

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)	
)	
PROCEDURAL RULE AMENDMENTS:)	
PROPOSED AMENDMENTS TO 35 ILL.)	R16-17
ADM. CODE 101 THROUGH 125)	(Rulemaking – Procedural)

NOTICE OF FILING

TO: Mr. John T. Therriault	Mr. Daniel Robertson
Assistant Clerk of the Board	Hearing Officer
Illinois Pollution Control Board	Illinois Pollution Control Board
100 West Randolph Street	100 West Randolph Street
Suite 11-500	Suite 11-500
Chicago, Illinois 60601	Chicago, Illinois 60601
(VIA ELECTRONIC MAIL)	(VIA FIRST CLASS MAIL)

(SEE PERSONS ON ATTACHED SERVICE LIST)

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Board the ILLINOIS ENVIRONMENTAL REGULATORY GROUP'S FIRST NOTICE COMMENTS ON PROPOSED PROCEDURAL AMENDMENTS, a copy of which is herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
REGULATORY GROUP,

Dated: February 18, 2016

By: /s/ Antonette R. Palumbo
Antonette R. Palumbo

Antonette R. Palumbo
Legal Counsel
Illinois Environmental Regulatory Group
215 East Adams Street
Springfield, Illinois 62701
(217) 522-2212

CERTIFICATE OF SERVICE

I, Antonette R. Palumbo, the undersigned, hereby certify that I have served the attached ILLINOIS ENVIRONMENTAL REGULATORY GROUP'S FIRST NOTICE COMMENTS ON PROPOSED PROCEDURAL AMENDMENTS upon:

Mr. John T. Therriault
Assistant Clerk of the Board
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601

via electronic mail on February 18, 2016; and upon:

Mr. Daniel Robertson
Hearing Officer
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601

Matthew J. Dunn
Office of the Attorney General
69 West Washington Street
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Chicago, Illinois 60602

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Illinois Environmental Protection Agency
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Illinois Department of Natural Resources
One Natural Resources Way
Springfield, Illinois 62702

Amy Antonioli
Schiff Hardin, LLP
233 South Wacker Drive
Suite 6600
Chicago, Illinois 60606

by depositing said documents in the United States Mail, postage prepaid, in Springfield, Illinois on February 18, 2016.

By: /s/ Antonette R. Palumbo
Antonette R. Palumbo

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
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PROCEDURAL RULE AMENDMENTS:)
PROPOSED AMENDMENTS TO 35 ILL.) R16-17
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**THE ILLINOIS ENVIRONMENTAL
REGULATORY GROUP'S COMMENTS**

NOW COMES the ILLINOIS ENVIRONMENTAL REGULATORY GROUP (“IERG”), by and through its attorney, Antonette R. Palumbo, and in accordance with the December 17, 2015, Opinion and Order, hereby submits its First Notice comments in the above-captioned matter.

IERG is an Illinois non-profit corporation affiliated with the Illinois Chamber of Commerce. IERG is comprised of fifty-three (53) member companies that are regulated by governmental agencies that promulgate, enforce, or administer environmental laws, rules, regulations, or other policies. One of IERG’s primary roles is to represent the interests of its members in rulemakings before the Illinois Pollution Control Board (“Board”). A number of IERG’s member companies participate in Board rulemakings, and many have been involved with adjudicatory proceedings. As such, IERG and its member companies have an interest in the Board’s proposed amendments to procedural rules for rulemakings and adjudicatory proceedings. IERG appreciates the opportunity to participate in this proceeding and offers the following comments for consideration by the Board.

I. INTRODUCTION

On December 17, 2015, the Board issued a First Notice Opinion and Order in Rulemaking 16-17 regarding proposed procedural rule amendments. First Notice Opinion and

Order, R16-17, (Ill. Pol. Control Bd. Dec. 17, 2015) (hereafter "Opinion and Order"). The purpose of the proposed amendments is to increase the Board's efficiency and reduce the costs of Board proceedings through the increased use of technology. A dissenting opinion was also filed on December 17, 2015, by Board Member Glosser.

IERG supports the Board's desire to improve efficiency and cut costs and is generally supportive of the First Notice proposal's adoption. However, IERG does have reservations about some aspects of the Board's proposed procedural rule amendments it wishes to raise through this comment. First, IERG is concerned about the proposed process for deciding whether to hold hearings by videoconference and the ambiguity surrounding the logistics of videoconference hearings in adjudicatory and rulemaking proceedings. Second, IERG is apprehensive about the ability of the Board's website to process the increased number of electronic filings required under the proposed amendments.

II. VIDEOCONFERENCE HEARINGS

The Opinion and Order seeks to make videoconference hearings available for all Board proceedings. The proposed amendment to Section 101.600 states:

Any Board hearing may be held by videoconference. Upon its own motion or the motion of any party, the Board or the hearing officer may order that a hearing be held by videoconference. In deciding whether a hearing should be held by videoconference, factors that the Board or hearing officer will consider include cost-effectiveness, efficiency, facility accommodations, witness availability, and public interest.

Opinion and Order at 42.

A. The Proposed Regulatory Factors for Holding Board Hearings Via Videoconference

IERG's concern with this proposed amendment stems from the unilateral and *sua sponte* manner in which the Board or the hearing officer may decide to hold a hearing by videoconference. While videoconference hearings may, in some cases, be more cost effective

because of reduced travel costs, the result is likely to be a less engaging and potentially less effective hearing. The factors listed in the rule do not take into account the subject matter at issue in the hearing. The factors focus primarily upon the logistics and cost-efficiency of holding a videoconference hearing. The Board or the hearing officer is not required to give due consideration to the subject matter or the tenor of the proceedings, nor to consider the preference of parties or participants.

IERG is concerned that, in some instances, videoconferencing may actually hinder the proceedings. Videoconferencing, while inexpensive, can be less engaging, and participants may find it more difficult to connect with each other. This may result in misunderstandings or surface level discussions. Board members may not be able to gauge the feeling of the people in attendance or make any observations not visible to the limited view of the camera. Not having participated in an evidentiary hearing via videoconference, IERG has no basis upon which to form an opinion regarding the effectiveness of questioning witnesses or the Board's ability to assess the credibility of the testimony offered. IERG urges the Board to consider how videoconference hearings could affect the tone and presentation of hearings. The factors in the proposed amendment do not contemplate such considerations; as such, the Board or the hearing officer's unilateral authority to order a videoconference hearing should be exercised cautiously until the Board and participants have a better understanding of how holding a hearing via videoconference could impact the proceedings.

B. Geographic Location of Videoconference Hearings

The Opinion and Order also specifically requests comments regarding the geographic location of videoconference hearings. Opinion and Order at 5. The Board stated it "wishes to encourage videoconference hearings in rulemakings and adjudicatory proceedings. . . [and]

proposes to amend the procedural rules that require or establish a presumption for holding hearings in specific locations, unless the procedural rule is based upon a law that imposes the geographic requirement.” *Id.* at 6. The procedural rules proposed to be amended include those governing Board hearings generally (101.600 and 102.114); RCRA permit and variance hearings (103.414(b), 104.236(c)); adjusted standard hearings (104.422(b)); revocation and reopening of Clean Air Act Program Permits hearings (106.410); maximum achievable control technology determination hearings (106.510); landscape waste and compost application hearings (106.912); alternative thermal effluent limitations hearings (106.1155); and tax certification hearings (125.210).

The previous language qualifying the location of these hearings to be the county in which the source or facility is located has been removed, and the resultant language is vague and provides little guidance for the regulated community as to the resulting geographic location of these hearings. For example:

- Section 101.600: “The hearings will be ~~are generally held at locations in the county in which the source or facility is located unless otherwise~~ ordered by the hearing officer, in accordance with any geographic requirements imposed by applicable law and consistent with the Board’s resources.” Opinion and Order at 42.
- Section 102.114: “Hearings will be conducted pursuant to 35 Ill. Adm. Code 101. Subpart F, including any hearing held by videoconference (see 35 Ill. Adm. Code 101.600(b)).” *Id.* at 49.
- Sections 103.414(b) and 104.236(c): “The hearing will be held, whenever possible, at a location convenient to ~~in the county in which the facility is located,~~ in the population center that is in the county closest to the facility.” *Id.* at 57, 60.

- Section 104.422(b): “The hearing officer will set a time and place for the hearing. The hearing officer will make an attempt to consult with the petitioner and the Agency before ~~prior to the scheduling of a hearing. Hearings are to be held in the county likely to be affected by the petitioner’s activity that is the subject of the proposed adjusted standard.~~” *Id.* at 61.
- Section 106.410: “The Board will hold at least one public hearing ~~in the county where the CAAPP source is located.~~” *Id.* at 69.
- Section 106.912(c): “The hearing officer will set a time and place for the hearing. The hearing officer will make an attempt to consult with the petitioner and the Agency before ~~prior to the scheduling of a hearing. Hearings are to be held in the county likely to be affected by the petitioner’s activity that is the subject of the proposed authorization proceeding.~~” *Id.* at 71.
- Section 106.1155: “The hearing officer will schedule the hearing ~~to be held in the county likely to be affected by the petitioner’s activity.~~” *Id.*
- Section 125.210: “If a hearing is to be held, the hearing officer will set a time and place for the hearing. The hearing officer will ~~make an attempt to consult with the applicant and the Agency before scheduling a hearing.~~ Hearings will be conducted pursuant to 35 Ill. Adm. Code 101. Subpart F, including any hearing held by videoconference (see 35 Ill. Adm. Code 101.600(b)). ~~Hearings will be held in the county where the facility or portion thereof or the device for which the applicant seeks tax certification is located, unless the hearing officer orders otherwise.~~” *Id.* at 78.

From these amendments, it is unclear as to whether the Board’s proposal would require videoconference hearings to be held exclusively between the Springfield and Chicago offices of

the Board, or if such a hearing could occur between a location near the petitioner and the Board's Chicago office. The only provisions that provide any guidance as to location deal with RCRA permit and variance hearings. Otherwise, potential hearing participants are left to guess as to how the logistics of a videoconference hearing will be determined and who has the burden of finding a facility that is compatible for videoconferencing.

IERG finds the ambiguity in the proposed amendments concerning. IERG's members have facilities statewide. Requiring a representative and witnesses from a facility in Southern Illinois to drive to Springfield for a videoconference hearing in order to be heard on a petition or rulemaking can be onerous. If the Board is proposing this reading of the amendments, it is simply shifting the burden and expenses of hearings from itself to the hearing participants. Even if the Board is not proposing for videoconferencing to take place only in the Springfield and Chicago offices, the Board has not clearly articulated how such hearings will occur or who has the burden of finding a videoconference accessible location. IERG suggests the Board carefully consider the logistical impediments of the proposal and more clearly articulate how videoconference hearings for the various Board proceedings will work.

The Board also specifically requested comments regarding the location of videoconference hearings for rulemakings, as Section 28(a) of the Illinois Environmental Protection Act requires "a public hearing [to be held] within the area of the State concerned." 415 ILCS 5/28(a). In regards to rulemakings of general applicability, this provision requires hearings to "be held in at least two areas." *Id.* The Opinion and Order proposed that two videoconference hearings be held between the Board's Chicago and Springfield offices in order to satisfy the statutory requirements, which is the typical arrangement currently for rulemakings of general applicability. However, the same logistical issues present in the adjudicatory context

are also present for rulemakings of localized impact. The regulated community is spread across the state. For those not located near Springfield or Chicago, the burden of attending public videoconference hearing may be shifted to participants.

Given the statutory requirements that certain hearings be held in the affected county or area, it is unclear from the Opinion and Order whether these hearings would be conducted via videoconference and the actual location of these hearings.

III. ELECTRONIC FILINGS

IERG supports the Board's proposal to require petitions brought pursuant to Sections 104 and 106 and Agency records to be filed electronically. IERG encourages the Board to ensure that the Clerk's Office On-line ("COOL") is technologically sufficient and prepared for the increased number of electronic filings. Furthermore, if the digital file is to become the legal record of the filing, then it should be consistently maintained and accessible.

IERG and its members have experienced difficulties in utilizing COOL to file comments and other documents with the Board. It can be difficult to upload documents without error messages and multiple attempts, and IERG is concerned about COOL's ability to handle an increase in mandated electronic filings. While the Clerk's Office has been very helpful and accommodating by accepting filings via email or fax when problems do arise, IERG is concerned that the proposed amendments will require greater accommodations from the Clerk's Office in order to process the larger number of electronic filings and could result in an increased workload for the Clerk's Office.

Therefore, IERG urges the Board to examine the functionality and performance of COOL and to remedy any technical deficiencies that prohibit quick and reliable electronic filings. Without such an examination, the Board's proposed mandatory electronic filing may fall short of

the aims of the rulemaking, as individuals and organizations seeking to file a document on COOL close to the deadline will resort to finding alternative ways to get their document to the Board.

If the Board wishes to encourage efficiency and savings, it must ensure it has the proper tools to achieve these goals. So long as COOL can handle the influx of electronically filed documents without crashing or errors, IERG believes this proposed change will be positive for parties and the public, as they will be able to access Agency records and filed documents faster and easier than before.

IV. CONCLUSION

IERG has an interest in this rulemaking because it and its member companies frequently participate in rulemakings and other Board proceedings and are likely to be affected by the proposed amendments. IERG is generally supportive of this rulemaking, but it has concerns about holding hearings by videoconference and COOL's capability for increased electronic filings. IERG urges the Board to consider expanding the list of factors that the Board or hearing officer must take into account when determining whether to hold a hearing by videoconference. IERG also hopes the Board recognizes and remedies the ambiguity surrounding the logistics of holding videoconference hearings, particularly in individualized adjudicatory proceedings or rulemakings of localized impact. IERG also encourages the Board to look into the reliability and functionality of COOL for mandatory electronic filings. IERG hopes its comments are helpful and informative for the Board.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
REGULATORY GROUP

Dated: February 18, 2016

By: /s/ Antonette R. Palumbo
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