

ILLINOIS POLLUTION CONTROL BOARD  
August 7, 1980

IN THE MATTER OF: )  
 )  
PROPOSED AMENDMENTS TO ) R80-15  
PART V OF PROCEDURAL )  
RULES (PERMIT APPEALS) )

Proposed Rule. First Notice

ORDER OF THE BOARD (by D. Satchell):

The Board on its own initiative makes the following proposal for rulemaking: repeal of Part V of Chapter 1: Procedural Rules and adoption of the language which appears below. This matter is authorized for hearing. The Clerk is directed to publish a Notice of Proposed Rulemaking (First Notice) in the Illinois Register. The Board withholds judgment on the merits of this proposal until the testimony and comments have been received.

PART V: PERMITS

500 PERMITS

- (a) Proceedings under this Part V shall be in accordance with the rules set forth in Part III, except to the extent contradicted in this Part V.
- (b) Rules 501 through 519 apply only to NPDES permits.
- (c) Rules 520 through 539 apply to all other permits.
- (d) Rules 540 through 559 apply to all permits, including NPDES permits.

Subpart A: NPDES Permits

501 REVIEW OF NPDES PERMITS

- (a) If a denial letter cites a Board regulation or if a permit condition is mandated by Board regulations it may be necessary to obtain a variance from the regulation prior to modification of the permit. If the variance is granted, modification will be ordered automatically under Rule 914 of Chapter 3 without the necessity of a permit appeal.
- (b) Any person, whether or not a party to or participant to any earlier proceeding before the Agency, may file a complaint for modification, suspension or revocation of an NPDES permit in accordance with Rule 912 of Chapter 3. Such a complaint shall be commenced in accordance with Procedural Rule 304. Part III of these rules shall govern the proceeding.

- (c) Any person may challenge Agency rules, criteria and technical policy statements as applied in the context of a permit.

#### 502 NOTIFICATION OF DENIAL

If the Agency denies an NPDES permit, it shall advise the permit applicant in writing in accordance with the requirements of Section 39(a) of the Act. If the Agency issues an NPDES permit, compliance with the notification requirements of Section 39(a) of the Act is unnecessary.

#### 503 APPLICATION FOR SPECIFIC PERMIT MODIFICATION

- (a) A permit applicant may file a supplemental permit application with the Agency requesting modification of an issued permit to include, or exclude, specific conditions. The application may be in letter form and may incorporate the previous application by reference.
- (b) Any applicant may file one such supplemental permit application. Subsequent applications will be allowed unless the Agency indicates that no more applications will be considered. This rule shall not limit the applicant's right to request modification because of changed circumstances or to request modification after the time for appeal has lapsed.
- (c) If the supplemental permit application is filed within the time for appeal of the Agency's decision on a previous application, then the Agency actions will be consolidated for purposes of Board review. The time for appeal shall commence with the Agency's final action on the last application.
- (d) If the Agency refuses to grant a specifically requested permit modification it shall state its reasons in substantial accordance with the requirements of Section 39(a) of the Act.

#### 504 PETITION FOR REVIEW

- (a) In the case of the denial of an NPDES permit or the issuance by the Agency of an NPDES permit with one or more conditions or limitations to which the applicant objects, the applicant may contest the decision of the Agency by filing with the Clerk of the Board a petition for review of the Agency's action within thirty-five days from the date the Agency's final decision was

mailed to the applicant. The method of filing and service shall be in accordance with Rules 304 and 305 of these Procedural Rules.

- (b) Any person other than the applicant who has been a party to or participant at an Agency hearing with respect to the issuance or denial of an NPDES permit by the Agency, and any person who requested such a hearing in accordance with applicable rules, may contest the final decision of the Agency by filing with the Clerk a petition for review of the Agency's action in accordance with Rule 504(a). The Agency, the permit applicant and all other persons who were parties at an Agency hearing with respect to the permit shall be parties. All parties other than the petitioner shall be made respondents.
- (c) The petition shall contain a statement of the decision or part thereof to be reviewed. The Board upon motion of any respondent shall, or on its own motion may, require of the petitioner a specification of the errors upon which the petitioner relies in his petition.

#### 505 AGENCY RECORD

Within twenty-one days of the filing of the petition for review the Agency shall file the following:

- (a) NPDES permit application;
- (b) NPDES permit denial or issuance letter;
- (c) All correspondence with the applicant concerning the application; and
- (d) The hearing file for any hearing held before the Agency.
- (e) Denial of facts stated in the application (Rule 547);
- (f) List of extrinsic facts (Rule 548);
- (g) In the case of an issued permit, a statement of basis of conditions (Rule 549).

#### 506 ISSUED PERMIT: PETITION FOR EVIDENTIARY HEARING

- (a) The permittee may petition the Board for an evidentiary hearing before a hearing officer. A petition for hearing

may be filed at any time prior to twenty-one days after filing of the Agency record following a petition for review of an issued permit.

- (b) The petition for hearing shall consist of a numbered list of factual assertions upon which the permit applicant proposes to present evidence at a hearing and a request that the Board order hearings. The petition for hearing shall contain no argument.
- (c) Within fourteen days of filing of the petition for hearing the Agency shall file an answer to the petition for hearing. The answer shall admit or deny or move to strike as irrelevant each factual assertion of the petition. The answer shall contain no argument. If the Agency moves to strike an assertion it will be deemed to have denied it unless the Agency states that the assertion is to be admitted in the alternative. At the same time it files its answer the Agency may file a memorandum in support of its answer. The permit applicant shall have fourteen days thereafter in which to file a reply memorandum or amended petition for hearing.

507 ISSUED PERMIT: SPECIFICATION OF FACTUAL ISSUES

- (a) If on motion of any party or its own motion the Board finds that there is a material issue of fact which is in dispute it will appoint a hearing officer. If the Board finds that there is no material issue of fact in dispute, it will enter an order for expedited disposition of the appeal. This order may provide for a briefing schedule.
- (b) The Board may find that there is an issue of fact on the basis of the Agency record.
- (c) If, after motions to strike are decided, the Agency has denied any material assertion of the petition for hearing then there is a material issue of fact which is in dispute. If, after motions to strike are decided, the Agency has admitted all of the material assertions of the petition for hearing, then the Board will find that there is no material issue of fact in dispute.
- (d) The permit applicant may include exhibits with a motion for expedited decision and request that the Board enter an Order based on the record and the exhibits without a hearing even if there is a factual issue. The Agency may

oppose the motion or support it and may introduce its own exhibits with its response and may request a hearing.

- (e) The Board may enter an Order specifying the factual issues. If it does not the hearing officer shall enter an order specifying the factual issues. The hearing officer shall have authority to modify the specification of factual issues.
- (f) The parties may at any time submit to the Board and hearing officer a partial or complete stipulation of factual issues.
- (g) Any person may present evidence relevant to the issues contained in a specification of factual issues. Persons other than the Agency and permit applicant may present other evidence, subject to the hearing officer's discretion.

508 PERMIT DENIAL: SPECIFICATION OF FACTUAL ISSUES

- (a) In case of an NPDES permit denial the Board will appoint a hearing officer unless the applicant requests a decision without a hearing.
- (b) On motion of any party or on his own motion the hearing officer shall enter an order specifying factual issues. If the hearing officer does not, discovery will not be allowed.
- (c) The parties may agree to use the procedures of Rules 506 and 507 to develop a specification of factual issues; otherwise the hearing officer shall determine the procedures.

509 REQUEST FOR HEARING BY THIRD PARTY

If any person other than the permit applicant or Agency requests a hearing, the Board will order hearings, regardless of any other rule in this part.

510 DECISION PERIOD FOR NPDES PERMIT DENIALS

- (a) The decision period provided by Section 40 of the Act does not apply to review of NPDES permits.
- (b) The Board will render a decision within ninety days of the filing of the petition for review of an NPDES permit denial. This decision period may be waived pursuant to

Rule 544. In the event the Board fails to render a decision before the decision date the permit will, on motion of the permittee, be remanded to the Agency for reconsideration based on federal requirements only. The permittee must request remand within fourteen days after the decision date lapses.

- (c) There is no decision period for review of NPDES permit issuance.

#### 511 CONTINUATION OF NPDES PERMIT DURING RENEWAL

- (a) In the event a permittee makes timely and sufficient application for a renewed NPDES permit, the previous permit shall continue in effect beyond its stated expiration date until the final Agency action on the application.
- (b) In the event a permittee files a timely petition for review of a reissued NPDES permit, the previous permit shall continue in effect beyond its stated expiration date until 140 days after the petition for review is filed unless the Board orders otherwise.

#### 512 STAY OF NPDES PERMIT CONDITIONS

- (a) If a permittee files a timely petition for review of an issued NPDES permit, the conditions of that permit will be automatically stayed without action of the Board for 140 days from the date of filing of the petition for review, or until a final Board action on the petition, whichever comes first; provided, however, that the Board may terminate or modify any such automatic stay.
- (b) Stay of permit conditions has no effect on any authorization to discharge contained in a new permit. (For reissued permits see Rule 511).
- (c) Upon expiration of the automatic stay the issued permit becomes effective. However, the permittee may by motion obtain a further stay of permit conditions.
- (d) A motion to stay shall indicate whether the permit is new or renewed and include the following information concerning each condition for which a stay is sought:
  - (1) Whether the condition is new or was contained in a previous permit;

- (2) Statutes and regulations applicable to the condition and whether these have changed since any previous permit;
  - (3) What conditions should be in effect during the term of the stay;
  - (4) Injury anticipated if the stay is denied;
  - (5) What effect the stay would have on the environment; and
  - (6) What effect the stay would have on the public.
- (e) The Board will stay permit conditions and may make such other orders as justice requires. The Board will deny a stay of permit conditions if the permittee has contributed to unreasonable delay in the proceedings.
  - (f) Unless otherwise provided, a stay of permit conditions shall expire 140 days after entry of a Board order granting such stay. However, the permit applicant may file a motion for a further stay.
  - (g) Unless otherwise provided, a stay of permit conditions and any modification of the permit ordered by the Board shall be deemed to date back to the time the NPDES permit was issued.

Subpart B: Review of Permits Other than NPDES Permits

520 REVIEW OF PERMITS OTHER THAN NPDES PERMITS

Rules 520 through 539 cover review of permits other than NPDES permits. These rules are inapplicable to NPDES permits unless otherwise provided.

521 NOTIFICATION OF DENIAL

If the Agency denies the permit, it shall advise the permit applicant in writing in accordance with the requirements of Section 39(a) of the Act. If the Agency issues a permit, the notification of denial requirement is inapplicable.

522 PETITION FOR REVIEW

(a) In the case of a denial of a permit or issuance by the Agency of a permit with one or more conditions or limitations to which an applicant objects, an applicant who seeks to appeal the Agency decision shall file a petition for review with the Board within thirty-five days of the date of mailing of the Agency's final decision. The petition shall include:

- (1) Citation of the particular standards under which a permit is sought;
- (2) A complete and precise description of the facility, equipment, vehicle, vessel or aircraft for which a permit is sought, including its location;
- (3) A complete description of contaminant emissions and of proposed methods for their control; and
- (4) Such other materials as may be necessary to demonstrate that the activity for which the permit is sought will not cause a violation of the Act or the regulations.

(b) The method of filing and service shall be in accordance with Rules 304 and 305 of these Procedural Rules.

(c) The Agency shall appear as respondent and shall, within twenty-one days file with the Board the entire Agency record of the permit application, including:

- (1) The application;
- (2) Correspondence with the applicant;



- (3) The permit or denial letter;
  - (4) Denial of facts in the application (Rule 546);
  - (5) List of extrinsic facts (Rule 547); and
  - (6) In the case of an issued permit, a statement of basis of conditions (Rule 548).
- (d) The Clerk shall give notice of the petition and hearing in accordance with Part III.
- (e) The proceedings shall be in accordance with the Rules set forth in Part III of these Rules.

#### 523 EVIDENTIARY HEARING

The petition for review shall include a request for an evidentiary hearing or a request that the Board decide the appeal without a hearing. Other parties may request an evidentiary hearing. Requests for hearings shall indicate the factual issues upon which the requesting party proposes to offer evidence. On motion of any party or on his own motion the hearing officer shall enter an order specifying factual issues.

#### 524 PERMIT REVIEW FOR HAZARDOUS WASTE DISPOSAL SITES

- (a) Any person other than the applicant or the Agency may petition the Board for a hearing to contest the issuance of a permit for a hazardous waste disposal site. The petition shall be filed within thirty-five days of the issuance of the permit. The Agency and the applicant shall be named co-respondents. The Board shall conduct a public hearing, in accordance with Rule 523 and Part III hereof, unless it determines that:
- (1) The petition is duplicitous or frivolous;
  - (2) The petitioner is so located as not to be affected by the permitted facility; or
  - (3) The permit was granted for the disposal or utilization of sludge from publicly owned sewage works.
- (b) The hearing shall be based exclusively on the record before the Agency at the time the permit was issued. The burden of proving that the Agency's action was in violation of the Act or applicable Board regulations shall be upon the petitioner.

525 DECISION PERIOD

- (a) Pursuant to Section 40 of the Act, the permit applicant may deem the permit issued if there is no final action by the Board within ninety days of the filing of the petition for review of a permit denial. The decision period may be waived pursuant to Rule 544.
- (b) There is no decision period for review of permits which have been issued.

526 STAY OF PERMIT CONDITIONS

The permittee may by motion request a stay of conditions of an issued permit. The motion should follow Rule 512 in so far as it is applicable to the circumstances.

Subpart C: Review of All Permits

540 REVIEW OF ALL PERMITS, INCLUDING NPDES PERMITS

Rules 540 through 559 apply to all permits, including NPDES permits.

541 BURDEN OF PROOF

The Agency's findings of fact shall be true unless they are shown to be false. If the Agency's findings of fact are disputed by any party or if issues of fact are raised in the review proceeding, the Board will make its own determination of fact based on the record.

542 COST OF REVIEW

In any proceeding brought pursuant to this Part V, including an NPDES permit review, the petitioner shall pay all costs of review except that he shall not be required to reimburse the Agency for expenses incurred in the preparation of the record or otherwise, and shall furnish the Board within fourteen days following the completion of said hearing, at petitioner's cost, seven copies of a complete stenographic transcript of the proceedings of the hearing. Upon petition and good cause shown, the Board may assume all or any part of the costs of said review or transcript or may allocate the costs among the parties as it deems equitable.

543 FILING DATE

The filing date of the petition for review shall be the date it is received by the Clerk of the Board; provided, however, that upon motion of any party the petition for review shall be deemed filed on the date sufficient service has been received by the Agency and all other parties. This will extend any applicable decision period.

544 DECISION PERIOD

- (a) In many permit appeals the Board is required to take its final action within ninety days. However, the permit applicant may at any time waive this decision period. The waiver may be open or may specify a later date for decision. If the permit applicant files an open waiver he may subsequently file a request for decision, in which case the decision will be due at the latest of the following dates:

- (1) A date specified in the request for decision;
  - (2) A date determined by adding to the date of filing of the request for decision the number of days which remained for decision at the time of filing of the open waiver; or,
  - (3) The next regularly scheduled Board meeting.
- (b) The waiver may contain a request to defer decision or a request for expedited decision.
  - (c) It is the responsibility of the petitioner to develop an adequate record for review. This includes the duty to ensure that a hearing is scheduled and a transcript provided for the Board in advance of the decision date. Unless an adequate waiver is received prior to the last regularly scheduled Board meeting prior to the decision date, the Board will decide the appeal on the basis of the record before it.
  - (d) If late filings are too extensive for proper consideration, the Board will strike from the record everything filed less than fourteen days before the decision is due, including the transcript of any hearing if filed late. The permit applicant may, however, extend the decision date under subsection (a) above.
  - (e) Waivers are unilateral actions of the permit applicant which do not require Board action. A waiver may be conditioned on the outcome of a motion pending before the Board at the time the waiver is filed. Other conditional waivers may be construed by the Board as unconditional waivers.
  - (f) If the hearing officer refuses to schedule a prompt hearing, the petitioner shall immediately notify the Clerk of the Board and shall file a motion requesting that the Board order the hearing officer to act.

#### 545 FINAL ORDER

The Order of the Board entered pursuant to a petition for review may affirm or reverse the decision of the Agency, in whole or in part, may remand the proceeding to the Agency for the taking of further evidence, or may direct the issuance of the permit in such form as it deems just, based upon the law and the evidence.

546 DENIAL OF FACTS IN APPLICATION

A denial of facts in the application shall consist of a list indicating what parts of the application the Agency believes are not true. The Agency is deemed to have admitted the truth of any facts in the application which it does not deny.

547 LIST OF EXTRINSIC FACTS

A list of extrinsic facts shall consist of a list of all evidence which the Agency has considered which is not a part of the permit application. The Agency may not introduce at a hearing evidence which it has omitted from this list. After twenty-one days the Agency may add to the list only with leave of the Board. The list shall include the identities of experts, including Agency employees, on whom the Agency relied in considering the application.

548 STATEMENT OF BASIS OF CONDITIONS

A statement of the basis of permit conditions shall indicate for each condition objected to in the petition for review the following:

- (a) Whether the Agency believes the permit condition is mandatory or discretionary;
- (b) If mandatory, the identity of mandating statutes or regulations;
- (c) If discretionary a statement of why inclusion of the condition is required or necessary to accomplish the purposes and provisions of the Act, and
- (d) Such other information as may be necessary to show that inclusion of the permit condition is justifiable.
- (e) The Agency may advance alternative bases for conditions, provided they are not mutually exclusive.

549 SCOPE OF DISCOVERY IN PERMIT APPEALS

- (a) Discovery will be allowed only if reasonably calculated to lead to evidence relevant to factual issues in dispute. The rules contained in Parts III and VII apply to discovery, provided, however, that in the event of conflict, the rules contained in this Part shall control.

(b) Discovery begins with the entry of an order specifying factual issues.

(c) The following are discoverable:

- (1) Factual information which is not contained in the permit application which the Agency considered in reaching its decision.
- (2) Studies, treatises, books, communications with persons outside the Agency and expert opinions which the Agency considered in reaching its decision.
- (3) The identity of experts, including Agency employees, who rendered opinions to the Agency during its consideration of the application.
- (4) Calculations made by experts in passing on the application.
- (5) Policy statements, letters and interpretations by the United States Environmental Protection Agency, in the possession of the Agency, which it considered in reaching its decision.

(d) Discovery is not allowed in the following general areas:

- (1) Discovery seeking to show that the Agency acted inconsistently on applications for unrelated facilities.
- (2) Discovery seeking to show the Agency's motives.
- (3) Discovery seeking to determine the Agency's legal theories.

(e) The following are not discoverable:

- (1) Agency permit files other than those concerning the facility in question.
- (2) Legal opinions given by Agency employees.
- (3) Documents which are not part of the Agency record unless they contain factual assertions which the Agency considered in reaching its decision.

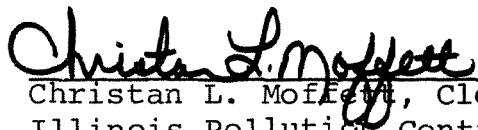
- (f) Depositions may be taken of the following Agency personnel:
- (1) Any person who signed the permit or denial letter;
  - (2) Agency employees who actually reviewed the application for its sufficiency or took part in writing the permit; and
  - (3) Any experts who are not Agency employees but with whom the Agency consulted concerning the application.
  - (4) The Agency must produce for deposition persons who are currently employed by it.
- (g) Depositions may not be taken of the following persons:
- (1) Agency employees who performed only clerical tasks such as opening mail, file stamping, filing, photocopying, microfilming or typing; or
  - (2) Agency employees who acted only as attorneys rendering legal opinions.
- (h) Parties other than the permit applicant shall have the same rights of discovery. The hearing officer may enlarge the scope of discovery upon such terms as may be just.

The record will be open for comment for forty-five days after publication in the Illinois Register.

IT IS SO ORDERED.

Mr. Werner abstained.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 7<sup>th</sup> day of August, 1980 by a vote of 4-0.

  
Christan L. Moffett, Clerk  
Illinois Pollution Control Board