's authority extend to motions which partially dispose of proceedings? The wording utilized suggests that the only restriction upon the Hearing Officer is for cases wholly dispositive of a proceeding.

§101.510(e):

Is there any authority for the Board to assess actual costs of newspaper notice of a rescheduled hearing, in the event it chooses to grant a motion to cancel a hearing? If the point is that the Board will condition such cancellation upon payment of such costs, that point should probably be made explicit in these regulations. [The same is true of §101.510(f), which allows for costs for the court reporter.]

§101.512(a):

The phrase "and/or" in the second line of this paragraph should be replaced simply with the word "and."

§101.614:

What is the purpose of this paragraph? It appears to be redundant with §101.616, and seems to add nothing to that provision. At worst, this Section appears to allow a hearing officer to "take charge" of discovery by ordering all discovery on his or her own initiative, and completely limiting or conditioning any further or additional discovery the parties may wish to engage in. This should be replaced with more conventional provisions regarding production of documents, inspection of facilities or recovery of samples, and physical examination of parties (of course, where appropriate).

§101.616:

No specific provision is included that incorporates privileges recognized by the Circuit Courts of Illinois, or providing that such privileges will be recognized in Board proceedings. This appears to be an oversight of a requirement of the Administrative Procedure Act.

§101.616(b):

This Section refers to a hearing officer authority to "deny requests for discovery." The concept of a "request for discovery" is never clearly set forth in these rules, though, and in the absence of some clear indication of its meaning, should probably be deleted. Alternatively, more conventional mechanisms such as authority to rule upon motions to compel or motions for protective orders should probably be inserted.

§101.616(g):

What is the Board's authority for issuance of sanctions, and in particular monetary sanctions? Also, this provision appears to be lacking a procedure by which a party who is alleged to have violated the discovery rules can challenge the allegation and be heard on the claim.

§101.618:

I agree with the observation of the Office of the Attorney General that the time for returning admissions of fact and genuineness of documents should correspond with the time provided for in the Supreme Court Rules. The same holds true for other discovery devices utilized by both the Circuit Courts and by this Board, such as interrogatories; discrepancies in the time allowed can cause confusion with no real corresponding benefit.

§101.618(f):

A comma should be added after the very last word ("matters") on the sixth line of this subparagraph.

§101.620(b):

Is there any benefit to being required to file discovery materials, including interrogatories, with the Board? The requirement for filing such discovery materials has in the past created some difficulties with respect to trade secret information, which could be avoided if this Board, like the Circuit Courts, allowed discovery to simply flow between the parties until and unless a dispute arises, at which time specific motions addressing specific discovery issues could be raised and entertained. Presumably this would also cut down on the amount of paperwork generated at the Board, and the amount of paper storage the Board must maintain.

Part 101, Subpart F:

No specific provisions exist for requests to produce documents, requests to view premises or to obtain samples, or for deposition practice and the uses of depositions. In general parties have, in the past, simply followed the Code of Civil Procedure and Supreme Court Rules with respect to these specific discovery devices, but as long as the Board is revamping the procedural rules, it would make sense to specifically address these common discovery tools. In addition, the Board may want to consider adopting an "initial disclosure" rule, like that utilized by the Federal Courts. It would be particularly useful and likely to expedite proceedings to require complainants to provide to respondents basic information and evidence supporting the complaint, such as relevant documents and witness lists, as an early automatic process rather than making respondents pursue this information in discovery.

§101.622:

. No provision is made for a notice to a party to appear and produce documents at any deposition or adjudicatory hearing. Compare Supreme Court Rules 204(a)(3) (compelling appearance of a party at a deposition), and 237(b) (compelling appearance of a party at trial). Absent such notices, these rules would appear to contemplate that parties would have to subpoena one another to compel attendance and production.

§101.622(b):

The last sentence of this paragraph provides that the failure to serve a subpoena upon the Board's clerk and hearing officer will render the subpoena null and void. When must the subpoena be served upon the clerk and hearing officer to avoid this result? How can the subpoenaed party know that the subpoena is null and void?

§101.622(g):

Is it the Board's intention that the limit upon the length of depositions (three hours) only applies to subpoenaed witnesses (presumably third parties, if party witnesses need to respond to a notice to appear and produce)? Although some rationale could be discerned from such a distinction, in general the factors warranting limiting non-party depositions would appear to also apply to party depositions. Moreover, §100.622(g) would allow the parties to agree to a longer deposition, apparently without the non-party's input, which appears to counteract any concerns with the status of third parties. The three hour limit should apply to parties and non-parties alike, or should be eliminated altogether.

§101.626(c):

This provision allows for the admissibility of scientific/technical "articles, treatises or materials" apparently without any foundation, subject to "refutation" or "disputation" by the opponent at hearing. This is a highly objectionable provision. Although articles may appear in prestigious and well-known journals, and treatises may be published by well thought of publishing companies, merely the printing or publishing of such articles does not in and of itself establish the legitimacy of the scientific position being taken, nor of the relevance of the subject of the written work to the circumstances of the case being decided, without corroborating expert testimony. This provision could prove disastrous, placing the burden on an opponent to hire experts to reveal "junk science" being peddled in journals or treatises.

§101.628(a):

A comma is included in the first line of this paragraph, which should be deleted.

§101.800:

This provision allows for sanctions, including monetary sanctions, and again I question the Board's authority to obtain such sanctions. Further, I question the Board's authority, as an administrative agency, in utilizing its "discretion" in determining what sanctions to impose, particularly in the absence of any express statutory provisions establishing relevant factors.

§103.204(e):

This provision requires that an answer be filed within sixty days following the filing of a complaint; §103.204(f) requires that a "Miranda" - type warning be included in all complaints, warning of the consequences of failing to file an answer. The requirement to file an answer is, of course, contrary to this Board's practice since its inception, and this abrupt reversal may cause significant problems to the bar and, more particularly, to citizens. Further, this provision appears to ignore the permissive language of §31(c)(1) of the Environmental Protection Act, 415 ILCS 5/31(c)(1), which allows a party to file an answer but does not mandate it. Finally, the requirement that a complainant warn his opponents of the consequences of failure to file an answer would appear to run the risk of requiring legal counsel to warn his client's adversary about a matter of tactical advantage to the client. This type of potential interference with attorney-client relations and fiduciary obligations would also seem inappropriate, particularly in the absence of specific statutory authority.

§103.206(a)(1):

The last sentence of this subparagraph states that "The movant also must serve the complainant with a copy of the motion to add a respondent." Are not all pleadings to be served on all parties? If so, why is a special mention being made that the movant must serve upon the complainant a copy of this motion?

§103.206(d):

I agree with other commentors that counter-respondents and cross-respondents are already parties to a proceeding.

§103.208(b) and (c):

This provision allows the Agency to inform the Board that it has decided "not to investigate" in response to a Section 30 inquiry by this Board. That Section requires an investigation by the Agency upon such notice from the Board, and so there would seem to be no authority for the Agency to decide "not to investigate." In fact, this would seem to be a violation of the Environmental Protection Act, and this Board should not participate in or encourage disregard for statutory mandates.

§103.210(a):

The number "101" needs a period immediately after it.

§103.212(c):

Is this provision intended to be a limitation upon motion practice in cases filed by the Attorney General or a State's Attorney on behalf of the People of the State of Illinois?

§103.302:

This provision requires a stipulation to all material facts prior to the Board acceptance of settlement of an enforcement action. It is not uncommon, though, for the parties to an enforcement action to reach agreement on a settlement that provides for no admission of violation, or for admission of only certain allegations or the stipulation to certain facts but not to others. If it is the Board's intent to not accept any settlement absent capitulation by the respondent on all salient facts, it is not unlikely that the number of settled cases will drop dramatically, adding to the administrative burdens of both this Board and the Attorney General's

Office, as well as to the costs to the regulated community. If this provision is intended, however, only to address stipulation that certain facts have been alleged, (but not necessarily agreed to or admitted), then that point should be clarified.

§105.600:

This provision concerns appeals from "other" final decisions of state agencies, but only addresses appeals "authorized by law" which are not otherwise addressed in these regulations. No provision appears to be made for those Agency decisions which result from a Board regulation, but for which no specific statutory authority exists. An example is found at 35 Ill. Adm. Code §620.250, providing for establishment of a Groundwater Management Zone to mitigate impairment caused by a release from a site. The concept of a Groundwater Management Zone is not expressed anywhere within the Groundwater Protection Act, yet §620.250(a) and (b) allow for the Agency to approve of a Groundwater Management Zone meeting the criteria of the regulation. Since the statute is silent about creation of Groundwater Management Zones, it is also silent about review of Agency denials of Groundwater Management Zones, and so no appeal would appear to be "authorized by law." This section should be revised to also provide for the procedures applicable to appeal from Agency decisions allowed by this Board's regulations.

§107.500(b):

This provision appears to allow this Board to dismiss a siting denial review case upon the mere allegation by a local governmental unit that a petitioner has failed to pay costs. Provision for notice and hearing would seem to be appropriate.

§107.506(b):

This paragraph purports to identify the bases for Board reversal of siting decisions. A "catchall" subparagraph would be appropriate, providing that reversal is allowable if any other ground provided by statute or case law is determined to exist. This will ensure that any future amendments to the statute, or developments in case law, are not precluded from consideration by this Board's own procedural rules.

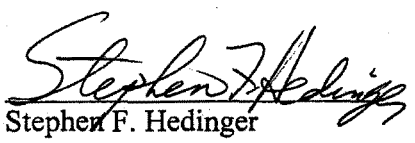
§108.200(b):

This Board should define "unit of local government." It has come to the attention of the undersigned that certain questionable organizations are attempting to secure the mantle of "unit of local government" for purposes of the administrative citation powers, and some clarity at this level might ensure that all such attempts are appropriate and justifiable.

§108.506:

No provision has been made for evidentiary hearings on alleged hearing costs, even though factual disputes on the costs will likely occur at some point. Clearly if the AC Recipient has grounds to challenge claimed costs, those grounds might include issues requiring consideration of evidence. Absent an evidentiary hearing process, such an AC Recipient might have substantial grounds for challenge to the Board's procedures on appeal.

Respectfully submitted,



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