

ILLINOIS POLLUTION CONTROL BOARD

December 21, 2000

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

Adopted Rule. Final Opinion.

OPINION OF THE BOARD (by C.A. Manning, G.T. Girard, and E.Z. Kezelis):

The Board today adopts new procedural rules. The rules govern how persons initiate and participate in all proceedings before the Board under the Environmental Protection Act (Act) (415 ILCS 5/1 *et seq.* (1998)), and other statutes directing Board action. The Board developed these rules to more efficiently and effectively implement the Act and other laws and to make it easier for the public to participate in Board proceedings.

These rules will replace all of the Board's current procedural rules and all Board resolutions that relate to procedural matters. The final rules therefore are the comprehensive source of all of the Board's procedural requirements.

The final rules will become effective on January 1, 2001, and will apply to all proceedings pending as of that date and to all proceedings initiated after that date. The final rules will be available on the Board's Web site (www.ipcb.state.il.us) and from the Board's offices in Chicago and Springfield.

To aid the public in moving from the Board's current procedural rules to the new rules, the Board attaches an appendix as part of this opinion. The appendix lists, on a section-by-section basis, where the requirements of the Board's current procedural rules are addressed in the new rules. The information in the appendix also appears in the rules themselves as appendices to the corresponding parts. The Board notes that, consistent with Section 5-40(c) of the Illinois Administrative Procedure Act (IAPA) (5 ILCS 100/5-40(c) (1998)), the Board has not made any substantive change to the second-notice version of the procedural rules except in response to an objection or suggestion of the Joint Committee on Administrative Rules (JCAR).

In this opinion, the Board first sets forth background information on the proceedings to revise the procedural rules. The Board then provides an overview of the new procedural rules, including some of the more significant provisions that the Board's current procedural rules either do not address or address differently.

BACKGROUND

On October 3, 1996, the Board issued a proposal for public comment, setting forth proposed amendments to the Board's procedural rules. See Revision of the Board's Procedural

Rules: 35 Ill. Adm. Code 101-130 (October 3, 1996), R97-8. The Board received a significant number of public comments on that proposal.

Those public comments prompted many of the changes to the procedural rules that the Board proposed for first-notice on March 16, 2000, in this docket, R00-20. See Revision of the Board's Procedural Rules: 35 Ill. Adm. Code 101-130 (March 16, 2000), R00-20. The Board's first-notice opinion and order have been on the Board's Web site since March of this year, and the first-notice rules were published in the *Illinois Register* on March 31, 2000 (24 Ill. Reg. 5173-5606).

During the first-notice period, the Board received oral and written comment from persons who regularly appear before the Board. These comments led to many of the changes set forth in the rules that the Board proposed for second notice.

The Board held three public hearings on the first-notice rules (April 11, May 4, and July 10, 2000). The Board posted the transcripts of those hearings on its Web site. The Board appreciates the insights of all of those who participated at hearing and lists those commentors in the order that the Board heard from their respective organizations: Deirdre Hirner and LaDonna Driver on behalf of the Illinois Environmental Regulatory Group (IERG); Lisa Moreno, Susan Schroeder, Don Sutton, and Deborah Williams of the Illinois Environmental Protection Agency (Agency); James Harrington on behalf of the Illinois Steel Group and Ross & Hardies; Thomas Davis, Chief of the Environmental Bureau of the Attorney General's Office (AGO); Diana Jagiella on behalf of the Environmental Law Section Council of the Illinois State Bar Association (ISBA); and Michael Maher of McKenna, Storer, Rowe, White, and Farrug.

The Board also received 18 written public comments on the rules that it proposed for first notice. In this proceeding, for the first time, the Board established a public comment page on its Web site, where the Board posted comments. As noted below, several commentors filed more than one set of comments. The Board thanks all of the commentors for their thoughtful remarks and lists those commentors in the order they filed their comments: Sierra Club, Piasa Palisades Group (Public Comment 1); IERG (Public Comments 2, 15, and 18); the AGO (Public Comment 3); Mayer, Brown & Platt (Public Comment 4); Illinois Steel Group and Ross & Hardies (Public Comment 5); Cathy Busto (Public Comments 6 and 14); Illinois Fertilizer & Chemical Association (Public Comment 7); Webber & Thies, P.C. (Public Comment 8); Stephen Hedinger (Public Comment 9); the Environmental Law Section Council of ISBA (Public Comment 10); the Agency (Public Comments 11, 16, and 17); Devro-Teepak, Inc. (Public Comment 12); and the Chemical Industry Council of Illinois (Public Comment 13).

The Board filed the proposed rules, as modified at second notice, with JCAR. JCAR considered the rules at its December 12, 2000 meeting and issued a certificate of no objection. The final rules reflect minor, non-substantive modifications that JCAR requested. These changes do not merit discussion.

OVERVIEW OF THE FINAL RULES

The new procedural rules consist of ten parts within Title 35 of the Illinois Administrative

Code: Part 101 (General Rules); Part 102 (Regulatory and Informational Hearings and Proceedings); Part 103 (Enforcement); Part 104 (Regulatory Relief Mechanisms); Part 105 (Appeals of Final Decisions of State Agencies); Part 106 (Proceedings Pursuant to Specific Rules or Statutory Provisions); Part 107 (Petition to Review Pollution Control Facility Siting Decisions); Part 108 (Administrative Citations); Part 125 (Tax Certifications); and Part 130 (Identification and Protection of Trade Secrets and Other Non-Disclosable Information). The following is an overview of each part and a description of some of the more significant provisions in the new rules that are either not addressed or addressed differently in the Board's current procedural rules.

Part 101: General Rules

Part 101 has nine subparts. The Board first describes the general structure of Part 101 and then addresses each subpart.

General Structure

Part 101 sets forth the general procedural provisions that apply to all Board proceedings, including adjudicatory and rulemaking proceedings. These general rules apply unless more specific rules for particular processes supersede them. The balance of the new rules (*i.e.*, Parts 102, 103, 104, 105, 106, 107, 108, 125, and 130) govern specific types of processes.

The Board has placed into Part 101 not only many provisions of the Board's current general procedural rules (see 35 Ill. Adm. Code 101), but also many of the general requirements for adjudicatory proceedings found in the Board's current rules on enforcement proceedings (see 35 Ill. Adm. Code 103). Part 101 includes definitions (see Sections 101.200 and 101.202), as well as provisions on the following: computing time (see Section 101.300); filing documents (see Section 101.302); serving documents (see Section 101.304); decision deadlines (see Section 101.308); intervention (see Section 101.402); joinder (see Section 101.403); consolidating claims (see Section 101.406); motions (see Subpart E); hearings, evidence, and discovery (see Subpart F); sanctions (see Subpart H); and review of final Board opinions and orders (see Subpart I).

Subpart A: General Provisions

Over the course of the Board's 30-year history, the Board occasionally has adopted resolutions to address various procedural matters. A person appearing before the Board therefore may have to refer not only to the Board's procedural rules, but also to these Board resolutions. Section 101.104 of the new procedural rules repeals all Board resolutions relating to procedural matters. The new procedural rules therefore codify in one place all of the Board's procedural requirements. See Section 101.104.

To ensure that persons using the rules understand the nature of the Board's authority, the Board sets forth its authority to act in regulatory and adjudicatory matters as provided in Section 5 of the Act (415 ILCS 5/5 (1998)). See Section 101.106. The next provision in Subpart A explains the context in which the Board uses that authority. See Section 101.108. The Board has two primary functions: its regulatory function (promulgating environmental regulations and

standards for the State) and its adjudicatory function (adjudicating contested environmental cases). Section 101.108(b) provides examples of the more common types of regulatory proceedings that the Board conducts: identical-in-substance; Clean Air Act/fast track; federally required rulemaking; general rulemaking; and site-specific rulemaking. Section 101.108(b) further directs the reader to Part 102 for specific procedural rules governing the Board's regulatory proceedings.

Section 101.108(c) provides examples of the more common types of adjudicatory proceedings that the Board conducts, and directs the reader to the procedural rules for those types of proceedings: enforcement proceedings (Part 103); variance petitions and adjusted standard petitions (Part 104); permit appeals and underground storage tank appeals (Part 105); pollution control facility siting appeals (Part 107); and administrative citations (Part 108). See Section 101.108(c).

In Section 101.110, the Board codifies one of the philosophical underpinnings of the Act -- that the public may participate in various types of environmental matters before the Board. The rules state that the Board encourages the public to participate in all proceedings. The rules also state that the extent to which the public may participate in the various types of Board proceedings is explained in the specific rules governing those proceedings. See Section 101.110(a) and (b).

Section 101.110(c) addresses how persons may file *amicus curiae* ("friend of the court") briefs. The rule states that these briefs must consist of argument only and cannot be used to bring new facts into the record.

The Board for the first time addresses the ability of current or former Board Members or Board employees to represent others in Board proceedings. Without exception, the rules prohibit current Board Members and Board employees from representing others in any Board proceeding. Former Board Members and Board employees cannot represent others in any Board proceeding in which he or she participated personally and substantially while with the Board, unless the Board and all parties or proponents consent in writing after disclosure. The rules also provide that the Board may disqualify a hearing officer for bias or conflict of interest, as the IAPA (5 ILCS 100/10-30(b) (1998)) requires. See Section 101.112.

Subpart B: Definitions

To prevent the public from unwittingly attempting to improperly contact a Board Member or Board employee, the Board for the first time defines "*ex parte* communication." See Section 101.202. The Board restricts *ex parte* communications in Section 101.114.

To make the Board's processes more understandable, the Board defines many terms commonly used in Board proceedings that are not defined in the current procedural rules. These terms include "brief," "complaint," "duplicitous," "decision deadline," "filing," "hearing," "frivolous," "intervention," "participant," "party," "petition," "public comment," "service," and "service list." See Section 101.202. For convenience, the Board has placed in one section many definitions currently located throughout the various parts of the Board's existing procedural

rules.

Subpart C: Computation of Time, Filing, Service of Documents, and Statutory Decision Deadlines

The Board requires all persons to use recycled paper for their filings. See Section 101.302(g). The Board also takes several steps to reduce the amount of paper required to be filed with the Board. Instead of an original and nine copies, the Board now will require an original and four copies of (1) Illinois Environmental Protection Agency (Agency) and Office of the State Fire Marshal (OSFM) records under Part 105 appeals and (2) local pollution control facility siting records under Part 107 appeals. See Section 101.302(h). The Board also eliminates the requirement to file discovery documents, except in certain circumstances, and requires that, when feasible, persons print on both sides of each page of their filings. See Section 101.302(g) and (i).

The Board is working on a new project which, if funded, would allow the Board to receive and disseminate documents electronically on a regular basis. Until that project is complete, the Board cannot further reduce the number of copies of a document that must be filed with the original. At this time, the Board includes a new provision that would allow filing electronically or by facsimile, but only upon the prior approval of the Clerk or hearing officer. In addition, given their time-sensitive nature, the Board specifically allows the Agency to file its provisional variance recommendations electronically or by facsimile. See Section 101.302(d).

In Section 101.308, the Board adds new provisions on waiving decision deadlines. The rules allow a petitioner who has provided an “open waiver” to reinstate the 120-day decision period. The rules specify the minimum length of “time certain” waivers filed before hearing. The rules also clarify that a waiver does not preclude the Board from deciding a matter before the decision deadline, and that a party may at any time move the Board to set a hearing or decide a case. See Section 101.308.

Subpart D: Parties, Joinder, and Consolidation

The Board clarifies that a person must be a licensed attorney to appear before the Board on behalf of others in an adjudicatory proceeding. This contrasts with the Board’s current procedural rule (see 35 Ill. Adm. Code 101.107), which generally allows officers or employees who are not attorneys to represent corporations in proceedings other than enforcement actions. The Board bases the new provision (see Section 101.400(a)(2)) in the Attorney Act (705 ILCS 205/1 *et seq.* (1998)), the Corporation Practice of Law Prohibition Act (705 ILCS 220/1 *et seq.* (1998)) and Illinois case law. In addition, the new provision is consistent with the recent line of Board decisions that found various activities in adjudicatory proceedings before the Board to constitute the practice of law. See, *e.g.*, *In re Petition of Recycle Technologies, Inc. for an Adjusted Standard Under 35 Ill. Adm. Code 721.131(c)* (July 10, 1997), AS 97-9.

The Board emphasizes that individuals may represent themselves in adjudicatory proceedings before the Board. The Board also draws an important distinction between its quasi-judicial adjudicatory function and its quasi-legislative regulatory function. Because participation in regulatory proceedings does not constitute the “practice of law,” one may represent others in a

regulatory proceeding without being an attorney.

The current procedural rules on intervention and joinder are located in the enforcement provisions. See 35 Ill. Adm. Code 103.121(c) and 103.142. While tailored to the Board's adjudicatory proceedings, the provisions on intervention and joinder more closely mirror those of the Illinois Code of Civil Procedure (see 735 ILCS 5/2-405 - 2-408 (1998)). The Board's provisions may apply in any type of adjudicatory proceeding.

In Section 101.404, the Board codifies the Agency's role as a "party in interest" when the Board, under Section 30 of the Act (415 ILCS 5/30 (1998)), requests the Agency to investigate an alleged violation.

Subpart E: Motions

The Board extends the amount of time that a party has to respond to a motion from 7 to 14 days. See Section 101.500(d). The rules also state that any objection to a hearing officer's ruling made at hearing, and any oral motion to the Board made at hearing, will be deemed waived if not filed within 14 days after the Board receives the hearing transcript. See Section 101.502. In Section 101.506, the Board extends the amount of time to file a motion to strike, dismiss, or challenge the sufficiency of any pleading to 30 days.

The Board establishes new provisions on motions to cancel hearings. The hearing officer will grant the motion only if a pending decision deadline would allow the Board sufficient time to reschedule, re-notice if applicable, deliberate, and decide the matter. See Section 101.510.

The Board also addresses motions for expedited review (see Section 101.512), motions to stay proceedings (see Section 101.514), motions for summary judgment (see Section 101.516), motions for interlocutory appeal of hearing officer orders (see Section 101.518), and motions to reconsider. See Section 101.520.

Subpart F: Hearings, Evidence, and Discovery

Section 101.600 codifies current Board practices with respect to holding hearings, including complying with the Americans with Disabilities Act (42 U.S.C. §§ 12101 *et seq.*). The Board adds a new provision addressing the hearing officer's ability to regulate the use of audio and video recording equipment at hearing to avoid disrupting the hearing. The provision does not preclude persons from retaining their own court reporters, provided that they do not disrupt the proceeding. See Section 101.606. Section 101.608 clarifies that if a respondent fails to appear at hearing, the complainant or petitioner nevertheless must prove its *prima facie* case to prevail on the merits.

The Board adds a new provision to assist *pro se* parties when faced with requests to admit. The Board requires the party serving the request to include language in the first paragraph of the request explaining the consequences of failing to respond (*i.e.*, the facts requested are deemed admitted). The notice also suggests that the recipient direct any of his or her questions to the hearing officer or an attorney. See Section 101.618(c).

The Board adds a new provision explaining how participants, including the general public, may participate before, at, and after adjudicatory hearings. Participants may make oral statements at hearing. Participants may submit written statements before or at hearing. Participants also may file public comments and *amicus curiae* briefs after hearing. See Section 101.628.

Subpart G: Oral Argument

The Board adds new provisions on oral argument. Parties may argue orally before the Board only with the Board's permission. The provisions address the purpose of oral argument, the contents of a motion for oral argument, and the Board's need to deny the motion if a statutory decision deadline does not allow sufficient time for oral argument. See Section 101.700. Because of time constraints, the Board does not presently anticipate allowing oral argument routinely.

Subpart H: Sanctions

Sanctions that the Board may order include staying a proceeding, barring filings of a claim or defense, and striking pleadings. In the non-exhaustive list of potential sanctions, the rules no longer refer to the offending person paying reasonable expenses. See Section 101.800(b).

Subpart I: Review of Final Board Opinions and Orders

The Board clarifies that moving the Board to reconsider its final opinion and order is not a prerequisite to appealing the Board's decision to the Appellate Court. See Section 101.904(f).

Part 102: Regulatory and Informational Hearings and Proceedings

As in the existing rules, Part 102 addresses the Board's regulatory and informational proceedings, which are quasi-legislative in nature. Part 102 has seven subparts, each of which the Board discusses below.

Subpart A: General Provisions; Subpart B: Regulations of General Applicability, Resource Conservation and Recovery Act (RCRA) Amendments, and Site-Specific Regulations

Generally, these rules set forth, as necessary, the rulemaking requirements of the IAPA (first notice publication in the *Illinois Register*; second-notice review by JCAR; filing with and publication by the Administrative Code Unit of the Secretary of State), along with those of the Act (notice; hearing; entry of opinion and order).

Subpart A identifies the different types of regulatory proposals (see Section 102.106) and describes how to file written public comments (see Section 102.208). Subpart A also states that the Board may conduct other noncontested or informational hearings, including inquiry hearings. See Section 102.112.

The Board requires in Subpart B that when a State agency is the rulemaking proponent,

the State agency must submit the proposed rule electronically. See, *e.g.*, Section 102.202(i). The Board adds this requirement elsewhere in Part 102 when the rules specify the required contents of a proposal. In addition, each proponent seeking to amend Board rules must certify that the proposal amends the most recent version of the rules as published on the Board's Web site or as received from the Clerk of the Board. See Section 102.202(h).

Subpart C: Clean Air Act Amendments (CAAA) Fast Track Rulemaking

These provisions implement Section 28.5 of the Act (415 ILCS 5/28.5 (1998)), which establishes a rulemaking procedure to speed adoption of Agency-proposed rules required by the federal Clean Air Act (42 U.S.C. §§ 7401 *et seq.*), as amended. The Board adds a provision to reflect amendments to Section 27(b) of the Act (415 ILCS 5/27(b) (1998)). Consistent with Section 28.5 and these amendments, the Board will hold a second hearing to, at a minimum, consider the Department of Commerce and Community Affairs' (DCCA) economic impact study of the proposed rules, or to admit into the record DCCA's statement declining to conduct a study.

Subpart D: Service and Filing of Documents, Motions, Production of Information, Subpoenas, Prehearing Conferences, and Hearings

Some of the provisions in Subpart D simply refer to Part 101, including provisions on service, filing, and motions. See Sections 102.400 and 102.402. Subpart D also addresses prehearing conferences, for which Section 27(d) of the Act (415 ILCS 5/27(d) (1998)) specifically provides. See Sections 102.404 - 102.408.

In addition, the Board has added a new provision to address the requirements of Section 27(b) of the Act (415 ILCS 5/27(b) (1998)), noted above, with respect to requesting that DCCA conduct a study of the economic impact of the proposed rules. The Board must request that DCCA conduct an economic impact study. The Board must conduct at least one hearing on the economic impact of proposed rules. At this hearing, the Board must, among other things, consider DCCA's study or present any explanation DCCA gives for not producing a study. See Section 102.414.

Subpart E: Certification of Required Rules

Subpart E addresses the procedures associated with the Agency certifying that its proposed rule is federally required pursuant to Section 28.2 of the Act (415 ILCS 5/28.2 (1998)). These include procedures by which a person can challenge the Agency's certification. See Section 102.502.

Subpart F: Board Action; Subpart G: Motion for Reconsideration and Appeal

These are similar to provisions in Part 101, but are tailored to rulemakings. Subpart F addresses requirements applicable when the Board revises proposed rules, and when the Board adopts first notice, second notice, and final opinions and orders. See Sections 102.600-102.608. Subpart F also addresses Board action with respect to identical-in-substance rules, emergency rules, and peremptory rules. See Sections 102.610-102.614.

Subpart G identifies the limits on the Board's ability to reconsider rules already adopted, and states that Board orders may be appealed to the Appellate Court pursuant to Sections 29 and 41 of the Act (415 ILCS 5/29, 41 (1998)). See Sections 102.702 and 102.706.

Part 103: Enforcement

Part 103 continues to apply to enforcement proceedings. The Board has significantly streamlined this Part by moving to Part 101 the provisions of the current 35 Ill. Adm. Code 103 that are more general and should apply to all adjudicatory proceedings. Part 103 has five subparts, which the Board addresses in turn.

Subpart A: General Provisions

Section 103.100 explains that Part 103 applies to proceedings in which complaints, filed under Section 31 of the Act (415 ILCS 5/31 (1998)), allege violations of the Act, regulations, permits, or Board orders.

Subpart B: Complaint, Request for Informal Agency Investigation, Service, and Authorization of Hearing

Section 103.200 states that any person may file a complaint. The person filing the complaint is the complainant, while the alleged violator is the respondent. The Agency may appear as a "party in interest" because of a Board request that the Agency investigate under Section 30 of the Act (415 ILCS 5/30 (1998)). See Section 103.202.

Section 103.204(d) codifies a major change to current practice before the Board. All material allegations of a complaint will be taken as admitted if the respondent either files no answer or files an answer that fails to specifically deny the allegations, unless the respondent asserts a lack of knowledge sufficient to form a belief. This change makes the Board's rule more consistent with Section 2-610 of the Civil Practice Law (735 ILCS 5/2-610 (1998)) (compare current Section 103.122(d)).

The rule also stays the 60-day period to file an answer when the respondent timely files certain motions challenging the complaint. See Section 103.204(e). The Board also includes in Section 103.204(f) language similar to that in Section 101.618(c). The new language requires that all notices of complaints notify the respondent of the consequences of failing to respond to the complaint and that questions should be directed to the hearing officer, the Clerk's Office, or an attorney.

The Board adds Section 103.206 based upon its recent experiences with multi-party litigation. The increasing complexity of enforcement litigation has necessitated that the Board develop detailed procedures with respect to joinder, counter-complaints, cross-complaints, and third-party complaints.

The Board sets forth procedures for adding a non-party as a respondent to an enforcement proceeding when the Board cannot completely determine a controversy without the presence of the non-party. The Board may order the non-party to be added on the Board's motion or a

respondent's motion. See Section 103.206(a). The Board then will grant the complainant permission to file an amended complaint that sets forth a claim against the added respondent. See Section 103.206(b).

Section 103.206 also contains procedures for filing counter-complaints, cross-complaints, and third-party complaints. The Board defines each of these terms in Section 101.202. Section 103.206 requires the party who wishes to file the pleading to file a motion requesting the Board's permission to do so. See Section 103.206(d). The counter-complaint, cross-complaint, or third-party complaint must set forth a claim that arises out of the occurrence or occurrences that are the subject of the proceeding and must meet the requirements of Section 103.204. See Section 103.206(e). Section 103.206 likewise addresses filing an amendment to a complaint, counter-complaint, cross-complaint, or third-party complaint that sets forth a new or modified claim against another person.

Section 103.208 replaces a Board resolution that established an informal citizen's complaint process. See *In re Duplicitous or Frivolous Determinations* (June 8, 1989), RES 89-2.

Any person may request that the Agency conduct an informal investigation by submitting a request to the Board. See Section 103.208(a). This request, distinct from filing a complaint under Section 31 of the Act (415 ILCS 5/31 (1998)), allows persons to alert the Agency to potential areas of environmental concern without engaging in formal litigation. The Board will forward the request to the Agency with a copy of the transmittal to the person requesting the investigation. The Agency must send the Board an acknowledgment that it received the request. See Section 103.208(b). This approach in many ways codifies the current informal complaint process.

Section 103.212 codifies the current practice of automatically setting all State enforcement actions for hearing. It also allows a respondent in a citizen's complaint 30 days in which to file a motion alleging that a complaint is "duplicitous or frivolous," and states that the motion stays the deadline for filing an answer to the complaint. The Section also contemplates that the Board might hold hearings on discrete issues, such as violation only and then remedy only.

Subpart C: Settlement Procedure

This subpart codifies current practice and the requirements of Section 31 of the Act (415 ILCS 5/31 (1998)). Section 31(c) applies to State enforcement actions. Section 31(c)(2) provides that settling parties to State enforcement actions may move the Board to waive the hearing requirement of Section 31(c)(1). Unless the Board decides to hold a hearing, it will provide public notice of the proposed settlement in a newspaper. If the Board receives a written hearing request within 21 days of publication, the Board will deny the requested waiver and hold a hearing. See Section 103.300.

Subpart C also addresses the required contents of proposed settlements (see Section 103.302), the manner in which the Board will hold hearings on proposed settlements (see Section

103.304), and Board orders on proposed settlements. See Section 103.306.

The Act does not address settlement of citizen enforcement actions. Accordingly, the Board will hold a hearing when parties to a citizen enforcement action ask the Board to approve the terms of a proposed settlement. If the parties do not desire a hearing on the proposed settlement, they may file a motion to dismiss the case.

Subpart D: Proceedings Involving RCRA Permits

Subpart D applies when the Board finds in an interim order that an enforcement proceeding involves issuing or modifying a RCRA permit. The procedures provide methods by which the Board will formulate a compliance plan and, if necessary, direct that a RCRA permit be issued or modified. See Section 103.400. The rules also detail how the Agency will be involved in the proceeding and how the United States Environmental Protection Agency (USEPA) and the public will be notified of the matter and provided an opportunity to participate.

The Board originally adopted these provisions as identical-in-substance rules under Section 7.2 of the Act (415 ILCS 5/7.2 (1998)). The rules are required to retain federal authorization of the State's RCRA enforcement and funding program.

Subpart E: Imposition of Penalties, Fees, and Costs

Section 103.502 states that the Board will determine civil penalties pursuant to Sections 33(c) and 42 of the Act (415 ILCS 5/33(c), 42 (1998)). Section 103.504 describes how civil penalties must be paid and how they will accrue interest if not paid on time.

Part 104: Regulatory Relief Mechanisms

Part 104 addresses the three core adjudicatory proceedings for obtaining relief from generally applicable regulations: variances (Subpart B); provisional variances (Subpart C); and adjusted standards (Subpart D). The Board discusses these provisions below.

Subpart B: Variances

This Subpart contains provisions on petition contents, notices, Agency recommendations, stipulations, objections, amendments, decision deadlines, hearings, Board decisions, conditions, and certificates of acceptance. Several provisions warrant highlighting.

The Board may extend the terms of variances. Section 104.210 applies to a petitioner seeking to have the term of a variance extension commence at the end of the existing variance's term. That section now requires that the petitioner file the petition to extend the variance no later than 120 days before the variance expires, unless the petitioner demonstrates that it filed as soon as practicable after learning that it could not meet the compliance timeframe under the existing variance.

Section 104.212 clarifies that a petitioner may seek, by motion, to modify compliance dates in a variance when the modification does not extend the variance term. Requests to extend

variances, however, proceed as new cases. See Section 104.210.

In Section 104.214(a), the Board extends from 10 to 14 days the amount of time that the Agency has to publish notice of a variance petition after the petition is filed. In Section 104.216(b), the Board changes the deadline for the Agency to file its recommendation on the variance petition from the current 30 days after the petition is filed to the following: unless the Board or hearing officer orders otherwise, the Agency must file its recommendation within 45 days after the petition is filed, or if a hearing has been scheduled, at least 30 days before hearing, whichever is earlier. The Board also extends from 7 to 14 days the amount of time that a petitioner has to respond to the Agency's recommendation. See Section 104.220.

Section 104.224 describes in detail the opportunities for the public to participate in variance proceedings. Section 104.240 states that each order in which the Board grants a variance will include a certificate of acceptance. A variance and its conditions are not binding until the petitioner files the executed certificate with the Board and serves it on the Agency. If the petitioner fails to timely file and serve the executed certificate, the variance is void. Executing the certificate is not a prerequisite to moving the Board to reconsider its decision or appealing the Board's decision.

Subpart C: Provisional Variances

This subpart largely sets forth language from Sections 35(b), 36(c), and 37(b) of the Act (415 ILCS 5/35(b), 36(c), 37(b) (1998)) with respect to Board action on provisional variances, Agency action on provisional variance requests, notice, and the terms of provisional variances. See Sections 104.302 - 104.308. Section 104.310 states that the Board will not issue a provisional variance to the extent that the petitioner already holds a variance from the same requirement for the same time period -- that is, the Board will not grant duplicate relief.

Subpart D: Adjusted Standards

This subpart contains provisions on the Agency as co-petitioner, petition contents, notices, petition filings as stays, Agency recommendations, amendments, hearings, burden of proof, and Board action.

The Board changes the deadline for the Agency to file its recommendation on the petition for an adjusted standard from the current 30 days after the petition is filed to the following: unless the Board or hearing officer orders otherwise, the Agency must file its recommendation within 45 days after the petition is filed, or if a hearing has been scheduled, at least 30 days before hearing, whichever is earlier. See Section 104.416(a).

Section 104.420 clarifies that when all parties and participants who have requested a hearing withdraw those requests, the Board will not hold a hearing unless the Board deems it advisable.

Part 105: Appeals of Final Decisions of State Agencies

Part 105 covers Board review of final decisions of the Agency under various programs

and final decisions of the OSFM with respect to the Underground Storage Tank (UST) Fund. It contains provisions on petitions for review, filing agency decision records, and hearings.

In Part 105, the Board eliminates the requirements that the Agency and the OSFM file their respective decision records within 14 days after notice of a petition for review. Section 105.116 requires the record to be filed within 30 days after the petition is filed, unless Part 105 provides otherwise or the Board or hearing officer orders otherwise. If either agency wishes to seek additional time to file the record, however, it must file a request for extension before the date on which the record is due.

The Board has procedures for appeals of OSFM UST Fund decisions. See 35 Ill. Adm. Code 107. For the first time, however, the Board establishes specific procedural rules for appeals of Agency leaking underground storage tank (LUST) decisions. See Part 105.Subpart D. Consistent with Section 40(e) of the Act (415 ILCS 5/40(e) (1998)), the Board provides for third-party appeals of National Pollutant Discharge Elimination System permit decisions. See Section 105.204(b). The Board also provides for appeal of an Agency decision to terminate an Environmental Management System Agreement (EMSA) under Section 52.3-4(b) of the Act (415 ILCS 5/52.3-4(b) (1998)).

In Section 105.208, the Board specifies that the extension of the time in which to file certain petitions for review may be for any period to which the parties agree that does not exceed 125 days from the date of service or issuance of the Agency's final decision. The 90-day extension adds to the 35-day appeal period, which would allow for a total of 125 days in which to petition for review.

Part 106: Proceedings Pursuant to Specific Rules or Statutory Provisions

Part 106 addresses proceedings pursuant to specific rules or statutory provisions. Part 106 contains the following: heated effluent, artificial cooling lake, and sulfur dioxide demonstrations (Subpart B); water well setback exception procedures (Subpart C); revocation of Clean Air Act Permit Program permits (Subpart D); maximum achievable control technology determinations (Subpart E); culpability determinations for particulate matter less than or equal to 10 microns (PM-10) (Subpart F); and involuntary termination of EMSAs (Subpart G).

Part 107: Petition to Review Pollution Control Facility Siting Decisions

For the first time, the Board will have procedural rules that specifically address appeals of local government decisions on siting new pollution control facilities. The rendering and review of local siting decisions are provided for in Sections 39.2 and 40.1 of the Act (415 ILCS 5/39.2 and 40.1 (1998)).

Subpart B of Part 107 addresses petitions for the Board to review local siting decisions, including who may file a petition. Siting applicants may petition for review of siting denial or a condition of siting approval. See Section 107.200(a). Any person who participated in the local public hearing and who is so located as to be affected by the proposed facility may petition for review of siting approval. See Section 107.200(b).

In Subpart C, the Board instructs the county or municipal clerk how to file the local siting decision record. The Board previously had to set forth these instructions in a Board order accepting the petition for hearing. Subpart D addresses the hearing before the Board, including how the public can participate. Subpart E contains provisions on the Board's review, including the decision deadline.

Part 108: Administrative Citations

For the first time, the Board establishes procedural rules that specifically address appeals of administrative citations. The issuance and appeal of administrative citations are addressed in Sections 31.1 and 42(b)(4) and (4-5) of the Act (415 ILCS 5/31.1, 42(b)(4), (4-5) (1998)).

Under the Act, the Agency may issue administrative citations. The Agency also may delegate its administrative citation authority to a unit of local government, which then may issue administrative citations. See 415 ILCS 5/4(r) and 31.1(b) (1998). The Board requires that units of local government file these delegation agreements annually with the Board. See Section 108.200(b). In Subpart B of Part 108, the Board sets forth provisions on how the Agency or delegated unit of local government issuing the administrative citation must serve it on the alleged violator and file it with the Board. The Board also provides what the administrative citation must contain. See Section 108.202.

Subpart B also addresses requirements for filing a petition with the Board to contest an administrative citation, and what the petition must contain. See Sections 108.204 and 108.206. Subpart C addresses Board hearings and Subpart D addresses Board decisions.

Subpart E contains provisions on civil penalties, as well as the hearing costs of the Board, the Agency, and the delegated unit of local government. At the beginning of each fiscal year, the Board will make available, in its offices and on its Web site, a schedule of the Board's hearing costs for administrative citations. See Section 108.504.

Part 125: Tax Certifications

Part 125 addresses how the Board will certify "pollution control facilities" and "low sulfur dioxide emission coal fueled devices" for preferential tax treatment under the Property Tax Code (35 ILCS 200/11-5 *et seq.* (1998)). The Board has no existing procedural rules that specifically address tax certifications. Currently, persons apply to the Agency for tax certification and the Agency issues or denies the certificate. The applicant may appeal the Agency's decision to the Board.

Under Part 125, persons will continue to submit tax certification applications to the Agency. See Section 125.202. After reviewing the application, the Agency will file a recommendation with the Board that the Board issue or deny certification. See Section 125.204. Consistent with the Property Tax Code, the Board will issue or deny the certificate. See Section 125.216. If the applicant wishes to contest the Agency's recommendation to deny certification, it

must file a petition to contest with the Board within 35 days after the Agency serves the recommendation on the applicant. See Section 125.206. Generally, if the applicant timely files the petition, the Agency must file the record on which it based its recommendation, and the Board will hold a public hearing. See Sections 125.208 and 125.210. Ultimately, whether or not the applicant contests the Agency's recommendation, the Board will issue an order granting or denying tax certification. See Section 125.216.

As Section 11-30 of the Property Tax Code (35 ILCS 200/11-30 (1998)) provides, the Board, after notice to the certificate holder and an opportunity for a hearing, may revoke or modify a certificate in several circumstances. See Section 125.216(c). These circumstances include those when the certificate was obtained by fraud or misrepresentation, or when the facility to which the certificate applies is no longer used for the primary purpose of pollution control and is being used for a different purpose. See Sections 125.216(c)(1), (3). The Board may learn of the circumstances through any credible filing. See Reed-Custer Community Unit School District No. 255-U v. Pollution Control Board, 232 Ill. App. 3d 571, 597 N.E.2d 802 (1st Dist. 1992) (school district alleged that certificate was obtained by fraud or misrepresentation).

Part 130: Identification and Protection of Trade Secrets and Other Non-Disclosable Information

Part 130 sets forth procedures to identify and protect trade secrets and other non-disclosable information, consistent with Sections 7 and 7.1 of the Act (415 ILCS 5/7, 7.1 (1998)). Subparts B and C on trade secrets apply to the Board, the Agency, and the Department of Natural Resources (DNR), while Subpart D on other non-disclosable information applies only to filings with the Board. See Section 130.100(b). Part 130 largely reflects the Board's current provisions on trade secrets (35 Ill. Adm. Code 120) and other non-disclosable information (35 Ill. Adm. Code 101.161), with a few notable exceptions.

For the first time, the Board defines "emission data" to clarify what may be protected and what must be available for public review. See Section 130.110. The Board also relaxes the stringent 10-day deadline within which the Board, the Agency, and DNR must determine whether an article represents a trade secret. See Section 130.206(a) (45-day deadline).

In addition, the rules require that the owner of an article seeking trade secret protection submit a letter claiming trade secret protection at the time it submits the article to the State agency. If the owner fails to do so, the article is considered a matter of general public knowledge and cannot be protected as a trade secret. See Section 130.200(a). Preparing a claim letter is not burdensome and requiring that one arrive with the article allows the State agency to properly manage the article from the outset.

CONCLUSION

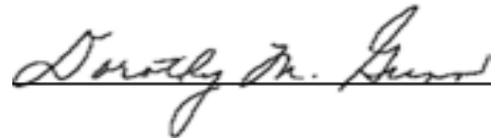
The Board adopts these procedural rules to better implement the Act and other laws in Board proceedings and to make it easier for the public to participate before the Board. Effective January 1, 2001, these rules replace all of the Board's current procedural rules and all Board

resolutions on procedural matters. The rules will apply to all proceedings pending on January 1, 2001, and to all proceedings initiated after that date.

In the order that the Board adopts today in this docket, the Board directs the Clerk to file the adopted procedural rules with the Secretary of State.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion was adopted on the 21st day of December 2000 by a vote of 7-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", written over a horizontal line.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board

APPENDIX

CONVERSION TABLE OF CURRENT RULES TO NEW RULES

CURRENT PART 101	NEW SECTION
101.100	101.100
101.101	101.200 101.202
101.102	101.302
101.103	101.302
101.104	101.302
101.105	101.308
101.106	101.306
101.107	101.400
101.108	101.400
101.109	101.300
101.120	101.302
101.121	2 Ill. Adm. Code 2175.210 (current)
101.122	2 Ill. Adm. Code 2175.215 (current)
101.140	101.304(a)
101.141	101.304
101.142	101.304(c)
101.143	101.304(d)
101.144	101.300
101.160	2 Ill. Adm. Code 2175.300 (current)
101.162	2 Ill. Adm. Code 2175.305 (current)
101.180	101.700 2 Ill. Adm. Code 2175.210 (current)
101.181	2 Ill. Adm. Code 2175.130 (current)
101.200	101.114 101.612
101.220	101.610
101.221	101.606
101.241	101.500
101.242	101.504
101.243	101.506
101.244	101.516
101.245	101.508 101.510
101.246	101.520 101.902
101.247	101.502

	101.518 101.522
101.260	101.622
101.261	101.614
101.280	101.608 101.800
101.281	101.802
101.300	101.520
101.301	101.904
101.302	101.906
101.304	101.908
101.Appendix A Illustration A	101.Appendix Illustration J
101.Appendix A Illustration B	101.Appendix A Illustration K
101.Appendix A Illustration C	101.Appendix A Illustration D
101.Appendix A Illustration D	101.Appendix A Illustration C 101.Appendix A Illustration F
101.Appendix A Illustration E	101.Appendix A Illustration A
101.Appendix A Illustration F	101.Appendix A Illustration I
101.Appendix B	101.Appendix B
101.Appendix C	101.Appendix C
101.Appendix D	101.Appendix D
101.Appendix E Illustration A	101.Appendix E Illustration A
101.Appendix E Illustration B	101.Appendix E Illustration B

CURRENT PART 102	NEW SECTION
102.100	102.100
102.101	102.104
102.102	102.106
102.103	102.110
102.104	102.112
102.120	102.200
102.121	102.202
102.122	102.212
102.123	102.204
102.124	102.206
102.140	102.208
101.141	102.210
102.142	102.212
102.160	102.410
102.161	102.412
102.162	102.416
102.163	102.206

102.164	102.418
102.180	102.414
102.200	102.500
102.201	102.502
102.202	102.504
102.220	102.420
102.221	102.422
102.240	102.404
102.241	102.406
102.242	102.408
102.260	102.402
102.261	102.402
102.262	102.402
102.280	102.424
102.281	102.418
102.282	102.426
102.283	102.428
102.284	102.430
102.285	102.418
102.320	102.108
102.341	102.602
102.342	102.604
102.343	102.606
102.344	102.608
102.345	102.610
102.346	102.612
102.347	102.614
102.360	102.700
102.361	102.702
102.362	102.704
102.363	102.706

CURRENT PART 103	NEW SECTION
103.101	102.100
103.120	103.200
103.121	103.202
103.122	103.204
103.123	101.204
103.124	103.212
103.125	101.600 101.602
103.140	101.Subpart E

103.141	101.406 101.408 103.206
103.142	101.502 101.510
103.161	101.616
103.162	101.618
103.163	101.622
103.180	103.Subpart C
103.200	101.610
103.204	101.626
103.206	101.630
103.207	101.632
103.208	101.626
103.209	101.624
103.220	103.500 101.608
103.221	101.604
103.224	103.416
103.Subpart H	101.Subpart I
103.Subpart I	103.Subpart D

CURRENT PART 104	NEW SECTION
104.102	104.200
104.104	104.206
104.120	104.202
104.121	104.204
104.122	104.208
104.123	104.210
104.124	104.234 104.236
104.125	104.228 104.230
104.126	104.206
104.140	104.214
104.141	104.224
104.142	104.214
104.160	104.228 104.234 104.236 104.232 104.230

104.180	104.216
104.181	104.220
104.182	104.218
104.183	104.224
104.200	104.236
104.201	104.238 101.Subpart F
104.221	104.238

CURRENT PART 105	NEW SECTION
105.102	105.202 105.204 105.206 105.212 105.Subpart C
105.103	105.204

CURRENT PART 106	NEW SECTION
106.101	106.200
106.102	106.202
106.103	106.200
106.104	106.208
106.201	106.202
106.202	101.602 106.200 106.210
106.301	106.202 106.204
106.302	106.202
106.303	106.200
106.304	106.208
106.305	101.602 106.200 106.210
106.411	104.402
106.412	104.404
106.413	104.406
106.414	104.416
106.415	104.422 104.424
106.416	104.428

106.501	104.400
106.502	104.402
106.503	104.404
106.504	104.406
106.505	104.416
106.506	104.422 104.424
106.507	104.428
106.601	106.300
106.602	106.302 106.304
106.603	106.306
106.604	106.308
106.701	104.400
106.702	104.104
106.703	104.402
106.704	104.404
106.705	104.406
106.708	106.100 106.306
106.709	106.100 101.Subpart E
106.710	106.100 101.304
106.711	104.408
106.712	104.410
106.713	104.420
106.714	104.416
106.715	104.418
106.801	104.422
106.802	104.424
106.803	104.400
106.804	101.616 104.100
106.805	101.626 104.100 104.400
106.807	104.400
106.808	104.426
106.902	104.414
106.903	104.426 104.428
106.904	104.428

106.906	104.428
106.907	104.412
106.910	106.400
106.911	104.104
106.912	106.400 106.404 106.406
106.913	106.408
106.914	106.410 106.412
106.915	106.414
106.916	106.416
106.920	106.500
106.921	106.502
106.922	106.504 106.506
106.923	106.508
106.924	106.510 106.512
106.925	106.514
106.930	106.600
106.931	106.600 106.602 106.604
106.932	106.606
106.933	106.608 106.610
106.940	106.700 106.702
106.942	101.202
106.944	106.102
106.945	106.704
106.946	106.706
106.948	106.707
106.950	106.708
106.952	106.710
106.954	106.712
106.956	106.714
106.958	106.716
106.960	106.718
106.962	106.720
106.964	106.722
106.966	106.724

106.968	106.726
106.970	106.728
106.972	106.730
106.974	106.732
106.976	106.734
106.978	106.736
106.980	106.738
106.982	106.740

CURRENT PART 107	NEW SECTION
107.100	105.500
107.101	105.102
107.102	105.502
107.103	105.104
107.120	105.504(a)
107.121	105.504(b)
107.122	105.506
107.123	105.504(c)
107.124	105.508
107.Subpart C	105.108
107.Subpart D	105.510
107.Subpart E	105.100(b) 101.Subpart F
107.Subpart F	105.100(b) 101.Subpart F
107.Subpart G	105.100 101.Subpart E
107.Subpart H	105.100 101.Subpart F
107.Subpart I	105.100 101.Subpart F
107.Subpart K	105.100 101.Subpart F
107.320	105.100 101.Subpart H
107.Subpart M	105.100 101.Subpart I
107.Subpart N	105.100 101.Subpart I

CURRENT PART 120	NEW SECTION
120.101	130.100
120.102	130.100
120.103	101.200 101.202 130.104
120.201	130.200
120.202	130.203
120.203	130.204
120.215	130.201
120.220	130.202
120.225	130.206
120.230	130.208
120.240	130.210
120.245	130.212
120.250	130.214
120.260	130.216
120.265	130.218
120.270	130.220
120.301	130.300
120.305	130.302
120.310	130.304
120.315	130.306
120.320	130.106
120.325	130.308
120.330	130.310
120.340	130.310
120.350	130.312
120.360	130.108
120.401	130.102