

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
)
REVISION OF THE BOARD’S) R00-20
PROCEDURAL RULES: 35 ILL. ADM.) (Rulemaking – Procedural)
CODE 101-130)

**COMMENTS OF THE ILLINOIS
ENVIRONMENTAL REGULATORY GROUP
UPON PROPOSED 35 ILL. ADM. CODE 101-125**

NOW COMES HODGE & DWYER, on behalf of the Illinois Environmental Regulatory Group (“IERG”), and provides the following comments with respect to the proposed Parts 101 – 125 of the Illinois Pollution Control Board’s (“Board”) procedural rules.

I. INTRODUCTION

IERG is a not-for profit Illinois corporation comprised of 68 member companies engaged in industry, commerce, manufacturing, agriculture, trade, transportation or other related activity, and which persons, entities, or businesses are regulated by governmental agencies which promulgate, administer, or enforce environmental laws, regulations, rules or policies. IERG was organized to promote and advance the interests of its members before governmental agencies such as the Illinois Environmental Protection Agency (“IEPA”) and the Board. IERG is also an affiliate of the Illinois State Chamber of Commerce, which has more than 5,000 members in the State.

IERG appreciates this opportunity to comment upon proposed Parts 101 – 125. IERG will be filing a separate comment with respect to proposed Part 130.

IERG commends the Board for its efforts in revising its procedural regulations. While IERG is supportive of most of the Board’s revisions, IERG has concerns with

respect to some specific provisions of the proposed Parts 101-125. These concerns stem from the substantial experience IERG and its members have in proceedings before the Board, both in regulatory and adjudicatory matters. Some of IERG's comments are geared toward improvement of purely procedural aspects of appearing before the Board. In other instances, IERG is also raising more substantive concerns with the proposed rules, particularly where IERG believes a proposed provision does not follow the parameters of the Illinois Environmental Protection Act ("Act").

IERG recognizes that some the comments herein address existing provisions in the procedural rules. However, IERG sees this as an opportunity to provide input on areas of concern throughout the Board's current and proposed procedural rules, with a view toward improving those rules. The Board has an integral role in the development and enforcement of environmental requirements in this state. IERG and its members welcome this opportunity to comment upon the way the Board carries out that role.

II. DISCUSSION

A. PROPOSED PART 101: GENERAL RULES

1. Section 101.110: Public Participation

Subsection (c) of proposed Section 101.110 pertains to amicus curiae briefs. The Board states in this section that these briefs must consist of argument only and may not raise facts that are not in evidence. IERG points out that the United States Supreme Court rule for amicus briefs states that such briefs that bring "relevant matter" to the Court's attention may be of considerable help to the Court. U. S. Sup. Ct. Rule 37.1(a).

IERG understands the language of proposed Section 101.110 to be in line with this concept. If this is not the case, IERG requests clarification from the Board.

2. Section 101.202: Definitions

IERG has raised issues with certain definitions throughout this comment and its comment upon proposed Part 130. These comments will not be reiterated here.

The Board has defined “misnomer” which is used in proposed Section 103.202(c). In that provision, the Board states that misnomer of a party is not a ground for dismissal as the name of any party may be corrected at any time. This indeed reflects civil practice in Illinois, pursuant to Section 2-401 of the Illinois Code of Civil Procedure. However, the Board’s definition of “misnomer” is extremely broad, stating that it is a mistake in name, giving an incorrect name in a complaint or other document. Illinois caselaw is replete with decisions that the misnomer rule only allows correction of a party’s name where the proper defendant has been served with a suit, and that defendant has only been identified incorrectly in the pleading. The misnomer rule does not apply where the wrong defendant has been sued, such that the real party in interest has not been given actual notice of the lawsuit. See, e.g., Zito v. Gonzalez, 291 Ill.App.3d 389, 683 N.E.2d 1280, 225 Ill. Dec. 617 (1st Dist. 1997). IERG requests that the Board clarify the definition of “misnomer” to reflect this distinction.

3. Section 101.302: Filing of Documents

Subsection (j) of the proposed Section 101.302 deals with page limitations. This subsection prescribes that no motion, brief in support of a motion or brief may exceed 30 pages. This is an improvement over the 15-page limit for briefs in support of or in

opposition to any motion, under the existing Section 101.104(a). IERG questions whether the new 30-page limit would also apply to briefs supporting a response to a motion, or a reply thereto. The proposed rule reduces the page limit for post-hearing briefs or response briefs (50 pages) or reply briefs (25 pages) to 30 pages. Post-hearing briefs and response briefs will likely have much more argument and coverage of the record than a motion on a narrower point. Accordingly, these limits should be reinstated as in the existing Section 101.104(b).

4. Section 101.304: Service of Documents

Subsection (f) of the proposed Section 101.304 deals with service of comments of participants in an adjudicatory proceeding. The proposed subsection (f) states that such participants do not have to serve comments upon the parties to the proceeding, but that the Clerk of the Board will do so. Persons who interject themselves into an adjudicatory proceeding should be required to provide their comments directly to the parties in the proceeding. This will save time and is a minor effort to ensure prompt receipt of comments.

5. Section 101.308: Statutory Decision Deadlines and Waiver of Deadlines

Subsection (c)(3) of the proposed Section 101.308 states that if a petitioner files a time certain waiver before the hearing, it must be for at least 120 days. This has the effect of restarting decision deadlines for most proceedings. This mandatory length of waiver is excessive, particularly if a petitioner is trying to accommodate another party's scheduling difficulties, which may be resolved in a period as short as 30 or 60 days. If

the Board insists on imposing some sort of minimum waiver, it should be substantially shortened, to at most 30 days.

6. Section 101.403: Joinder of Parties

Subsection (c) of the proposed Section 101.403 specifies that nonmoving parties and the person sought to be added to an adjudicatory proceeding may file a response to the motion for joinder within 14 days of service. Pursuant to section-specific comments herein, IERG maintains that this timeframe is not realistic and requests that it be extended to 21 days.

7. Section 101.500: Filing of Motions and Responses

Subsection (d) of proposed Section 101.500 states that a party may file a response to a motion within seven days of service. This response time is too short and leads to many motions for extension of time. IERG requests that the seven-day timeframe for motion responses be extended to 21 days, particularly given the Board's statement that failure to file a response will be deemed a waiver of objection to the motion.

Subsection (e) of proposed Section 101.500 states that a reply to a response to a motion must be permitted by the Board or a hearing officer. Given the extensive motions that are filed for leave to file such a reply, IERG requests that the Board revise this subsection to state that replies may be filed within 14 days of service of a response to a motion.

8. Section 101.502: Motions Directed to the Hearing Officer

Subsection (b) of the proposed Section 101.502 states that an objection to a hearing officer ruling or any oral motion to the Board made at hearing will be deemed waived if not filed within 7 days after the Board receives the hearing transcript. This timeframe is unfair and inappropriate. By the time a party could secure a transcript, the 7 days would expire. If the Board insists on having the requirement to file the objection, the timeframe should be extended to 21 days from the objector's receipt of the transcript.

9. Section 101.506: Motions Attacking the Sufficiency of the Petition, Complaint, or Other Pleading

Proposed Section 101.506 states that all motions to strike, dismiss or challenge any pleading must be filed within 21 days of service. This timeframe does not correspond with that for filing an answer, which is 60 days, pursuant to the proposed rules. According to civil practice under state and federal procedural rules, the filing of motions on the pleadings should correspond with the timeframe for filing the answer. See, e.g., Section 2-619 of the Illinois Code of Civil Procedure. IERG requests that the Board align the filing deadline in proposed Section 101.506 with that of filing answers.

10. Section 101.510: Motions to Cancel Hearing

Proposed Section 101.510 is a new provision that establishes very onerous parameters for hearing cancellation. IERG appreciates the inconvenience that may occur from a last-minute request to cancel a hearing. However, IERG believes the prescriptive nature of proposed Section 101.510 could be an attempt to over-correct a perceived problem with hearing cancellations. In reality, there are very good reasons to cancel a

hearing, such as a settlement of the controversy on the eve of the hearing. Further, there can be instances where a party retains different counsel just prior to hearing. In such a situation, the attorney would not fulfill his or her ethical duties without seeking rescheduling and time to prepare for a hearing. How would the newly retained attorney fulfill the affidavit requirements of subsection (b) without knowledge of the parameters specified?

Further, subsection (c) seems particularly inappropriate where a waiver of decision deadline (where applicable) could be granted. IERG therefore requests that the Board revise this proposed section. The Board could provide that a hearing officer may grant motions to cancel hearings upon a showing of sufficient circumstances and a waiver of any decision deadlines that will accommodate a rescheduled hearing.

11. Section 101.516: Motions for Summary Judgment

Subsection (a) of proposed Section 101.516 states that responses to motions for summary judgment must be filed within 14 days of service. Given the potential gravity of a motion for summary judgment, the 14-day deadline for responses is inappropriate. Extension of this deadline to 30 days would abrogate the need for many motions for extension of time to file a response. Therefore, IERG requests that the Board revise this deadline from 14 days to 30 days.

12. Section 101.604: Formal Board Transcript

The proposed Section 101.604 states that motions to correct a transcript must be filed with 14 days of the Board Clerk's receipt of the transcript. This does not allow enough time for attorneys to receive the transcript from the Board, send the transcript to a

witness, receive corrections, prepare a motion to correct the transcript, and file the motion. This 14-day deadline should be expanded to 28 days from the party's receipt of the transcript from the Board, which is in accord with Ill. Sup. Ct. Rule 207(a).

13. Section 101.618: Admissions

Subsection (e) of proposed Section 101.618 deals with admission of the genuineness of documents. The Board's existing rules state that the documents subject to the request do not have to be provided with the requests if the documents have already been furnished. Subsection (e) of the proposed Section 101.618 deletes this element. IERG requests that the Board reintroduce this to the proposed rules, to avoid unnecessary duplication of documents.

14. Section 101.620: Interrogatories

Subsection (b) of proposed Section 101.620 states that answers to interrogatories must be served in 20 days. This is a very brief timeframe, particularly where complex technical issues are involved. IERG therefore requests that this deadline conform to civil practice rules, i.e. 28 days after service. See Ill. Sup. Ct. Rule 213(d).

15. Section 101.902: Motions for Reconsideration

The Board has substantially revised its standard for reconsideration, to include grounds such as new evidence, a change in the law or "any other reason." IERG does not necessarily take issue with the first two items. However, "any other reason" is far too broad a standard, precluding any certainty in Board decisions. Therefore, IERG requests that the Board delete this part of proposed Section 101.902.

B. *PROPOSED PART 102: REGULATORY AND INFORMATIONAL HEARINGS AND PROCEEDINGS*

1. **Section 102.304: Hearings for Clean Air Act Amendments (“CAAA”) Fast Track Rulemaking**

Proposed Section 102.304 prescribes the parameters for hearings for CAAA fast track rulemakings. Section 28.5(g) of the Act sets forth the requirements for those hearings. These requirements are not clearly followed at proposed Section 102.304. Like Section 28.5(g)(1) of the Act, proposed Section 102.304(b) provides that the first hearing is reserved for the IEPA testimony and witnesses. However, Section 28.5(g)(1) of the Act also requires that the IEPA’s witnesses be available for questioning. Proposed Section 102.304(b) should be revised to make clear that persons would be able to question IEPA witnesses at the first hearing.

Proposed Section 102.304(d) states that the second hearing is for comments upon the Department of Commerce and Community Affairs’ economic impact study. However, Section 28.5(g)(2) of the Act states that the second hearing “shall be devoted to presentation of testimony, documents and comments by affected entities and all other interested parties.” Proposed Section 102.304(d) should be revised to add this opportunity for participation by affected entities and other interested parties.

IERG also notes that there are several requirements in Section 28.5 of the Act that are not specified in the Board’s rules. IERG seeks clarification from the Board that these statutory provisions will be followed.

2. Section 102.424: Prehearing Submissions of Testimony and Exhibits

Proposed Section 102.424 is taken from the existing Section 102.280. Existing Section 102.280(b) states that the hearing officer may require prehearing submission of testimony and exhibits by the proponent or other participants. Proposed Section 102.424(b) adds prehearing submission of questions, responses and answers. IERG does not necessarily oppose such a requirement, given the proper circumstances. However, this addition is not consistent throughout the remainder of proposed Section 102.424. For examples, see subsections (e) and (f). IERG suggests that these provisions be made consistent with the other revisions in proposed Section 102.424.

C. PROPOSED PART 103: ENFORCEMENT

1. Section 103.204: Notice, Complaint and Answer

Subsection (e) of proposed Section 103.204 provides for the filing of an answer wherein all material allegations must be admitted or denied. Section 2-610(b) of the Illinois Code of Civil Procedure provides that parties may state that they have no knowledge sufficient to form a belief as to the allegations, providing an affidavit to that effect. 735 ILCS 5/2-610(b). Parties should not be forced to admit or deny matters of which they have no knowledge. Proposed Section 103.204(e) should be revised to include this element of pleading.

In addition, proposed subsection (e) states that “facts constituting an affirmative defense must be plainly set forth before hearing in an answer or in a supplemental

answer.” IERG questions whether or not an affirmative defense may be used if it does not come to light until the hearing.

Subsection (g) of proposed Section 103.204 requires the inclusion of language in a complaint advising of the consequences of failing to file an answer. IERG questions whether or not this requirement applies to cross-claims, counterclaims or third-party claims.

2. Section 103.206: Adding Parties

Proposed Section 103.206 specifies the procedures for adding parties to the enforcement case. Subsection (a)(2) contains a 14-day deadline for a potential party to respond to a motion seeking that party’s addition as a respondent. Fourteen days does not allow enough time to retain an attorney, and prepare a response, for a person who has not been involved in the litigation. Accordingly, this deadline should be extended from 14 days to 30 days. Further, under this proposed provision, only the party sought to be added and the complainant may respond to the motion. IERG requests that the Board consider allowing other parties to respond to the motion as well.

Subsection (d) of the proposed Section 103.206 states that subsections (a) – (c) apply to adding counter-respondents, cross-respondents or third-party respondents who are not already parties. IERG questions how a cross-respondent or counter-respondent would not already be a party to the case. If the Board intends the phrase “who are not already parties” to only apply to third-party respondents, IERG requests the wording to be clarified to that effect. This issue also arises in subsection (e).

Subsection (e)(3) of the proposed Section 103.206 specifies a 14-day deadline for responding to a motion for leave to file a counter-complaint, cross-complaint or third-party complaint. Again, IERG understands that only a potential third-party respondent would be a new party to the case. With respect to those entities, 14 days is not enough time to retain an attorney and prepare a response for a motion seeking to bring a party to litigation. IERG therefore suggests changing the 14-day deadline to a 21-day deadline.

3. Section 103.208: Request for Informal Agency Investigation

Proposed Section 103.208 provides for informal investigation requests from citizens, which are to be provided by the Board to the IEPA. Section 30 of the Act provides for investigations by IEPA. IERG does not take issue with the concept of proposed Section 103.208. However, IERG suggests that when a copy of the investigation request is forwarded to the IEPA and the person requesting the investigation, a copy should also be provided to the facility or person being investigated. See subsection (b) of proposed Section 103.208. In addition, when the IEPA informs the citizen and the Board of the results of its investigation or its decision not to investigate under subsection (b), IERG requests that the facility or person at issue also be so informed.

D. PROPOSED PART 104: REGULATORY RELIEF MECHANISMS

1. Section 104.204: Petition Content Requirements

Proposed Section 104.204 contains requirements as to what must be included in a petition for variance. Title IX of the Act sets the statutory framework for variances and

the Board's authority for considering them. Pursuant to Section 35 of the Act, the Board may grant a variance where compliance with any rule or regulation, requirement or order of the Board would impose an arbitrary or unreasonable hardship. IERG urges the Board to consider carefully whether the items in subsection (b) of proposed Section 104.204 are necessary for such a determination.

For example, subsection (b)(5) requires that the petitioner include the number of persons employed by the facility and the age of the facility involved. IERG questions the relevance of this item to the Board's decision as to whether compliance with the requirement at issue would impose an arbitrary or unreasonable hardship. The number of people employed or the age of a facility does not readily appear to be necessary information for such a decision.

Further, discussion of the nature and amount of materials used in the process or activity does not contribute to a determination of arbitrary or unreasonable hardship. How integral is the fact that a unit processes 100 widgets versus 500 widgets in making a variance decision? The Board is also seeking information as to the nature and amount of emissions, discharges or releases of the "constituent in question currently generated by the petitioner's activity." The phrase "petitioner's activity" could be interpreted as referring to the overall activity at a facility. Thus, if the constituent in question is VOM, this provision implies that the petitioner would have to provide a description of all VOM emissions at the facility, instead of only those pertinent to the unit in question. This is an overbroad and irrelevant demand for information.

These examples are not exhaustive, but the point is that the Board should not stray from its authority under Section 35 of the Act. The Board has set forth the information that is absolutely necessary for its determination at subsection (e), which is “[f]acts that set forth the reasons the petitioner believes that immediate compliance with the regulation, requirement or order of the Board would impose an arbitrary or unreasonable hardship.” The other listed items should be included at the petitioner’s discretion, as it is the petitioner that has the burden of proof. The Board should not demand information of the petitioner that is not pertinent to its decision on the variance petition.

2. Section 104.206: RCRA Variance Petition Contents

Subsection (b) of proposed Section 104.206 requires that where a RCRA permit is involved, a permit application reflecting the requested variance be filed prior to filing the variance petition. Yet, the Board had also proposed a new provision at proposed Section 104.244, stating that in a RCRA variance the Board may direct the IEPA to issue or modify a RCRA permit with conditions reflecting the variance order. Accordingly, IERG questions why the proposed Section 104.206(b) permit application filing requirement is necessary.

3. Section 104.216: Agency Investigation and Recommendation

Proposed Section 104.216 guides the IEPA’s response to a variance petition, including the contents of the IEPA’s recommendation to the Board on the petition. Subsection (b) states that the IEPA’s recommendation is to be filed within 45 days after filing the petition or amended petition, or where there has been a hearing scheduled, at least 30 days before hearing. IERG recommends deletion or revision of the last option,

i.e., from filing 30 days before hearing, to 60 days before hearing. The IEPA's recommendation is required to include numerous items, including some that involve subjective conclusions. The recommendation could include suggested conditions for the variance or even a recommended denial of the variance petition. Adequate time should be allowed for the petitioner to prepare for the hearing, given the contents of the IEPA's recommendation.

IERG notes again that the standard for a variance is that compliance with any rule or regulation, requirement or order of the Board would impose an arbitrary or unreasonable hardship. The lengthy list of items that must be included in the IEPA's recommendation should not stray beyond the matters necessary for making a decision as to arbitrary or unreasonable hardship. As an example, the Board has added a new item at subsection (b)(4), namely any past or pending enforcement actions against the petitioner. IERG believes that this is inappropriate information for consideration. A variance is to be determined based on the arbitrary or unreasonable hardship that would be imposed if the petitioner had to comply with the requirement at issue. While this could involve a technical and feasibility analysis for the ability to meet a certain requirement, it has nothing to do with compliance issues from the past that may be completely unrelated to the unit or requirement at issue. Second, an enforcement action, in and of itself, should never be considered substantively, without an adjudication or admission of liability.

IERG refers the Board to its comments as to the contents of the variance petition. The same concerns are relevant here. IERG contends that the proposed subsection

(b)(11) is all the IEPA need provide, which is its recommendation to deny or grant the petition, with beginning and end dates, along with any suggested conditions.

4. Section 104.220: Response to Agency Recommendation

Proposed Section 104.220, subsection (a), increases the petitioner's deadline to respond to the IEPA's variance recommendation, from seven days to 14 days. The IEPA's deadline to file its recommendation is proposed to be enlarged from 30 days to 45 days. Fourteen days is a rather small timeframe in which to respond to the IEPA's recommendation, which could contain complex and/or subjective information or conclusions, recommended conditions, or even a recommended denial. Accordingly, IERG requests that the Board consider increasing the petitioner's response deadline to 21 days.

Proposed Section 104.224(d) allows filing of written comments within 14 days after the close of the hearing, or 30 days before the Board's decision date, if there is no hearing. IERG does not take issue with the filing of comments on variance petitions, but asks that the petitioner be given an opportunity to file response comments, particularly where incorrect information has been presented. IERG requests that the timeframes for comment be amended to allow for response comments by the petitioner, to provide a more complete and accurate record for the Board's consideration.

5. Section 104.226: Amended Petition and Amended Recommendation

Proposed Section 104.226(a) deals with amended variance petitions. Under the proposed language, an amended petition recommences the decision period. IERG

requests that this only occur where the petition has been changed substantively. It would be unnecessary to delay a variance for months because of a minor variation between petitions. The proposed rules for adjusted standards provide that petitions may be amended at any time, and that the amended petition does not restart timeframes unless it contains a substantive change to the requested relief, i.e., additional or alternative relief. IERG requests that this same concept apply at proposed Section 104.226(a).

6. Section 104.240: Certificate of Acceptance

This proposed section states that “[t]he petitioner’s filing with the Board, which must be served on the Agency, will include a certificate of acceptance in all variances.” It appears that some language has been left out of this provision, as it is unclear to which “filing” the Board is referring. The prior proposal reflected Board practice, which is that the Board will include a certificate of acceptance in all variance orders, which the petitioner must execute and forward to the Agency. IERG requests that such language be added to this provision to make it clear when the certificate is to be filed.

7. Section 104.250: Revocation

This proposed section is a new provision allowing the Board to revoke or vacate any variance or any condition of any variance. IERG does not find such authority in the Act. Further, IERG objects to “any person” being able to cause the Board to consider revoking a variance or a variance condition. IERG understands concern as to ensuring compliance with variances and variance conditions and trusts that the IEPA and the Board can fulfill such a goal. The proposed Section 104.250, however, goes beyond that

and creates a great deal of uncertainty as to a facility's ability to rely on regulatory relief ostensibly secured in a variance.

8. Section 104.406: Petition Content Requirements

Section 28.1 of the Act sets forth the statutory framework for adjusted standards. Section 28.1(c) states that the petitioner has to prove four things for the Board to grant an adjusted standard. In proposed Section 104.406, the Board sets forth 12 different categories of items the petitioner must cover in the adjusted standard petition. As with the comments set forth above regarding contents of variance petitions, IERG urges the Board to carefully review this provision to ensure that it is not overreaching.

9. Section 104.416: Agency Recommendation and Petitioner Response

In subsection (a) of proposed Section 104.416, the IEPA is required to file its recommendation within 45 days after filing the petition or amended petition, or where there has been a hearing scheduled, at least 30 days before hearing. IERG recommends deletion or revision of the last option, i.e., from filing 30 days before hearing, to 60 days before hearing. The IEPA's recommendation is required to include numerous items, including some that involve subjective conclusions or even a recommended denial of the petition. Adequate time should be allowed for the petitioner to prepare for the hearing, given the contents of the IEPA's recommendation.

Subsection (b) of the proposed Section 104.416 describes what the IEPA's recommendation must contain, which keys off of the requirements for the petition.

Accordingly, IERG recommends revision of this section to reflect revisions suggested for proposed Section 104.406.

Subsection (d) is a new provision that allows a response to the IEPA's recommendation within 14 days after date of service. IERG supports this concept, but believes that 14 days is a rather small timeframe in which to respond to the IEPA's recommendation, which could contain complex and/or subjective information or conclusions, or even a recommended denial. Accordingly, IERG requests that the Board consider increasing the petitioner's response deadline to 21 days.

E. PROPOSED PART 105: APPEALS OF FINAL DECISIONS OF STATE AGENCIES

1. Section 105.114: Calculation of Decision Deadline

Proposed Section 105.114(b) provides that the Board's decision period recommences when an amended petition is filed. As with IERG's comment regarding amended variance petitions, the decision period should not recommence if the petition is amended with minor, nonsubstantive changes. IERG requests that the Board revise this provision accordingly.

2. Section 105.116: Record Filing

Proposed Section 105.116 provides that the agency must file the entire record of its decision no later than 30 days before the date of any scheduled hearing. The Board's existing rules provide that the record must be filed within 14 days of the appeal petition. The Board's proposed change in this deadline will not allow enough time to review the record and take any necessary action upon that record, including discovery, depositions,

etc., before the hearing. This is particularly true given the newly imposed discovery deadlines prior to hearing, e.g., proposed Section 101.616. Accordingly, IERG proposes that the deadline for filing the agency record be amended to 21 days after the appeal petition is filed.

3. NPDES Appeals

IERG notes that the Board has not included a pertinent provision of its existing rules regarding NPDES permit appeals. Specifically, the current Section 105.102(b)(8) provides that “[i]f any party desires to introduce evidence before the Board with respect to any disputed issue of fact, the Board shall conduct a de novo hearing and receive evidence with respect to such issue of fact.” The Board has not indicated why this provision was deleted. This is a crucial element of NPDES appeals and IERG therefore requests that it be added to proposed Part 105.

4. Section 105.502: General Overview

Subpart E of proposed Part 105 deals with appeals of decisions of the Office of the State Fire Marshal (“OSFM”). Under proposed Section 105.502, hearings will be publicly noticed in the county where the underground storage tank (“UST”) is located. Yet, this same proposed provision states that most hearings will be held in either Chicago or Springfield. Such a limited selection of hearing locations is unreasonable and unfair, particularly for UST owners or operators with USTs located distant from Chicago or Springfield. IERG urges the Board to revise this provision to hold hearings in the county in which the UST at issue is located.

5. Section 105.506: Petition Content Requirements

Subsection (f) of the proposed Section 105.506 concerns requests to hold a hearing in a location other than Chicago or Springfield. IERG suggests that this subsection be deleted on the basis of the comment regarding Section 105.502.

6. Section 105.508: OSFM Record and Appearance

Subsection (b) of the proposed Section 105.508 states that the entire record of the OSFM's decision must be filed with the Board as directed by the Board or hearing officer. However, there is no timeframe imposed for filing the record. IERG suggests that a deadline be set by the Board, which can be consistent with that suggested by IERG for other permit appeals, i.e., 21 days after the petition is filed.

7. Section 105.600: Applicability

Subpart F of proposed Part 105 purports to involve appeals of final decisions of state "agencies" that are not otherwise addressed in Part 105. This terminology appears to refer to more than one state agency, yet "agency" is defined in proposed Part 101 as only meaning the IEPA. Accordingly, IERG believes that the scope of proposed Part 105, Subpart F, is unclear. IERG requests that the Board revise proposed Section 105.600 to address this concern, or revise the definition of "agency" in proposed Part 101.

8. Section 105.608: Time to File the Petition; Service

Subsection (a) of proposed Section 105.608 deals with when a person may appeal an agency decision under proposed Subpart F. Subsection (a)(1) specifies a 35-day appeal period for a person who applied for or requested a final decision. Subsection

(a)(2) provides the same timeframe if the petitioner is a “third party.” IERG questions the circumstances under which a third party could appeal a final decision of a State agency, other than those enumerated in proposed Sections 105.204 and 105.302. IERG is not aware of any statutory provision, which would provide other such opportunities for review. IERG therefore recommends deletion of subsection (a)(2) of proposed Section 105.608.

9. Section 105.612: State Agency Record

This proposed section states that where the law authorizing the appeal at issue does not prescribe a deadline for filing the agency record, proposed Section 105.116 will apply. That section, as proposed, provides for filing the record 30 days before any hearing. For the reasons expressed in its comment to proposed Section 105.612, IERG respectfully requests that the default deadline in proposed Section 105.612, for filing the agency record, be revised to 21 days after the appeal petition is filed.

F. PROPOSED PART 125: TAX CERTIFICATIONS

Proposed Part 125 concerns tax certification of pollution control facilities and low sulfur dioxide emission coal fueled devices. The Board determines such tax certifications under the authority granted at Article 11 of the Property Tax Code. IERG supports the Board’s approach for tax certifications, as expressed in proposed Part 125. IERG notes one apparent discrepancy, however, between Section 11-30 of the Property Tax Code and the proposed Part 125. Section 11-30 of the Property Tax Code states that before denying tax certification, the Board must give reasonable notice to the applicant, in writing, and provide a reasonable opportunity for a fair hearing. The Board has arguably satisfied the

requirement for providing an opportunity for a hearing at proposed Section 125.210.

That provision states that a hearing will be held when requested by the petitioner or the IEPA, or where the Board determines that a hearing would be advisable.

In order to meet the requirements of Section 11-30, the Board should consider adding a Section 125.209, that would provide for written notice of the Board's preliminary decision to deny tax certification, which notice would be served upon the petitioner and the IEPA within a certain timeframe after the IEPA files its recommendation and the petitioner files its response. Then, if the petitioner does not receive a notice of preliminary decision to deny certification in the specified timeframe, the petitioner can choose not to request a hearing. If the petitioner receives the notice of a preliminary decision to deny, it would obviously then be put on notice that a hearing should be requested. This revision should align the procedures in proposed Part 125 with the requirements of Section 11-30 of the Property Tax Code.

III. CONCLUSION

IERG appreciates the opportunity to participate in this proceeding. IERG respectfully requests that the Board consider the comments set forth herein.

Respectfully submitted,

By: (Signature on Original)
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Dated: May 30, 2000

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IERG:001/Misc/Part 101-125 Comments