

ILLINOIS POLLUTION CONTROL BOARD

April 11, 2019

IN THE MATTER OF: )  
)  
PROPOSED AMENDMENTS TO GENERAL ) R19-19  
PROCEDURAL RULES (35 ILL. ADM. ) (Rulemaking - Procedural)  
CODE 101) )

Proposed Rule. First Notice.

OPINION AND ORDER OF THE BOARD (by K. Papadimitriou):

The Board proposes first-notice amendments to Part 101 of its procedural rules (35 Ill. Adm. Code 101). Part 101 contains the Board’s general rules of procedure, which apply to all types of Board proceedings. Procedures for specific types of Board proceedings are contained in the other nine Parts of the procedural rules—Parts 102 through 108, as well as Parts 125 and 130. Today’s proposed amendments to Part 101 cover four subjects:

- **Electronically Filing Exhibits Offered at Specified Types of Hearings.** A person who offers an exhibit for admission at an adjudicatory hearing or a time-limited water quality standard (TLWQS) hearing will be required to e-file an accurate reproduction of that hearing exhibit after the hearing. This will enable the Clerk’s Office, for the first time, to routinely post these hearing exhibits on the Board’s website (pcb.illinois.gov).
- **E-Mail Serving Final Adjudicatory Orders.** For a party who consents to e-mail service, the Board will e-mail serve the party with the Board’s final adjudicatory order, as permitted by Public Act 100-880 (eff. Jan. 1, 2019).
- **Explicitly Addressing TLWQS Proceedings in Part 101.** The General Assembly recently authorized the Board to adopt TLWQS, and the Board has since adopted procedural rules for TLWQS proceedings. Generally, a TLWQS is a legal mechanism that provides dischargers with temporary relief from surface water quality standards. A TLWQS proceeding before the Board is neither an adjudicatory case nor a rulemaking. The proposed amendments will clarify Part 101’s applicability to TLWQS proceedings, including the Part 101 provisions on ex parte communications and attorney representation.
- **Making Part 101 Clear, Concise, and Current.** The proposed amendments will clarify, update, and streamline the rule text of Part 101 consistent with the Board’s on-going initiative to review all its rules for language that is unclear, obsolete, or redundant.

In this opinion, the Board discusses each of these four areas in turn, followed by an explanation of the procedures for this rulemaking. After the opinion is the Board’s order directing the Clerk to cause publication of the proposed amendments in the *Illinois Register* for first notice. The rules themselves appear in the addendum to this opinion and order.

## **DISCUSSION**

### **E-File Adjudicatory and TLWQS Hearing Exhibits**

#### **Current Situation**

Currently, exhibits offered by parties at an adjudicatory hearing are generally not available on the Board's website.<sup>1</sup> The reasons for this are twofold. First, the Board does not receive these hearing exhibits in electronic form. After an adjudicatory hearing, the hearing officer conveys the hearing exhibits, which are almost always in paper form, to the custody of the Clerk's Office. This contrasts with exhibits from rulemaking hearings, most of which are electronically pre-filed. For example, when a rulemaking hearing is held by videoconference, any document to be offered as a hearing exhibit must be e-filed at least 24 hours before the scheduled start of the hearing. 35 Ill. Adm. Code 102.424(h); *see also* 35 Ill. Adm. Code 101.302(h). Second, the Clerk's Office does not have the resources to scan paper exhibits into PDFs. The Board conducts many adjudicatory hearings; hearing exhibits are often numerous, voluminous, or both. TLWQS hearings are expected to present like issues, though the Board has not yet held one.

Adjudicatory hearing exhibits, in this regard, sharply contrast with hearing transcripts, which the Board receives electronically from court reporting services and readily uploads to the Board's website. To review adjudicatory hearing exhibits, a member of the public generally must visit the Clerk's Office in person. But, if the hearing exhibits were on the Board's website, anyone with an internet connection could access them. This would benefit the other parties to the proceeding and members of the public, as well as Board members and staff.

#### **Proposed Rule Changes**

**Scope and Timing.** The Board proposes a new Section 101.627, which will require the person who offers an exhibit for admission at an adjudicatory or TLWQS hearing to file a copy of that exhibit—through the Clerk's Office On-Line (COOL)—within five days after the hearing ends. *See* proposed Sections 101.627(a), (b). The requirement will apply regardless of whether the hearing officer admits the hearing exhibit into the record. *See* proposed Section 101.627(a)(1)(A). The requirement will not apply, however, to a hearing exhibit that contains unredacted information claimed or determined to be a trade secret or other non-disclosable information. *See* proposed Section 101.627(a)(1)(B).

As proposed, the offering party or participant must mark the e-filed copy of the hearing exhibit with the number assigned to that exhibit by the hearing officer. *See* proposed Section 101.627(d). The Board's hearing officers assign a number to every exhibit offered at hearing,

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<sup>1</sup> The Board's adjudicatory proceedings include permit appeals, enforcement actions, variance petitions, adjusted standard petitions, administrative citations, and pollution control facility siting appeals. They do not include rulemakings.

even if the exhibit is not admitted. In addition, the e-filed exhibit must be in text-searchable format, to the extent technically feasible. *See* proposed Section 101.627(e)(1).

**If Difficulties Arise.** The person offering the hearing exhibit will usually be in the best position to e-file it. The Board recognizes, however, that an offering party or participant may be unable to e-file an exhibit or unable to e-file within five days. The proposed rule therefore provides that e-filing the exhibit will not be required if the hearing officer determines that it is not practicable for the offering party or participant to do so. *See* proposed Section 101.627(a). And, the hearing officer may extend the five-day deadline if the offering party or participant shows good cause for an extension. *See* proposed Section 101.627(b).

**E-File an Accurate Reproduction.** As noted, the hearing officer takes custody of the exhibits offered at hearing. Accordingly, after hearing, the offering party or participant will not possess the hearing exhibit itself. However, the proposal includes measures to ensure that the e-filed copy of the hearing exhibit is the same as the exhibit offered at hearing.

Specifically, the e-filed version must include the offering party's or participant's certification that the exhibit is an accurate reproduction of the one offered at hearing. No later than five days after the offering party or participant e-files the hearing exhibit, any other party or participant may file an objection—but only to allege that the e-filed exhibit is not an accurate reproduction. *See* proposed Section 101.627(g)(1). The offering party or participant may file a response to the objection no later than five days after being served with it. *See* proposed Section 101.627(g)(2). Despite providing these safeguards, the Board expects the post-hearing e-filing of hearing exhibits to be a straightforward process that generates objections only rarely.

### **E-Mail Serve Final Adjudicatory Orders**

#### **Current Situation**

On January 1, 2019, Public Act 100-880 amended the Illinois Administrative Procedure Act (IAPA) (5 ILCS 100 (2016)). Before Public Act 100-880, Section 10-50(a) of the IAPA required that a final order in a “contested case” be served “either personally or by registered or certified mail.”<sup>2</sup> 5 ILCS 100/10-50(a) (2016). Public Act 100-880 amended Section 10-50(a) to allow agencies a third alternative for serving their final adjudicatory orders, *i.e.*, by e-mail.

To accommodate e-mail service both by the Clerk's Office and by parties and participants, the Board amended its procedural rules in 2015. *See* Procedural Rule Amendments to Implement Electronic Filing and Allow for Public Remarks at Board Meetings: Proposed Amendments to 35 Ill. Adm. Code 101-130, R14-21 (Jan. 22, 2015). Since then, for those consenting to e-mail service, the Clerk's Office has been e-mail serving nearly all Board and

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<sup>2</sup> The IAPA defines a “contested case” as “an adjudicatory proceeding (not including ratemaking, rulemaking, or quasi-legislative, informational, or similar proceedings) in which the individual legal rights, duties, or privileges of a party are required by law to be determined by an agency only after an opportunity for a hearing.” 5 ILCS 100/1-30 (2016).

hearing officer orders, including final Board orders in rulemakings. However, primarily because of Section 10-50(a), the Clerk's Office was not allowed to serve the Board's final adjudicatory orders by e-mail.

With Public Act 100-880, agencies may e-mail serve under the conditions specified by new Section 10-75 of the IAPA. Many of those conditions are already satisfied by the Board's current procedural rules. For example, Section 10-75(a)(1) allows an agency to require that an attorney representing a party accept e-mail service from the agency. The Board's procedural rules require that.<sup>3</sup> *See* 35 Ill. Adm. Code 101.1070(a)(3); *see also* 35 Ill. Adm. Code 101.400(a)(4)(B). Additionally, Section 10-75(c) provides that e-mail service is "deemed complete on the day of transmission," which the Board's procedural rules also provide. *See* 35 Ill. Adm. Code 101.300(c)(3).

### **Proposed Rule Changes**

Some conditions of Section 10-75, however, are not satisfied by the Board's current procedural rules. Before the Board can avail itself of the ability to e-mail serve its final adjudicatory orders, it must amend Part 101 to address three items: secondary e-mail addresses; serving all e-mail addresses; and confirming delivery.

**Secondary E-Mail Addresses.** First, Section 10-75(a)(4) requires that parties consenting to receipt of e-mail service from the agency "be given the option to designate no more than two secondary email addresses." The Board's current procedural rules allow this for an attorney representing a party (35 Ill. Adm. Code 101.400(a)(4)(B)), but the Board proposes adding a new subsection (b) to Section 101.1070, which extends the secondary e-mail option to all parties and participants, including any individual representing himself or herself in an adjudicatory proceeding, *i.e.*, a *pro se* party. A corresponding amendment is proposed for a new subsection (e) to Section 101.1070, requiring the recipient of e-mail service to notify the Clerk of a change in any primary or secondary e-mail address. Similarly, Part 101's Appendix I, the sample form for consenting to receiving e-mail service, is amended to reflect the secondary e-mail option.

**Serving All E-Mail Addresses.** Second, if a party to an adjudicatory proceeding provides a secondary e-mail address, Section 10-75(a)(4) requires the agency to serve the party at "both the designated primary and secondary email addresses." The Board proposes a new subsection (g)(2) to Section 101.1060, stating that the Clerk will serve "all the recipient's e-mail addresses designated under Section 101.1070(b)" with Board and hearing officer orders, which includes an adjudicatory proceeding's notice of hearing and final order.<sup>4</sup> *See* 5 ILCS 100/10-25(a), 10-50(a), as amended by P.A. 100-880. This is the Clerk's current practice, which new

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<sup>3</sup> Serving a party is accomplished by serving the party's attorney. 35 Ill. Adm. Code 101.304(b)(1).

<sup>4</sup> Parties and participants serving their filings by e-mail—which Public Act 100-880 does not address—are only required to successfully transmit to one of the recipient's designated e-mail addresses. *See* proposed Section 101.1060(a)(1).

subsection (g)(2) will codify. The exception to e-mail serving final adjudicatory orders comes from Section 33(a) of the Act, which requires the Board to serve a final enforcement order on “the respondent . . . by registered mail.” *See* 415 ILCS 33(a) (2016). The Board proposes a corresponding amendment to Section 101.1060(g). Accordingly, even if a respondent in an enforcement action has consented to e-mail service, the Board will serve its final order on the respondent in paper by certified mail. *See County of Kankakee v. Illinois Pollution Control Bd.*, 396 Ill. App. 3d 1000, 1012 (3d Dist. 2010) (certified mail is “functional equivalent” of registered mail).

**Confirming Delivery.** Third, Section 10-74(c) requires an agency using e-mail service to “adopt rules that specify the standard for confirming delivery, and in failure to confirm delivery, what steps the agency will take to ensure that service by email or other means is accomplished.” To satisfy these requirements, new subsection (g)(2) to Section 101.1060 provides that the Clerk, when e-mailing, will simultaneously request a delivery receipt and, if no delivery receipt is received within 24 hours, the Clerk will promptly initiate paper service. Again, this will codify the Clerk’s current practice.

### **Explicitly Address TLWQS Proceedings in Part 101**

#### **Current Situation**

Generally, the universe of Board proceedings has been divided into regulatory proceedings (*i.e.*, rulemakings) and adjudicatory proceedings.<sup>5</sup> When it created the TLWQS, however, the General Assembly specified that the Board’s TLWQS proceedings are both “non-adjudicatory” and not subject to the procedural requirements for rulemaking, *i.e.*, “Section 5-35 of the [IAPA and] Title VII of this Act.”<sup>6</sup> 415 ILCS 5/38.5(a), (l), added by Public Act 99-937 (eff. Feb. 24, 2017). A TLWQS proceeding is therefore neither adjudicatory nor a rulemaking.<sup>7</sup> Part 101 contains the general procedural rules applicable to all Board proceedings but does not refer to TLWQS proceedings.

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<sup>5</sup> The Board also conducts informational proceedings, though only infrequently. The Board’s procedural rules specific to regulatory proceedings and informational proceedings are at 35 Ill. Adm. Code 102.

<sup>6</sup> “A TLWQS provides relief from water quality standards . . .” 35 Ill. Adm. Code 104.500(a). “TLWQS” means “a time-limited designated use and criterion for a specific pollutant or water quality parameter that reflects the highest attainable condition during the term of that relief.” 35 Ill. Adm. Code 104.515(b).

<sup>7</sup> *See* 35 Ill. Adm. Code 101.202 (definitions of “adjudicatory proceeding”, “regulatory hearing” or “proceeding”, “rulemaking”).

## **Proposed Rule Changes**

The Board proposes amending Part 101 to reflect the unique nature of TLWQS proceedings.<sup>8</sup> *See, e.g.*, proposed Section 101.108(a) (“Board Proceedings”), Section 101.202 (definitions of “adjudicatory proceeding”, “COOL”, “proceeding”). These amendments include cross-references to, and text based on, Public Act 99-937 and the procedural rules specific to TLWQS proceedings (35 Ill. Adm. Code 104.Subpart E).<sup>9</sup> *See, e.g.*, proposed Section 101.106(b) (“Board Authority”), Section 101.202 (definitions of “regulatory relief mechanisms”, “TLWQS”).

Most of the proposed amendments are straightforward. For example:

- Rather than “parties,” a TLWQS proceeding has “participants,” a term which includes the TLWQS petitioner or petitioners and the Illinois Environmental Protection Agency (Agency). *See, e.g.*, proposed Section 101.110(b) (“Public Participation”), Section 101.202 (definition of “participant”).
- Filing a TLWQS “petition” requires, by statute, a \$75 fee. *See* proposed Section 101.202 (definition of “petition”), Section 101.302(e)(6) (filing fee).
- TLWQS proceedings, like rulemakings, have a “notice list” but may also have a “service list.” *See* proposed Section 101.202 (definitions of “notice list”, “service list”).
- If the Board determines that a TLWQS petition is in substantial compliance, the Agency must make a “recommendation” on the petition. *See* proposed Section 101.202 (definition of “Agency recommendation”).
- The Board’s final TLWQS decision may be appealed directly to the Illinois Appellate Court within 35 days after the Board first publishes the decision on its website. *See* proposed Sections 101.300(d)(4), 101.906(a).

However, three subjects addressed by the proposed amendments merit elaboration: attorney representation; ex parte communications; and bias and conflict of interest.

**Attorney Representation.** First, the proposed rules specify whether attorney representation is required in a TLWQS proceeding. The Board has long held that the Illinois statutes on the practice of law require an attorney to represent an entity or another individual in a Board adjudicatory proceeding. *See, e.g., Petition of Recycle Technologies, Inc. for an Adjusted Standard from 35 Ill. Adm. Code 720.131(c), AS 97-9, slip op. at 3-7 (July 10, 1997).* This requirement, which does not preclude an individual from representing himself or herself, is

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<sup>8</sup> The Board has 54 pending TLWQS proceedings.

<sup>9</sup> The Board adopted the TLWQS-specific procedural rules last year. *See Regulatory Relief Mechanisms: Proposed New 35 Ill. Adm. Code Part 104, Subpart E, R18-18 (Apr. 26, 2018).*

codified in the Board’s procedural rules. *See* 35 Ill. Adm. Code 101.400(a). The attorney-representation requirement does not apply to any regulatory proceeding. *See* 35 Ill. Adm. Code 101.400(d); 35 Ill. Adm. Code 102.100(b). Because a TLWQS proceeding is, by statute, “non-adjudicatory,” the Board proposes adding “TLWQS proceedings” to “rulemakings” as proceedings in which a non-attorney may appear on behalf of others. *See* proposed Section 101.400(d).

**Ex Parte Communications.** Second, the proposed amendments address the relationship between ex parte communication restrictions and TLWQS proceedings. The Board’s members and staff are subject to the State Officials and Employees Ethics Act (5 ILCS 430 (2016)), which defines an “ex parte communication” as “any written or oral communication by any person that imparts or requests material information or makes a material argument regarding potential action concerning regulatory, quasi-adjudicatory, investment, or licensing matters pending before or under consideration by the agency.” 5 ILCS 430/5-50(b) (2016); *see also id.* (exclusions from definition not relevant here). The Board repeats this statutory definition in its current procedural rules. *See* 35 Ill. Adm. Code 101.202. Generally, the Board’s procedural rules prohibit Board members and staff from engaging in ex parte communications regarding “an adjudicatory or regulatory proceeding” pending before or under consideration by the Board, and require that they take steps upon receiving an ex parte communication. 35 Ill. Adm. Code 101.114(c), (e), (f).

To avoid any disputes over whether a TLWQS proceeding falls within the scope of the definitional language—“regulatory, quasi-adjudicatory, investment, or licensing matters”—the Board proposes adding this sentence to the definition: “For this definition, a time-limited water quality standard proceeding is considered a regulatory matter.” *See* proposed Section 101.202 (definition of “ex parte communication”); *see also* proposed Section 101.114(a) (definition of “interested person or party”). The Board also proposes adding references to “time-limited water quality standard proceeding” in Section 101.114 on ex parte communications where the current rule mentions “adjudicatory proceeding” and “regulatory proceeding.” *See* proposed Sections 101.114(c), (d).

**Bias and Conflicts of Interest.** Third, the proposed amendments address how the procedural rules’ bias and conflict of interest provisions apply to TLWQS proceedings. To avoid bias and conflicts of interest, the Board’s current procedural rules bar any former Board member or Board employee from representing any other person in a 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.” 35 Ill. Adm. Code 101.112(b).

The term “parties” refers only to an adjudicatory proceeding and the term “proponents” refers only to rulemakings. *See* 35 Ill. Adm. Code 101.202 (definitions of “party”, “proponent”). The corresponding person in a TLWQS proceeding is the “petitioner.” The Board proposes amending Section 101.112(b) to add TLWQS petitioners to the consent language.

## **Clarify, Update, and Streamline Part 101**

In keeping with its regulatory review initiative, the Board proposes a host of changes that will make Part 101 easier to understand. These changes include making the rule text clearer and more concise, as well as eliminating legalese. *See, e.g.*, proposed Sections 101.100, 101.110, 101.302(e), 101.522, 101.618(c). The Board also proposes deleting obsolete or redundant provisions and reconciling inconsistent ones. *See, e.g.*, proposed Sections 101.628(c)(3), 101.1000(a), 101.1020(e).

Only three of these amendments warrant discussion: post-hearing deadlines; motions for interlocutory appeal; and official notice and evidence evaluation.

### **Post-Hearing Deadlines**

First, the current procedural rules measure 14-day post-hearing deadlines differently. Under Section 101.502(b), if the hearing officer makes a ruling on the record at hearing, an objection to that ruling is waived if the objection is not filed within 14 days “after the Board receives the hearing transcript.” 35 Ill. Adm. Code 101.502(b). Under Section 101.518, however, if the hearing officer makes a ruling on the record at hearing, any motion for interlocutory appeal from that ruling is due within 14 days “after the hearing.” 35 Ill. Adm. Code 101.518. Similarly, under Section 101.500(b), a party’s oral motion made to the Board at hearing is waived if the party fails to file the motion within 14 days “after the hearing.”

No compelling reason is apparent for having different start dates for these 14-day periods. In fact, having differing start dates sews confusion. Board receipt of the transcript after hearing is the better choice for these start dates. Parties will then be able to review the transcript when deciding whether to file the objection, motion for interlocutory appeal, or oral motion. The Board proposes to amend Sections 101.500(b) and 101.518 accordingly.

### **Motions for Interlocutory Appeal**

Second, the waiver language in Section 101.518 on interlocutory appeals is unsound. Here, an “interlocutory appeal” means “the appeal of a hearing officer ruling to the Board.” 35 Ill. Adm. Code 101.202. A party should be able to preserve its objection to the hearing officer’s ruling by filing the objection (as discussed above), without the party also being required to file a motion for interlocutory appeal.

Generally, an interlocutory appeal is warranted when review of a hearing officer ruling by the Board—during that part of the proceeding—is necessary to avoid material prejudice that might otherwise result if the Board did not consider the ruling until later in the proceeding. It is neither logical nor efficient to require a party to file a motion for interlocutory appeal from every hearing officer ruling to which the party objects merely to avoid waiving those objections. The Board therefore proposes deleting the last sentence of Section 101.518.



## **Official Notice and Evidence Evaluation**

Third, under Section 10-40(c) of the IAPA, an agency conducting an adjudicatory proceeding may take “notice” of “matters of which the circuit courts of this State may take judicial notice.” 5 ILCS 100/10-40(c) (2016). An agency may also take notice of “generally recognized technical or scientific facts within the agency’s specialized knowledge.” *Id.* These aspects of Section 10-40(c) are generally captured in the Board’s procedural rules at Section 101.630 (“Official Notice”), though the Board proposes amending the rule to more closely track the statutory text. *See* proposed Section 101.630(a).

Two other aspects of IAPA Section 10-40(c), however, are not mentioned in Section 101.630. The first aspect concerns notifying the parties about taking notice. Section 10-40(c) states that the parties “shall be notified . . . of the material noticed” and “they shall be afforded an opportunity to contest the material so noticed.” *Id.* The second aspect concerns evidence evaluation. Section 10-40(c) states that the agency’s “experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence.” *Id.* The Board has always done this when evaluating evidence, consistent with Section 5 of the Act (415 ILCS 5/5 (2016)) and well-settled case law (*see, e.g., Town & Country Utilities, Inc. v. Illinois Pollution Control Bd.*, 225 Ill. 2d 103, 123 (2007)). For the procedural rules to capture both these aspects of IAPA Section 10-40(c), the Board proposes adding language to Section 101.630. *See* proposed Sections 101.630(b), (c).

## **Procedures for this Rulemaking**

*Illinois Register* publication of these proposed first-notice amendments will start a 45-day period during which anyone may file public comments on the Board’s proposal. *See* 5 ILCS 100/5-40(b) (2016); *see also* 35 Ill. Adm. Code 102.604. Public comments must be filed through COOL and served on the hearing officer as well as those participants appearing on this proceeding’s service list. *See* 35 Ill. Adm. Code 101.302(h), 101.304, 101.1000(c), 101.1060; *see also* 35 Ill. Adm. Code 102.100(a), 102.108, 102.422. Also, each public comment must identify the docket number of this proceeding, R19-19. *See* 35 Ill. Adm. Code 101.302(g). Participants must serve the hearing officer by e-mail and are encouraged to consent to receipt of e-mail service. *See* 35 Ill. Adm. Code 101.1060(d), 101.1070. COOL and information concerning this rulemaking are available on the Board’s website ([pcb.illinois.gov](http://pcb.illinois.gov)).

As this rulemaking proposes to adopt procedural rules, the Board is not required to hold a hearing and, at present, does not plan to hold one. *See* 415 ILCS 5/26, 27 (2018). However, if the Board finds that a hearing would be advisable or otherwise receives a request for a hearing under the IAPA, the Board will schedule a hearing. *See* 5 ILCS 100/5-40(b) (2016).

## **CONCLUSION**

The Board proposes first-notice amendments to its general procedural rules at Part 101. Generally, the proposed amendments will (1) allow hearing exhibits from adjudicatory and TLWQS proceedings to be regularly posted to the Board’s website; (2) allow the Board to e-mail serve its final adjudicatory orders consistent with recent amendments to the IAPA; (3) fully

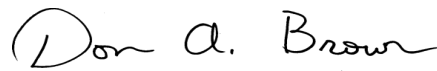
integrate TLWQS proceedings into the procedural rules; and (4) further the Board's regulatory review initiative by clarifying, updating, and streamlining the rule text of Part 101.

**ORDER**

The Board directs the Clerk to cause *Illinois Register* publication of the proposed first-notice rule amendments that appear in the addendum to this opinion and order.

IT IS SO ORDERED.

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on April 11, 2019, by a vote of 4-0.

A handwritten signature in black ink that reads "Don A. Brown". The signature is written in a cursive style with a large initial "D" and "B".

Don A. Brown, Clerk  
Illinois Pollution Control Board