

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
) R17-18
PROCEDURAL RULE AMENDMENTS:)
PROPOSED AMENDMENTS TO 35 ILL.) (Rulemaking - Procedural)
ADM. CODE 101 THROUGH 130)

NOTICE OF FILING

Pollution Control Board, Attn: Clerk
100 W. Randolph
James R. Thompson Center, Suite 11-500
Chicago, Illinois 60601
(ELECTRONIC FILING)

Ms. Marie Tipsord, Hearing Officer
100 W. Randolph
James R. Thompson Center, Suite 11-500
Chicago, Illinois 60601
(ELECTRONIC MAIL)

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board FIRST NOTICE COMMENTS OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, a copy of which is herewith served upon you.

ILLINOIS ENVIRONMENTAL PROTECTION
AGENCY

By: /s/ Sara G. Terranova

DATE: 3/23/2017
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ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
)
PROCEDURAL RULE AMENDMENTS:) R17-18
PROPOSED AMENDMENTS TO 35 ILL.) (Rulemaking – Procedural)
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FIRST NOTICE COMMENTS OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

NOW COMES the Illinois Environmental Protection Agency (Illinois EPA or Agency) by and through its counsel and hereby submits the following comments regarding the first notice proposal of the Illinois Pollution Control Board (Board) published in the Illinois Register on February 10, 2017. *See*, 41 Ill. Reg. 1293.

I. BOARD’S REQUEST FOR COMMENT

In the Opinion and Order dated January 19, 2017, there are four specific instances where the Board requested the Agency to comment:

A) Whether the Agency is prepared to accept tax certification applications under 35 Ill. Adm. Code 125.202 and provisional variance submittals under 35 Ill. Adm. Code 104 Subpart C in electronic format. The Agency will consider the electronic filing option for tax certification applications and requests for provisional variances at a later date; at present however, considering the infrequency of such applications and requests and the resources that would be needed to both develop an electronic filing system and revise the Agency’s rules applicable to provisional variances, the Agency will retain its current practices.

B) Whether the Agency can provide an email address for the initial service of documents under 35 Ill. Adm. Code 101.304(g)(1), even before an attorney files an appearance. The Agency is willing to provide an email address for the initial service of

documents under 35 Ill. Adm. Code 101.304(g), even before an attorney files an appearance.

Service of documents can be emailed to epa.dlc@illinois.gov. The Agency requests that service continue to this email address even after an attorney files an appearance. As will be discussed in more detail below, the intention of this additional service is to ensure that the Agency receives notice of filings even when the attorney or attorneys handling a matter are absent or otherwise unavailable.

C) Proposed changes to 35 Ill. Adm. Code 106.1180(a), (c), and (d); Renewal of Alternative Thermal Effluent Limitations. The Agency supports the Board's proposed revisions in both 35 Ill. Adm. Code 106.1180 (a) and (b). However, due to the substantive nature of the language in subsections (c) and (d), the Agency requests the Board hold a public hearing to gather additional comments from both the regulated community as well as environmental groups.

D) Sections that are repetitive, unduly burdensome, or in need of updating.

1) 35 Ill. Adm. Code 101.112. On August 26, 2015, the United States Environmental Protection Agency (USEPA) disapproved portions of Illinois' Infrastructure State Implementation Plan (SIP) submittals for the 2006 fine particulate matter National Ambient Air Quality Standard (NAAQS) and the 2008 ozone NAAQS. 80 *Fed. Reg.* 51730. USEPA indicated that such SIPs failed to address Section 110(a)(2)(E)(ii) of the Clean Air Act (CAA), which requires that each SIP contain provisions that comply with the state board requirements of Section 128 of the CAA. Section 128 requires: (1) that any board or body which approves permits or enforcement orders have at least a majority of members who represent the public interest and do not derive any significant portion of their income from persons subject to permits and enforcement orders; and (2) that any potential conflicts of interest by members of such board

or body or the head of an executive agency with similar powers be adequately disclosed. 42 USC Sec. 7428.

USEPA found that Illinois' SIP submittals failed to satisfy the above requirements. USEPA has advised that, until such provisions are added to the SIP, it cannot fully approve any of Illinois' infrastructure SIPs. The Illinois EPA therefore requests that the Board adopt the following amendments in this rulemaking proceeding. The Illinois EPA believes these revisions, which largely mirror the language in Section 128, will satisfy the CAA requirements described above:¹

Section 101.112 Bias and Conflict of Interest

- a) No Board Member or Board employee may represent any other person in any Board proceeding.
- b) No former Board Member or Board employee may represent any other person in any Board proceeding in which he or she participated personally and substantially as a Board Member or Board employee, unless the Board and, as applicable, all parties or proponents in the proceeding consent in writing after disclosure of the participation. For purposes of subsections (a) and (b) of this Section, representation includes consulting on legal or technical matters, and Board employee means a person the Board employs on a full-time, part-time, contract, or intern basis.
- c) The Board, on its own motion or the motion of any party, may disqualify a hearing officer for bias or conflict of interest as provided by Section 10-30(b) of the IAPA [5 ILCS 100/10-30(b)].
- d) In accordance with Section 128 of the federal Clean Air Act, at least a majority of Board members must represent the public interest, and must not derive any significant portion of their income from persons subject to permits or enforcement orders under the Clean Air Act or Illinois Environmental Protection Act. Any potential conflicts of interest by Board members must be adequately disclosed.

¹ USEPA has issued guidance regarding Section 128 requirements, available at https://www.epa.gov/sites/production/files/2016-03/documents/19780302_guidance_states_lead.pdf. The guidance contains "suggested definitions" that indicate USEPA's interpretation of the terms used in Section 128, such as "significant portion of income," "represent the public interest," and "adequately disclosed," among others. As most of these terms appear in the Agency's proposed amendments to Section 101.112, the guidance may be useful to the Board in considering (and, if adopted, in implementing) the Agency's proposed language.

2) **35 Ill. Adm. Code 101.302(k)**. The phrase “federal regulations, and statutes” is unclear as to whether State statutes are included (whereas State regulations clearly are not). It seems both State and federal should be included, but if the intent is only to include federal statutes, then that should be specified.

3) **35 Ill. Adm. Code 101.400(a)(3)**. The phrase “no...motions...is necessary...” needs subject/verb agreement. The Agency proposes the following language: "No Board order is required for an out-of-state attorney to appear and no motions to appear pro hac vice are is necessary."

4) **35 Ill. Adm. Code 101.518**. Interlocutory appeals from hearing officer decisions during a hearing are now tied to the hearing date. If the transcript is unexpectedly delayed, it may be difficult to file the interlocutory appeal with the Board by the prescribed deadline. The Agency requests that the deadline begin to run on the date the Board posts the transcript.

5) **35 Ill. Adm. Code 101.904(a)**. The Agency requests that the Board clarify the timeframe when clerical mistakes may only be corrected with permission of the appellate court. The changes proposed could imply that while the appeal is pending, clerical mistakes cannot be corrected at all.

6) **35 Ill. Adm. Code 103.306(a)**. In order for the Illinois EPA to satisfy federally-mandated public participation requirements in proposed settlements of National Pollutant Discharge Elimination System (NPDES) enforcement cases, the provisions in 35 Ill. Adm. Code 103.306(a) should be retained. In October 1977, the USEPA approved Illinois to administer the NPDES program. That delegation was invalidated in 1979 by the U.S. Court of Appeals for the Seventh Circuit (*Citizens for a Better Environment v. EPA*, 596 F.2d 720 (7th Cir.

1979)). In that ruling, the court held that USEPA had failed to promulgate regulations providing for public participation in State enforcement actions. In response to this court ruling, the Director of the Illinois EPA submitted a letter dated July 7, 1980, indicating that Illinois EPA would investigate all citizen complaints and provide a public comment period for all settlements. Separately, the Illinois Attorney General's Office sent a letter dated July 1, 1980, stating that it would not oppose permissive citizen intervention. After receipt of these letters, USEPA approved Illinois' NPDES program in April 1981. Around the same time, USEPA then promulgated regulations that are now found in 40 CFR 123.27(d), which indicate that States administering the NPDES program must provide for public participation in the enforcement process by either:

1. Allowing for citizen intervention as of right in civil or administrative actions; or
2. Giving assurances that the State will (i) investigate citizen complaints; (ii) not oppose permissive citizen intervention; and (iii) publish notice and provide at least 30 days for public comment on any proposed settlement of an enforcement action.

The Illinois EPA is committed to satisfying the public participation requirements of 40 CFR 123.27, as well as the commitments made in the 1980 letter to USEPA. With respect to proposed settlements of NPDES enforcement actions that are filed in Circuit Court, the State is currently in the process of establishing a framework to utilize its website to publish notice of these proposed settlements for at least 30 days to allow for public comment. With respect to proposed settlements of NPDES enforcement actions that are filed with the Pollution Control Board, provisions already exist in the Administrative Code to satisfy the federally-mandated public notice requirement. Specifically, 35 Ill. Adm. Code 103.306(a) provides that "where a National Pollutant Discharge Elimination System (NPDES) permit is involved in the settlement, notice of

settlement must be published in the Environmental Register at least 30 days prior to the settlement.”

In order for the State to satisfy the public participation requirements in 40 CFR 123.27(d), which are applicable to all States that have been delegated control over their respective NPDES programs, the provisions in 35 Ill. Adm. Code 103.306(a) should be retained.

II CHANGES IN RESPONSE TO ILLINOIS SUPREME COURT RULES

A) Amendments in 35 Ill. Adm. Code 101.1070(d) providing that an attorney cannot revoke consent for email service. While the Agency is generally accepting of email service, the Agency is concerned with the inability of an attorney to revoke consent for email service. From a State-Agency point of view, emails can be lost or misdirected, and deadlines could thereby be missed. If an attorney is unexpectedly absent for a period of time, for example, the Agency could miss the opportunity to file a response to a motion it did not realize had been filed, because the absent attorney’s email would not be readily accessible to others. In an attempt to avoid lost or misdirected emails, the Agency is proposing that all email service of documents be provided to both any attorney who files an appearance and to the Agency generally at the email address provided by the Agency for the initial service of documents under 35 Ill. Adm. Code 101.304(g). The Agency believes this continued additional email service of documents will help to provide a safeguard in the event the attorney on file does not receive her or his email service of documents.

B) Amendments in 35 Ill. Adm. Code 101.1030(g) requiring the original preparing of records on appeal to include bookmarks and pagination in Adobe Acrobat filing. The Agency believes the Board’s proposed amendments are technically feasible and agrees to include bookmarks and pagination in Adobe filing for records on appeal.

C) Amendments in 35 Ill. Adm. Code 101.302(l) allowing the Clerk or hearing officer to reject documents that do not comply with the procedural rules. The Agency has the following three points it requests the Board to consider:

1) The Agency requests that the Board clarify or narrow the scope of documents that may be rejected by the Clerk or hearing officer. As proposed, 35 Ill. Adm. Code 101.302(l) allows the Clerk or hearing officer to reject documents filed that do not meet the requirements of 35 Ill. Adm. Code Subtitle A. While Subtitle A contains procedural rules, there are procedural rules within that contain substantive content. The Agency is concerned the Clerk or hearing officer will be required to make a substantive determination regarding the information provided in a filed document. For example, 35 Ill. Adm. Code 104.210(d)(1) requires that a petition for an extension of variance must contain “a detailed statement showing that satisfactory progress toward compliance has or will have been achieved during the term of the prior variance.” In this particular instance, it is unclear to the Agency if the Clerk or hearing officer will be making a determination if: 1) “satisfactory progress toward compliance...” has been shown by the applicant, 2) the required statement is detailed, or 3) simply, a statement at all has been provided. The Agency believes any substantive determination regarding the information provided in a filed document should be left to the Board. Therefore, the Agency is requesting that the Board either clarify when exactly the Clerk or hearing officer may reject documents filed that do not meet the requirements of 35 Ill. Adm. Code Subtitle A or narrow the scope.

2) The Agency requests the Board to specify how the Clerk or hearing officer will communicate its action and to whom.

3) The Agency requests the Board to specify what mechanism will be put in place for challenging such a rejection.

D) Amendments in 35 Ill. Adm. Code 104.419 regarding insufficient petitions and supplemental information for an adjusted standard. To promote efficiency among the parties, the Agency requests that the Board make a determination as to the sufficiency of a petition and whether or not the petitioner must supplement the information contained in the petition as soon as possible after the initial filing and preferably before the Agency files its recommendation. The Agency believes this early-on determination will help to avoid a situation where the Agency must file additional recommendations subsequent to an amended petition. While the Agency realizes it may not always be possible for the Board to make this early-on determination and the Board maintains the authority to dismiss a petition for lack of sufficient information at any time during the proceedings, the Agency requests that once the Agency has filed its recommendation with the Board that the Board rule on the merits of the petition.

WHEREFORE, the Illinois EPA respectfully submits these comments.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: /s/ Sara G. Terranova
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CERTIFICATE OF SERVICE

I, SARA G. TERRANOVA, an attorney, do certify that I have served an entry of FIRST NOTICE COMMENTS OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY upon:

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via electronic mail on March 23, 2017

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