

ILLINOIS POLLUTION CONTROL BOARD
September 22, 1988

IN THE MATTER OF:)
)
PROCEDURAL RULES REVISION,)
35 ILL. ADM. CODE 101, 102,) R88-5
106, and 107)

PROPOSED RULE. FIRST NOTICE.

PROPOSED OPINION OF THE BOARD (by J. Theodore Meyer):

SUMMARY

On September 8, 1988, the Board proposed for first notice revisions of some of its procedural rules. This Proposed Opinion supports those proposed rules.

This docket (R88-5) includes revisions to Parts 101, 102, 106, and 107 of the Board's procedural rules. Specifically, the Board has proposed new general rules (35 Ill. Adm. Code 101), new rules governing regulatory proceedings (35 Ill. Adm. Code 102), and new rules for adjusted standards proceedings (35 Ill. Adm. Code 106). After consultation with the Administrative Code Unit, the Board has determined that the most efficient way to revise the existing rules and add new provisions is to repeal the existing Parts and propose new Parts, at the same Part number, covering the same subject matter. Thus, in its September 8, 1988 order, the Board proposed repeal of existing Part 101 (general rules), Part 102 (regulatory proceedings), and Part 107 (sanctions). At the same time, the Board proposed new Parts 101 (general rules) and 102 (regulatory proceedings). Please note that rules pertaining to sanctions, currently in Part 107, have been added to the new Part 101 general rules. The Board has proposed repeal of Part 107, which will be left open for two years, as is required by 1 Ill. Adm. Code 100.315. New rules implementing general adjusted standards proceedings have been proposed as new subpart G in Part 106. The existing rules in Part 106 have been changed only to update references to Parts 101 and 102.

Many of the new rules are proposed in response to SB 1834 (P.A. 85-1048) and HB 4039 (P.A. 85-1331), effective January 1, 1989. This legislation changes several aspects of Board procedures. For example, HB 4039 establishes filing fees for petitions for site-specific regulation, variance, permit review, and adjusted standard pursuant to Section 28.1 of the Environmental Protection (Act) (Ill. Rev. Stat. 1987, ch. 111 1/2 par. 1028.1), and for petitions to review local government siting decisions pursuant to Section 40.1 of the Act. The Board has proposed rules in Part 101 which establish procedures for those filing fees.

Additionally, SB 1834 makes some fundamental changes to the environmental rulemaking system in Illinois. Among other things, SB 1834 authorizes the Board to determine whether an economic impact study (EcIS) should be prepared by the Department of Energy and Natural Resources (ENR). This legislation also allows for a pre-hearing conference in rulemakings, to the extent consistent with deadlines for adoption of regulations mandated by state or federal law. Further, SB 1834 expands the adjusted standards provision of Section 28.1 of the Act. The Board believes that its proposed rules will fully implement the provisions of SB 1834 and HB 4039.

The Board has also reorganized and tightened its existing rules. Some regulations have been added in order to update the procedural rules consistent with the Board's current practices. In sum, the Board feels that the proposed rules will implement new legislative action and will streamline the regulatory and adjusted standards procedures without undermining the quality and integrity of those procedures or infringing upon public participation in the regulatory and adjusted standards processes.

This Proposed Opinion will touch upon each Subpart in the proposed rules, but will discuss only those rules which are new and/or upon which the Board requests comment. Please note that capitalization within the rules themselves denotes actual or paraphrased statutory language.

As noted in the Board's order of September 8, 1988, in preparing this draft the Board has considered comments filed by participants in predecessor dockets R82-27, R82-36, and R83-37, as well as comments filed in response to the Board RES88-1. (The Board is amending RES88-1 in a separate action today.) The Board again emphasizes that participants are free to reiterate any previous comments which they may feel have not been fully addressed, regardless of whether the Board has specifically requested comments concerning any particular section.

PART 101 - GENERAL RULES

Subpart A: General Provisions

This Subpart sets out some of the basic requirements and procedures for all Board proceedings. Section 101.100 "Applicability" tracks the old rule in stating that Part 101 is applicable to all proceedings conducted by the Board, and clarifies that Part 101 is to be read in conjunction with the Board's other procedural rules in 35 Ill. Adm. Code 102 through 120. Section 101.100 also states the current fact that the Code of Civil Procedure (Ill. Rev. Stat. 1987, ch. 110, par. 1-101 et seq.) does not apply to Board proceedings unless expressly stated.

Section 101.102 "Filing of Documents" updates the existing rule with the Board's correct Chicago address, and sets out that

filing of documents with the Clerk may be done by certified, registered, or First Class mail, by messenger service, or personally at the Board's Chicago office. Filing by electronic transmission, such as telefax machine or computer modem, is prohibited, unless the Board specifically requests such a filing. While the Board is aware that some court systems are experimenting with electronic filing, the Board's staffing levels cannot presently accommodate such experimentation. This prohibition allows for better recordkeeping and tracking of filed documents, since all filings will be accepted at one central point, at the receptionist's desk.

Section 101.102 also changes current practice by providing that filing, inspection, and copying of documents may be done in the Clerk's office from 8:30 a.m. to 4:30 p.m., instead of until 5:00 p.m. This change allows staff to complete the duties associated with filing and inspection before the Board's offices close. Board offices will continue to be open until 5:00 p.m. for phone calls, etc.

"Form of Documents", Section 101.103, basically tracks the existing rule in areas such as number of copies to be filed and the form of all filed documents. Subsection (e) allows for waiver of some of the requirements if the Board finds, upon motion, that compliance with the requirements would impose an undue burden. Subsection (g) requires that all original documents be signed by the person filing the document and include that person's business address and telephone number. All copies must be made from the signed original, to aid in determining compliance with these requirements. The Clerk will refuse to accept for filing any document which does not comply with subsection (g). Finally, subsection (i) allows the Clerk to refer all filings which do not comply with the other requirements of Section 101.103 to the Board for review.

Section 101.104 sets limits on the length of briefs which may be filed in Board proceedings without prior approval; the Board has become increasingly burdened with excessively lengthy pleadings. Briefs in support of or in opposition to any motion are limited to 15 pages. Post-hearing briefs, briefs submitted in response to a Board order, and public comments submitted in lieu of a brief are limited to 50 pages, and reply briefs shall not exceed 25 pages. This rule is based upon Rule 28 of the Federal Rules of Appellate Procedure. The page limits do not include appendixes containing regulations, cases, and other relevant material.

Section 101.105 "Waivers" and Section 101.106 "Incorporation of Prior Proceedings" merely codify the Board's current practices. The waiver section now specifies that all waivers of a deadline for Board action shall be filed as a separate document. This will enable the Clerk to better monitor these waivers, instead of having to read every document filed in search of a waiver. Section 101.106(a) establishes procedures and

standards for incorporations of another Board record. Section 101.106(b) articulates the weight the Board gives materials from another Board docket incorporated into a pending proceeding.

"Appearances and Withdrawals", Section 101.107, expands the current rule on appearances to additionally specify that an attorney who has appeared in a representative capacity and who wishes to withdraw must file a notice of withdrawal with the Clerk, and serve all other participants. Section 101.108 "Substitution of Attorneys" requires any attorney who substitutes for an attorney of record file a written appearance, and identify the attorney for whom the substitution is made. These two sections will enable Board staff to more easily keep track of who represents a particular person in a Board proceeding.

Section 101.109 "Computation of Time" has been changed to provide that computation of any period of time prescribed by rule or the Act begins on the next calendar day. The rule formerly stated that computation of time begins on the next business day. This change was made to conform the rule to the statutory mandate of Section 1.11 of "An Act to revise the law in relation to the construction of statutes." (Ill. Rev. Stat. 1987, ch. 1, par. 1012.)

The Board intends to add a severability clause to this Subpart. The proposed language of that clause is:

If any provision of these rules or regulations is adjudged invalid, or if the application thereof to any person or in any circumstance is adjudged invalid, such invalidity shall not affect the validity of this Part as a whole or of any Subpart, Section, subsection, sentence or clause thereof not adjudged invalid.

Subpart B: Filing and Photocopying Fees

Section 101.120 implements the new filing fee provisions of HB 4039. These provisions will be found at Section 7.2 of the Act after the January 1, 1989 effective date of HB 4039. The rule requires that a person filing an action for which a filing fee is required by the Act (petitions for site-specific regulation, variance, review of a permit, to contest a local government siting decision, and for adjusted standard) must pay that fee at the time the petition is presented to the Clerk for filing. The Clerk will refuse to accept any petition which is not accompanied by the required fee. At this time, the fee is statutorily set at \$75.

Section 101.121 "Photocopying Fees" codifies current Board practice concerning fees for copying of Board files and records. Most of this rule is currently contained in existing Section 101.107(f) "Public Information". The rule was separated from the public information section for organizational purposes.

"Forms of Payment", Section 101.122, specifies the form in which filing and photocopying fees shall be paid. Filing fees may be paid by cashier's check, or check drawn on an attorney's account. Photocopying fees may be paid in any of these ways, and also by personal check. By specifying methods of payment other than cash, the Board will avoid having to keep a petty cash fund for fees, thus simplifying administrative matters.

Subpart C: Service

This Subpart is new to Part 101, but these rules simply articulate current Board practice for service of filings. The substance of the rules in Subpart C is currently found in 35 Ill. Adm. Code 103, which deals with enforcement cases. In the past there has sometimes been dispute over whether the enforcement rules in Part 103 apply to other types of proceedings. By placing service rules in Part 101, which applies to all Board proceedings, there will be no question that these rules are applicable to all proceedings. Sections 101.140 through 101.144 cover service of initial and subsequent filings, proof of service, and effective date of service.

Subpart D: Public Information

This Subpart covers public information, non-disclosable information, and Board publications. The substance of these rules is basically the same as existing Sections 101.107 and 101.108, but the text has been reorganized and divided into three separate sections. One change from the existing rules is that proposed Section 101.161(c) sets forth who may examine material which is claimed to be not subject to disclosure. Under the existing rules, only Board members are authorized to view such material. The proposed rule tracks the Board's February 6, 1986 resolution (RES 86-2) dealing with who may have access to trade secret material. Under the proposed rule, material for non-disclosure will be available only to Board members, Board assistants, environmental scientists of the Board's Scientific/Technical Section, the assigned hearing officer, the Clerk, and the Assistant Clerk. By articulating in the rule specifically who may examine material for non-disclosure, the filing and decision of non-disclosure claims, and cases involving non-disclosable material, will be much easier administratively. Carried to its logical extreme, the existing rule might require that a Board member, rather than the Clerk or Assistant Clerk, literally file the documents.

Please note that as is currently provided, there are four types of information in terms of that information's availability to the public. Proposed Section 101.160 states that all files maintained by the Clerk will be open to reasonable public inspection, except: 1) internal communications between and among Board members and staff; (2) trade secret material pursuant to Section 7.1 of the Act and 35 Ill. Adm. Code 120; and 3) material which is stamped "Not Subject to Disclosure by Board

order, pursuant to Section 7 of the Act and proposed Section 101.161.

Subpart E: Board Meetings

Section 101.180 "Board Meetings" includes the substances of the existing rule on Board meetings. Some things have been updated, such as providing that four Board members constitutes a quorum, since the Board now has seven members instead of five. The rule also articulates current Board practice that oral argument is not heard at Board meetings unless specifically requested by the Board.

New Section 101.181 states that no document received by the Clerk after 4:30 p.m. two days before a scheduled Board meeting will be placed on the agenda for that meeting. Instead, any such filing will appear on the agenda for the next regularly scheduled Board meeting. The Board will make exception to this rule only when it finds that undue delay or material prejudice will result. The purpose of this deadline is to allow Board members and staff at least one day to review all filings before any action is taken.

Subpart F: Ex Parte Contacts

Section 101.200 sets forth prohibitions on ex parte contacts on contested and non-contested cases. (A contested case is defined in Section 101.101 as "an adjudicatory proceeding, not including regulatory, quasi-legislative, informational, or similar proceedings.") The section is substantially similar to the existing section on ex parte contacts. Some wording changes have been made, such as clarifying the fact that ex parte communications in contested cases are prohibited only with respect to the substance of the proceeding. Subsection (c) has been added to specifically state that this section does not preclude Board members, hearing officers, and Board staff from receiving informal complaints about individual pollution sources, or forbid administrative contacts on a pending proceeding.

Subpart G: Hearings

"Authority of Hearing Officer", Section 101.220, is an addition to Part 101 general rules. The proposed rule is based upon the current section on authority of hearing officers in regulatory proceedings. (35 Ill. Adm. Code 102.160.) Several specific areas of authority have been added to the list, although the list is merely an example of a hearing officer's powers and does not limit those powers. For example, the proposed section now specifically states that a hearing officer has the power to issue interrogatories and subpoenas. There has previously been some dispute over whether a hearing officer must be directed by Board order to issue subpoenas and interrogatories, or whether he or she had the inherent authority to do so without Board direction. The Board today specifically states that a hearing

officer does have the power to issue subpoenas and interrogatories without Board direction.

Section 101.221 "Hearing Decorum" is based upon existing Section 101.122 "Improper Publicity". The provisions relating to recording of hearings on tape, film, or other media have been changed to comply with Section 2.05 of the Open Meetings Act. (Ill. Rev. Stat. 1987, ch. 102, par. 42.05.) The section states that if a witness refuses to testify because any portion of his or her testimony is to be broadcast or televised, or because motion pictures are to be taken while the witness is testifying, the hearing officer will prohibit such recording during that witness' testimony. The section also allows the hearing officer to prescribe reasonable rules governing the right to record the proceedings. Finally, participants in Board proceedings are required to conduct themselves with the same degree of dignity and respect that they would before a court.

Subpart H: Motion Practice

Like Subpart C, on service, this Subpart has been added to Part 101 general rules in order to end any dispute over which motion procedures apply to what types of proceedings. As is stated in Section 101.240, this Subpart applies to all Board proceedings, except to any extent that 35 Ill. Adm. Code 102 through 120 conflict with or supplement Subpart H. In such a case, that more specific Part applies.

The individual rules in this Subpart are based on the current motion rules in 35 Ill. Adm. Code 103. The proposed rules set out filing and timing requirements for general motions and more specific types of motions, such as motions attacking jurisdiction, motions for summary judgment, and motions for reconsideration. Section 101.245 "Motions Preliminary to Hearing" requires that all motions preliminary to hearing be presented to the Board or the hearing officer at least 21 days prior to hearing, unless otherwise allowed by the Board or the hearing officer to prevent material prejudice. The section allows the Board or the hearing officer to direct that the hearing proceed during the pendency of the motion. Finally, the section provides that no motion to continue a hearing in a proceeding with a deadline for Board action will be granted unless the motion is accompanied by a waiver of that decision deadline. The provisions of this section are designed to aid the Board in seeing that proceedings move forward, and to avoid any possible "time crunch" between a hearing in a deadline proceeding and the date for decision of that proceeding.

"Disposition of Motion", Section 101.247, sets forth the types of motions on which a hearing officer may rule. This section also establishes the fact that no interlocutory appeal of a hearing officer ruling may be taken to the Board unless the Board grants a motion to do so. The hearing officer may also refer a ruling to the Board if he or she feels that such action

is necessary to prevent harm to the public interest or to avoid unusual delay or expense. A continuing objection to a hearing officer ruling may be raised at the close of hearing and in post-hearing submissions. Subsection (c) provides that all hearing officer orders remain in effect during the pendency of any appeal to the Board. The filing of a motion, or any related appeal of the ruling on that motion, shall not stay the proceeding or extend the time for the performance of any act. Again, the provisions allow the Board to ensure that proceedings move forward at a reasonable pace.

Subpart I: Discovery

This Subpart has also been placed in Part 101 general rules to clarify that these procedures are applicable to all proceedings before the Board. Section 101.260 "Subpoenas" is based upon existing 35 Ill. Adm. Code 103.163. The Board solicits comments on whether it has authority to order payment of a subpoenaed witness's expenses where the witness is an Illinois resident. (See Section 101.260(b).) "Production of Information", found in Section 101.261, gives the hearing officer the authority to order the production of information which is relevant to the matter under consideration. ("Relevant" is defined in Section 101.101 as that which is both related to and material to the determination of the proceeding.) The hearing officer will regulate the production of information to prevent delay, expense, harassment or oppression, or when the information is non-disclosable or a trade secret.

Subpart J: Sanctions

Rules regarding sanctions are currently found at 35 Ill. Adm. Code 107. For consistency, these rules have been added to Part 101, and the Board proposes repeal of the existing Part 107. The rules in this Subpart cover sanctions for refusal to comply with procedural rules, Board orders, and hearing officer orders, and sanctions for abuse of discovery procedures. These proposed rules track the language of existing Part 107, but have been reorganized. The Board specifically solicits comments on its statutory authority to order an offending person to pay another's reasonable expenses incurred in obtaining an order of sanctions. (See Section 101.280(g).)

Subpart K: Relief from and Review of Final Orders

Again, this Subpart has been added to Part 101 in order to clarify that these procedures for relief from and review of final orders are applicable to all Board proceedings. Section 101.300 "Relief From Final Orders" is almost identical to existing 35 Ill. Adm. Code 103.241, with only minor language changes. Section 101.302 "Stay Procedures" are substantially like existing Section 101.140, with phrasing and organizational changes. Finally, "Interlocutory Appeals", Section 101.103, conforms these rules to current Board practice.

Appendixes

The Board has also proposed adding five appendixes to Part 101. The appendixes set forth forms to be used as examples when appearing before the Board. Appendix A gives examples of captions to be used in the various types of Board proceedings. Appendix B gives a sample appearance form, while Appendix C is an example of a notice of withdrawal of appearance. Appendix D is a sample "notice of filing" to be attached to all documents filed with the Clerk. Finally, Appendix E includes examples of certificates of service.

PART 102 - REGULATORY AND INFORMATIONAL HEARINGS AND PROCEEDINGS

Subpart A: General Provisions

The Act provides for three types of regulatory proposals: 1) identical in substance proposals; 2) federally required rules; and 3) other regulatory proposals, both of general applicability and not of general applicability. Regulations arising from these types of proposals may be adopted through four types of rulemakings: 1) general rulemaking; 2) emergency rulemaking; 3) peremptory rulemaking; and 4) temporary rulemaking. Section 102.103 is a "roadmap" of these types of proposals and rulemakings.

Section 102.104 "Waiver of Requirements" allows the Board to waive any of the requirements in Part 102 upon a showing by any person that a particular requirement would create an undue burden on that person. This provision gives the Board the ability to tailor the rulemaking system to the needs of the persons involved in that system.

"Other Proceedings", Section 102.105, is almost identical to existing Section 102.220. This section specifically states that the Board may conduct non-contested or informational hearings, in addition to hearings or regulatory proposals, as are necessary to accomplish the purposes of the Act. Such hearings are to be conducted according to Part 102, to the extent applicable. This section is based upon the authority of Section 5(d) of the Act.

The Board intends to add a severability section to this Subpart identical to the language proposed in Part 101.

Subpart B: Proposal of Regulations of General Applicability

This Subpart is based upon existing Subpart B, but has been greatly expanded and reorganized. The Subpart is a guide to the filing of a sufficient proposal of regulations of general applicability. Section 102.120 provides that any person may file a regulatory proposal. Ten copies of each proposal are to be filed with the Clerk, and one copy each with the Attorney

General, the Agency and ENR. By receiving a copy of each proposal as it is filed, these agencies will be better able to monitor and participate in the rulemaking process.

Section 102.121 sets forth the required contents of a regulatory proposal. Each proposal must include the language of the proposed regulation or amendment, including an identification of the existing regulatory language proposed to be amended or deleted. A statement of the reasons supporting the proposal shall accompany the proposal. In order to implement the new EcIS determination procedures of SB 1834, a proponent must also recommend whether an EcIS is advisable. This recommendation is to describe the universe of affected sources and facilities, and the economic impact of the rule. The recommendation shall also address the questions raised in the "Analysis of Economic and Budgetary Effects of Proposed Rulemaking", set forth at 1 Ill. Adm. Code 220, Exhibit B. This form is often requested by the Joint Committee on Administrative Rules (JCAR) as one of the components necessary for a proposed rule to be accepted by JCAR for second notice review. This will ensure that this necessary information will be in the record for decision. Additionally, by obtaining this information at the beginning of a proceeding, Board staff will be able to complete the required second notice package more quickly and efficiently, if the Board proposes a requested regulation for adoption. Finally, the EcIS recommendation must identify specific issues which the proponent feels should be addressed in the study if the Board determines that an EcIS should be done.

A regulatory proposal must also include copies of all testimony to be presented by the proponent at hearing, and copies of all exhibits and references. The Board recognizes that this requirement is quite a change from existing procedures, but feels that it is not unreasonable to expect a proponent to be able to locate witnesses in support of a proposal before filing that proposal. However, the Board specifically requests comment on whether these requirements are best fulfilled by complete testimony, or by a simple identification of witnesses with a synopsis of their expected testimony. Copies of all material to be incorporated in a rule by reference pursuant to Section 6.02 of the Administrative Procedure Act (APA) (Ill. Rev. Stat. 1987, ch. 127, par. 1006.02) must also accompany a regulatory proposal. Finally, the proposal must include proof of service of the proposal upon the Attorney General, the Agency, and ENR.

As noted in the September 8 Order, the Board realizes that the proposed requirements for the filing of a complete regulatory proposal may appear to impose a higher initial burden on a proponent than was the case in the past. The Board feels that the new proposed requirements are reasonable expectations of the vast majority of regulatory proponents, and that the requirements are necessary to focus and expedite the regulatory process. In essence, the requirements simply mandate that a proponent provide necessary information "up front", at the beginning of a

regulatory proceeding, instead of entering that information into the record in a piecemeal fashion during the course of a proceeding. Under almost all circumstances, the support for a particular proposal should be in place before that proposal is filed with the Board. A proposal should not be filed and then be delayed while the proponent builds his or her case. The Board did consider establishing a procedure for an informal request for regulation, in which the person making such a request would bear far less burden, but did not propose that procedure for first notice. That procedure is set out more completely in today's concurring opinion by J. Anderson, J. D. Dumelle, and J. Marlin. The Board requests comments on the advisability of establishing such a procedure. Again, the Board points out that Section 102.104 provides for a waiver of any requirement of Part 102 upon a showing that a particular requirement imposes an undue burden on a person.

"Dismissal of Proposal", Section 102.122, states that failure of a proponent to satisfy the content requirements of Section 102.121 or failure to respond to Board requests for additional information will render a proposal subject to dismissal for inadequacy. The section also allows the Board to dismiss a proposal where the Board finds that the proponent has failed to pursue disposition of the proposal in a timely manner. These provisions will enable the Board to manage its docket more effectively, and to enforce the requirements for a sufficient regulatory proposal.

Subpart C: Proposal of Regulations Not of General Applicability

This Subpart is a guide to the filing of a complete proposal of regulations not of general applicability. A regulation not of general applicability is one which applies to a specific site or sites, geographical location, or activity. Procedural rules for site-specific regulations and for site-specific regulations pertaining to water were proposed by the Board for first notice on March 5, 1987, in R82-27, R82-36, and R83-37, Consolidated. That proposal was published in the Illinois Register at 11 Ill. Reg. 5018 on March 27, 1987. However, no further action was taken on the proposal before the one-year period for adoption passed. This Subpart C is based upon that 1987 proposal, although some additions have been made.

Like the filing requirements for proposal of regulations of general applicability, Section 102.140 provides that any person may submit a proposal of a regulation not of general applicability. Ten copies of the proposal are to be filed with the Clerk, and one copy each served upon the Agency, ENR, and the Attorney General.

Section 102.141 sets out the required contents of a proposal. The proposal must identify the regulations which are to be addressed by the proposal, and must include a statement of reasons and facts supporting the proposal. The proposal must

also comply with all requirements in Section 102.121 for proposal of regulations of general applicability. If the proposed rule would replace the applicability of a general rule to the pollution source, the proposal shall specify the reasons why the general rule is not technically feasible or economically reasonable for that particular pollution source. The proposal must also demonstrate that the Board may grant the requested relief consistent with federal law. Finally, where circumstances render any of the required information inapplicable, the proposal shall include a justification for the inapplicability.

The information required by Section 102.141 is detailed and specific. The Board does not believe, however, that these informational requirements are oppressive or burdensome to proponents, because regulations not of general applicability usually give proponents long-term relief from general regulations. Therefore, the Board's record for decision must be comprehensive. The requirements will help identify the crucial issues of a proposal early in the proceeding, and thus allow for a more efficient rulemaking process.

As in proposal of rules of general applicability, Section 102.142 allows for dismissal of a proposal for inadequacy where a proponent fails to satisfy the content requirements or respond to Board requests for more information. A proposal is also subject to dismissal if the Board determines that the proponent has failed to pursue disposition of the proposal in a timely manner. Again, these provisions will enable the Board to manage its docket more efficiently and to enforce the content requirements of Section 102.141.

Subpart D: Contents of Site-Specific Proposals Pertaining to Water

This Subpart contains specific provisions for the contents of site-specific proposals pertaining to water. The rules of this Subpart are to be read in conjunction with, and are cumulative to, the rules in Subpart C. Like Subpart C, the bulk of these rules were proposed by the Board for first notice on March 5, 1987, in R82-27, R82-36, and R83-37, Consolidated, upon a proposal by the Agency. Pursuant to Subpart D, proposals for site-specific water regulations must include descriptions of the facility and of the affected area, an assessment of environmental impact, analysis of the proposal's consistency with federal law, and an evaluation of control options. These proposed rules are very similar to the rules proposed by the Board in March 1987, although there have been a few additions. For example, Section 102.161 "Description of Facility" now requires a list of all prior Board proceedings concerning that facility and the specific parameter for which regulatory change is sought. This will allow the Board to more easily determine if the facility is or has been operating under a variance from the standard for that specific parameter, if there have been any enforcement cases against the source for that particular parameter, etc. Additionally, Section

102.165 "Evaluation of Control Options" is now more specific about the cost information which must be included in the proposal.

The Board notes that although the Agency originally proposed these rules for water site-specifics, there have not yet been proposals for additional requirements for proposal of air, land, or groundwater site specifics, nor do the rules of Subpart D apply to water rules of general applicability. As these rules were proposed for first notice, Subparts E, F, and G have been reserved for regulations setting content requirements for proposal of site-specifics pertaining to air, land and groundwater. The Board requests comments on the rules in Subpart D, and on the advisability of adopting these rules in the absence of regulations governing the proposal of site-specifics in other media.

Subpart H: Authorization and Notice of Hearing

Section 102.240 "Authorization of Hearing" is substantially similar to existing Section 102.121. All regulatory proposals will be placed on the Board agenda for determination of the proposal's adequacy under the Act and Sections 102.121 and 102.141. Hearing will be authorized if the proposal meets the statutory criteria of Section 28 of the Act and the content requirements of Part 102. Please note that hearing will be authorized only after the proponent cures any inadequacy identified by Board order. This provision allows the Board to enforce the requirements of the Act and Sections 102.121 and 102.141 by delaying the acceptances of a regulatory proposal, in addition to the dismissal provisions of Sections 102.122 and 102.142.

"Notice of Hearing", Section 102.241, is also very similar to the existing rules on notice of hearing (see existing Section 102.122), although some language changes have been made. Pursuant to federal requirements, notice of hearings on regulatory proposals concerning air pollution or the Resource Conservation and Recovery Act (RCRA) (42 U.S.C. 6901 et seq.) must be published at least 30 days prior to the hearing date. The rule has been updated to reflect this requirement.

Subpart I: Economic Impact Study Determinations

This Subpart implements the provisions of SB 1834 which require the Board to determine when an EcIS should be prepared by ENR. When this legislation becomes effective on January 1, 1989, these EcIS determination provisions will be found in Sections 27(a) and 28.2 of the Act. Please note that Section 28.2 governs EcIS determinations on federally required rules, while Section 27(a) provides for EcIS determinations for all other regulatory proposals. These sections are substantially the same, and no distinction between the two have been made in this Subpart.

Section 102.260 "Board Determinations" sets forth the fact that within 60 days after the Board accepts a proposal for hearing pursuant to Section 28 of the Act and Section 102.210, the Board shall determine whether an EcIS should be prepared. However, at any time prior to the close of the record of a regulatory proceeding, the Board may determine that an EcIS should be prepared. This provision, which is statutory, allows the Board to reconsider a negative determination if the proposal is substantially modified or if information in the record indicates that an EcIS would be advisable. If the Board determines that an EcIS should be conducted, ENR shall prepare an EcIS in accordance with "An act in relation to natural resources, research, data collection, and environmental studies." (Ill. Rev. Stat. 1987, ch. 96 1/2, par. 7401 et seq.) The Board may identify specific issues to be addressed in the study.

"Request For Determination", Section 102.261, establishes a procedure for any person to request that the Board determine that an EcIS should or should not be prepared. Such a request must be made within 21 days of the date that the Board accepts a proposal for hearing, and must be in writing. Ten copies of the request shall be filed with the Clerk, and one copy each served upon the Agency, ENR, the Attorney General, and the proponent. The request shall detail the reasons supporting the request, and shall describe, to the extent reasonably practicable, the economic impact of the proposal. All material facts asserted in the request must be verified by affidavit.

Section 102.262 describes the considerations upon which the Board will base its EcIS determination. In addition to the statutory factors of Sections 27(a) and 28.2 of the Act, the Board will consider information in the record furnished by the proponent pursuant to Section 102.121 and by any person filing a request for determination pursuant to Section 102.261. (Please note that the text of the rules refers to a request for determination pursuant to Section 102.231; the reference to Section 102.231 is an error and should be Section 102.261. The error will be corrected at second notice.) Finally, Section 102.263 provides that the Board will issue a written order giving the reasons for its determination. Notice of that determination will be given to the proponent and to any person who has asked to be placed on the notice list for that proposal.

Subpart J: Authority of Hearing Officer

This Subpart is an addition to Part 102, and is intended to more clearly state the powers of hearing officers in regulatory proceedings. Section 102.280 "Authority of Hearing Officer" is based upon existing Section 102.160, and is intended to be identical to proposed 35 Ill. Adm. Code 101.220. (The Board notes that subsection (1) of Section 101.220 was inadvertently left out of Section 102.280. This error will be corrected at second notice.) As discussed in the explanation of Proposed Part 101, the section on authority of hearing officer lists several

specific powers. That list, however, is merely an example of a hearing officer's powers and does not limit those powers.

"Notice and Service Lists", Section 102.281, codifies a practice currently used in some regulatory proceedings. The hearing officer will maintain a notice list for each regulatory proceeding. That notice list will consist of all persons who have furnished their names and addresses in reference to that specific proceeding. Notice of all Board action and hearing officer orders will be given to all persons on the notice list. Additionally, the hearing officer may establish a service list, and may direct participants to serve copies of all documents upon persons listed on the service list. This "two list option" enables the hearing officer to draw a distinction between those who simply wish to be notified of Board action on a specific proposal and those who wish to see the comments and motions filed by participants in that proceeding. This option is especially helpful in proceedings which have large notice list but a relatively small number of actual participants.

Section 102.282 concerns the effect of a hearing officer ruling. All decisions, orders, and rulings made by a hearing officer shall remain in effect during the pendency of any appeal to the Board of that decision, order, or ruling. This provision will cut down upon any delay in a proceeding during any appeal of a hearing officer ruling or, for example, a motion to continue a hearing or a motion for sanctions.

Subpart K: Pre-Hearing Conferences

Subpart K establishes procedures for pre-hearing conferences, which are provided for in SB 1834. When that legislation takes effect on January 1, 1989, pre-hearing conferences will be authorized by Section 27(e) of the Act. Proposed Section 102.300 provides for initiation and scheduling of a pre-hearing conference. To the extent consistent with any deadline for adoption of any regulation mandated by state or federal law, the Board may assign a qualified hearing officer who may schedule a pre-hearing conference between the proponent and any or all of the potentially affected persons. A pre-hearing conference may be scheduled on the hearing officer's own motion, or on the motion of the proponent or any potentially affected person. A motion to schedule a pre-hearing conference shall be directed to the hearing officer. The requirements for notice of a hearing do not apply to pre-hearing conferences. However, the hearing officer will give notice to any person who has requested inclusion on the notice list of that proposal. That notice may be either oral or written.

Section 102.301 "Purpose" sets out the purpose of these pre-hearing conferences. These purposes are statutorily articulated in Section 27(e) of the Act. Section 102.302 "Pre-hearing Order" provides that no record of the pre-hearing conference need be kept, nor shall any participant in the conference or the Board be

found by any discussions at that conference. However, with the consent of all participants in the pre-hearing conference, the hearing officer may enter a pre-hearing order delineating issues to be heard, agreed facts, and other matters. The hearing officer may require that the participants in the conference furnish an agreed order setting forth the substance of the agreements reached at the pre-hearing conference. Please note that a pre-hearing order is not binding on non-participants in the pre-hearing conference.

Subpart L: Motions and Discovery

The sections in this Subpart, dealing with motion practice, production of information, and subpoenas, are based upon provisions found in proposed Part 101. For example, Section 102.320 merely states that motion practice in regulatory proceedings is governed by Part 101, Subpart H. Likewise, the section on subpoenas states that upon written motion by any participant, the hearing officer or the Board may issue subpoenas for attendance of witnesses at hearing. The section then states that subpoenas shall conform to the requirements of proposed Section 101.260. Section 102.321, on production of information, is identical to proposed Section 101.261.

Subpart M: Regulatory Hearings

This Subpart deals with the conduct of hearings on regulatory proposals. Section 102.340 "Pre-submitted Testimony" requires that all participants other than the proponent submit written testimony and any related exhibits 14 days prior to hearing. Rules governing the form and filing of those submissions are included. If a proponent wishes to supplement testimony submitted when the proposal was filed, those supplements shall also be pre-submitted. The Board points out that these pre-submissions are to be complete copies of testimony, not outlines of what a witness is expected to testify. Extra copies of testimony and exhibits shall be brought to hearing, so that the court reporter and any person who was not served may be provided with copies. Pre-submitted testimony will be entered into the record (i.e. directly typed into the transcript) as if read, unless the hearing officer determines that it will aid public understanding to have the the testimony read by the witness. Any testimony which is not pre-submitted will be allowed only as time permits. These provisions will enable participants, the Board, and Board staff to focus on the support for and/or opposition to a proposal before the hearing occurs, leading to more efficient use of hearing time. Better use of time at hearing will cut down upon the number of hearings necessary on a given proposal, thus moving the regulatory process more swiftly.

Section 102.342 "Admissible Information" articulates the current Board position on what information is admissible in a regulatory hearing. All information which is relevant and not

repetitious or cumulative shall be admitted by the hearing officer. Therefore, the only proper objections to the introduction of information are based on grounds of relevancy,, repetition, or harassment.

Sections 102.341 "Transcript" and Section 102.345 "Record for Decision" contain the provisions of existing Section 102.164 "Record", but have been divided into two separate sections for clarity. Sections 102.343 and 102.344, which cover presentation of testimony and questioning of witnesses, are based upon existing Section 102.161 "Examination of Witnesses". The Board believes that establishing a separate section covering questioning of witnesses more clearly articulates that although all witnesses are subject to questioning by any person, the hearing officer will prohibit repetitions, irrelevant, or harassing questioning.

Subpart N: Economic Impact Hearings

Section 102.360 "Hearings on the Economic Impact Study of New Proposals" is largely based upon existing Section 102.180. Subsection (b) has been added to incorporate another provision of SB 1834. That subsection provides that in the case of a federally required rule (as defined by Section 28.2 of the Act and proposed Section 102.101), the Board may adopt that rule without an EcIS if the EcIS is not submitted to the Board within six months of the Board's decision that an EcIS should be conducted. This provision will enable the Board to move to final adoption of federally required rules more quickly.

Section 102.361, which governs hearings on economic impact studies of existing regulations, is almost identical to the existing section. The language of the proposed section paraphrases the statutory provisions of Section 4(b) of "An Act in relation to natural resources, research, data collection and environmental studies." (Ill. Rev. Stat. 1987, ch. 96 1/2, par. 7404(b).)

Subpart O: Public Comments

Section 102.380 "Public Comments" is based upon existing Section 102.163 "Written Submissions." Any person may submit written comments on a proposal within 14 days after the close of hearing or regulation revision. This 14-day period may be changed by the hearing officer or the Board. The proposed section adds a provision which specifically states that any comment which is not timely filed will not be considered, except as allowed by the hearing officer or the Board to prevent material prejudice. This provision will encourage participants and others to file their comments on time, and will allow the Board to proceed to a decision on the proposal in a timely manner. The Board specifically points out that motions for extension of time to file comments are not favored.

Subpart P: Board Action

This Subpart, which is an expanded version of Subpart F of the existing Part 102, sets out the various ways that the Board may adopt regulations. Proposed Section 102.400 allows for Board revision of proposed regulations in response to suggestions made at hearing and in written comments prior to second notice, without triggering the need for an additional hearing or a new EcIS. Subsection (c) tracks the language of Section 28 of the Act in providing for revisions in response to suggestions or objections made by the Joint Committee on Administrative Rules (JCAR).

Section 102.401 is a general section on the adoption of regulations. Except as otherwise provided by the Act, the Board may not adopt any substantive regulatory proposal until after a public hearing. However, the Board need not hold a hearing on a procedural regulation, except as provided by Section 5.01 of the APA. The statutory authority for this distinction is found in Sections 26 and 28 of the Act. Section 102.401 also requires the Board to consider the elements of any EcIS performed by ENR on a particular regulation, except in a proceeding for adoption of an identical in substance regulation or a required rule. In the case of a required rule, the Board will consider any EcIS submitted within the six-month period established by Section 28.2 of the Act and proposed Section 102.362(b). Finally, the proposed section points out that the rulemaking provisions of Title VII of the Act and Section 5 of the APA do not apply to identical in substance rulemakings.

Proposed Sections 102.402 and 102.403 explain the first and second notice periods which, pursuant to Section 5.01 of the APA, are applicable to any regulation which is not an identical in substance rule or adopted pursuant to the emergency preemptory and temporary rule provisions of the Act and the APA. Among other things, these sections point out that although any person may submit written comments on a proposed rule during the 45-day first notice period, the Board will accept comments only from JCAR during the second notice period. After the beginning of second notice, no changes will be made to the proposed regulation except in response to objections or suggestions from JCAR. These provisions are mandated by Section 5.01 of the APA.

Section 102.404 "Notice of Board Final Action" is substantially the same as existing Section 102.201. The proposed section now provides that notice of Board final action will be published in the Illinois Register and in the Environmental Register. Finally, proposed Sections 102.405 through 102.409 cover the adoption of RCRA rules, identical in substance regulations, and emergency, preemptory, and temporary rules. The great majority of the provisions of these proposed sections track the statutory language applicable to each type of rule.

Subpart Q: Motions for Reconsiderations and Appeal

Motions for reconsideration or modification of any Board order taking substantive action on a regulatory proposal shall be filed in accordance with proposed Sections 101.242 and 101.246. Section 102.421 "Disposition of Motions for Reconsideration" has been added in order to specifically state the Board's position on motions for reconsideration at second notice and final adoption. Motions for reconsideration at these stages of a regulatory proceeding present a problem, because no substantive modifications of a rule may be made after the beginning of second notice, except in response to JCAR objections and suggestions. Thus, submission of second notice of a rule to JCAR will preclude the Board from revising that rule in response to a motion for reconsideration. However, the Board has the option of making changes and submitting the rule for first notice if necessary to prevent material prejudice. The Board will use this option only in the rarest of occasions. Likewise, because an adopted rule becomes effective upon the filing of that rule with the Secretary of State, the Board is precluded from allowing a motion for reconsideration of a final order adopting a rule, if that rule has been filed.

Finally, Section 102.422 provides that appeal of any final Board order is to the appellate court, and conducted pursuant to Sections 29 and 41 of the Act.

PART 106 - HEARINGS PURSUANT TO SPECIFIC RULES

<u>Subpart A:</u>	<u>Heated Effluent Demonstrations</u>
<u>Subpart B:</u>	<u>Artificial Cooling Lake Demonstrations</u>
<u>Subpart C:</u>	<u>Sulfur Dioxide Demonstrations</u>
<u>Subpart D:</u>	<u>RCRA Adjusted Standard Procedures</u>
<u>Subpart E:</u>	<u>Air Adjusted Standard Procedures</u>
<u>Subpart F:</u>	<u>Water Well Setback Exception Procedures</u>

The Board has not approached revision of this Part as it has done to revision of Parts 101 and 102, by repealing the Part and "starting over from scratch". In the interests of having rules implementing SB 1834's adjusted standards in place by January 1, 1989, the Board is deferring review of the oldest Subparts--A,B, and C-- although the Board anticipates returning to these Subparts before completion of this procedural rule revision process. In the newer Subparts-- D,E, and F -- the Board has updated references to other rules to make them consistent with the proposed revisions to Parts.

Subpart G: Adjusted Standards

The Board's proposed amendments add a new Subpart G to 35 Ill. Adm. Code 106. This proposed new Subpart imposes procedural requirements for adjusted standard proceedings that are held pursuant to Section 28.1 of the Act as amended by P.A. 85-1048 (effective January 1, 1989). On the whole, the requirements of

Subpart G speak for themselves. However, the Board will broadly outline the workings of an adjusted standard proceeding as held in accordance with the proposed Subpart. The Board generally solicits comments on this Part.

Section 106.701 "Applicability" provides that the proposed procedures of Subpart G would not apply to proceedings conducted pursuant to existing Subparts A, B, C, D, E or F of Part 106. It further provides that the requirements of 35 Ill. Adm. Code 101 do apply to proceedings conducted pursuant to Subpart G. In other words, one must read Subpart G in conjunction with Part 101 to determine all of the procedural requirements for an adjusted standard proceeding. In the event that the requirements of Part 101 conflict with those of Subpart G, the provisions of Subpart G govern in an adjusted standard proceeding.

The Board intends to add a severability section to this Subpart identical to that to be added to Parts 101 and 102.

An adjusted standard proceeding begins with the filing of a petition. A petition may be filed either singly or jointly with the Agency. (Section 106.703). Any person who wishes to file an adjusted standard petition may request that the Agency join as a co-petitioner. The Agency is not required to act as a co-petitioner if requested. However, if the Agency is requested to be a co-petitioner it may require information from the petitioner in order to evaluate the request. (Section 106.704).

Sections 106.703 - 106.708 set forth detailed requirements for the contents of a petition. These informational requirements are the minimum necessary to ensure a proper evaluation of an adjusted standard request. All the factual information asserted in the petition must be verified by affidavit accompanying the petition. The petition must also either request or waive a public hearing.

Section 106.711 - 106.712 implement Section 28.1(d) of the Act (P.A. 85-1048), which places the burden of the initial noticing of a petition on petitioner. Within 14 days after filing of a petition, the petitioner must cause the publication of a notice stating that an adjusted standard petition has been filed with the Board. The notice is to be an advertisement in a newspaper of general circulation in the area likely to be affected by the petitioner's activity which is the subject of the adjusted standard request. The publication of the petition notice is accomplished at the petitioner's own expense. Among other requirements, the petition notice must state that any person may request that a hearing be held in the proceeding by filing a hearing request within 21 days of the date of the notice's publication. Within 30 days of the filing of a petition, the petitioner must file proof of the petition notice publication.

Section 106.713 provides that any person may request a hearing on any adjusted standard proceeding. Such a hearing request must be filed within 21 days after the publication of the petition notice. If the Board receives a timely request, it will hold a hearing in the proceeding. In addition, if the Board determines that a hearing would be advisable, it will hold a hearing irrespective of whether it has received a hearing request from the petitioner or a member of the public.

Section 106.714 "Agency Response" provides that not later than 30 days after the filing of the petition the Agency must file a response if it is not a co-petitioner. At a minimum, the response must address and respond to the petition with respect to informational requirements of a petition. Also, the Agency may include in its response any information which the Agency believes is relevant to the Board's consideration of the proposed adjusted standard.

Sections 106.801 - 106.808 outline the procedures by which adjusted standards hearings are to be conducted. If a hearing is held in an adjusted standard proceeding, it will be held in the county likely to be affected by the petitioner's activity which is the subject of the proposed adjusted standard. In accordance with the requirements of Section 28.1(d), notice of the hearing shall be given by advertisement in a newspaper of general circulation at least 20 days prior to the date of the hearing. The Clerk of the Board will cause the publication of the hearing notice. (Section 106.802).

Although the pre-hearing submission of testimony and exhibits is not automatically required, as with the rulemaking procedures of proposed Part 102, the hearing officer may impose such a requirement. (Section 106.803).

At hearing, the burden of proof is on the petitioner to prove, by a preponderance of the evidence, the applicable level of justification for an adjusted standard proceeding. If the regulation of general applicability, from which an adjusted standard is sought, specifies the level of justification for an adjusted standard, then that standard will be applicable. If the regulation of general applicability is silent concerning the level of justification, then the standard imposed by Section 106.903(a) will govern. The standard set forth by that Section is identical to that imposed by Section 28.1(c) of the Act. (P.A.85-1048). (Section 106.903).

Subpart G as a whole provides for broad public participation in an adjusted standard hearing. The level of such public participation is patterned after that which is found in the current rulemaking procedures. Adjusted standard proceedings result in the establishment of environmental standards. Such standards have the same force and effect as those which are promulgated as rules. It follows naturally that the public should have participation rights in an adjusted standard

proceeding which are equivalent to those afforded in rulemakings. It would be seem inconsistent with the intent of the Act to allow adjusted standard proceedings to become forums which effectively exclude the public from meaningful participation in the determination of environmental standards. Consequently, the procedures of Subpart G provide opportunities for the public to contribute to the adjusted standard decision-making process.

Section 106.805(e) provides that any person may introduce evidence at hearing and any person may ask questions of any person who testifies at hearing. Section 106.807 provides that subsequent to the hearing, any person may file comments which present his or her views concerning the record before the Board.

Amended Section 28.1(a) states that adjusted standard determinations are "adjudicatory determinations". However, the Act does not define particular "parties" for an adjusted standard proceeding. This further indicates that public participation need not be limited in scope. In other words, adjusted standard proceedings are not contested cases between two or more distinct parties. Yet, at the same time, the "adjudicatory" language may not be ignored.

As a result, Section 106.805 sets forth a standard for admissible evidence which is equivalent to that currently used in the contested case proceedings of enforcement actions, permit appeals, and variances. It is also consistent with the requirements of Section 12 of the Illinois Administrative Procedure Act (APA). Ill. Rev. Stat. 1987, ch. 127, par. 1012. In addition, the opportunity for cross-examination of any person who testifies is afforded by Subpart G. This, too, comports with the Board's current procedures as well as Section 12 of the APA.

Again, the burden of proof is on the petitioner. The petitioner must prove its case by a preponderance of the evidence. Such a standard is generally used by triers of fact in civil cases, so that standard is appropriate here.

If the petitioner proves the applicable level of justification for an adjusted standard then the Board may, consistent with Section 27(a) of the Act, grant the adjusted standard. The use by Section 106.903 of the permissive term "may" is statutory in origin. Section 28.1(c) of the Act (P.A. 85-1048). Consequently, even if the petitioner meets its burden of proof, the Act does not require the Board to adopt the proposed adjusted standard. As in the Act, Subpart G provides that the Board may impose conditions on the granting of an adjusted standard.

Section 106.907(a) states that if the Board does not adopt the proposed adjusted standard, the regulation of general applicability remains applicable to the pollution source. Section 28.1(e) of the Act (P.A. 85-1048) states that the

operation of the regulation from which the adjusted standard is sought is stayed, pending the Board's final decision, as to the petitioner, if the petition is filed within 20 days after the effective date of that regulation.

However, if the regulation of general applicability implements in whole or in part the Clean Air Act, a petitioner becomes exempt from that regulation if a petition is filed within 20 days of the effective date of the regulation. Section 28.1(f) of the Act (P.A. 85-1048). This provision is also set forth by Section 106.907(b).

In the case of the Clean Air Act regulation of general applicability, the Board, as a final determination, must either adopt the proposed adjusted standard, if the applicable level of justification has been proven, or adopt a standard the same as that imposed by the regulation of general applicability. Section 106.903(c). This provision is found in Section 28.1(f) of the Act. (P.A. 85-1048). In a Clean Air Act regulation/adjusted standard proceeding where the petitioner has failed its burden of proof, the record need not justify the adoption of the standard of the regulation of general applicability.

It is clear from the Act that the Board must adopt either the standard imposed by the regulation of general applicability or the proposed adjusted standard when a proceeding involves the Clean Air Act. It is equally clear that the burden of proof in an adjusted standard proceeding is on the petitioner. Section 28.1(c) of the Act (P.A. 85-1048). The petitioner for an adjusted standard certainly will not prove that the regulation of general applicability should be applied to the petitioner. Neither does the Act provide for such a proof. Consequently, Section 106.903(c) hinges the imposition of the standard of the regulation of general applicability upon the failure by the petitioner to prove the applicable level of justification for the proposed adjusted standard.

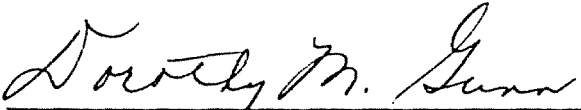
Section 106.902 provides that at any time during an adjusted standard proceeding, the Board may dismiss a petition upon several bases. If the Board determines that the petition is frivolous, duplicative, or deficient with respect to the petition's contents, petition verification, proof of service, or petition notice. Also, if the Board determines that the petitioner is not pursuing disposition of the petition in a timely manner the Board may order a dismissal.

Section 106.905 addresses an appeal of the Board's final decision. The Section merely restates the language of Section 28.1(g) of the Act which provides that appeal may be pursued pursuant to Section 41 of the Act. Since Section 28.1 of the Act does not specifically name "parties" to an adjusted standard proceeding the Board believes that an appeal of an adjusted standard decision would be available to any person, as it is in a rulemaking context. The Board cannot see a distinction between

the public's interest in an appeal of an environmental standard which was promulgated as a rule as opposed to one which was adopted pursuant to an adjusted standard proceeding. The Act has provided for broad public participation in the adoption and appeal of environmental standards. There is no apparent reason to deviate from that theme for adjusted standard proceedings. Ultimately, though, it is for the courts to decide who has standing to appeal a Board decision made pursuant to Section 28.1 of the Act.

J. Anderson, J. D. Dumelle, and J. Marlin concurred.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Proposed Opinion was adopted on the 22nd day of September, 1988, by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board