

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

PART 104  
REGULATORY RELIEF MECHANISMS

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#### 104.APPENDIX A Comparison of Former and Current Rules (Repealed)

**AUTHORITY:** Subparts B and C: Implementing Sections 5, 35, 36, 37 and 38 of the Environmental Protection Act (Act) [415 ILCS 5/5, 35, 36, 37, and 38] and authorized by Sections 26 and 27 of the Act [415 ILCS 5/26 and 27]. Subpart D: Implementing Sections 5, 14.2(c), 22.4, 27, 28, 28.1, 28.5 and 39.5 of the Act [415 ILCS 5/5, 14.2(c), 22.4, 27, 28, 28.1, 28.5 and 39.5] and authorized by Sections 26 and 27 of the Act [415 ILCS 5/26 and 27].

**SOURCE:** Subpart B: Originally adopted as Chapter I: Procedural Rules, Part IV: Variances, in R70-4, at 1 PCB 43, October 8, 1970; amended in R77-16, 29 PCB 503, at 2 Ill. Reg. 16, p. 3, effective May 1974; amended in R79-9, 35 PCB 433, at 3 Ill. Reg. 51, p. 128, effective December 7, 1979; amended in R80-12, 40 PCB 451, at 5 Ill. Reg. 2763, effective March 2, 1981; codified at 6 Ill. Reg. 8357; amended in R84-10, 62 PCB 87, at 9 Ill. Reg. 1409, effective January 16, 1985; old Part repealed, new Part adopted in R00-20 at 25 Ill. Reg. 613, effective January 1, 2001; amended in R04-24 at 29 Ill. Reg. 8803, effective June 8, 2005; amended in R14-21 at 39 Ill. Reg. 2357, effective January 27, 2015; amended in R15-20 at 39 Ill. Reg.



Section 104.200      General

a)      Description:

- 1)      General Variance. A variance is a temporary exemption from any specified rule, regulation, requirement or order of the Board, which may be granted by the Board with or without conditions for a period of time not to exceed five years, *upon presentation of adequate proof*, by the petitioner *that compliance with any rule, regulation, requirement or order of the Board would impose an arbitrary or unreasonable hardship* [415 ILCS 5/35(a)].
- 2)      Resource Conservation and Recovery Act (RCRA) Variance. A RCRA variance is an exemption from 35 Ill. Adm. Code 703, 720, 721, 722, 723, 724 or 725 or which allows the Illinois Environmental Protection Agency (Agency) to issue or modify any provision of a RCRA permit required pursuant to Section 21(f) of the Act.

b)      Effect of Filing:

- 1)      The filing of a petition for a variance does not stay enforcement of a regulation except as provided in subsection (b)(2) of this Section.
- 2)      *If any person files a petition for variance from a rule or regulation within 20 days after the effective date of such rule or regulation, the operation of such rule or regulation shall be stayed as to such person pending the disposition of the petition; provided, however, that the operation of any rule or regulation adopted by the Board which implements, in whole or in part, a State RCRA, Underground Injection Control (UIC), or National Pollutant Discharge Elimination System (NPDES) program shall not be stayed. The Board may hold a hearing upon said petition 5 days from the date of notice of such hearing or thereafter.* [415 ILCS 5/38(b)]

**Section 104.202      Filing Requirements**

- a)      Who May File. Any person seeking a variance from any rule or regulation, requirement or order of the Board that would otherwise be applicable to that person may file a variance petition.
- b)      General Filing and Service Requirements. All general filing and service requirements for Board filings, including the form of filing and the fee requirements for filing, apply to the filing of a petition for variance. These general requirements are found at 35 Ill. Adm. Code 101.Subpart C.

- c) Special Filing and Service Requirements. In addition to the general requirements found at 35 Ill. Adm. Code 101.Subpart C, a person filing a petition for variance must meet the following requirements:
  - 1) One copy of the petition and all related documents must be served on the Agency. The service on the Agency must be initiated on or before the date the petition is filed with the Board. Additionally, all RCRA variance petitions must be served on the United States Environmental Protection Agency (USEPA) Region V Director of Waste Management. An affidavit of service of the petition and related documents must accompany the filing with the Board; and
  - 2) The petition must contain all information or documents necessary to satisfy the petition content requirements found in Sections 104.204, 104.206, and 104.208 of this Part.

**Section 104.204      Petition Content Requirements**

The petition must include the information required by subsections (a) through (n) of this Section. Additionally, there are specific content requirements set forth at Section 104.206 of this Part for RCRA variance petitions. If the petitioner believes that any of these requirements are not applicable to the specific variance requested, the petitioner must so state and explain the reasoning.

- a) A statement describing the regulation, requirement, or order of the Board from which a variance is sought. If variance from a regulation is sought, the statement must include the Illinois Administrative Code citation to the regulation as well as the effective date of that regulation. If variance from a requirement or order of the Board is sought, the statement must include the citation to that requirement or order of the Board promulgating that requirement, including docket number;
- b) A complete and concise description of the nature of petitioner's activity that is the subject of the proposed variance, including:
  - 1) The location of, and area affected by, the petitioner's activity;
  - 2) The location of points of discharge, and, as applicable, the identification of the receiving waterway or land, or, if known, the location of the nearest air monitoring station maintained by the Agency;
  - 3) An identification, including docket number, of any prior variance issued to the petitioner and, if known, the petitioner's predecessors, concerning similar relief;

- 4) An identification, including number, of the environmental permits held by petitioner for the activity which may be affected by grant of variance;
  - 5) The number of persons employed by the petitioner's facility at issue and the age of that facility;
  - 6) The nature and amount of the materials used in the process or activity for which the variance is sought and a full description of the particular process or activity in which the materials are used;
  - 7) A description of the relevant pollution control equipment already in use; and
  - 8) The nature and amount of emissions, discharges or releases of the constituent in question currently generated by the petitioner's activity;
- c) Data describing the nature and extent of the present or anticipated failure to meet the regulation, requirement, or order of the Board from which variance is sought and facts that support petitioner's argument that compliance with the regulation, requirement, or order of the Board was not or cannot be achieved by any required compliance date;
- d) A description of the efforts that would be necessary for the petitioner to achieve immediate compliance with the regulation, requirement, or Board order at issue. All possible compliance alternatives, with the corresponding costs for each alternative, must be set forth and discussed. The discussion of compliance alternatives must include the availability of alternate methods of compliance, the extent that the methods were studied, and the comparative factors leading to the selection of the control program proposed for compliance. The discussion of the costs of immediate compliance may include the overall capital costs and the annualized capital and operating costs;
- e) Facts that set forth the reasons the petitioner believes that immediate compliance with the regulation, requirement, or order of the Board would impose an arbitrary or unreasonable hardship;
- f) A detailed description of the compliance plan, including:
- 1) A discussion of the proposed equipment or proposed method of control to be undertaken to achieve full compliance with the regulation, requirement, or order of the Board;
  - 2) A time schedule for the implementation of all phases of the control program from initiation of design to program completion; and

- 3) The estimated costs involved for each phase and the total cost to achieve compliance;
- g) A description of the environmental impact of the petitioner's activity including:
- 1) The nature and amount of emissions, discharges, or releases of the constituent in question if the requested variance is granted, compared to that which would result if immediate compliance is required;
  - 2) The qualitative and quantitative description of the impact of petitioner's activity on human health and the environment if the requested variance is granted, compared to the impact of petitioner's activity if immediate compliance is required. Cross-media impacts, if any, must be discussed; and
  - 3) A statement of the measures to be undertaken during the period of the variance to minimize the impact of the discharge of contaminants on human, plant, and animal life in the affected area, including the numerical interim discharge limitations that can be achieved during the period of the variance;
- h) Citation to supporting documents or legal authorities whenever they are used as a basis for the petition. Relevant portions of the documents and legal authorities other than Board decisions, reported state and federal court decisions, or state and federal regulations and statutes must be appended to the petition;
- i) If the requested variance involves an existing permit or a pending permit application, a copy of the material portion of the permit or permit application must be appended to the petition;
- j) Any conditions petitioner suggests for the requested variance;
- k) A proposed beginning and ending date for the variance. If the petitioner requests that the term of the variance begin on any date other than the date on which the Board takes final action on the petition, a detailed explanation and justification for the alternative beginning date;
- l) A discussion of consistency with federal law, including an analysis of applicable federal law and facts that may be necessary to show compliance with federal law as set forth in Section 104.208 of this Part;
- m) An affidavit verifying any facts submitted in the petition; and
- n) A statement requesting or denying that a hearing should be held in this matter.

## **Section 104.206 Resource Conservation and Recovery Act (RCRA) Variance Petition Contents**

In addition to the requirements of Sections 104.204 and 104.208 of this Part, a petition for a RCRA variance must meet the following requirements:

- a) All petitions for RCRA variances must include a showing that the Board can grant the requested relief consistent with, and establish RCRA permit conditions no less stringent than, those that would be required by RCRA and the regulations thereunder promulgated by USEPA (40 CFR 260, 261, 262, 263, 264, 265, 266, 267, 268 and 270). Petitions must indicate whether any federal provisions authorize the relief requested, and must include any facts necessary to show that the petitioner would be entitled to the requested relief pursuant to federal law;
- b) Persons who have, or are required to have, a RCRA permit and who seek a RCRA variance that could result in modification or issuance of the RCRA permit must have on file with the Agency a RCRA permit application reflecting the requested variance prior to filing the variance petition;
- c) Petitioner must attach to the variance petition a copy of the RCRA permit application, or such portion as may be relevant to the variance request; and
- d) Petitioner must attach to the variance petition documentation of service on USEPA as required by Section 104.202 of this Part.

(Source: Amended at 39 Ill. Reg. 2357, effective January 27, 2015)

## **Section 104.208 Consistency with Federal Law**

- a) All petitions for variances from Title II of the Act or from 35 Ill. Adm. Code.Subtitle B, Ch. I “Air Pollution”, must indicate whether the Board may grant the requested relief consistent with the Clean Air Act (CAA) (42 USC 7401 et seq.) and the federal regulations adopted pursuant thereto. If granting a variance would require revision of the State Implementation Plan, the petition must indicate whether the requirements of Section 110(a) of the CAA (42 USC 7410(a)) and 40 CFR 51 will be satisfied.
- b) All petitions for variances from Title III of the Act, from 35 Ill. Adm. Code.Subtitle C, Ch. I “Water Pollution”, or from water pollution related requirements of any other Title of the Act or Chapter of the Board’s regulations, must indicate whether the Board may grant the relief consistent with the Clean Water Act (CWA) (33 USC 1251 et seq.), USEPA effluent guidelines and standards, any other federal regulations, or any area-wide waste treatment management plan approved by the Administrator of USEPA pursuant to Section 208 of the CWA (33 USC 1288).

- c) All petitions for variances from Title IV of the Act or from 35 Ill. Adm. Code.Subtitle F, Ch. I “Public Water Supplies”, and to the extent applicable, from Title V of the Act or from 35 Ill. Adm. Code.Subtitle D, Ch. I “Mine Related Water Pollution”, must indicate whether the Board may grant the relief consistent with the Safe Drinking Water Act (42 USC 300(f) et seq.), the federal National Primary Drinking Water Regulations (40 CFR 141) and Underground Injection Control Program and other federal regulations adopted pursuant thereto.
- d) All petitions for variances from Title V of the Act or from 35 Ill. Adm. Code.Subtitle G, Ch. I “Waste Disposal” must indicate whether the Board may grant the requested relief consistent with RCRA, and the federal regulations adopted pursuant thereto.
- e) For all petitions for RCRA variances, petitioner should consult the federal RCRA rules which contain procedures that are referred to as “Variances” (40 CFR 260, 261, 262, 263, 264, 265, 266, 267, 268 and 270). The petitioner should consult the comparable Board regulations to decide whether the variance procedures of this Part need to be followed.

**Section 104.210      Petition for Extension of Variance**

- a) A variance extension pursuant to Section 36(b) of the Act *may be extended from year to year by affirmative action of the Board, but only if satisfactory progress has been shown* by the petitioner [415 ILCS 5/36(b)].
- b) A petition to extend a variance granted by the Board is a new petition for variance before the Board, and must be filed in accordance with this Subpart and 35 Ill. Adm. Code 101.Subpart C, including payment of the filing fee pursuant to Section 104.202(b) of this Part and 35 Ill. Adm. Code 101.302(e)(2).
- c) If the petitioner desires to have the term of the variance extension be sequential with the term of the prior variance, the petition to extend the variance must be filed with the Board no later than 120 days prior to the termination of the variance, unless the petitioner can demonstrate that the petition for variance extension was filed as soon as practicable after the petitioner learned that it could not meet the compliance time frame under the existing variance.
- d) In addition to the requirements of this Subpart, the petition for extension of variance must contain:
  - 1) A detailed statement showing that *satisfactory progress* toward compliance has been or will have been achieved during the term of the prior variance [415 ILCS 5/36(b)];

- 2) A statement that the conditions of the prior variance have been fully met, or, if any condition or conditions have not been fully met, a detailed explanation of the reason or reasons that the condition or conditions have not been fully met; and
- 3) A motion to incorporate any material from the record of the prior variance proceeding in accordance with 35 Ill. Adm. Code 101.306.

**Section 104.212 Motion for Modification of Internal Variance Compliance Dates**

- a) The petitioner may request, by written motion, modification of internal dates within a compliance schedule of an existing variance, so long as the modification does not extend the length of the existing variance period. The written motion will not be considered to be an extension of the prior variance. The motion must be filed under the docket number of the existing variance, and must be filed with the Clerk and served upon the Agency, and any joined parties pursuant to 35 Ill. Adm. Code 101.Subpart D. The Agency must, and any joined parties may, file a response to that motion. Any response must be filed within 14 days after receipt of the motion.
- b) A motion for modification that would extend the length of the existing variance period constitutes a Petition for Extension of Variance and must be filed in accordance with Section 104.210 of this Part.

**Section 104.214 Notice of Petition**

- a) Within 14 days after the petition is filed, the petitioner must *publish a single notice of such petition in a newspaper of general circulation in the county where the facility or pollution source is located* [415 ILCS 5/37(a)].
- b) Upon filing a petition for variance, the petitioner *shall promptly give written notice of such petition to:*
  - 1) *Any person in the county in which the installation or property for which variance is sought is located who has filed with the Board a written request for notice of variance petitions;*
  - 2) *The State's attorney of such county;*
  - 3) *The Chairman of the County Board of such county; and*
  - 4) *Each member of the General Assembly from the legislative district in which that installation or property is located. [415 ILCS 5/37(a)]*
- c) Upon receipt of a petition for RCRA variance, the Agency must promptly give

notice of the petition to:

- 1) Federal agencies as designated by USEPA;
  - 2) Illinois Department of Transportation;
  - 3) Department of Natural Resources;
  - 4) Illinois Department of Public Health;
  - 5) The Governor of any other state adjacent to the county in which the facility or pollution source is located; and
  - 6) Elected officials of any counties, in other states, adjacent to the county in which the facility or pollution source is located, and elected officials in any municipality, in another state, if it is the closest population center to the facility or pollution source.
- d) In addition to the methods of notice stated in subsection (c) of this Section, in a RCRA variance the Agency must also give notice by broadcast over at least one local radio station in the area of the facility or pollution source containing the information required by subsections (e) and (f) of this Section.
- e) *All notices required by this Section must include the following:*
- 1) *The street address of the facility or pollution source, and if there is no street address, then the legal description or the location with reference to any well known landmark, highway, road, thoroughfare or intersection [415 ILCS 5/37(a)];*
  - 2) A description of the requested relief;
  - 3) An indication that any person may request a hearing by filing with the Board a written objection to the grant of the variance within 21 days after the publication of the petitioner's notice, together with a written request for hearing;
  - 4) The Clerk of the Board's address and phone number, the Board's website address, and a statement that a copy of the variance petition may be obtained through the Clerk's Office or COOL, located on the Board's website;
  - 5) A statement that the Agency is preparing a recommendation and seeking the views of persons who may be adversely affected by the variance. All comments and inquiries should be addressed to the Agency employee responsible for the recommendation within 21 days after publication of the

petitioner's notice. The notice must include the date on which the recommendation is to be filed, and the name, address, email address, and telephone number of the Agency employee responsible for the recommendation;

- 6) A statement that a hearing may be held after the filing of the recommendation and that the record will remain open for written comments for 45 days after filing of the recommendation. The notice will include the address of the Board to which the comments must be mailed;
  - 7) A statement that the record in the variance proceeding is available at the Board office for inspection, except those portions that are protected from disclosure under 35 Ill. Adm. Code 130, and that procedures are available whereby disclosure may be sought by the public;
  - 8) A statement that variances may be granted pursuant to Section 35 of the Act [415 ILCS 5/35] and 35 Ill. Adm. Code 104, and a reference to the Board regulations or order from which a variance is sought; and
  - 9) Any additional information considered necessary or proper.
- f) Within 21 days after the publication of notice, the petitioner must file with the Board a certification of publication that states the date on which the notice was published and must attach a copy of the published notice.

(Source: Amended at 39 Ill. Reg. 12905, effective September 8, 2015)

#### **Section 104.216 Agency Investigation and Recommendation**

- a) Upon receipt of a petition for variance, *the Agency shall promptly investigate such petition and consider the views of persons who might be adversely affected by the grant of a variance* [415 ILCS 5/37(a)].
- b) *The Agency shall make a recommendation to the Board as to the disposition of the petition* [415 ILCS 5/37(a)]. Unless otherwise ordered by the hearing officer or the Board, the recommendation must be filed with the Board within 45 days after the filing of the petition or amended petition, or where there has been a hearing scheduled, at least 30 days before hearing, whichever is earlier. The Agency must serve a copy of its recommendation in accordance with 35 Ill. Adm. Code 101.304(c), on the petitioner, joined parties, and assigned hearing officer, if applicable. At a minimum, the recommendation must include:
  - 1) A description of the efforts made by the Agency to investigate the facts as alleged and to ascertain the views of persons who might be affected, and a summary of the views so ascertained;

- 2) The location of the nearest air monitoring station maintained by the Agency where applicable;
- 3) A statement of the degree to which, if at all, the Agency disagrees with the facts as alleged in the petition, including facts refuting any allegations in the petition for variance;
- 4) Allegations of any other facts the Agency believes relevant to the disposition of the petition, including any past or pending enforcement actions against petitioner;
- 5) The Agency's estimate of the costs that compliance would impose on the petitioner and on others;
- 6) The Agency's estimate of the injury that the grant of the variance would impose on the public, including the effect that continued discharge of contaminants will have upon the environment;
- 7) The Agency's analysis of applicable federal laws and regulations and an opinion concerning the consistency of the petition with such federal laws and regulations;
- 8) The status of any permits or pending permit applications that are associated with or affected by the requested variance;
- 9) Allegation of any facts that the Agency believes are relevant to whether the Board should condition a grant of variance on the posting of a performance bond pursuant to Section 104.246 of this Part;
- 10) Citation to supporting documents or legal authorities whenever they are used as a basis for the Agency's recommendation. Relevant portions of the documents and legal authorities, other than Board decisions, reported state and federal court decisions, state and federal regulations and statutes, must be appended to the recommendation if not already in the record of the proceeding;
- 11) The Agency's recommendation of what disposition should be made of the petition, deny or grant, and suggested conditions. If the Agency recommends that variance be granted, a recommended beginning and end date of the requested variance, and any recommended conditions on the variance; and
- 12) An affidavit verifying any facts outside the record referenced in the recommendation.

(Source: Amended at 39 Ill. Reg. 2357, effective January 27, 2015)

### **Section 104.218 Agency Recommendation to RCRA Variance**

In addition to the recommendation requirements stated in Section 104.216 of this Part, the Agency recommendation on petitions for RCRA variances must also include the following and, in addition to the service requirements of Section 104.216 of this Part, the Agency must serve its recommendation on USEPA and all persons who have notified the Agency that they intend to comment or have otherwise asked to be served a copy of the recommendation.

- a) The recommendation must include a fact sheet or statement of basis as provided in 35 Ill. Adm. Code 705.141 through 705.143, where relevant.
- b) If the Agency recommends that the variance be granted, a partial draft permit reflecting the variance and recommended conditions must be included with the recommendation.

### **Section 104.220 Response to Agency Recommendation**

- a) Within 14 days after service of the Agency recommendation the petitioner may file a response to the Agency recommendation or an amended petition. The petitioner must serve a copy of the response or amended petition upon the hearing officer, the Agency, and any other parties to the proceeding.
- b) The response or amended petition may include a request for hearing. New information in a response or amended petition must be verified by oath or affidavit.
- c) Any amended petition or request for hearing under this Section recommences the decision period pursuant to Section 104.232 of this Subpart.

### **Section 104.222 Stipulations**

Filing of a stipulation in a variance proceeding is permissible to the extent that the stipulation conveys to the Board those facts upon which the parties agree. However, the Board is not bound to accept as fact any stipulation to findings of ultimate fact or conclusion of law, such as stipulating that it would impose an arbitrary or unreasonable hardship if petitioner were to immediately comply with the applicable rule or regulation.

### **Section 104.224 Objections to Petition, Written Comments and Request for Hearing**

- a) A person who files an objection, request for hearing, or comment is a "participant" as defined in 35 Ill. Adm. Code 101.Subpart B.

- b) Except as provided in subsection (e) of this Section for RCRA variances, any person may file with the Clerk, within 21 days after the publication of the Petitioner's notice pursuant to Section 104.214 of this Part, a written objection to the grant of variance. The Clerk will serve a copy of the objection on the petitioner, the Agency, the hearing officer, and any joined parties in accordance with 35 Ill. Adm. Code 101.304(c).
- c) Any person may also file a written request for hearing. The written request must be filed within 21 days after the publication of the Petitioner's notice pursuant to Section 104.214 of this Part in order for a hearing to be held in accordance with Section 104.236 of this Part and 35 Ill. Adm. Code 101.Subpart F.
- d) Any person may file written comments in a variance proceeding. If a hearing is held, public comments must be filed within 14 days after the close of the hearing unless the hearing officer specifies a different date. If there is no hearing, comments must be filed no later than 30 days before the decision date, unless the hearing officer orders otherwise to prevent material prejudice. (See 35 Ill. Adm. Code 101.628(c)(1).)
- e) In RCRA variances, subsections (b) and (c) of this Section do not apply. However, persons may file written comments within 45 days after the Agency files its recommendation.

(Source: Amended at 39 Ill. Reg. 12905, effective September 8, 2015)

#### **Section 104.226 Amended Petition and Amended Recommendation**

- a) The petitioner may amend the petition prior to the close of 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. Amended petitions subsequent to hearing will be accepted only with leave of the Board. Amended petitions must be in writing and filed with the Board and served in accordance with 35 Ill. Adm. Code 101.Subpart C. If the petitioner substantively amends the petition, the filing of the amended petition recommences the decision period, pursuant to Section 104.232 of this Part.
- b) If the petitioner amends the petition, the Agency must file or give an amended recommendation in writing or orally at hearing, but in any event not later than 45 days after the filing of an amended petition. The Agency may amend its recommendation even if the petitioner has not amended its petition. In such an instance, a recommendation may be amended prior to close of the hearing, if a hearing is held, or 40 days prior to the Board's decision date if a hearing is not held. The petitioner may file a response to an Agency recommendation pursuant to Section 104.220 of this Part.

- c) Written amendments to the petition or recommendation need not repeat the entire unchanged portion of the original filing provided that a sufficient portion of the original filing is repeated so that the context of the amendment is made clear.

#### **Section 104.228      Insufficient Petition**

If the Board finds the petition fails to contain information as required by Sections 104.204, 104.206, and 104.208 of this Part, the Board may order the petitioner to supplement the information contained in the petition. Filings made in response to the order constitute an amended petition for the purposes of calculating the decision deadline pursuant to Section 104.232 of this Part. Alternatively, pursuant to Section 104.230 of this Part, the Board may dismiss the petition for lack of sufficient information. Failure of the Board to require supplemental information does not preclude a later finding that the information provided is insufficient to support grant of variance, or constitute a Board decision on the merits of the petition.

#### **Section 104.230      Dismissal of Petition**

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

- a) The petition requests relief that the Board is not empowered to grant;
- b) The petition fails to comply with the requirements of 35 Ill. Adm. Code 101.Subpart C and Sections 104.202, 104.204, 104.206 and 104.208 of this Part;
- c) The petitioner fails to timely comply with any order issued by the Board or the hearing officer, including an order requiring additional information pursuant to Section 104.228 of this Part; or
- d) The petitioner is not subject to the rule or regulation, requirement, or order of the Board at issue.

#### **Section 104.232      Calculation of Decision Deadline**

- a) Pursuant to Section 38(a) of the Act, the Board will render its final decision on the petition within 120 days after the date of filing of the petition or the receipt of a request for hearing pursuant to Section 37(a) of the Act, whichever is later, except:
  - 1) When the petitioner waives its right to a decision within the prescribed decision period in accordance with 35 Ill. Adm. Code 101.Subpart C;
  - 2) When the petitioner files an amended petition for variance pursuant to this Subpart, the decision period recommences from the date of filing of the amended petition; or

- 3) When a hearing is canceled pursuant to 35 Ill. Adm. Code 101.510.
- b) Time will be computed in accordance with 35 Ill. Adm. Code 101.Subpart C.

(Source: Amended at 39 Ill. Reg. 12905, effective September 8, 2015)

### **Section 104.234 Hearing**

The Board will order a hearing on a variance petition if:

- a) A hearing is requested by the petitioner at the time of initial filing on the associated form or in writing, which is filed and served in accordance with 35 Ill. Adm. Code 101.Subpart C;
- b) A hearing is requested in a response or amended petition;
- c) *The Board, in its discretion, concludes that a hearing would be advisable* [415 ILCS 5/37(a)];
- d) *The Agency or any other person files a written objection to the grant of such variance within 21 days after the publication of the Petitioner's notice pursuant to Section 104.214 of this Part, together with a written request for hearing* [415 ILCS 5/37(a)]; or
- e) The request concerns a RCRA variance.

(Source: Amended at 39 Ill. Reg. 12905, effective September 8, 2015)

### **Section 104.236 Hearing Procedures**

Hearings will be conducted pursuant to 35 Ill. Adm. Code 101.Subpart F, except that:

- a) Hearings may be canceled pursuant to a motion filed in accordance with 35 Ill. Adm. Code 101.510 at the discretion of the hearing officer.
- b) If all parties and participants who have requested a hearing pursuant to this Subpart have withdrawn their requests for a hearing, the hearing will not be held unless the Board in its discretion deems it advisable.
- c) The hearing on a RCRA variance petition will be held, whenever possible, at a location convenient to the population center that is closest to the facility.
- d) The hearing officer will give notice of RCRA hearings to the following persons:

- 1) Any person in the county in which the installation or property for which variance is sought is located who has in writing requested notice of variance petitions and the State's attorney of the county;
- 2) The Chairman of the county board of the county;
- 3) Each member of the General Assembly from the legislative district in which that installation or property is located;
- 4) Federal agencies as designated by USEPA;
- 5) Illinois Department of Transportation;
- 6) Department of Natural Resources;
- 7) Illinois Department of Public Health;
- 8) The Governor of any other state adjacent to the county in which the facility or pollution source is located;
- 9) Elected officials of any counties, in other states, adjacent to the county in which the facility or pollution source is located, and elected officials in any municipality, in another state, if it is the population center that is closest to the facility or pollution source; and
- 10) USEPA's Region V Director of Waste, Pesticides and Toxics Division.

(Source: Amended at 40 Ill. Reg. 7973, effective May 20, 2016)

**Section 104.238      Standard of Review**

- a) *The Board may grant individual variances beyond the limitations prescribed by the Act, whenever it is found, upon presentation of adequate proof, that compliance with any rule or regulation, requirement or order of the Board would impose an arbitrary or unreasonable hardship. [415 ILCS 5/35(a)]* The burden of proof in a variance proceeding is on the petitioner.
- b) In addition to subsection (a) of this Section the Board may grant a RCRA variance only to the extent consistent with, and with conditions no less stringent than, those that would be required by RCRA and 40 CFR 260, 261, 262, 263, 264, 265, 266, 267, 268, and 270. Variances must require compliance with the regulations in the shortest practicable time.

## **Section 104.240      Certificate of Acceptance**

The Board's order granting a variance will include a certificate of acceptance. The certificate constitutes acceptance of the variance and its conditions by the petitioner. A variance and its conditions are not binding upon the petitioner until the executed certificate is filed with the Board and served on the Agency. Failure to timely file the executed certificate with the Board and serve the Agency renders the variance void. However, execution of the certificate is not necessary prior to seeking reconsideration pursuant to 35 Ill. Adm. Code 101.Subpart I, or appeal pursuant to Section 104.244 of this Part.

## **Section 104.242      Term of Variance**

*Except as provided by Section 38(a) of the Act, any variance granted pursuant to the provisions of this Part shall be for such period of time, not exceeding five years, as shall be specified by the Board at the time of the grant of such variance, and upon the condition that the person who receives such variance shall make such periodic progress reports as the Board shall specify. Such variance may be extended from year to year by affirmative action of the Board, but only if satisfactory progress is shown. [415 ILCS 5/36(b)]*

## **Section 104.244      Variance Conditions**

*In granting a variance the Board may impose such conditions as the policies of the Act may require [415 ILCS 5/36(a)]. In a RCRA variance the Board may direct the Agency to issue or modify a RCRA permit with conditions that may be set forth specifically in the order, or that may consist of general guidelines to be followed by the Agency, together with applicable regulations, in issuing a permit.*

## **Section 104.246      Performance Bonds**

*If the hardship complained of consists solely of the need for a reasonable delay in which to correct a violation of the Act or of the Board regulations, the Board shall condition the grant of such variance upon the posting of sufficient performance bond or other security to assure the completion of the work covered by the variance. The original amount of such performance bond shall not exceed the reasonable cost of the work to be completed pursuant to the variance. The obligation under such bond shall at no time exceed the reasonable cost of work remaining pursuant to the variance. [415 ILCS 5/36(a)]*

## **Section 104.248      Objection to Conditions**

*The Board may include such conditions in granting a variance and may adopt such rules and regulations as the policies of the Act may require. If an objection is made to a variance condition, the Board shall reconsider the condition within not more than 75 days from the date of the objection. [415 ILCS 5/41(b)] An objection to a specific variance condition may be made*

by filing a motion pursuant to 35 Ill. Adm. Code 101.Subpart E within 35 days after the receipt of the Board's opinion and order containing the objectionable condition.

## SUBPART C: PROVISIONAL VARIANCES

### **Section 104.300      Applicability**

This Subpart applies to any person seeking a provisional variance from the Agency pursuant to Title IX of the Act. This Subpart must be read in conjunction with 35 Ill. Adm. Code 101 and this Part. In the event of conflict between this Subpart and the requirements of 35 Ill. Adm. Code 101, the requirements of this Subpart apply.

(Source: Amended at 29 Ill. Reg. 8803, effective June 8, 2005)

### **Section 104.302      Agency Action**

*The Agency shall grant provisional variances whenever it is found, upon presentation of adequate proof, that compliance on a short term basis with any rule or regulation, requirement or order of the Board, or with any permit requirement, would impose an arbitrary or unreasonable hardship. [415 ILCS 5/35(b)]*

(Source: Amended at 29 Ill. Reg. 8803, effective June 8, 2005)

### **Section 104.304      Initiating a Request**

*Any person seeking a provisional variance pursuant to Section 35(b) of the Act and 35 Ill. Adm. Code 180 shall make a request to the Agency. The Agency shall promptly investigate and consider the merits of the request. If the Agency fails to take final action within 30 days after receipt of the request for a provisional variance, or if the Agency denies the request, the person may initiate a variance proceeding with the Board pursuant to Subpart B of this Part. [415 ILCS 5/37(b)]*

(Source: Amended at 29 Ill. Reg. 8803, effective June 8, 2005)

### **Section 104.306      Filing and Notice**

*If the Agency grants a provisional variance, the Agency must promptly file a copy of its written decision with the Board, and shall give prompt notice of its action to the public by issuing a press release for distribution to newspapers of general circulation in the county. The Clerk will maintain for public inspection copies of all provisional variances filed with the Board by the Agency. [415 ILCS 5/37(b)]*

(Source: Amended at 29 Ill. Reg. 8803, effective June 8, 2005)

### **Section 104.308 Term**

*Any provisional variance granted by the Agency pursuant to subsection (b) of Section 35 of the Act shall be for a period of time not to exceed 45 days. A provisional variance may be extended up to an additional 45 days by written decision of the Agency. The provisional variances granted to any one person shall not exceed a total of 90 days during any calendar year. [415 ILCS 5/36(c)]*

(Source: Amended at 29 Ill. Reg. 8803, effective June 8, 2005)

### **Section 104.310 Simultaneous Variance Prohibition (Repealed)**

(Source: Repealed at 29 Ill. Reg. 8803, effective June 8, 2005)

## **SUBPART D: ADJUSTED STANDARDS**

### **Section 104.400 General**

- a) Description. An adjusted standard has the effect of an environmental regulation that would apply to petitioner, if granted, in lieu of the general regulation that would otherwise be applicable to a petitioner and the regulated community.
- b) Applicability. This Subpart will apply to any person seeking an adjusted standard pursuant to Section 28.1 of the Act. This includes an adjusted standard sought pursuant to 35 Ill. Adm. Code 212.126 (CAA) and 35 Ill. Adm. Code 700 through 750 (RCRA). This Subpart must be read in conjunction with 35 Ill. Adm. Code Part 101 which contains procedures generally applicable to all adjudicatory proceedings before the Board. In the event of a conflict between the requirements of 35 Ill. Adm. Code 101 and those of this Subpart, the provisions of this Subpart apply.

### **Section 104.402 Initiation of Proceeding**

A person may initiate an adjusted standard proceeding by filing a petition that meets the requirements of Section 104.406 of this Part. A petition for an adjusted standard (petition) may be filed either jointly with the Agency or singly pursuant to the filing requirements of 35 Ill. Adm. Code 101. If filed singly the petitioner shall also serve the petition upon the Agency in accordance with 35 Ill. Adm. Code 101. Additionally, a person may file a petition and request the Agency to join as a co-petitioner as set forth in Section 104.404 of this Part.

#### **Section 104.404 Request to Agency to Join as Co-Petitioner**

- a) The Agency may, in its discretion, act as a co-petitioner in any adjusted standard proceeding.
- b) Any person may request Agency assistance in initiating a petition for adjusted standard. The Agency may require the person to submit to the Agency any background information in the person's possession relevant to the adjusted standard that is sought.
- c) Discretionary decisions made by the Agency pursuant to this Section are not appealable to the Board.
- d) Subsequent to the filing of the petition and prior to hearing, the Board will grant the Agency co-petitioner status upon joint motion of the Agency and the petitioner who originally filed the petition.

#### **Section 104.406 Petition Content Requirements**

If the Agency is a co-petitioner, the petition must so state. The petition must contain headings corresponding to the informational requirements of each subsection of this Section. If the petitioner believes that any of the informational requirements are not applicable to the specific adjusted standard requested, the petitioner must so state and explain his reasoning. The following information must be contained in the petition:

- a) A statement describing the standard from which an adjusted standard is sought. This must include the Illinois Administrative Code citation to the regulation of general applicability imposing the standard as well as the effective date of that regulation;
- b) A statement that indicates whether the regulation of general applicability was promulgated to implement, in whole or in part, the requirements of the CWA (33 USC 1251 et seq.), Safe Drinking Water Act (42 USC 300(f) et seq.), Comprehensive Environmental Response, Compensation and Liability Act (42 USC 9601 et seq.), CAA (42 USC 7401 et seq.), or the State programs concerning RCRA, UIC, or NPDES [415 ILCS 5/28.1];
- c) The level of justification as well as other information or requirements necessary for an adjusted standard as specified by the regulation of general applicability or a statement that the regulation of general applicability does not specify a level of justification or other requirements [415 ILCS 5/28.1] (See Section 104.426);
- d) A description of the nature of the petitioner's activity that is the subject of the proposed adjusted standard. The description must include the location of, and

area affected by, the petitioner's activity. This description must also include the number of persons employed by the petitioner's facility at issue, age of that facility, relevant pollution control equipment already in use, and the qualitative and quantitative description of the nature of emissions, discharges or releases currently generated by the petitioner's activity;

- e) A description of the efforts that would be necessary if the petitioner was to comply with the regulation of general applicability. All compliance alternatives, with the corresponding costs for each alternative, must be discussed. The discussion of costs must include the overall capital costs as well as the annualized capital and operating costs;
- f) A narrative description of the proposed adjusted standard as well as proposed language for a Board order that would impose the standard. Efforts necessary to achieve this proposed standard and the corresponding costs must also be presented;
- g) The quantitative and qualitative description of the impact of the petitioner's activity on the environment if the petitioner were to comply with the regulation of general applicability as compared to the quantitative and qualitative impact on the environment if the petitioner were to comply only with the proposed adjusted standard. To the extent applicable, cross-media impacts must be discussed. Also, the petitioner must compare the qualitative and quantitative nature of emissions, discharges or releases that would be expected from compliance with the regulation of general applicability as opposed to that which would be expected from compliance with the proposed adjusted standard;
- h) A statement which explains how the petitioner seeks to justify, pursuant to the applicable level of justification, the proposed adjusted standard;
- i) A statement with supporting reasons that the Board may grant the proposed adjusted standard consistent with federal law. The petitioner must also inform the Board of all procedural requirements applicable to the Board's decision on the petition that are imposed by federal law and not required by this Subpart. Relevant regulatory and statutory authorities must be cited;
- j) A statement requesting or waiving a hearing on the petition (pursuant to Section 104.422(a)(4) of this Part a hearing will be held on all petitions for adjusted standards filed pursuant to 35 Ill. Adm. Code 212.126 (CAA));
- k) The petition must cite to supporting documents or legal authorities whenever they are used as a basis for the petitioner's proof. Relevant portions of the documents and legal authorities other than Board decisions, State regulations, statutes, and reported cases must be appended to the petition;

- l) Any additional information which may be required in the regulation of general applicability.

### **Section 104.408 Petition Notice Requirements**

- a) *The petitioner shall submit to the Board proof that, within 14 days after the filing of the petition, it has published notice of the filing of the petition by advertisement in a newspaper of general circulation in the area likely to be affected by the petitioner's activity that is the subject of the adjusted standard proceeding [415 ILCS 5/28.1].*
- b) The title of the notice must be in the form as follows: "Notice of Petition by [petitioner's name] for an Adjusted Standard before the Illinois Pollution Control Board." The notice must contain the name and address of the petitioner and the statement that the petitioner has filed with the Board a petition for an adjusted standard. The notice must also provide the date upon which the petition was filed, the Board docket number, the regulatory standard (with appropriate Administrative Code citation) from which an adjusted standard is sought, the proposed adjusted standard, and a general description of the petitioner's activity that is the subject of the adjusted standard proceeding, and the location of that activity. This information must be presented so as to be understood in accordance with the context of this Section's requirements. The concluding portion of the notice must read as follows:

"Any person may cause a public hearing to be held in the above-described adjusted standard proceeding by filing a hearing request with the Illinois Pollution Control Board within 21 days after the date of the publication of this notice. The hearing request should clearly indicate the docket number for the adjusted standard proceeding, as found in this notice. The hearing request must be mailed to the Clerk of the Board, Illinois Pollution Control Board, 100 W. Randolph Street, Suite 11-500, Chicago, Illinois 60601, or filed electronically through COOL, located on the Board's website ([www.ipcb.state.il.us](http://www.ipcb.state.il.us))."

(Source: Amended at 39 Ill. Reg. 2357, effective January 27, 2015)

### **Section 104.410 Proof of Petition Notice Requirements**

Within 30 days after the filing of the petition, the petitioner must file a certificate of publication, issued by the publisher of the petition notice certifying the publication of that notice. The certificate must be issued in accordance with Section 1 of the Notice by Publication Act [715 ILCS 5/1].

### **Section 104.412 Effect of Filing a Petition: Stay**

- a) *If any person files a petition for an individual adjusted standard in lieu of complying with the applicable regulation within 20 days after the effective date of the regulation, the operation of the regulation shall be stayed as to such person pending the disposition of the petition; provided, however, that the operation of any regulation shall not be stayed if that regulation was adopted by the Board to implement, in whole or in part, the requirements of the federal Clean Air Act, Safe Drinking Water Act or Comprehensive Environmental Response, Compensation, and Liability Act, or the State RCRA, UIC or NPDES programs. [415 ILCS 5/28.1(e)]*
- b) *Within 20 days after the effective date of any regulation that implements in whole or in part the requirements of the Clean Air Act, if any person files a petition for an individual adjusted standard in lieu of complying with the regulation, such source will be exempt from the regulation until the Board makes a final determination on the petition. If the regulation adopted by the Board from which the individual adjusted standard is sought replaces a previously adopted Board regulation, the source shall be subject to the previously adopted Board regulation until final action is taken by the Board on the petition. [415 ILCS 5/28.1(f)]*

#### **Section 104.414 Dismissal of Petition**

The Board may at any time dismiss a petition for any of the following reasons:

- a) The Board determines that the petition is frivolous, duplicative, or deficient with respect to the requirements of Sections 104.406, 104.408, and 104.410 of this Part; or
- b) The Board determines that the petitioner is not pursuing disposition of the petition in a timely manner.

#### **Section 104.416 Agency Recommendation and Petitioner Response**

- a) Unless otherwise ordered by the hearing officer or the Board, the recommendation must be filed with the Board within 45 days after the filing of the petition or amended petition, or where a hearing has been scheduled, at least 30 days before hearing, whichever is earlier. The recommendation must set forth the rationale for the Agency's position and may present any information which the Agency believes is relevant to the Board's consideration of the proposed adjusted standard. If the Agency recommends a denial of the petition due to informational deficiencies within the petition, the recommendation must identify the types of information needed to correct the deficiencies.
- b) At a minimum, the Agency must address and respond to the petition with respect to each issue raised by the requirements of subsections (a) through (j) of Section 104.406 of this Part.

- c) The recommendation must cite to supporting documents or legal authorities whenever such are used as a basis for the Agency's conclusion. Relevant portions of the documents and legal authorities other than Board decisions, State regulations, statutes and reported cases must be appended to the recommendation if not already in the record of the proceeding.
- d) The petitioner may file a response to the recommendation within 14 days after the date of service of the recommendation.

**Section 104.418 Amended Petition, Amended Recommendation, and Amended Response**

- a) Amended Petition. The petitioner may amend its petition at any time. The amendment must be in writing and filed with the Board unless made orally at hearing. If the petitioner amends the petition such that the amendment is a substantive change to the requested relief in that it requests additional or alternative relief, petitioner must re-notice the amended petition pursuant to Section 104.408 of this Part.
- b) Amended Recommendation. The Agency may amend its recommendation at any time, even if the petitioner has not amended its petition, if the amendment does not cause material prejudice. The amendment must be in writing and filed with the Board unless made orally at hearing.
- c) Amended Response. The petitioner may file a reply to a written amended recommendation within 14 days after the date of receipt of the amended recommendation or within 14 days after the hearing when the Agency orally amended its recommendation.
- d) Written amendments to the petition or recommendations need not repeat the entire unchanged portion of the original filing provided that a sufficient portion of the original filing is repeated so that the context of the amendment is made clear.

**Section 104.420 Request for Public Hearing**

- a) Any person can request that a public hearing be held in an adjusted standard proceeding. The requests must be filed not later than 21 days after the date of the publication of the petition notice in accordance with Section 104.408 of this Part. Requests for hearing should make reference to the Board docket number assigned to the proceeding. A copy of each timely hearing request will be served upon the petitioner and Agency by the Clerk of the Board in accordance with 35 Ill. Adm. Code 101.304(c). Participation by the public at the hearing must be in accordance with 35 Ill. Adm. Code 101.110 and 101.628.

- b) Where all parties and participants who have requested a hearing pursuant to this Subpart have withdrawn their requests for a hearing, the hearing will not be held unless the Board in its discretion deems it advisable.

(Source: Amended at 39 Ill. Reg. 2357, effective January 27, 2015)

**Section 104.422 Public Hearing**

- a) A public hearing will be held and the Board will assign a hearing officer to an adjusted standard proceeding when:
  - 1) The petitioner requests a hearing be held; or
  - 2) The Board receives a hearing request by any person pursuant to Section 104.420, not later than 21 days after the date of the publication of the petition notice in accordance with Section 104.408; or
  - 3) The Board *in its discretion determines that a hearing would be advisable* [415 ILCS 5/28.1]; or
  - 4) The adjusted standard is sought pursuant to 35 Ill. Adm. Code 212.126 (CAA).
- b) The hearing officer will set a time and place for the hearing. The hearing officer will attempt to consult with the petitioner and the Agency before scheduling a hearing.

(Source: Amended at 40 Ill. Reg. 7973, effective May 20, 2016)

**Section 104.424 Hearing Notice**

After receiving notification from the hearing officer of the scheduled hearing date made pursuant to Section 104.422 of this Part, the Clerk will cause the publication of a hearing in accordance with Section 28.1 of the Act [415 ILCS 5/28.1] and 35 Ill. Adm. Code 101.

**Section 104.426 Burden of Proof**

The burden of proof in an adjusted standard proceeding is on the petitioner. A petitioner must justify an adjusted standard consistent with Section 27(a) of the Act.

- a) *If the regulation of general applicability does not specify a level of justification required of a petitioner to qualify for an adjusted standard, the Board may grant individual adjusted standards whenever the Board determines, upon adequate proof by petitioner, that:*

- 1) *factors relating to that petitioner are substantially and significantly different from the factors relied upon by the Board in adopting the general regulation applicable to that petitioner;*
  - 2) *the existence of those factors justifies an adjusted standard;*
  - 3) *the requested standard will not result in environmental or health effects substantially and significantly more adverse than the effects considered by the Board in adopting the rule of general applicability; and*
  - 4) *the adjusted standard is consistent with any applicable federal law. [415 ILCS 5/28.1(c)]*
- b) If the regulation of general applicability specifies a level of justification for an adjusted standard, the Board may adopt the proposed adjusted standard, if the petitioner proves the level of justification specified by the regulation of general applicability.

**Section 104.428 Board Action**

- a) In adopting adjusted standards the Board may impose such conditions as may be necessary to accomplish the purposes of the Act.
- b) Subsequent to the Board's adoption of an adjusted standard, the Board will publish, in the Environmental Register, the name of the petitioner, date of the Order that adopted the adjusted standard, and a brief narrative description of the adopted adjusted standard.
- c) *Board orders and opinions shall be maintained for public inspection by the Clerk of the Board and a listing of all determinations made pursuant to Section 28.1 of the Act shall be published in the Illinois Register and the Environmental Register at the end of each fiscal year. [415 ILCS 5/28.1(d)]* Board opinions and orders will also be available from the Board's Web site.

104.APPENDIX A Comparison of Former and Current Rules (Repealed)

(Source: Repealed at 29 Ill. Reg. 8803, effective June 8, 2005)