

ILLINOIS POLLUTION CONTROL BOARD  
December 17, 2015

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

DISSENTING OPINION (by D. Glosser):

I am entering this dissenting opinion today even though I support some of the proposed changes because I have concerns with certain of the changes proposed by the new procedural rules. I believe that these changes will severely limit the public's ability to participate in Board proceedings. Some of my specific concerns are related to changes delineated in Sections 101.600, 101.602, 101.1070, 102.424(e), and 101.302 and the corresponding changes in the more specific procedural provisions. While I believe some of my concerns may have been able to be addressed, given more time, the majority declined my request to delay proceeding with the rule today, which is contrary to long standing practice by the Board. Therefore, I enter this dissenting opinion to call attention to these issues and to encourage all persons who have participated in or been a part of the Board's proceedings to comment on these issues.

**HEARINGS**

While I agree that allowing the Board to hold both rulemaking and adjudicatory hearings by videoconference is a lofty goal, I am concerned by the change in the Board's policy to require holding at least one hearing in the county or area where the source or facility is located. The Board has held hearings in the county or area where the source or facility is located since the creation of the Board. This allows the public that is directly impacted by the Board's decision an opportunity to attend the hearings and perhaps offer public comment or even testimony at those hearings. Moving the hearings away from the county or area where the source or facility is located may impact the public's ability to attend those hearings, particularly in permit appeals, enforcements, and adjusted standards. I believe that this change to the Board's long standing policy is not warranted or even needed at this time. We should not allow what may be convenient and efficient for the Board to undermine the ability of the public to participate.

In addition to changing the Board's policy on holding public hearings in the county or area where the source or facility is located, in Section 101.602 and also Sections 102.304 and 102.416, the Board is eliminating the use of newspapers for public notice in certain circumstances. While the *Illinois Register* may be a legally correct way to notify the public, the general public does not receive the *Illinois Register*, and newspapers offer far greater notice to the general public than does the *Illinois Register*. I believe the Board should continue to use newspapers and possibly also utilize the *Illinois Register*.

### USE OF ELECTRONIC MEDIA

While I agree that electronic filing should be utilized, and in fact was the author on rule changes adopted in February 2015 that incorporated the electronic filing procedures into the Board's rules, I believe that the amendments to those requirements go too far at this time. One area of concern is the change that has a party consenting to email service by simply providing an email address. While use of emails by parties may be a convenience, not all parties may be willing or even able to accept formal filings via email. Providing an email address to allow for informal exchanges between parties and even the hearing officer, is not the same as agreeing to accept all filings by email. I believe a more substantive step, such as a formal agreement to accept email filing should remain in the rules, and I therefore would not make this change in Section 101.1070.

Additionally, I do not agree with the new requirement that a participant in a rulemaking, who prefiled testimony, questions, responses, or any related exhibits before a hearing in paper only, must then at hearing provide a compact disk or other portable electronic storage device containing their respective prehearing documents in text-searchable Adobe PDF for the record. I believe this type of change may have a chilling effect on participation from the general public. I am not convinced that all members of the public, who choose to participate in rulemakings, will have the electronic capabilities or technical expertise to provide documents in a searchable Adobe PDF or even on a compact disc. The Board still receives many filings written by hand, and I believe we should encourage all participation and not discourage it. We should not over-estimate the availability of the Internet or the technical expertise of the potential participants to Board proceedings.

As the Board's first Chairman, David Currie said, Section 28 of the Act (415 ILCS 5/28 (2014)) "at a minimum . . . contemplates the opportunity to present one's views orally". David P. Currie, *Rulemaking under the Illinois Pollution Law*, 42 University of Chicago Law Review 457, 470 (1975). Professor Currie continued:

Even if, as often happened under the earlier Illinois provision, such a hearing consisted solely of the reading aloud of statements that were also submitted in writing, it would have symbolic value in giving the citizen a greater sense of participation by the opportunity to speak to the rulemaker face to face. *Id.*

I am concerned that these electronic requirements will limit the public ability to participate, contrary to the Board's clear statutory mandate in rulemakings.

I am also concerned that the electronic requirements have an impact on the filings in proceedings before the Board. The changes to Section 101.302(h) require that landfill siting records be submitted only electronically as well as any petition under Part 104 or 106. I agree that requiring the Agency and OSFM to file records electronically may be warranted; however, I am not sure that local siting authorities and individual petitioners will always have the ability to provide electronic materials.

Pollution Control Facility Siting appeal records are generally very substantial both in size and information. The application alone can be thousands of pages and then the transcripts from the public hearings, along with public comments, counter proposals, and exhibits can result in a record that is thousands of pages. Many of the Board's cases in siting appeals are generated by siting applications filed in smaller villages, town, and counties. I am unconvinced that these smaller villages, towns and counties may not always have the resources to prepare a record thousands of pages in size in an electronic format. The resources of these smaller villages, towns, and counties are evident in a recent Board case where the basic question of when an application was delivered to the Village created an issue before the Board. See Roxana Landfill, Inc. v. Village Board of the Village of Caseyville, Illinois; Village of Caseyville, Illinois; and Caseyville Transfer Station, L.L.C., Village of Fairmont v. Village Board of the Village of Caseyville, Illinois; Village of Caseyville, Illinois; and Caseyville Transfer Station, L.L.C., PCB 15-65 and PCB 15-69 (conslid.). This is sufficient for me to have concerns that all siting authorities will have the resources to meet the rule change.

I believe that requiring electronic filing of some of these documents is a reach at this point in time. I would prefer that we continue to encourage electronic filing from the general public, while implementing electronic filing from state agencies and those who wish to voluntarily do so.

### CONCLUSION

I agree that the use of videoconferencing, electronic filing, and email service should be encouraged by the Board in all proceedings. However, I believe the majority overestimates the availability of technology and technical expertise required for videoconferencing and electronic filing in Illinois. As a result, many of the amendments proposed today by the majority will have a chilling effect on participation before the Board, and I urge all members of the public to provide comment to the Board to ensure the Board's processes remain transparent and open to the general public.

For the foregoing reasons, I respectfully dissent.




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Deanna Glosser, PhD

I, John T. Therriault, Clerk of the Illinois Pollution Control Board, certify that the above dissenting opinion was submitted on December 17, 2015.




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John T. Therriault, Clerk  
Illinois Pollution Control