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STATE OF ILLINOIS
Pollution Control Board

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	P.C. #11
	)	
REVISION OF THE BOARD'S	)	R00-20
PROCEDURAL RULES:	)	(RULEMAKING-PROCEDURAL)
35 ILL. ADM CODE 101-130	)	

COMMENTS OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

The Illinois Environmental Protection Agency hereby presents its comments to the Illinois Pollution Control Board ("Board) proposed procedural rules.

Comments to Part 101

Section 101.202 Definition of "Service List"

Comment: In its March 16, 2000 Opinion, the Board states that under its proposal "hearing officers have the discretion to relieve persons of service requirements in a given rulemaking as may be appropriate." The Agency is concerned that there are no standards by which the Hearing Officer must determine "appropriateness." The Agency suggests that the Board require the Hearing Officer follow the "waiver of requirements" standard in proposed Section 102.110 in granting an adjustment to service requirements. In order to avoid the prejudice that may occur if participants are not required to serve the proponent of the regulations, all participants should follow the same filing requirements unless a particular participant can demonstrate that serving everyone on the list would create an undue burden.

Proposed Change Include in the procedural rules a requirement that in order for the Hearing Officer to grant an adjustment to the service requirements, the participant must demonstrate that serving everyone on the service list would create an undue burden such as imposing financial costs (for copying and postage, etc.) that would limit further participation, or where the proponent or other participants already have the materials in question.

Section: 101.300(d)(2) - Date of Board Decision

Comment: Section 101.300(d)(2) provides that for purposes of appeal of a final order, the date of the Board decision is the date of service of the final opinion and order by the Board upon the appealing party. This is consistent with the terms of the Administrative Review Law (ARL), and affords the appealing party the entire 35 day period to review the decision and prepare for appeal. However, subsection (d)(2) further provides that for purposes of appeal of the decision on a motion for reconsideration, the date of the Board order ruling upon the motion is the date of service by the Board upon the appealing party. In other words, the 35-day appeal period for motions for reconsideration begins to run on the date of the Board meeting, regardless of when the appealing party actually receives a copy of the written opinion and order. In cases where the written opinion and order is prepared and mailed on the decision date or the day after, only a few days of the 35 day appeal period are lost; however in some cases, the time elapsed between the date of the decision and the date when the party actually receives the opinion and order and learns the terms of the Board's decision may be several days. This elapsing of time may be significant when a party wishes to review the opinion to determine whether an appeal is well founded. Any elapse of time that diminishes the effectiveness of the 35 day appeal period is even more significant in the case of the Agency, where the Board's decision not only has to be reviewed and a course of action approved by Agency management, but the approval and representation of the Attorney General must be requested and obtained before a notice of appeal can be filed.

For the sake of consistency with the ARL, and in order to allow the party the full benefit of the 35 day appeal period, the Board should eliminate this redefinition of "service" for this special circumstance, and make in all cases the date of the Board's decision for purposes of appeal the date on which the opinion and order was received by the party.

Section: 101.302(d) Filing of Documents

Comment: In proposed Section 101.302(d), the Board states that it will allow filing by electronic transmission or facsimile only with the prior approval of the Clerk or hearing officer assigned to the proceeding. Section 180.303 of the Agency rules concerning provisional variance recommendations requires that the Agency submit a recommendation to the Board by personal service or certified mail (35 Ill. Adm. Code 180.303). Section 35(b) of the Illinois

Environmental Protection Act requires the Board to issue provisional variances within two working days after notification from the Agency. The Board proposed regulations address provisional variances in Sections 104.300 through 104.310.

Often, the Illinois EPA receives requests for provisional variances on a last minute basis. In light of the statutory time constraint and the Board's meeting schedule, the Agency generally sends the Board a draft provisional variance recommendation by facsimile, and follows with a hard copy for filing. The Agency must send the hard copy by Federal Express or other overnight delivery services, shortly before a regularly scheduled Board meeting in order for the Board to act at its regular meeting and within two days of the notification.

The Agency requests a general permission to file provisional variance recommendations with the Board through electronic transmission or facsimile within two days of a regularly scheduled meeting date. The electronic filing would obviate the need to send a draft recommendation and eliminate concerns that the Board will not receive the Federal Express delivery in time. The language of the Agency's provisional variance rules does not preclude an electronic filing. The Agency could follow the electronic filing with a hard copy submission.

Proposed Change: Include a provision in Section 101.302 as follows: "The Agency may file provisional variance recommendations with the Board through electronic transmission or facsimile within two days of a regularly scheduled meeting date."

Section: 101.302(j) - Page Limitation.

Comment: Section 101.302(j) limits all motions and briefs to a maximum of 30 pages. While in most cases the issues before the Board may be properly addressed by the parties within 30 pages of text, sometimes it will be necessary to exceed that number to give adequate explanation or coverage to all of the pending issues and to properly articulate the parties' arguments. Accordingly, the proposed rule contemplates that the Board or hearing officer may grant prior approval to exceed this 30 page limitation. In many instances the party may not realize the need to exceed 30 pages in a brief or motion until sometime into the drafting process. With the formalities associated with filing and serving a written motion and the requisite response time, it is possible that a request for relief from the page limitation will be pending but unresolved on the date the brief or motion in question is due. Accordingly, the

rule should include an expedited process for obtaining relief from the page limitation on oral motion to the hearing officer.

Proposed Change: The following language should be added to subsection (j): "Relief from the page limitation may be sought by oral motion to the hearing officer so long as all parties have reasonable notice and an opportunity to be heard. In determining whether to grant the relief the hearing officer shall consider the number, complexity and novelty of the factual and legal issues involved in the proceeding."

Section: 101.304(c) - Method of Service.

Comment: The Board references facsimile as an approved method of service in non-enforcement adjudicatory cases, "as prescribed in Section 101.302(d)." However, Section 101.302(d) refers to filing by facsimile, upon prior approval of the Clerk or the hearing officer. The Agency assumes that the Board intends facsimile service to also be limited to occasions of prior approval by the Clerk or the hearing officer. Because "filing" and "service" are two different things, the reference should be clarified.

Proposed Change: "... or by facsimile with the prior approval of the Clerk of the Board or hearing officer assigned to the proceeding, except for service of enforcement ..."

Section 101.304(g)(1) Service of Documents/Service on State Agencies

Comment: The address given for the Agency does not include the street address. It would be useful for the Board to include the street address, particularly since mail for the Agency is still being sent to the Churchill Road address (now another State agency), resulting in delays in receipt at the Agency's office.

Proposed Change: Add the Agency's street address, "1021 North Grand Avenue, East."

Section 101.306(a) Incorporation of Documents by Reference

Comment: A person seeking incorporation of documents must file nine copies of the material to be incorporated. It may be that incorporation by reference is being requested because of the voluminous size of the document (e.g., an administrative record in a related permit appeal). If so, the requirement that the full nine copies of that material be filed along with the request for incorporation will defeat the purpose of the incorporation by reference.

Proposed Change: An exemption should be created allowing for incorporation of voluminous documents from another Board docket without the need of filing all nine copies of those documents, upon approval by the Board.

Section: 101.308(b) Statutory Decision Deadlines and Waiver of Deadlines

Comment: This subsection provides that the Board will establish all hearing and filing requirements where the Petitioner does not waive the decision deadline. It includes the statement that, "Failure to follow Board requirements on such deadlines will subject the party to sanctions pursuant to Subpart H of this Part." It does not appear that any discretion is afforded the hearing officer or the Board to withhold sanctions when the failure to follow the schedule is outside the control of the party, is caused by the other party, or is otherwise excusable.

Proposed Change: "... Willful or unexcused failure to follow Board requirements on such deadlines will subject the party to sanctions pursuant to Subpart H of this Part."

Section 101.308(c)(2) Negotiation Waiver

Comment: This type of waiver seems unnecessary and would allow for undefined decision deadlines. Either the open waiver or time certain waiver can be used to meet situations encountered by the parties. Also, this type of waiver seems contrary to the Board's policy of encouraging timely resolution of pending matters.

Proposed Change: This provision should be deleted.

Section: 101.400(a)(1), (2) and (3) Attorneys in Adjudicatory Proceedings

Comment: Although reference to Section 1 of the Illinois Attorney Act makes it implicit, this subsection should be amended to expressly state that only Illinois licensed attorneys may engage in the practice of law in Illinois. The case law is clear that non-Illinois licensed attorneys cannot lawfully practice law in Illinois unless admitted *pro hac vice* by a court of competent jurisdiction. Although the Board has made a practice of granting such motions filed by out-of-state attorneys, and indeed proposes to carry on that practice by rule, its authority to do so is open to question, in that the Board has no inherent common law powers and there is no express statutory authority granting it the right to determine who is or who is not entitled to practice law before it.

Proposed Change: The language of Subsections 101.400(a)(1) and (2) should be modified to state: ".. or through an attorney-at-law licensed and registered to practice law in the State of Illinois." Subsection 101.400(a)(3) should be deleted in its entirety.

Section: 101.403 - Joinder of Parties

Comment: Subsection 101.403(a) allows joinder if a complete determination of the controversy cannot be had without the presence of the person who is not already a party to the proceeding or if it may be necessary for the Board to impose a condition on the person sought to be joined. In certain rare instances, it may come to light that a person who is not a named party may be the real party in interest in the proceeding (e.g., a LUST reimbursement claim where the environmental consultant has taken an assignment of claim from the owner/operator in full payment and is actually in charge of the litigation), but does not clearly fall within the proposed rule's two stated grounds for joinder. In such an instance the real party in interest should be made a party and be subject to the same discovery and appearance requirements as other parties.

Proposed Change: Subsection (a) should be revised to add the following provision:
"...; or
3) such person is a real party in interest in the proceeding."

Section: 101.500 - Filing of Motions and Responses

Comment: Subsection 101.500(b) provides that all motions should be in writing except those made orally on the record during a hearing. Provision should be made for certain non-dispositive motions (particularly agreed or uncontested motions, and those motions relating to matters of scheduling that require expedited resolution) to be made orally to the hearing officer so long as all parties have the opportunity to be heard. Otherwise, the formalities of a written motion, formal filing, service and passage of the requisite response time might prove to unduly expend the resources of the parties and the Board, and may render moot the relief sought.

Proposed Change: Language to the following effect should be added to subsection (b):

"In the discretion of the hearing officer, certain non-dispositive motions directed to the hearing officer, such as those pertaining to matters of scheduling, and non-dispositive uncontested or agreed motions directed to the hearing officer may be presented orally, on reasonable notice, so long as all parties are afforded an opportunity

to be heard. The hearing officer will prepare a written order stating the substance of the oral motion and the stated positions of the parties. Objection to the hearing officer's ruling on any such oral motion will be deemed waived unless preserved in accordance with the procedures set forth in Section 101.502(b)."

Section 101.502(b) Motions Directed to the Hearing Officer

Comment: Proposed Section 101.502(b) provides that objections to motions or rulings made during hearing must be filed within 7 days after the Board receives the hearing transcript. The objector, however, may not know when the transcript is received by the Board, and may well receive the transcript sometime after the Board does. The Agency requests that the time period for filing be predicated on the receipt of the hearing transcript by the objector, and further requests that the Board allow the objection to be filed 14 days after receipt of the transcript (which is the period of time allowed for correction of the transcript in Section 101.604).

Proposed Change Change subsection 101.502(b) as follows: "...shall be deemed waived if not filed within 14 days after the party making the objection receives the hearing transcript.

Section: 101.504 - Contents of Motions and Responses

Comment: Both the existing and the proposed rule provide that: "Facts asserted that are not of record in the proceeding must be supported by oath or affidavit." Section 1-109 of the Code of Civil Procedure (735 ILCS 5/1–109) provides, in part, that:

"Unless otherwise expressly provided by rule of the Supreme Court, whenever in this Code any complaint, petition, answer, reply, bill of particulars, answer to interrogatories, affidavit, return or proof of service, or other document or pleading filed in any court of this State is required or permitted to be verified, or made, sworn to or verified under oath, such requirement or permission is hereby defined to include a certification of pleading, affidavit or other document under penalty of perjury as provided in this Section.

Whenever any such pleading, affidavit or other document is so certified, the several matters stated shall be stated positively or upon information and belief only, according to the fact. The person or persons having knowledge of the matters stated in a pleading, affidavit or other document certified in accordance with this Section shall subscribe to a certification in substantially the following form:

> Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the

undersigned certifies as aforesaid that he verily believes the same to be true.

Any pleading, affidavit or other document certified in accordance with this Section may be used in the same manner and with the same force and effect as though subscribed and sworn to under oath. ..."

Use of a certification in lieu of an affidavit benefits the parties, since it is not always possible or convenient to obtain the services of a notary public or other officer to administer the oath. Furthermore, such a certification has, by statute, the same effect as a sworn statement. The Board's rule should expressly add authorization to certify in lieu of an affidavit.

Proposed Change: This Section should be amended to read: "Facts asserted that are not of record in the proceeding must be supported by oath, affidavit or certification in accordance with Section 1-109 of the Code of Civil Procedure (735 ILCS 5/1–109)."

Section 101.516 Motions for Summary Judgment

Comment: As drafted, Section 101.516 allows for the possibility that a motion for summary judgment will not be decided as of the date of the hearing on the underlying matter. The Board acknowledges this possibility in its proposal, but states that given the various time constraints involved, it may not be possible to rule on a motion for summary judgment before a hearing starts. While understandable, this still creates a possibility of a waste of resources (on the part of the parties as well as the Board) if a motion for summary judgment, timely filed, could have resolved the issues but was not decided prior to a hearing.

Proposed Change: The Board should amend Section 101.516(a) to allow for more time for consideration of a motion for summary judgment. This is most easily done by requiring that such motions be filed more in advance of the hearing than the 30 days now proposed. If this were done, the parties could seek to resolve matters through summary judgment without having to potentially participate in a hearing as well. It would also allow the Board to delete Section 101.516(c), since there would be no need to cancel a hearing.

Section: 101.610 - Duties and Authority of the Hearing Officer

Comment: This list of hearing officer powers and responsibilities is similar to current Section 103.200, applicable to permit appeals by reason of the incorporation of Section 105.102. However, the provision in current Section 103.203(f) that contains the authority to rule on

offers of proof has been omitted from proposed Section 101.610. The Board's intention should be clarified as to whether the omission is inadvertent or whether the Board intends that making an offer of proof is now a matter of absolute right and that there is therefore no necessity for a hearing officer to rule on a request? This could have important impact on trial practice before the Board.

Section: 101.616(a) - Discovery

Comment: Section 101.616(a) states that "All relevant information and information calculated to lead to relevant information is discoverable, excluding [trade secrets]." It does not exclude from discovery privileged information, such as attorney-client confidential communications and attorney work-product. Supreme Court Rule 201(2) expressly excludes from discovery in civil cases all matters that are privileged from disclosure at trial. Allowing discovery of privileged matter would undercut the very reasons for the privilege and render it meaningless. The Board should also exclude from the definition of discoverable information in Section 101.616 all matters that are privileged.

Proposed Change: The proposed rule should be changed to read: "All relevant information and information calculated to lead to relevant information is discoverable, excluding matters that would be privileged from disclosure in the courts of this State pursuant to statute, Supreme Court Rules or common law, and those materials that would be protected from disclosure under 35 Ill.Adm.Code 130."

Section: 101.616(f) Discovery

Comment: Section 101.616(f) subjects a party who fails to comply with any order, including hearing officer orders respecting discovery, to sanctions. In the Circuit Court, Supreme Court Rule 219(c) governs non-compliance with civil discovery orders, and provides that the court "may" impose the sanctions there listed. Section 101.616(f), however, appears not to afford the Board any discretion to consider the circumstances of noncompliance and may thus result in arbitrary and unfair imposition of sanctions.

Proposed Change: Section 101.616(f) should be amended to read: "Failure to comply with any order regarding discovery may subject the offending person to sanctions ..."

Section: 101.618(b) - Admissions

Comment: Requests for admission are a powerful tool for hearing preparation and advancing a case toward disposition. A party can be directly asked specific questions that must be answered accurately and in a timely fashion. An inaccurate answer later proven to be false can carry grave consequences. Likewise, a failure or refusal to respond within the prescribed time period results in a judicial admission of the fact by default. Explanations or contradictions at a subsequent hearing are prohibited. Section 101.618(b) appears to allow the Hearing Officer to extend a party's time to answer a request to admit facts even after the time has expired. This undermines the judicial admission of a failure to deny and defeats one of the main purposes of admissions.

Proposed Change: Reference to extending the time for answering a request to admit after the expiration of time should be deleted.

Section: 101.620 Interrogatories

Comment: There is no provision in Section 101.620 that addresses the number of interrogatories that may be propounded. Illinois Supreme Court Rule 213(c) limits the number of interrogatories to 30, with the possibility of exceeding that number upon a showing of good cause. The Board should follow this authority.

Proposed Change: A new subsection (d) should be added to Section 101.620 that references Supreme Court Rule 213(c) or otherwise limits the number of interrogatories that may be served to 30 (with the possibility of serving more upon a showing of good cause).

Section: 101.622(e) – Subpoenas—Out of State Witnesses

Comment: Although the current rules also mention costs for out of State witnesses, the basis of the Board's authority to compel the attendance of an out of State witness by subpoena is not clear.

Section 101.626(a) Information Produced at Hearing/Hearsay

Comment: Although Section 101.626(a) is similar to language in Section 10-40 of the Illinois Administrative Procedure Act ("IAPA") (5 ILCS 100/10-40), the language in the IAPA does not specifically refer to "hearsay."

Proposed Change: To be consistent with Section 10-40 of the IAPA, as is the stated purpose in Section 101.626, references to the term "hearsay" should be deleted from Section 101.626(a).

Section: 101.626(b) - Admissibility of Evidence

Comment: This provision, which is in the current rule, purports to mandate the admissibility of proffered evidence if it "depends upon an arguable interpretation of substantive law." It is unclear what "arguable" means in this context. For comparison, Supreme Court Rule 137 requires a lawyer to certify that any pleading filed is well grounded in fact and warranted by existing law or a good-faith argument for the extension, modification or reversal of existing law, and that is not interposed for any improper purpose..." If the concept that the Board has in mind is evidence "offered in a good faith argument", the Agency believes that it is too subjective a criterion for a rule of evidence.

Proposed Change: Given the rules of evidence and the procedural device of the offer of proof, subsection 101.626(b) should be dropped.

Section: 101.626(d) - Written Testimony.

Comment: Current Section 103.205 allows written testimony but only if provided to all other parties prior to the date of hearing and the parties are given an opportunity to object to portions thereof, and if the witness is available for cross-examination at the hearing. In effect, it treats written testimony as analogous to an evidence deposition. Proposed Section 101.626(d) eliminates the requirement that written testimony be produced prior to hearing. The Agency believes that the prior production requirement should be reinstated. Otherwise, the other parties will be put in the position that they may not have the time during trial to read the testimony closely enough to ascertain whether some or all of it is objectionable, and therefore not be able to properly prepare for cross examination of the witness.

Proposed Change: The language of current Section 103.205 should be retained.

Section 101.700 Oral Argument

Comment: It is unclear from the provisions of this Section 101.700 just how much time a party would be given to present its argument.

Proposed Change: A provision could be added Section 101.700(d) addressing the time allowed for argument and sequence of arguments.

Section: 101.800(a) - Sanctions for Failure to Comply with Procedural Rules, Board Orders, or Hearing Officer Orders

Comment: Although proposed Section 101.800(a) allows the Board some discretion in imposing sanctions (i.e., "may order sanctions"), some degree of culpability, such as willfulness should accompany the noncompliance in order for sanctions to be available in the first instance. For example, Supreme Court Rule 219(c) requires "unreasonable" noncompliance with the rules before sanctions may be imposed.

Proposed Change: Section 101.800(a) should be amended to read: "If any person unreasonably fails to comply with any provision..."

Section: 101.802 Sanctions for Abuse of Discovery Procedures

Comment: The last sentence of Section 101.802 states that the Board or Hearing Officer may enter any order provided for in that Part. This statement, seems to imply that a Hearing Officer may enter an order on his or her own motion that imposes sanctions for abuse of discovery procedures. This would contradict Section 101.800(a), which provides that only the Board has sanction authority and that the Hearing Officer must make a motion to the Board for sanctions.

Proposed Change: Amend Section 101.802 to clarify that a Hearing Officer may not enter an order imposing sanctions.

Section Former Section 103.206—Official Notice

Comment: Former Section 103.206, "Official Notice," is not included in Part 101 of the proposed rules. In the current rules, Section 105.102(a)(6) incorporates the enforcement procedures of Part 103 for non-NPDES permit appeals. That incorporation is not included in the proposed rules. Accordingly, official notice is no longer in the rules for LUST and permit appeals. It is an essential tool for Board hearing practice.

Comments to Part 102

Section 102.304(f) Hearings (CAA Fast Track)

Comment: Proposed Section 102.304(f) provides that hearing dates may be chosen by the assigned Board member and Hearing Officer without consultation with the participants. While this section applies to Clean Air Act Amendments Fast Track Rulemaking only, the Agency is concerned that this concept will be applied to other types of rulemakings. Because of the intense level of

technical participation necessary for regulatory development, it is essential that the Agency be consulted when a Board member or Hearing Officer sets a hearing date for a non-CAA Fast Track proceeding. In order to avoid problems that can be created if an essential Agency technical staff member cannot attend a hearing on a particular day, the Agency requests that the Board continue to confirm with the Agency that the necessary witnesses will be available on the dates the Board desires to conduct non-CAA Fast Track hearings.

Section 102.306(c) Prefiled Testimony

Comment: Section 102.306(c) provides for a waiver of the pre-filing deadline or service requirement "for good cause." The Agency would like to see incorporated into this provision some burden of proof requirements that the individual seeking a waiver must meet. It is the Agency's opinion that this provision is currently abused and that testimony is allowed even when "good cause" for violating the pre-filing requirements has not been established. As stated by the Board in its March 16, 2000 First Notice opinion, the purpose of the pre-filing requirement is to "prevent events, such as surprise, that could interfere with the timely adoption of the regulation" However, surprise is what inevitably occurs when individuals testify at hearing without having followed the pre-filing requirements., and is detrimental to the proponent who does not then have adequate time to prepare cross examination questions or to refute the testimony being given.

Section: 102.424(g) Prehearing Submission of Testimony and Exhibits

Comment: Section 102.424(g) provides that testimony that is not timely pre-submitted will be allowed only as time permits. This "sanction" of only allowing the testimony if time allows does not address the prejudice that is caused to the other parties when there is time for the testimony. There have been instances where participants have been allowed to file testimony either late or at hearing, and this has prevented the Illinois EPA from adequately preparing for and addressing the issues raised in that testimony or required additional hearing dates to do so, thereby materially prejudicing the Agency. Requiring that all participants to a regulatory matter pre-file testimony keeps everyone on a level playing field.

Proposed Change: Add the following language to the end of subsection (g): "and where its submission will not materially prejudice the proponent."

Comments to Part 103

Section: 103.106 General

Comment: Section 103.106 provides that "enforcement proceedings may be initiated by-the Attorney General of the State of Illinois or any person may file with the Board a complaint. . .against any person allegedly violating this Act or any rule or regulation thereunder or any permit or term or condition thereof. [415 ILCS 5/31(d)]. Complaints filed by persons other than the Attorney General or a State's Attorney will be known as citizen's complaints. The separate references in the first sentence to the Attorney General and any other person are unnecessary, inasmuch as each must file a complaint in order to initiate enforcement.

Proposed Change Section 103.106 should be changed to read "Enforcement proceedings may be initiated by filing with the Board a complaint ".

Section: 103.202(a) Parties

Comment: In matters where the Agency is requested by the Board to conduct an investigation and thereby be named a "party in interest," a situation may arise where the remedy being sought would involve Agency permitting decisions or oversight of some remedial or corrective action. In such a case, the Agency would have a significant interest in fashioning the remedy since it would involve the exercise of Agency discretion and use of Agency resources, and would wish to take an active position in the case. Allowing the Agency to align itself with a party would provide the necessary flexibility.

Proposed Change: Add the following language to the end of Section 103.202(a): "Upon motion of the Agency, the Board may align the Agency with any other party or parties as appropriate."

Section: 103.204(c) Notice, Complaint, and Answer

Comment Section 103.204(c)(3) makes compliance with the requirements for filing a complaint discretionary in the case of a citizen's complaint ("A citizen's complaint may be filed..."). A complaint may be filed by any person. There is no good reason not to require that a citizen's complaint meet the very basic elements that are listed in subsection 103.204(c). Since only individual citizens may appear for themselves, most of the cases will be handled by attorneys, who are assumed to be able to satisfy the minimal pleading

requirements. In the event of an individual appearing for himself, the Board will always have the flexibility to grant leave to amend to satisfy Board concerns.

Proposed Change: Subsection 103.204(c) should be changed to read "The complaint must be captioned in accordance with 35 Ill. Adm. Code 101.Appendix A, Illustration A and contain..." and subsection 103.204(d) should be deleted.

Section: 103.204(g) Notice, Complaint, and Answer

Comment Subsection 103.204(g) requires that all complaints must contain specific language concerning failure to answer within 60 days. Under Section 103.204(a), a notice must be filed with the complaint. The required language would be more obvious in the notice accompanying the complaint, and would be similar to the notice and warnings found on a summons in a civil court action.

Proposed Change: Change subsection 103.204(g) to read "...must include the following language in the notice.."

Comments to Part 104

Section: 104.202(c)(1); Section 104.214(a), (b)

Comment: Section 104.202(c)(1) provides that the one copy of a variance petition must be served on the Agency. The service on the Agency must also be initiated on or before the date the petition is filed with the Board. Sections 104.214(a) and (b) require that the Agency publish notice in the newspaper and give notice to designated individuals within 14 days *of receipt of the petition*. Some situations could arise in which the Agency would be placed in a position of giving notice of petitions before they are actually filed with the Board or giving notice of petitions that ultimately are not filed at all.

Section: 104.212 Motion for Modification of Internal Variance Dates

Comment: Section 104.212 allows for the modification of internal variance dates upon motion of the petitioner. Internal variance compliance dates are contained in a final Board order. Modification of a final order is extraordinary relief and should fit within the presently-available methods (*i.e.*, Motions for Reconsideration under Sections 101.520 and 101.902, and Relief from and Review of Final Opinions and Orders under Section 101.904). Modification of a final order is designed to be difficult, and should not be as easy as typical motion practice.

Proposed Change: Delete Section 104.212.

Section 104.214(f) Agency's Notice of Petition

Comment: This Section adds a new requirement that the Agency must file with the Board a certification of publication within 21 days after the publication of notice of a variance petition. The Agency has no control over when it receives (and consequently can send to the Board) the certification. Publication of variance petition notices is handled for the Agency by the Illinois Press Association. According to the Press Association, it takes them at least 15 days to receive back the notice of publication (tearsheet), which they then forward to the Agency, where it may take a few days to get to the Division of Legal Counsel. The Board's proposed procedural regulations now give petitioners in adjusted standard proceedings (who do not have to go through the Illinois Press Association) 30 days after publication to file certifications of publication. In order to avoid delays and confusion caused by the fact that the Agency has no control over when it receives the certificate of publication, the Agency suggests that, consistent with the timeframes allowed for adjusted standards, it be allowed to attach the certificate of publication to its variance recommendation or be given 30 days after publication to file the certificate of publication.

Proposed Change: The Agency recommends that this Section be changed to require that a certification of publication accompany the Agency's variance recommendation or at least allow the Agency 30 days to file a certification of publication.

Section 104.226(a) Amended Petition and Amended Recommendation

Comment: Section 104.226(a) adds a new requirement that the Agency publish and send out an additional notice when a variance petition is amended, irrespective of whether the amendment is substantive or does not change the relief requested. This new provision increases the public notice expenses for the Agency by requiring a renotice of every amended variance petition, although there is no need to publish an additional notice when the change is not substantive and therefore does not render the initial notice procedurally inadequate.

Proposed Change: The last phrase of this paragraph should be amended to mirror the language used in the Section 104.418(a) addressing the renoticing of amended adjusted standard petitions only when substantive changes are made to the original petition.

Section: 104.226 Amended Petition and Amended Recommendation

Comment: Section 104.226(a) allows petitions for variance to be amended prior to the close of the hearing, and provides that after the hearing, amended petitions may be filed only with leave of the Board. Section 104.226(b) provides that the Agency may amend its recommendation even without an amended petition prior to the close of the hearing. In view of the resources of the Board and of the parties that are necessary to schedule and hold a hearing, any last minute modifications to the position of either side should be limited by time. That way, the scheduled hearing could go forward with no material prejudice to either side. The Board (through the Hearing Officer) would still have the discretion to continue the entire matter, but if it chose to proceed with the hearing, the record would be more complete.

Proposed Change Change Section 104.226(a) as follows: "The petitioner may amend the petition no later than 30 days prior to the hearing, if a hearing is held, or prior to the Board's decision, if a hearing is not held, by filing a motion pursuant to 35 Ill. Adm. Code 101.Subpart E. The petitioner may file an amended petition at any later time only with leave of the Board..."

b) Change Section 104.226(b) as follows: "The Agency may amend its recommendation even if the petitioner has not amended its petition. In such an instance, a recommendation may be amended no later than 15 days prior to the hearing, if a hearing is held, or 40 days prior to the Board's decision date if a hearing is not held..."

Section 104.226(b) Amended Petition and Amended Recommendation

Comment: This Section provides that if a petitioner amends its variance petition, the Agency must file or give an amended recommendation in writing or orally at hearing, but in any event not later than 30 days after the filing of an amended petition. Since the filing of an amended variance petition recommences the Board's decision period under section 104.226(a), it seems inconsistent to allow the Agency only 30 days to respond to an amended petition, but 45 days to respond to an initial petition. If a petitioner amends a petition less than 15 days after filing its initial petition, the Agency's initial response time will actually be shortened by this provision.

Proposed Change: To avoid this inconsistency, 30 days should be changed to 45 days in this section.

Section 104.234(e) Hearing

Comment: This Section requires that a hearing be held if "[t]he variance request, if granted, would require an amendment to the State Implementation Plan for a criteria pollutant under the CAA." Generally, requests for variances from regulations promulgated to fulfill Illinois' obligations under the Clean Air Act must be submitted to USEPA as revisions to the relevant Illinois State Implementation Plan ("SIP") in order to be federally enforceable and to maintain consistency between Illinois' SIP and the Illinois regulations. Since hearings must be conducted for all SIP revisions variances that would require an amendment to Illinois' SIP will require a hearing to be federally enforceable. However, the Agency and the petitioner retain some discretion to determine what variances will in fact be submitted to USEPA as SIP revisions. It is possible that a petitioner will not be concerned about the federal recognition of its variance request; the variance request may be of such a short duration that U.S. EPA approval of the SIP would not occur before the variance expires; or a hearing in the context of a related Clean Air Act Permit Program proceeding might fulfill the SIP hearing requirements.

Proposed Change: Delete 104.234(e).

Section: 104.404(b) Request to Agency to Join as Co-Petitioner

Comment: Section 104.404(a) provides that the Agency may, *in its discretion* (emphasis added) act as co-petitioner in any adjusted standard. Section 104.404(b) requires that when the Agency receives a request for assistance in initiating an adjusted standard it must provide written notification of its decision whether to join as a co-petitioner and, if it declines to join, must state the basis of its decision in the written notification. Since the Agency's decision in this matter is entirely discretionary, the means and content of its communication to the petitioner regarding the request may be handled any way the Agency chooses. It may be more appropriate to keep this decision only between the parties where the request may occur in the context of ongoing settlement negotiations.

Proposed Change: Delete all the language in Section 104.404(b) concerning notification by the Agency of its decision to join as co-petitioner.

Comments to Part 105

Section: 105.108 - Dismissal of Petition

Comment: Section 105.108 lists four circumstances under which a petition for review will be dismissed. In the absence of an expressed contrary intent, it is generally presumed that such a list is exclusive. Although the four stated grounds cover the most common reasons for dismissal, it is possible that additional grounds may exist. For example, the Agency has had a situation where a *pro se* petition was filed prior to the actual final decision and the appeal was dismissed as unripe. In addition, the Code of Civil Procedure recognizes nine separate grounds for involuntary dismissal applicable to civil actions in the Circuit Courts (735 ILCS 5/2-619(a)), including such reasons as lack of subject matter jurisdiction, the petitioner's lack of legal capacity, the existence of another action pending between the parties on the same issues in a different forum, the action is barred by a prior judgment, the Statute of Frauds, and that the action is barred by "other affirmative matter avoiding the legal affect of or defeating the claim." The Agency suggests that the Board might benefit from an additional general ground in Section 105.108 that incorporates other, but unnamed, reasons to dismiss the petition.

Proposed Change: "A petition is subject to dismissal if the Board determines that:

_____ ____ _____ _____ ___ ___

(e) Or, that other affirmative grounds exist that would bar the petitioner from proceeding."

Section: 105.118 Sanctions for Untimely Filing of the Record

Comment: The use of the term "may" implies discretion on the part of the Board in imposing sanctions for a late-filed administrative record. In most cases the record will not be due until 30 days prior to the scheduled hearing, so there should be no problem filing the administrative record on time. However, in the extraordinary case, where there is a short delay due to inadvertence, miscalculation or unanticipated delays in delivery, the imposition of sanctions is counterproductive to both parties.

Proposed Change: Change Section 105.118 to read as follows: "If the State agency willfully, or without reasonable cause, fails to file the record on or before the date required under this Part, the Board may sanction the State agency in accordance with 35 Ill. Adm. Code 101.Subpart H.

Section 105.200 Applicability

Comment: The language of Section 105.200 states that it applies to any appeal to the Board of an Agency final permit decision and "other final decisions of the Agency." This is a vague, undefined phrase which may include conclusions or opinions or interpretations put forth by the Agency that are not appealable pursuant to any statutory authority.

Proposed Change: The phrase "and other final decisions of the Agency" should be deleted.

Section 105.204(f) Who May File a Petition for Review/Other Agency Final Decisions

Comment: While the language of Section 105.204(f) refers to an Agency "final decision," the only type of decision which may be appealed to the Board is one that is made in conjunction with a clear statutory right of appeal.

Proposed Change: This section should be amended to make it clear that the "final decisions" referred to are only those final decisions with a statutory right of appeal.

Section 105.210 Petition Content Requirements

General Comment: There have been occasions when the recipient of an Illinois EPA final decision has sent a letter or request to the Board asking for a 90-day extension of time by which to file a formal appeal, but no such letter has been sent to the Illinois EPA. It is not uncommon for the Board, at the conclusion of the initial 35-day period for filing either the formal petition or request for extension of time, to treat the letter or request as a formal petition. The Board then grants the recipient leave to file an amended petition (well after the date which such a petition would otherwise be due) which would contain all requisite elements of a formal petition. This practice essentially puts the Board in the position of acting on behalf of the recipient, with such act being without any supporting authority.

Proposed Change: Though this comment is directed at Section 105.210, Sections 105.108(a), 105.108(b), 105.206(a) and 105.208 are also affected. These rules, as needed, should be amended to reflect the position that only a petition or request for extension of time may be filed following the receipt of a final appealable decision, and that such a document must be clearly labeled or described. Also, if the document does not meet all the requisite elements for filing, the filing party may be given leave to amend the document, but such

leave should not include an allowance to file the document beyond the statutory time allowed.

Section 105.212(b)(1) Agency Record

Comment: The scope of the requisite contents of the Agency record have been expanded from the Board's previous rule on this topic. In this subsection, one element of the record is described as "any permit application or other request that resulted in the Agency's final decision." The phrase "other request" is overly broad, since it could be interpreted to include requests for opinions, interpretations, or other positions that do not carry statutory rights of appeal. As such, no appeal–and no corresponding Agency record–would be possible.

Proposed Change: The words "or other request" should be deleted.

Section 105.212(b)(2) Agency Record

Comment: Another example of how the proposed rules expand on the current requirements of the Agency Record is that in addition to requiring correspondence between the petitioner and the Illinois EPA, the new rules also require that any documents or materials submitted by the petitioner to the Illinois EPA must also be included. This is an overly broad requirement, since it could include documents or materials submitted by the petitioner on completely unrelated issues. It is not uncommon for a petitioner to submit permit applications (and accompanying documents) for more than one permit at a time, or for different media permits (e.g., water, land, air). For example, it would be burdensome and a waste of resources for both the Agency and the Board to include documents submitted for a water permit in a record of a land permit appeal.

Proposed Change: The language should be amended to read, "Correspondence with the petitioner and any documents or materials submitted by the petitioner to the Agency related to the permit application."

Section 105.212(b)(3) Agency Record

Comment: Another example of how the contents of the Agency record have been expanded from the Board's previous rule is the language "or other Agency final decision" in this subsection. The phrase is overly broad, since it could include opinions, interpretations, or other positions put forth by the Illinois EPA that do not carry statutory rights of appeal.

Proposed Change: The words "or other final Agency decision" should be deleted.

Section 105.214(a) Board Hearing

Comment: Section 105.214(a) states that the hearing on a permit appeal will be based exclusively on the record before the Illinois EPA at the time of the permit decision, unless the parties agree to supplement the record pursuant to Section 40(d) of the Act (415 ILCS 5/40(d)). However, Section 40(d) only references hearings held on permits issued pursuant to Section 9.1 of the Act (415 ILCS 5/9.1). Section 9.1 involves decisions regarding the Clean Air Act. Therefore, any Board hearing on matters other than permits sought or issued pursuant to the Clean Air Act would not fall within the purview of Section 40(d).

Proposed Change: A separate subsection should be created, with the last sentence of Section 105.214(a) being placed there along with qualifying language stating that the provision applies only to permit decisions related to Section 9.1 of the Act.

Section 105.400(a) Parties/Petitioner

Comment: This section only refers to decisions made by the Illinois EPA pursuant to Section 57.1 *et seq.* of the Act (415 ILCS 5/57.1). However, there are still appeals of decisions that are filed by parties pursuant to the now-repealed sections of the Act that addressed the "old" Leaking Underground Storage Tank Law, or Section 22.18b(g) of the Act.

Proposed Change: A reference to Section 22.18b(g) of the Act should also be included.

Section 105.402 Who May File a Petition for Review

Comment: This section only refers to final determinations made by the Illinois EPA pursuant to Section 57.1 *et seq.* of the Act (415 ILCS 5/57.1). There is also a citation made to Illustration A of the Part, which lists all appealable decisions. However, there are still appeals of decisions that are filed by parties pursuant to the now-repealed sections of the Act that addressed the "old" Leaking Underground Storage Tank Law, or Section 22.18b(g) of the Act.

Proposed Change: A reference to Section 22.18b(g) of the Act should also be included, either in Section 105.402 or in Illustration A.

Section 105.404 Time for Filing the Petition

Comment: The time for filing a petition is tolled beginning from the date of service of the Agency's's final decision. This is a departure from the present practice of the Board, which uses the actual date of the Agency's decision for purposes of calculating the timely filing of a petition. If the date of service is used, not only does it create the possibility discussed regarding Sections 101.300(d)(1,2), it could also cause problems in determining the exact date of service. (This issue will also be discussed regarding Section 105.408(b).)

Proposed Change: The words "of service" should be deleted from the last sentence of the first paragraph of Section 105.404.

Section 105.408 Petition Content Requirements

General Comment: There have been occasions when the recipient of an Agency final decision has sent a letter or request to the Board asking for a 90-day extension of time by which to file a formal appeal, but no such letter has been sent to the Agency. It is not uncommon for the Board, at the conclusion of the initial 35-day period for filing either the formal petition or request for extension of time, to treat the letter or request as a formal petition. The Board then grants the recipient leave to file an amended petition (well after the date which such a petition would otherwise be due) that would contain all requisite elements of a formal petition. This practice essentially puts the Board in the position of acting on behalf of the recipient, with such act being without any supporting authority.

Proposed Change: Though this comment is directed at Section 105.408, Sections 105.404 and 105.406 are also affected. These rules, as needed, should be amended to reflect the position that only a petition or request for extension of time may be filed following the receipt of a final appealable decision, and that such document must be clearly labeled or described. Also, if the document does not meet all the requisite elements for filing, the filing party may be given leave to amend the document, but such leave should not include an allowance to file the document beyond the statutory time allowed.

Section 105.408(b) Petition Content Requirements

Comment: One requirement of a petition is a statement specifying the date of service of the Agency's final decision. All final appealable decisions are issued by the Agency via certified mail. Therefore, if this provision is to remain in the rules (i.e., if the language of Section 105.404 regarding date of service of the Agency final

decision is not changed), then the petition should either include a copy of the certified mail receipt with the date as proof of the date of service, or the Agency should be allowed to refute any statement by producing its copy of the return receipt.

Proposed Change: The requirement should either be stricken or, if left as a requirement, should also impose the requirement of including a copy of the certified mail receipt as an exhibit. The Agency should also have a right to challenge any statement of service, with the date of a certified mail return receipt being the uncontested date of service.

Section 105.410(b)(1) Agency Record

Comment: This element of the Agency Record does not include a reference to decisions being final and appealable.

Proposed Change: Either a reference should be made that the Agency decision must be an appealable one pursuant to statute, or reference should be made to Illustration A of the Part.

Section 105.410(b)(2) Agency Record

Comment: Section 105.410(b)(2) requires that any documents or materials submitted by the petitioner to the Agency must also be included in the Agency record.. This is an overly broad requirement, since it could include documents or materials submitted by the petitioner on completely unrelated issues.

Proposed Change: The language should be amended to read, "Correspondence with the petitioner and any documents or materials submitted by the petitioner to the Agency related to the plan or budget submittal or other request."

Section: 105.410(b)(4) Agency Record

Comment: Same comment regarding the "any other information the Agency relied upon" language in 105.212 above.

Proposed Change: "4) Any other material information the Agency relied upon in making its final decision."

Section 105.412 Board Hearing

Comment: At the conclusion of this section, a citation is made to Sections 40(d) and 40.2 of the Act. These sections deal only with appeals of Clean Air Act permits, and thus should not be referenced here.

Proposed Change: The citation should be deleted.

Former Section 103.206, "Official Notice"

Comment: Former Section 103.206, "Official Notice," is not included in Part 101 of the proposed rules. In the current rules, Section 105.102(a)(6) incorporates the enforcement procedures of Part 103 for non-NPDES permit appeals. That incorporation is not included in the proposed rules. Accordingly, official notice is no longer in the rules for LUST and permit appeals. It is an essential tool for Board hearing practice.

Proposed Change: The language of former Section 103.206, "Official Notice," should be expressly added to Part 101 of the proposed rules.

Subpart D Generally

Comment The Agency seeks clarification in those instances where the Agency will be deemed to have denied a UST technical plan, report or application that had been submitted pursuant to Title XVI and Part 732 by reason of the Agency's failure to take final action within the prescribed time period. What is the issue on appeal? Is it substantive - i.e., whether the plan, report or application should have been approved (had the Agency actually reviewed it)? Or, is it procedural - i.e., did the Agency really take final action within the prescribed time period, or not?

Comments to Part 106

Section: 106.707(b)(1)—Notice, Statement of Deficiency

Comment The citation to "106.612(a) of this Subpart" should be "106.712(a) of this Subpart."

Proposed Change Change "106.612(a)" to "102.712(a)."

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
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