ILLINOIS POLLUTION CONTROL BOARD
October 3, 1996

IN THE MATTER OF:	)	
	)	
REVISION OF THE BOARD'S	)	R 97-8
PROCEDURAL RULES: 35 ILL. ADM.	)	(Rulemaking-Procedural)
CODE 101-130	)	

Proposed Rule. Proposal for Public Comment.

PROPOSED OPINION OF THE BOARD (by C.A. Manning):

SUMMARY OF TODAY'S ACTION

This opinion supports the order, also entered today, which proposes certain changes to update and streamline all of the Board's procedural rules.[1] This modernization effort, which began as a part of the Board's 25th anniversary celebration, is designed to mirror some changes which have already been implemented in the Board's administrative processes.[2] In other instances, the rules propose changes in some of the Board's more idiosyncratic procedures to bring the Board more closely into line with current practice in other administrative agencies and in the circuit courts with which the Board shares concurrent jurisdiction.[3] The comprehensive rule package proposed today at long last codifies procedures for each and every type of action before the Board, including administrative citations/reviews and appeals of local government decisions regarding siting of pollution control facilities.

We welcome input and debate from all members of the Board's "extended family": local government, the regulated community, other agencies of state and federal government, the environmentalist and natural resources entities and associations, the organized bar, and members of the public who have participated or who may participate in Board proceedings in the future. To this end, we are today adopting a proposal for public comment and hearing rather than a proposal for Illinois Register publication as a first notice rule under the Administrative Procedure Act (APA) 5 ILCS 100/1-1 (1994).[4] We do so to prevent any chill to public participation which might arise

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[1] The Board gratefully acknowledges the contributions of its staff -- from the Clerk's Office to the Technical, Hearings and Legal Units to the Board Members' attorneys -- in the development and refinement of the various in-house drafts through which today's proposal has passed. We most particularly wish to highlight the efforts of the principal drafting team working under the Chairman's direction: Senior Attorney Kathleen M. Crowley, Hearing Officer Deborah L. Frank, and Attorney Assistant to Member Yi, Charles M. Feinen.

[2] One example is the Board's creation of an in-house hearing officer unit to reduce and eventually eliminate reliance on contract hearing officers.

[3] One example is the inclusion of a proposal for request for declaratory ruling, rather than addressing such issues only in the context of a variance or other regulatory relief proceeding. See proposed 35 Ill. Adm. Code Subpart I: Declaratory Rulings.

[4] We will, however, publish a Notice of Public Information in the Illinois Register announcing the availability of the R97-8 opinion and order, to avoid missing or unintentionally bypassing persons for whom the Illinois Register is a primary source of information.

from any misperception that the Board is irrevocably and unalterably wedded to this proposal in each and every of its particulars. This proposal does reflect the Board's own current consensus and best thinking on the matters addressed, based on the sometimes conflicting concerns outlined below. However, the continuing strength of the rulemaking process under the Environmental Protection Act (Act), 415 ILCS 5/1 et seq. (1974), is the ability to tailor rules as they are seen through the light of many perspectives and disciplines.

Given the detailed and often "nitpicking" review which procedural rules must receive, we believe the most efficient manner of proceeding is establishment of a public comment period, running through and including December 15, 1996. We hope that all interested persons will file appearances and/or requests to be added to notice and/or service lists in this matter. We presently intend to hold two public hearings, the first in Springfield on January 13 and the second in Chicago on January 24, at specific times and locations to be announced shortly. After analysis of the public comments received, the Board will determine and announce how best to proceed, e.g. immediate publication of an APA first notice proposal, creation of a second draft for public comment, holding one or more pre-hearing conferences, holding one or more hearings, or some combination of the above. Commenters should feel free to make any suggestions they have about the direction this proceeding would most usefully take. In the meantime, this proposal for public comment is available from the Board's Chicago office and from the Board's Home Page on the Internet,[5] and will be mailed to those who had previously asked to be included on the notice list for any procedural rules update proceeding.[6]

PREVIOUS PROCEEDINGS AND RESOLUTIONS

The Board adopted its first set of procedural rules in 1970. In its adopting opinion, the Board noted that its rules were:

> based partly on the Federal Rules of Civil Procedure for judicial proceedings, partly on the rules of procedure of various state and federal agencies and partly on the independent thinking of the Technical Advisory Committee and the Board within the framework laid down by the procedural sections of the Environmental Protection Act, all as modified in response to suggestions made by the public. (In The Matter of: Procedural Rules (October 8, 1970) R70-4, p.1.)

Since then, the Board has opened some 30 dockets to consider procedural rule revisions.[7] In addition to the original sources, procedural rules have been based on the Illinois Code of Civil Procedure, the rules of the Illinois Supreme Court, and various procedural requirements of the

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[5] The Board's computer-based informational service can be accessed at http://www.state.il.us/pcb/.

[6] This includes R95-1, which was administratively closed when this docket was opened.

[7] The following is a listing of dockets which clearly indicate by title that procedural rule revisions were their subject. It does not include any dockets which may also have incidentally amended or added procedural rules such as, for instance, update dockets in "identical-in-substance" rulemaking pursuant to Section 7.2 of the Act. All dockets here listed may not have resulted in adoption of new or amended rules. The dockets are: R70-4, R70-14, R71-21, R72-1, R72-12, R72-13, R72-14, R73-14, R75-1, R77-16, R78-6, R79-5, R79-7, R79-9, R80-18, R81-1, R81-13, R81-30, R82-27, R82-36, R83-37, R88-5, R88-10, R90-8, R90-24, R92-7, R93-24, R94-11, R95-1.

state's "identical-in-substance" programs to the federal ones for the Safe Drinking Water Act (SDWA), Underground Injection Control (UIC) and the Resource Conservation and Recovery Act (RCRA). The most recent comprehensive effort at procedural rules revision took place in docket R88-5, in response to some fundamental changes made to the environmental rulemaking system by P.A. 85-1048, effective January 1, 1989. While the Board had anticipated reviewing all of its existing rules, the R88-5 effort resulted in changes and additions affecting only general rules (35 Ill. Adm. Code 101), regulatory proceedings (35 Ill. Ad. Code 102), and rules for adjusted standards (35 Ill. Adm. Code 106). Finally, as explained below, the Board has also addressed matters which were arguably of a procedural nature by administrative rules and by resolutions.

Even the most dedicated archivist would have difficulty tracing the complete history of any given Board rule or practice, and particularly prior to the enactment of the APA in 1975. Rules and rationales for their adoption were contained from time to time in the minutes of Board meetings, the Board's Environmental Register newsletter, in the Board's bound and printed opinion volumes and, in the case of rules (but not opinions), in the Illinois Register. Rule numbers themselves changed under the APA's filing and codification mandate. Thus, in 1981, rule numbers changed from three digits under the Board's simple nine "Chapter" system (e.g. Rule 101 of Chapter 1, Procedural Rules) to six digits under the Secretary of State's Administrative Code system covering all state agencies (e.g. Section 101.101 of Title 35: Environmental Protection, Subtitle A: General Provisions, Chapter 1: Pollution Control Board).

The APA, as well as the 1984 Freedom of Information Act (FOIA) (5 ILCS 140/4), required the Board to adopt, in addition to its procedural rules, administrative rules in Title 2 of the Administrative Code describing Board organization, operation, and access to public information. These rules were, for the most part, repetitive of the procedural rules or mandates to the Board as contained in the Act and various other legislation. They have recently been modernized.[8]

Finally, over time, the Board developed a practice of adopting, by resolution, various statements concerning how it intended to conduct its internal operations or to accommodate new legislation.[9] These resolutions have been published in the Board's Environmental Register upon adoption, and are publicly available in the Clerk's Office. They are indexed, however, only by title.

DRAFTING PRINCIPLES TOWARDS "USER FRIENDLINESS" AND ENHANCED PUBLIC PARTICIPATION

Prior to commenting on the various sections within the various parts, we will outline some of the thoughts or principles which have guided the drafting choices made in this rule package. The overarching principles have been to make the rules more "user friendly" with the goal of further enhancing opportunities for meaningful public participation by the interested citizen. Some

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[8] These dockets are, in reverse chronological order, R96-15, R96-14, R84-41 and R83-27.

[9] See e.g. In The Matter of: Designation of Personnel Authorized to Have Access to "Trade Secret" Material In Accordance With 35 Ill. Adm. Code 120, (June 8, 1984), RES 84-1; In The Matter of : Clean Air Act Rulemaking Procedures Pursuant to Section 28.5 of the Environmental Protection Act, As Added By P.A. 87-1213, (October 29, 1992 and December 3, 1992), RES 92-2.)

steps to be taken towards this goal have been readily apparent. Others have definitely required the Board to weigh competing interests.

Filling Regulatory Gaps

One "easy fix" was a repeal of all prior resolutions, and incorporation of their substance, where appropriate, into the rules themselves. Another was creation of new parts to codify rules for causes of action which have not had their own specific sets of rules. These include administrative citation/reviews (new Part 108), and pollution control facilities (PCF) siting appeals (new Part 106), and underground storage tank (UST) appeals, both from Illinois Environmental Protection Agency (Agency) determinations (new Part 105, Subpart C) and Office of the State Fire Marshal determinations (Part 105, Subpart D which reworks existing Part 107). A third was a more explicit description of the opportunities for public participation, and of the rights of party and non-party participants. (See, e.g. Sections 101.105, 101.613, and 104.224.) We have also added specific procedures for use of oral argument (Part 101, Subpart G), as requested by the organized bar in years past.

Language Choices: Plain Language vs. Jargon

On the whole, the Board has sought to use crisp, clean language understandable to the average intelligent person who may not be legally trained. We have attempted to avoid "legalese" and "bureaucratese", and have attempted to clearly define legal terms whose use could not be avoided, i.e. "joinder", "intervention", "subpoena", and so on. We recognize that the risk inherent here is elimination of nuance which may be important in a particular situation. We request that public comment identify any such omissions which may need corrections.

Language which appears in the rules in italics letters is language which quotes, or very closely paraphrases, statutory language; the statutory provision from which the language is drawn appears in parentheses on the end of the passage. The Board is not always free to modify such language, but requests that comments address any perceived unclarity.

Procedural Rules As Requirements vs. "Aspirational Goals"

As the Board's internal rules review continued, members and staff gained an appreciation for just how often existing rules are simply not complied with because they were either too stringent, outdated, difficult to understand, or somehow just "not fair" in one circumstance or another. In drafting this proposal we have attempted "to say what we mean and mean what we say." In other words, the Board intends to demand strict compliance with its new rules, and to enforce every rule, not waived by the Board or hearing officer order, quickly and consistently by sanctions as appropriate to the case pursuant to Subpart H of Part 101. We do not wish parties, participants, or the courts to treat these rules as aspirational goals, but to instead treat them as firm compliance requirements. Commenters are requested to bear this in mind as they analyze these rules for inter-relationships, comprehensibility, and all around "doability."

Retention of Familiar Formats and Numbers vs. Rule Restructuring and Roadmapping

The Board's earliest internal drafts in this matter closely tracked the formats and numbering systems of the existing Parts 101 through 120. One virtue of this approach was that the changes from, and additions to, existing language could clearly be shown by striking language to be deleted

and by underlining language to be added. This scheme would also arguably retain intact prior Board and judicial interpretations of particular rule language and history.

As the rules review process continued, however, we determined to repeal existing Parts 101-120 and to restructure the rules to avoid perpetuation of awkward constructions and difficult-to-locate rule placements. A certain level of restructuring was, of course, necessary to accommodate new Parts for newer causes of action such as the administrative citation/review process (proposed new Part 108) and petitions for review of local government decisions regarding siting of PCF (proposed new Part 106). We described and distinguished the Board's various processes and causes of action before us (See Section 101.108). We have introduced new subparts and titles to better "roadmap" the rules as a whole, from sections within subparts to subparts within parts. If we have inadvertently "buried" rule provisions as subsections in unlikely sections, or as subparts within parts, we welcome identification of any such potential problem areas.

"The Shorter the Better" vs. "One Stop Shopping"

As suggested earlier, one of our goals is to make these new rules "user-friendly". In order for a "reasonable person" to take part in proceedings before the Board, that person might need to consult various sources. These might include, but are not limited to, the Act itself, 2 Ill. Adm. Code Part 2145, 35 Ill. Adm. Code Parts 101-120, the Board's Resolutions, the Illinois Code of Civil Procedure, the Illinois Supreme Court rules, the APA, the FOIA, and the Code of Federal Regulations (to the extent procedural information relevant to federal identical-in-substance programs may not yet be replicated in Board rules in programs such as RCRA, UIC and SDWA programs). The challenge here is to reconcile opposing inclinations on the one hand to keep rules "short, sweet, and simple" by including only that information not available elsewhere and on the other hand to provide, in one document, a "one-stop-shopping guide" which is totally comprehensive and which does not contain cross-references either to other documents or to various portions within the document itself. The first approach customarily leads to a set of brief rules which are fully intelligible only to the most knowledgeable of practitioners; the latter can lead to creation of an encyclopedia too heavy to lift, let alone read.

We have once again attempted to take the best of both approaches. The existing Part 104 rules in, for instance, a variance action, require a reader to refer to the general provisions of Part 101 as well as the Part 103 Enforcement rules in order to get a feel for the course the action must take. While cross-reference is still necessary under this proposal, we have moved all case processing/case flow provisions into one part, Part 101, to eliminate page flipping. We have continued to retain all rulemaking procedures and trade secret procedures in stand-alone parts, respectively Parts 125 and 130. We have grouped like-actions into single, rather than multiple, parts.[10] We have shortened the rules to some extent by removing most instructions and directives to the Clerk and Board staff regarding matters such as how to provide notice of hearing or when to place items on the Board's agenda. (See existing Sections 102.162 and 101.181.) Where appropriate, these items have been moved into our Title 2 administrative rules. This allows the

[10] See Part 104 "Regulatory Relief Mechanisms" which contains the rules for variance actions previously found at Part 104, adjusted standards formerly found in Part 106, and the provisions for reopening of Clean Air Act Permit Programs formerly found in the substantive air regulations in Subtitle B.

procedural rules to more efficiently do the job they were intended to do: define the rights and obligations of parties, participants and the public.

We have increased the rules' bulk in some areas, however, as an aid to the lay person seeking to understand or to appear in Board proceedings. By way of example, we have defined in the "m" portion of Section 101.202 the meaning of various motions to take particular actions (e.g. "motion for reconsideration", "motion for summary judgment"). The Board again specifically solicits comments concerning any portions of the rules in which readers perceive that the Board has gone astray in balancing a desire for brevity with a desire for comprehensiveness.

Improved Administrative Case Flow: Increased Efficient Use of Hearing Officers and Clerk's Office

The Board's caseload continually increases and the number and complexity of the technical issues presented in these cases increases at an even greater rate. The Board believes that it is now most important for its Members to become less "hands on" with routine procedural and administrative issues to afford us adequate time to address the tough technical and policy issues brought before us. This is the job for which the Board was created.

Kerber, Eck, and Braeckel (KEB) Management Study. In July 1995 the management consulting firm Kerber, Eck & Braeckel LLP presented to the Board the results of its study "Review of Case Processing Functions, Illinois Pollution Control Board" (KEB Study).[11] The KEB Study quantified that, while 1995 staffing levels were 15% lower than those in 1991, the Board's caseload had increased 60% along with its expanded responsibilities in UST cases, CAAA fast track rulemaking, and RCRA, Subtitle D Landfill cases (KEB Study, p 5). KEB had been contracted by the Board to "focus on the case processing functions of the Board, the flow of information between the Clerk's office and the Board's constituents, and the flow of information between the Clerk's office and other internal entities of the Board" (Ibid.)

The KEB Study recommendations clustered around four needs identified as critical:

1. The need for management information which can be easily accessed at any point in time;

2. A need for staff to develop familiarity with and fully utilize the computer hardware and software available to them;

3. Opportunities for further streamlining of workflow and case processing functions within the Clerk's office; and

4. The need for a clear delineation of the expectations the Board has of its constituents, and a clear delineation of the expectations which constituents should have of the Board. (Id., p. 6-7.)

Primary among KEB's recommendations are the use of forms (addressed in more detail below), the addressing of various hearing cancellation and renotice issues, and an expedited process for withdrawal of cases. (KEB Study, p. 21 and App. B-F.) The various procedural changes we

[11] This document is hereby entered into the record of this proceeding as Exhibit 1.

propose in this draft are consistent with the recommendation made in the KEB Study, and we reference these recommendations in this opinion as appropriate.

Hearing Officer Unit. An initial move to this end was transfer of the Board's hearing officer function from part-time, outside contractual hearing officers who were trained in litigation but not necessarily environment, to an inside staff of Board-employed hearing officers. This has allowed the Board to develop a more consistent approach in the conduct of its statewide hearings, and to exert a greater degree of supervision and quality control. Now that the Board's hearing unit has been in place for some time, it is appropriate to place greater authority and discretion in handling of adjudicated case processing issues within the hands of the hearing officers. The rules in general, and Subparts E and F of Part 101 in particular do so, allow hearing officers, for instance, to establish stays in some instances (Section 101.514), and filing dates for Agency variance recommendations (Section 104.216) and permit appeal records (Sections 105.210 and 105.310). The Board is not, at this time, proposing that its hearing officers assist the Board by drafting proposed findings of fact and conclusions of law, as do hearing officers for other state agencies such as the Illinois Commerce Commission. The Board is, however, proposing to allow its hearing officers to participate in its deliberative sessions.[12] As this does represent a shift in the Board's use of hearing officers, we specifically invite comment.

Clerk's Office. In addition to acting as the official custodian of the Board's records, the Clerk's office acts as the gatekeeper of the Board's docket, agenda, and decision time periods. As described in more detail below, we have proposed the KEB Study-recommended use of filing forms to allow for the enhanced, standardized, "non-arbitrary" screening of filings by the Clerk: the Clerk will be authorized and expected to reject non-complying filings (Section 101.302 (a, d, e)). The Clerk will be authorized to administratively close cases upon receipt of a notice of withdrawal from petitioner (Section 101.310), rather than being required, as currently, to hold a case open until entry of a Board order as has been the practice. We have also increased the number of copies to be filed to a total of 12 (original plus 11 copies), as suggested by KEB. (Section 101.302 and KEB Study, p. 15-16.)

Forms and Electronic Information Access and Transfer: Blessing or Burden?

The Board is today proposing the use of certain forms to accompany some filings (e.g. variance and permit appeals) and still others to be used as guides to the content of filings (e.g. citizens enforcement actions, AC appeals). Persons may use the forms themselves, or use a "reasonably similar format." All forms will be published as Appendices A through G to our rules, will be available at no cost from our offices electronically and in hard copy, and will be approved as required by the Forms Management Program Act, 20 ILCS 435/1 et seq. While we are certainly aware that forms can be a burden to the regulated community and the public at large, we are proposing use of forms to assist laymen and practitioners alike in making timely and complete filings the first time they enter the Board's door. As recommended by KEB, we have designed the filing forms (App. G, Illus. A, B, D, E, F) in a checklist format which we believe will eliminate return by the Clerk's office of most filings which it must now reject for failure to include filings fees, signatures, and so on. The citizen's complaint form (Id. , Illus. G) replaces that which has

[12] These are closed meetings periodically held and noticed pursuant to the Open Meetings Act, 5 ILCS 120/1.01 et seq.

been used over the years pursuant to Board Resolution, while the AC form (Id., Illus. C) is one which we have long been asked to develop.

Again, the KEB Study suggested the use of forms to satisfy a "need for a clear delineation of the expectations the Board has of its constituents, and a clear delineation of the expectations which constituents should have of the Board" (KEB Study, p. 7). To the extent that failure to do so has resulted in unnecessary work for the Board or the parties, it is high time for such wasted effort to be eliminated.

Additionally, we believe the time is right for use of forms, in part because of the great strides the Board has made recently, and particularly in the last year or so, in its capabilities of providing access to information by computer. Since these forms can be computer accessed from the Board's Home Page, we believe that any compliance burden due to lack of a form's availability is dramatically reduced. Comments about the use of forms in general, as well as the content of the particular forms here presented, are invited.

The Board is not, however, at this time proposing to allow filing of documents by computer; the Board's resources and technology simply do not allow the taking of the giant step at this time. We do, however, continue to explore available options in the interests of efficiency and conservation of the reams of paper filed with the Board daily. Also due to resource constraints, we cannot as this time expand our current policy regarding telefax filings, which are permitted only with prior approval (see proposed Section 101.301). While we appreciate the convenience to the parties, the Board is presently unable to maintain sufficient capability for both routine receipt of filings and our own inter-office communications needs.

Adjudicatory "Due Process" vs. Expediency, Decision Deadlines, Waivers

One of the features of the Act, which is not replicated in the enabling acts of other Illinois agencies or its courts, is the 120-day decision deadlines for the Board in various actions. (Section 35 variances, appeals pursuant to Sections 40 and 40.1, etc.) Because of the existence of these deadlines, the Board cannot simply adopt the rules of the courts or other administrative bodies, which are designed to allow their discovery and hearing processes to operate at a more stately pace. The Board, under its mandate, must pack as much "due process of law" as it can into 120 days, consistent with (generally) petitioner's decision period control, 30-day hearing notice requirements, transcript, delivery considerations, briefing schedules, Open Meeting Act requirements, and written opinion and order constraints.

Within these parameters, the Board must maintain as much control of its processes as possible. In addition to the existing "open" and "time certain" waivers, we are here proposing a new type of waiver in Section 101.308(c), the "negotiation waiver." This would allow the petitioner to stop its time clock at any time, but would then allow the Board to have a full 120-day period commencing at the filing of a notice of reinstate the time clock. This option is designed to allow the parties to settle cases, without prejudicing the Board's ability to make a reasoned decision or requiring expensive hearing renotice and cancellation. (See Section 101.510.) Comment is requested on the utility and potential usage of the "negotiation waiver" option.

PART-BY-PART OUTLINE OF CHANGES

As we walk through the rule proposal, we will not comment upon or explain each and every section or provision. We will instead highlight rules which are new or substantially revise current practice. We additionally underscore the point that all existing rules in Parts 101 through 120 are to be repealed, and totally replaced by the rules proposed as Parts 101 through 130 as described below and as set forth in the accompanying order of today's date.

Part 101: General Rules

Subpart A: General Provisions. Section 101.104 "Repeals" contains the repealer of the Board's prior regulations. Sections 101.108 "Board Processes" and 101.110 "Public Participation" are each entirely new sections which generally give an overview of these topics, which are treated in greater detail throughout the balance of the rules. Section 101.112 "Conflicts of Interest" addresses a previously unregulated subject: appearance before the Board of current or past employees or members. The prohibition against appearance is absolute as to present employees and members and is absolute for 6 months as to past members and employees, with other conditional restrictions. Subsection (c) also specifically allows for disqualification of a hearing officer for bias or conflict of interest, as required by the APA. Section 101.114 "Ex Parte Contacts" is little changed from existing Section 101.200.

Subpart B: Definitions. As earlier stated, we have not repeated in Subpart B the definitions contained in the Act. Many of the definitions of legal terms draw from those in Black's Law Dictionary. Significant new definitions include that for "Home Page/Internet," which gives the Board's computer service access address; the "m" definitions of various types of motions, "non-party participant," as used in the variance rules (Section 104.224); "party in interest" as applied to the Agency in some enforcement cases (see Section 101.404 and Section 30 of the Act); and "notice list" and "service list" as used in the rulemaking context (new Part 125). Section 101.202 also contains various definitions previously "buried" in various inappropriate sections of existing rules (e.g. "recycled paper," currently found in existing Section 101.103(d)). We would expect participants to pay particular attention to definitions in their comments.

Subpart C: Computation of Time: Filing; Service of Documents and Statutory Deadlines. There is one new articulation in Section 101.300 "Computation of Time"; subsection (d) specified dates of Board decisions for the purposes of compliance with the Act's deadlines and for purposes of appeal. Section 101.302 "Filing of Documents" states the new earlier-described required use of forms (subsection (e)). Section 101.304(d) within "Service of Documents" contains, as a public service, addresses of state and federal agencies who must commonly be served in Board proceedings. Section 101.308 "Statutory Decision Deadlines and Waiver of Deadlines and Waiver of Deadlines" spells out the three types, and effects, of waivers the Board proposes to accept: "open", "negotiation", and "time certain" waivers. Section 101.310 "Notice of Withdrawal of Cases" describes the process for administrative closure of cases upon receipt of notices of withdrawal.

The balance of the Subpart's requirements mirrors existing ones.

Subpart D: Parties, Joinder and Consolidations. Section 101.400 "Appearances, Withdrawals, and Substitutions In Adjudicatory Cases" contains some significant proposed changes from current practice. Section 101.400 (a)(2) clarifies that corporations, associations, and units of local government who are parties in adjudicatory proceedings may appear only by and through

attorneys in these cases. (By its terms, the rule does not apply to non- party participants.) This change may especially impact persons wishing to file petitions for variance or UST Fund reimbursement requests who have been in the habit of having the engineer or consultant who regularly works with the Agency on their behalf prepare pleadings or otherwise "appear" before the Board. The Board queries whether this has amounted to an unwitting practice of law without a license, and requests comment on this subject.

Under the Attorney Act, a person is privileged to appear in court on his own behalf, but has no such privilege or authority to represent other persons unless admitted to the practice of law (705 ILCS 205/1, 205/11). The Attorney Act by its terms does not prohibit non-attorneys from representing parties in proceedings before various state boards and commissions, but the Board is not included among these.[13] Corporations may prosecute and defend in actions in small claims courts pursuant to Section 205/11 of the Attorney Act, by using officers or employees. However it is otherwise unlawful for corporations to practice law, as further set forth in the Corporation Practice of Law Prohibition Act, 705 ILCS 220/0.01. This act, too, has some exemptions, notably that for "associations organized for benevolent or charitable purposes" (a phrase which is not defined elsewhere in the act).

The purpose of all of these prohibitions, as summed up by one court, is "to protect litigants against the mistakes of the ignorant and the schemes of the unscrupulous and to protect the court itself in the administration of its proceedings from those lacking the requisite skills." (City of Chicago v. Witvoet (1973), 12 Ill. App. 3d 654, 655-56, 299 N.E. 2d 128.) In addition to any other penalty, such as a fine against the person who has unlawfully practiced law, the Illinois cases have held that where proceedings are instituted by a person not entitled to practice law, such proceedings are a nullity, and the suit will be dismissed. If the cause has proceeded to judgment, the judgment is void and reversed. Midwest Home Savings and Loan Assn. v. Ridgewood Inc., et al. (5th Dist. 1984), 123 Ill. App. 3d 1001, 463 N.E. 3d 909, 912.

These statutes do not by their terms include administrative bodies. However, the Illinois Supreme Court decided long ago, in an unauthorized practice case that:

> It is immaterial whether the acts which constitute the practice of law are done in an office, before a court, or before an administrative body. The character of the act done, and not the place where it is committed, is the factor which is decisive of whether it constitutes the practice of law.
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> People ex rel. Chicago Bar Assn. v. Goodman (1937), 366 Ill. 346, 8 N.E. 2d 941 (finding respondent guilty of unauthorized practice of law in institution and trial of cases before Industrial Commission.)

The second district appellate court has recently noted that there is no "single satisfactory mechanistic formulation or definition of the practice of law". Perto v. Board of Review, Dept. of Employment Security et al. (2d Dist. 1995) 274 Ill. App. 3d 485, 654 N.E. 2d 232, 238, citing In re Discipio (1994) 163 Ill. 2d 515, 523, 645 N.E. 2d 906. In Perto, the court recapitulated various

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[13] 705 ILCS 205/1 lists the State Labor Relations Board, Local Labor Relations Board, Educational Labor Relation Board, state and local Civil Service Commissions, and University Civil Service Merit Board as exempt from its prohibitions.

principles of decision articulated in Goodman, as well as those of similar unemployment insurance program cases in other jurisdictions. The Court concluded that the activity involved did not constitute unauthorized practice: a company's non-lawyer registered agent submitted information in response to letters about a discharged employee from the Department presenting a factual basis for the company's disagreement with the Department's determination that the former employee was eligible for benefits. The court specifically did not, however, speculate as to "at what point, if any, in the Department's administrative proceedings the participation of non-attorneys constitutes the unauthorized practice of law".

The question of "at what point, if any", proceedings before the Board by non-attorneys may become the unauthorized practice of law is one which has not been considered by the courts. Given the high stakes involved – invalidation of a proceeding – we have taken the conservative approach in Section 101.400(a)(2) of prohibiting representation by non-attorneys of corporations, associations, and units of local government; these legal entities may appear only through attorneys in adjudicatory proceedings. We believe that we may continue to freely encourage participation by non-attorneys in regulatory proceedings, as these proceedings are an exercise of our quasi-legislative authority. The Board again solicits comments by all persons on this point, but would particularly appreciate comment from the Office of the Attorney General.

Section 101.400 (a) and (c) would allow attorneys to withdraw and to substitute for one another upon the filing of a notice of withdrawal. Entry of a Board order is no longer necessary to effectuate a withdrawal, as recommended by KEB (KEB Study, pp. 18-20).

Section 101.402 "Intervention or Joinder of Parties" explicitly recognizes that intervention or joinder may not be statutorily appropriate or permissible in all cases, such as purported third party appeals in cases where there is no specific statutory grant of authority for such appeals. (See Landfill, Inc. v. PCB, 74 Ill. 2d 541, 387 N.E. 2d 258 (1978).) This is a point which had been obscured in the existing rules because of the cross reference of all other Parts to Part 103 for rules concerning the conduct of a case generally. Subsection (c) also makes clear that, in deadline driven cases, the joined party does not gain any control of the decision period, which remains in control of the original party.

Section 101.404 "Agency as a Party in Interest" codifies the Agency's role in any enforcement case in which it makes an investigation at Board request pursuant to Section 30 of the Act. (See also Section 103.202.) Section 101.406 "Consolidation of Claims" codifies the Board's practice of declining to consolidate cases of different types where burdens of proof are different, such as variances and permit appeals; proper review and appropriate use of the various portions of the consolidated record becomes extremely difficult.

Subpart E: Motions. The rules as proposed do not substantially modify the Board's current motion practice, although the rules have been restructured to give more assistance to the lay person appearing before the Board. Section 101.500 "Filing of Motions and Responses" makes clear that the Board and its hearing officers will entertain virtually any motion which a person chooses to file, although later sections in the part go on to specifically discuss particular types of motion. The seven-day time for filing a response to a motion is retained, as is the seven-day time for filing a reply to a response, but only with leave of the Board. Section 101.502 "Motions Directed to Hearing Officer" similarly does not change existing practice or authorities, but makes explicit the fact that appeal to the Board of any hearing officer ruling does not stay the ruling or the

proceeding. Section 101.504 "Contents of Motions and Responses" includes the specification that facts asserted but not of record must be supported by oath or affidavit, noting the availability of Board forms for same. Sections 101.506 "Motions Attacking Sufficiency of Petition or Complaint" specifies that such motion must be filed within 21 days of service, while Section 101.508 "Motions to Board Preliminary to Hearing" specifies that such motion must be filed 21 days in advance of hearing.

Section 101.510 "Motion to Cancel Hearing" establishes some new concepts to enable the Board to get control of escalating costs for cancellation and re-noticing of hearing as recommended by KEB (KEB Study, pp. 15-16). The Board's aim is to shift to the party seeking the cancellation at least some of the financial burdens of its lack of foresight or planning**.** This section establishes the general rule that motions to cancel hearing must be filed no less than 10 days prior to hearing unless agreed to by all parties, in which case 5 days lead time suffices. All motions must be supported by affidavit and must include the reasons for cancellation, a status report, history of prior cancellations, and a proposed rescheduling date. Hearing officers are prohibited from granting cancellations in deadline cases unless a waiver of time is also provided. We propose to assess fees for newspaper re-noticing and court reporter cancellation against the moving party in appropriate cases.

Section 101.512 "Motion for Expedited Review" requires that such requests be accompanied by affidavit. Section 101.514 "Motions to Stay Proceedings" is one of the provisions designed to enhance administrative case flow: after the granting of an initial stay by the Board, any motions for extension are to be directed to and handled by the hearing officer. Section 101.516 "Motions for Summary Judgment" largely recapitulates existing standards and requirements although it increases the response time from 7 to 14 days. It also goes on to address a not uncommon occurrence: pendency of a motion for summary judgment on the day hearing is to commence. This can occur if the Board's meeting schedule, the scheduled hearing date, and decision deadlines do not mesh. The proposal states that such motions may be deemed denied, so that the parties may proceed to hearing on the merits of the case and the Board need not later deal with motions mooted by their terms.

Section 101.518 "Motions for Interlocutory Appeal from Hearing Officer Orders" reaffirms existing procedure, as does much but not all of Section 101.520 "Motions for Reconsideration." Such motions may be filed within 35 days of a final order, and responses 14 days after. The filing and pendency of such motion stays the effect of the challenged order until the motion's final disposition. Commenters should note that we will no longer entertain motions for reconsideration of discovery and other interim orders. Similarly, we will not entertain motions for reconsideration of orders which were themselves entered in response to motions for reconsideration. Finally, we wish to underscore that the filing of a motion for reconsideration is not a prerequisite for the filing of appeals before the courts. As this is a permissive rule, a filing is not necessary to "exhaust administrative remedies".

Subpart F: Hearings, Evidence and Discovery. The new Section 101.600 "Hearing Overview" announces several general principles applicable to Board proceedings which are not new but which may previously have not been articulated: all hearings are held in compliance with the Americans with Disabilities Act to facilitate participation; hearings are generally held in the county where the facility is located; hearings may be canceled without notice so that details should be confirmed by the Clerk or hearing officer; and hearings are conducted with courtroom decorum

and all persons must conduct themselves with dignity and respect. While the Board had considered eliminating Section 101.602 "Notice of Board Hearings" as a "self-directive," we decided to include it for its public information value.[14]

Section 101.604 "Formal Board Transcript" reconfirms existing procedure for transcription of Board proceedings and correction of transcripts. Section 101.606 "Informal Recording of Proceedings" authorizes the hearing officer to regulate use of audio or video recording equipment at hearing to avoid disruption of hearings. This section does not preclude individuals retention of their own court reporters, but such use is similarly subject to any limitation necessary to prevent disruption.

Section 101.608 "Default" has been added at the request of the Board's hearing officers to clarify that the party who carries the ultimate burden of proof must always prove up a *prima facie* case on the merits, even if the opposing party fails to show up at hearing. For example, the Agency as complainant in an enforcement case must always present a *prima facie* case if respondent defaults, but the Agency as respondent in a variance or permit appeal must present nothing if petitioner defaults, since petitioner has the burden of proof in both cases.

Section 101.610 "Duties and Authority of Hearing Officer" restates a hearing officer's existing authorities to manage both the case and the parties to provide the best possible record for Board review. As earlier stated, however, it adds one new authority in subsection (p): to "[a]ssist the Board in its deliberation," which commenters may wish to address.

Section 101.612 "Completion of the Record," 101.614 "Production of Information and 101.616 "Discovery" do not depart from current practice. Subsection (c) Section 101.618 "Admissions" is one of the provisions of this proposal intended to aid *pro se* parties. It requires the party to include in a prominent place, the first paragraph of the request-specified language explaining consequences of failure to respond, and suggesting that questions be referred to the hearing officer or an attorney. The consequences of refusal to admit is still, pursuant to subsection (d), admission of the matters of fact or genuineness of the document involved in the request.

Section 101.620 "Interrogatories" and 101.622 "Subpoenas" contains no new concepts. Subpoenas continue to be issued by the Clerk. In answer to often-asked questions, however, the latter section refers to the Fees and Salaries Act (55 ILCS 45/47) as establishing the amount of witness fees and expenses, and to Illinois Supreme Court Rule 206(d) as establishing, as general matter, a three-hour limit to depositions. Section 101.626 "Information Produced at Hearing" now contains an explicit reference to APA requirements (5 ILCS 100/10-40), but otherwise remains substantially unchanged from current rules in Part 103 Subpart F.

In Section 101.628 "Statement from Non-Party Participants," we have combined in one location the description of the general public's rights to participate in various ways during and after adjudicatory hearings. We have also specified how the public may make oral and written statements, what weights will be given to the various types of statement, and what public comments may contain. To facilitate public participation, the Board has proposed to assume the burden and cost of copying and distributing post-hearing comments in adjudicatory cases to the parties and hearing officer (Section 101.628 (c)(3)). Requirements for the filing of *amicus curiae* briefs as

[14] The Board does not notice administrative citation hearings because the Act does not so require.

contained in Section 101.110 are cross-referenced. Again, there is no requirement for non- party participants to be represented by counsel.

Subpart G: Oral Argument. As previously stated, we have included expanded treatment of the oral argument concept at the request of the organized bar. The primary stumbling block to the Board's allowance of argument is the familiar one of time: Section 101.700 (c) requires that a request be accompanied by waiver of any decision deadline. Any oral argument will be transcribed by a court reporter, with the transcript to become part of the case record. As we do not presently contemplate granting oral argument on a routine basis, the rules suggest some factors that the Board will consider.

Subpart H: Sanctions. Some new ground is broken in the rewritten sanctions rules occurring in Section 101.800(b)(6-7), in which we list assessment of reasonable expenses, including attorneys fees, as among the possible sanctions to be imposed. We are not asserting new authority here, but are codifying remedies previously ordered by the appellate court (e.g. Grigoleit Co. v. PCB, 245 Ill. App. 3d 337; 613 N.E. 2d 371 (1993). Additionally, new subsection (c) indicates the Board's intent to sanction, by removal, any attorneys who prove inattentive to their cases. This is intended to apply to government and private practitioners alike.

Subpart I: Declaratory Rulings. In proposing to accept requests for declaratory rulings, the Board's intent is to allow sources a direct method of asking the Board to consider an interpretation, rather than requiring that the question be tortured into a form that will fit within the confines of, for instance, a variance petition. It is not our intent to entertain a flood of frivolous requests. The Board continues to be in the business of settling cases or controversies, and does not intend to get into the business of answering merely hypothetical questions. To this end, in Section 101.900(b) we have established various criteria which we would consider in determining whether to address a declaratory judgment request. Recognizing the importance of input from the Agency and the Office of the Attorney General (AGO), we have provided that they be served with such requests in all cases, and indicate that the Board might, by order, request their responses (and possibly those of others as well). As declaratory rulings are advisory only, we would not consider any opinion issued, or order denying a request, to be appealable pursuant to Section 40. As this is an entirely new concept idea, we particularly request input, and most especially that of input of the environmental enforcement community, concerning both the concept and the details of the proposal as drafted.

Subpart J: Review of Final Board Opinions and Order. Section 101.1000 "Board Decisions" incorporates into Board rules the APA listing of various types of material which may be properly noticed and considered by the Board (5 ILCS 100/10-40(c)). The balance of the Subpart repeats existing law and procedure in Sections 101.1002 "Motions for Reconsideration" and Section 101.1004 "Relief From and Review of Final Opinions and Orders".

Part 101.Appendix

The appendix to Part 101 contains various samples to guide persons in preparing pleadings. Appendix A contains sample captions for various actions. Appendix B is a sample appearance, and Appendix C is a sample withdrawal of same. Appendix D is a sample notice of filing, while Appendix E contains both a proof and certificate of service. Appendix F is a sample notice of

withdrawal of a case, the replacement for the current practice's motion to withdraw or dismiss one's own case.

Appendix G contains the newly proposed, detailed filing forms. These forms relate to the following actions:

Illustration A	Petition to Review Final Illinois Environmental Protection Agency Decisions.
Illustration B	Petition for an Extension of Time to File a Petition for Review of an Agency Final Decision
Illustration C	Petition to Contest Administrative Citation
Illustration D	Petition to Review Pollution Control Facility Siting Decision
Illustration E	Petition to Review Final Illinois Environmental Protection Agency Underground Storage Tank Decision
Illustration F	Petition for Variance
Illustration G	Citizen's Complaint

The rules allow either use of the forms themselves, or use of a "reasonably similar format." We especially wish to note that the Board's diamond-shaped graphic need not be reproduced, since this may challenge some computers' memory capability.

Again, we welcome comments concerning these appendices.

Part 102: Repealed

This proposal would repeal the existing Part 102 rulemaking rules in their entirety. The reworked rules would be readopted in a new Part 125. To avoid any confusion, we would plan to "retire" and not reuse any numbers in Part 102.

Part 103: Enforcement

In general, the girth of Part 103 has substantially decreased, due to the transfer to Part 101 of the general rules for the conduct of adjudicatory cases which used to be contained here. The discussion below addresses the highlights of the proposed changes.

Subpart A: General Provisions. There is no new material here.

Subpart B: Complaint. In addition to complainants and respondents, Section 103.202 "Parties" specifically acknowledges the potential appearance of the Agency as a "party in interest" as the result of a Section 30 investigation request from the Board. It also specifically contemplates possible appearance of cross-complainants and counter-complainants, whose joinder is more fully addressed in Section 103.206 "Adding Parties." Section 103.204 "Notice, Formal Complaint, and Answer" continues current practice with one major, and often requested change: failure to file an

answer within 30 days will now result in all material allegations of a complaint being taken as admitted. This is consistent with Section 5/2-610 of the Civil Practice Act, but is the opposite result from that in the current rules (see existing Section 103.122(d)). If there is any single rule change most requested by legal practitioners, this may well be it, as it brings the Board's enforcement action practice into line with that of the circuit court. We have, however, included in Section 103.122(c) language similar to that in Section 101.618(c) regarding failure to respond to requests to admit. This advises that failure to respond could have "severe consequences," that facts not denied are taken as admitted, and that the hearing officer or an attorney should be contacted if questions remain.

The Board historically has advised citizens that they could file "formal" (i.e. Section 31) or "informal" complaints. Informal complaints were referred to the Agency by the Board for investigation, with a request for a response to the Board and person complaining. Proposed Section 103.208 "Request for Informal Agency Investigation" would entirely replace the old "informal complaint" system, which is repealed along with the Resolution explaining it. The request form would continue to be Board-provided (Section 101.App.G, Illus. H), and forwarded by the Board to the Agency. The Agency would have a non-appealable option to choose to investigate or not, and is directed to inform the citizen of the results of any investigation.

Section 103.210 "Notice of Complaint" contains no new material. Section 102.212 "Hearing On Complaint" codifies existing practice of setting all complaints filed by government for hearing. It allows a respondent in a citizen's complaint 30 days in which to file a motion that a complaint is "duplicitous or frivolous" (which definitions are unchanged). The section also contemplates that the Board might hold hearings on discrete issues, such as violation only, remedy only, or compliance issues only.

Subpart C: Settlement Procedure. This subpart merely codified existing practice and statutory requirements. Section 31 (a)(1) requires a hearing on all stipulations filed in citizens' actions. It allows the parties to waive hearing in government enforcement cases, but dictates that notice of the proposed settlement be published in a newspaper. A hearing is scheduled if a written hearing request is received within 21 days of the publication of the notice.

Subpart D: Decision In Cases Involving RCRA Permits. These rules were originally adopted as identical-in-substance rules pursuant to Section 7.2 of the Act. They replicate federal procedures involving cases which could impact RCRA permits. The Board has little discretion to amend these rules, which are unchanged since their original adoption, as they are required to retain federal authorization of the state's RCRA enforcement and funding program.

Subpart E: Imposition of Penalties, Fees, and Costs. This section specifies only payment methods and interest accrual. The Board considered, but rejected, adoption of a specific "penalty policy", feeling that existing models are too mechanistic and unresponsive to the peculiarities of any given case.

Part 104 Regulatory Relief Mechanisms and Regulatory Alternatives

Part 104 contains modification to existing rules for "regular", Section 35(a) variances (Subpart B); provisional variances pursuant to Section 35(a); modifications to existing rules for Section 28.1 adjusted standards (Subpart D) and modifications to existing rules for heated effluent,

artificial cooling lake, sulfur dioxide demonstrations and water well setback exceptions required by various rules (Subpart E). We also gathered into this part procedures of like kind for various determinations which had previously been contained in the air rules: Agency or USEPA revocation and reopening of CAAPP permits (Subpart G), maximum achievable control technology determinations (Subpart H), and culpability determinations for particulate matter less than or equal to 10 microns (PM-10) (Subpart I).

Subpart B: Variances. IIS procedural rules for RCRA variances have been blended into the rules generally, rather than appearing within their own subparts. A new rule (Section 104.212) clarifies that requests to modify internal compliance dates within a variance which do not extend the variance term may be made by motion; other requests to extend or modify variances proceed as new cases (Section 104.210), New Section 104.224 "Non-Party Participant's Objections to Petition, Written Comments, and Request for Hearing" address public participation rights and duties in detail. The balance of the rules repeat existing statutory requirements and duties regarding notice, Agency recommendations, hearing, calculation of decision deadlines, variance terms and conditions, revocation, etc.

Subpart C: Provisional Variances. These rules track statutory requirements. Section 104.310 "Simultaneous Variance Prohibition" states that the Board will not grant a provisional variance to a source which has a "regular" variance for the same thing: duplicate relief is simply unnecessary.

Subpart D: Adjusted Standards. The adjusted standards rules which were adopted in the R88-5 proceeding do not need much change. The only noteworthy addition occurs in subsection (b) of Section 104.420 Request for Public Hearing by Non-Party Participant, wherein we advise that, in the general course, we will not hold a hearing scheduled after receipt of a hearing request in the event all hearing requests are withdrawn. Previous practice had required such hearings to be held once newspaper notices are published, on the theory that some members of the public may have relied upon another person's hearing request. Upon reflection, we have concluded that this remote possibility does not justify the expense to the Board and others of a needless hearing. We believe it better to forewarn interested persons not to rely upon another's request.

Part 105: Appeal of Final Agency and OSFM Decisions

This Part contains the Section 40 permit appeal rules presently contained in Part 105, and the rules for appeal of the Fire Marshal's UST decisions adopted in the R94-11 proceeding and contained in existing Part 107. The Part requires use of Board forms for each type of action, but does not otherwise propose to significantly amend existing procedures: petitions are usually filed within 35 days of an Agency or OSFM decision, when the Board administrative records of hearing are filed, hearings are noticed and held, and decisions rendered within any statutory deadline. We have eliminated rigid requirements for the time of filing the record, allowing the hearing officer flexibility to set deadlines based on waivers filed and the likelihood of a cases' settlement versus its proceeding to hearing (Section 105.116). However, as a counterpoint to this flexibility, we have also suggested the possibility of a monetary sanction of $500 for each day a record is filed late (Section 105.118 "Sanctions for Filing a Late Record"). We have included rules and forms to implement recent statutory amendments (P.A. 88-690 effective January 24, 1995) which allow for 90-day extensions of the time for filing some petitions for review (Section 105.206 "Extension of Time to File a Petition for Review").

A significant deletion from these rules is the existing rules for third party appeal of NPDES permits (see existing Section 105.102 (b)(3)); such appeals were found impermissible in Citizens Utilities Co. et al. v. PCB, et al., 26 Ill. App. 3d 773, 639 N.E. 2d 1306 (3rd Dist. 1994). Section 105.202 "Who May File A Petition for Review" as drafted includes third party appeal rights only as currently authorized by Section 40. While the Board is aware that USEPA has proposed rules to require states to authorize such appeals if they wish to retain program authorization (61 Fed. Reg. 2901, May 8, 1996), legislative authorization would be needed to enable the Board to lawfully adopt such rules.

Part 106: Petition to Review Pollution Control Facility Siting Decisions

We are most pleased to fill a regulatory void by proposal of new Part 106 procedures for appeals of PCF siting decisions by local government pursuant to Section 40.1 of the Act. This Part naturally mirrors Part 105, as Section 40.2 requires that Section 40 procedures be followed. We believe the Subpart B: Petition for Review and Subpart D: Hearing should eliminate confusion about who may participate in these proceedings and in what manner. Subpart C: Filing of the Local Record contains instructions to the county or municipal clerk which had formerly been contained in the Board's "set for hearing" orders. Subpart E: Board Review and Decision articulates the major statutory and case law standards the Board must consider in reaching decisions, and suggests what actions the Board may take when its review is completed. The Board's standard of review in these cases is whether the decision made by local government is against the manifest weight of the evidence. (See Section 106.606 (b) and e.g.; City of East Peoria v. IPCB, 117 Ill. App. (3d Dist. 1983) 3d 673, 452 N.E. 2d 1378; Waste Management of Illinois v. IPCB, (2d Dist. 1984), 123 Ill. App. 3d 1075, 463 N.E. 2d 969; File v. D&L Landfill, Inc., (5th Dist. 1991), 219 Ill. App. 3d 897, 579 N.E. 2d 1228.

Part 107: Repealed

We are not proposing to reuse the numbers in Part 107, which currently contains procedures for appeals of OSFM decisions in UST appeals. As stated, the existing Part 107 rules have been tucked into proposed Part 105.

Part 108: Administrative Citations

The new administrative citation (AC) rules codify the Board's existing practice concerning government's filing of ACs and any appeal by the AC recipient. The Board's existing practice – and, of course, the proposed rules -- track the procedure-rich statutory AC process as codified in Sections 21 (o, p), 31.1 and 42 (b)(4) of the Act.

In Section 108.200 (b), we require units of local government who have been delegated AC authority by the Agency to annually file a copy of their agreements with the Board. The Board does not currently receive these agreements on a regular basis, and we have occasionally had questions which could easily be answered by reference to the delegation agreement.

A simple check-off form for contest of an AC appears in Subpart 101.Appendix G, Illustration C. The form makes clear, as does Subpart E of Part 108, that persons who lose their AC appeals are subject to costs which may exceed the amount of the statutory fine of $500 per violation. We particularly seek comment on proposed Section 108.504 "Board Costs", in which we propose to yearly publish a schedule of hearing costs.

Part 120: Repealed

The existing Part 120 trade secret rules have been rewritten and moved to Part 130.

Part 125: Regulatory And Informational Hearings and Proceedings

As explained earlier, proposed Part 125 contains the existing Part 102 rulemaking procedures. As the rulemaking process is a quasi-legislative one, we have drafted Part 125 as a stand-alone part. This means that the person who wishes to participate in a rulemaking need not read, and possibly be confused by, the rules for adjudicatory procedures and requirements.

Subpart A: General Provisions; Subpart B: Regulations of General Applicability, RCRA Amendments and Site Specific Regulations. As the majority of the rules in these subparts were adopted in the R88-5 proceeding, we will not discuss individual rules in detail. Interested persons may wish to consult the R88-5 opinions for specifics about the development of particular rules contained in Subparts A and B. Generally, the rules lay out, and interweave as necessary, the rulemaking requirements of the APA (first notice Illinois Register publication, second notice review by the Joint Committee on Administrative Rules, filing and final publication by the Administrative Code Unit of the Office of the Secretary of State) with those of the Act (notice, hearing, entry of opinion and order).

Subpart C: Clean Air Amendments Fast Track Rulemaking. This set of rules implements the fast track rulemaking mandates of Section 28.5 of the Act, and are designed to speed adoption of state rules responsive to the Clean Air Act Amendments of 1990. These rules supersede the Boards 1990 resolution dealing with this subject matter.

Subpart D: Service and Filing of Documents, Motions, Production of Information, Subpoenas, Pre-Hearing Conferences and Hearings. This Subpart contains as much procedure as anyone would need to intelligently follow and speak at a rule hearing. These procedures are similar to those contained in Part 101 for adjudicatory cases, but with irrelevant or overly- strict requirements weeded out. We feel that that these revisions were particularly important given the large volume of rulemaking on the Board's agenda for the next year or so, including rules to implement recent Brownfields and livestock waste legislation.

Subpart E: Certification of Required Rules. The Agency certification procedure of Subpart R is relevant only to rulemaking pursuant to Section 28.2 of the Act, a section which has been little used since the advent of Section 28.5. Agency certification that rules are federally required triggers specified certain publication. Section 125.502 "Challenge to Agency Certification" allows a person to challenge such certification within 21 days, and others to file any reply thereto within 14 days.

Subpart F: Board Action & Subpart G: Motion for Reconsideration and Appeal. These are similar to the Part 101 provisions, but are tailored to explain and include constraints in rulemakings on, for instance, motions for reconsideration.

Part 130: Identification and Protection of Trade Secret Rules

Subpart A: Trade Secrets and Non-Disclosable Information. The proposed Part 130 trade secret rules replace those in existing Part 120 adopted in docket R81-30, which we propose to repeal. They implement the mandate of Section 7.1 of the Act that we adopt rules for determining which materials are trade secrets or are otherwise nondisclosable or exempt from disclosure requirements of Section 7 of the Act and Section 7 of the FOIA. While we have attempted to streamline these rules, we cannot entirely avoid an awkwardness in construction caused by the fact that Subparts A, B and C of the rules apply to three agencies: the Board, the Agency, and the Department of Natural Resources.

Subpart B: Procedures for Identifying Articles Which Represent Trade Secrets; Subpart C: Procedures for Protecting Articles Which Represent Trade Secrets. The general Subpart B and C trade secret claim process involves filing a claim letter, complete with justification, to the agency at the same time an article is filed (Section 130.200-130-202). The agency has 45 days in which to make a determination, after consideration of any timely filed response. If the agency fails to act, the request is deemed denied. If the agency determines an article is non-disclosable, it is protected. Nevertheless, if the agency determines that the article is not eligible for trade secret protection, the material continues to be protected through any subsequent appeals.

Subpart D: Non-Disclosable Information. This subpart applies to material filed with the Board alone, and contains a simpler alternative procedure which is currently found at existing Section 101.161.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion was adopted on the _____ day of _____, 1996 by a vote of _____.

_____

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board

ILLINOIS POLLUTION CONTROL BOARD
October 3, 1996

IN THE MATTER OF:	)	
	)	
REVISION OF THE BOARD'S PROCEDURAL	)	R 97-8
RULES: 35 ILL. ADM. CODE 101-130	)	(Rulemaking-Procedural)
	)	

Proposed Rule. Proposal for Public Comment.

PROPOSED ORDER OF THE BOARD (by C.A. Manning):

SUMMARY OF TODAY'S ACTION

This order is supported by an opinion also entered today, which proposes certain changes to update and streamline all of the Board's procedural rules. We believe the most efficient manner of proceeding is establishment of a public comment period, running through and including December 15, 1996. We hope that all interested persons will file appearances and/or requests to be added to notice and/or service lists in this matter. We presently intend to hold two public hearings, the first in Springfield on January 13 and the second in Chicago on January 24, at specific times and locations to be announced shortly. After analysis of the public comments received, the Board will determine and announce how best to proceed, e.g. immediate publication of an APA first notice proposal, creation of a second draft for public comment, holding one or more pre-hearing conferences, holding one or more hearings, or some combination of the above. Commenters should feel free to make any suggestions they have about the direction this proceeding would most usefully take. In the meantime, this proposal for public comment is available from the Board's Chicago office and from the Board's Home Page on the Internet,[15] and will be mailed to those who had previously asked to be included on the notice list for any procedural rules update proceeding.[16]

The complete text of the proposed rules follows.

[15] The Board's computer-based informational service can be accessed at http://www.state.il.us/pcb/.

[16] This includes R95-1, which was administratively closed when this docket was opened.