

ILLINOIS POLLUTION CONTROL BOARD
July 25, 2019

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

Proposed Rule. Second Notice.

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

The Board proposes amendments to Part 101 of its procedural rules (35 Ill. Adm. Code 101) for second-notice review by the Joint Committee on Administrative Rules (JCAR). 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 Service of Final Adjudicatory Orders.** For a party who consents to e-mail service, the Board will electronically serve, via e-mail, its final adjudicatory order on the party, as permitted by Public Act 100-880 (eff. Jan. 1, 2019).
- **Explicitly Addressing Time-Limited Water Quality Standards (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.
- **Rendering 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 highlights 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 filing of the proposed amendments with JCAR for second notice. The rules themselves appear in the addendum to this opinion and order.

DISCUSSION

E-File Adjudicatory and TLWQS Hearing Exhibits

Currently, exhibits offered by parties at an adjudicatory hearing are generally not available on the Board’s website.¹ The reasons for this are twofold. First, the Board does not receive these hearing exhibits in electronic form. 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.

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).

If the offering party or participant is unable to e-file an exhibit or unable to e-file within five days, 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).

E-Mail Serve Final Adjudicatory Orders

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.”² 5 ILCS 100/10-50(a) (2016). Public Act 100-880 amended Section 10-50(a) to allow a third alternative to agencies for serving their final adjudicatory orders, *i.e.*, via e-mail.

¹ 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.

² 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).

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 electronic service via e-mail, the Clerk’s Office has been electronically serving via e-mail nearly all Board and 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 via electronic service.

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.³ *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)*.

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. First, the Board proposes the addition of 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.

Second, for when a party to an adjudicatory proceeding provides a secondary e-mail address, 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.⁴ *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 subsection (g)(2) will codify. The exception to e-mail service for 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).

³ Serving a party is accomplished by serving the party’s attorney. 35 Ill. Adm. Code 101.304(b)(1).

⁴ 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)*.

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).

Third, to implement the statutory provisions regarding confirmation of service, the Board proposes a new subsection (g)(2) to Section 101.1060. Under that provision, 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

Generally, the universe of Board proceedings has been divided into regulatory proceedings (*i.e.*, rulemakings) and adjudicatory proceedings.⁵ 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.”⁶ 415 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.⁷ Part 101 contains the general procedural rules applicable to all Board proceedings but does not refer to TLWQS proceedings.

The Board proposes amending Part 101 to reflect the unique nature of TLWQS proceedings.⁸ *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).⁹ *See, e.g.*, proposed Section

⁵ 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.

⁶ “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).

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

⁸ The Board has 54 pending TLWQS proceedings.

⁹ 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).

101.106(b) (“Board Authority”), Section 101.202 (definitions of “regulatory relief mechanisms”, “TLWQS”).

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

Second, the proposed amendments address the relationship between ex parte communication restrictions and TLWQS proceedings. The Board proposes the addition of a sentence to the definition of “ex parte communication”: “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).

Third, the proposed amendments address how the procedural rules’ bias and conflict of interest provisions apply to TLWQS proceedings. 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 rendering 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. *See* 35 Ill. Adm. Code 101.500(b) (oral motion at hearing); 35 Ill. Adm. Code 101.502(b) (objection

to hearing officer’s ruling at hearing); 35 Ill. Adm. Code 101.518 (motion for interlocutory appeal from hearing officer’s ruling at 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 hearing 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. 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).

First-Notice Publication

On May 3, 2019, the Board’s proposed rules appeared in the *Illinois Register*. 43 Ill. Reg. 4883. The Board received no public comments on this proposal. Therefore, the Board proceeds to second notice with the rules as proposed at first notice, with only minor, non-substantive edits.

CONCLUSION


The Board proposes second-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 electronically serve via e-mail 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 filing of the proposed amendments with JCAR for second notice. The amendments appear in the addendum to this opinion and order. All changes to existing rule text appear with underlines or strikethroughs. Further, for changes to first-notice rule text, additions appear with double underlines and deletions appear with double strikethroughs.

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 July 25, 2019, by a vote of 5-0.


Don A. Brown, Clerk
Illinois Pollution Control Board