

ILLINOIS POLLUTION CONTROL BOARD  
December 17, 1998

IN THE MATTER OF: )  
)  
HEARINGS PURSUANT TO SPECIFIC )  
RULES, PROPOSED NEW SUBPART K, ) R99-9  
INVOLUNTARY TERMINATION OF ) (Rulemaking - Procedural)  
ENVIRONMENTAL MANAGEMENT )  
SYSTEM AGREEMENTS, 35 ILL. ADM. )  
CODE 106, SUBPART K )

Proposed Rule. Second Notice.

OPINION AND ORDER OF THE BOARD (by K.M. Hennessey, C.A. Manning, and M. McFawn):

This opinion and order of the Board concerns an Illinois Environmental Protection Agency (Agency) proposal regarding Environmental Management System Agreements (EMSAs). An EMSA is an agreement between the Agency and a regulated entity that allows the entity to implement alternatives to ordinarily applicable environmental laws or regulations. These alternatives should yield greater environmental benefits than would the entity's compliance with ordinarily applicable environmental laws or regulations.

The Agency's proposal sets forth procedures under which the Board will determine whether to terminate an EMSA without a regulated entity's consent (*i.e.*, "involuntarily"). Today, the Board adopts for second notice a modified version of the Agency's proposal.

BACKGROUND

In 1996, the General Assembly amended the Environmental Protection Act (Act), 415 ILCS 5/1 *et seq.* (1996), to create an EMSA pilot program. See 415 ILCS 5/52.3 (1996), added by Pub. Act 89-465, eff. June 13, 1996. The purpose of the legislation was to allow these persons to:

implement innovative environmental measures not otherwise recognized or allowed under existing laws and regulations of this State if those measures:

- 1) achieve emissions reductions or reductions in discharges of wastes beyond the otherwise applicable statutory and regulatory requirements through pollution prevention or other suitable means; or
- 2) achieve real environmental risk reduction or foster environmental compliance by other persons regulated under this Act in a manner that is clearly superior to the existing regulatory system. 415 ILCS 5/52.3-1(b) (1996).

An EMSA “shall operate in lieu of all applicable requirements under Illinois and federal environmental statutes, regulations, and existing permits that are identified in the [EMSA].” 415 ILCS 5/52.3-3(a) (1996). Participation in the program is voluntary and at the discretion of the Agency. See 415 ILCS 5/52.3-1(c) (1996).

The EMSA program was inspired by the United States Environmental Protection Agency’s pilot program entitled the “Regulatory Reinvention (XL) Pilot Project,” 60 Fed. Reg. 27282 (May 23, 1995) (Federal XL Program). Statement of Reasons at 2. That program allowed regulated entities to develop alternatives to regulatory requirements if the alternatives produced greater environmental benefits, reduced administrative burdens, and enhanced public participation. See 415 ILCS 5/52.3-1(a)(6) (1996). In Section 52.3 of the Act, the General Assembly stated that the pilot program was intended to allow “a proposal accepted under the Federal XL Program to be implemented at the State level if the proposal achieves one or more of the purposes of this Section and is acceptable to the Agency.” 415 ILCS 5/52.3-1(a)(6) (1996). However, a proposal need not be in the Federal XL Program to be accepted into the EMSA pilot program. Statement of Reasons at 3, citing 415 ILCS 5/52.3-1(a)(5), 52.3-1(b) (1996).

Section 52.3 allowed the Agency to develop Agency rules to establish (1) the criteria an applicant must meet to participate in the pilot program, (2) the minimum contents of a proposed EMSA, (3) the procedures for the Agency to review an EMSA, (4) the procedures for the public to participate in EMSAs and for stakeholders to be involved in designing and implementing specific projects, (5) the procedures to voluntarily terminate an EMSA, and (6) the type of performance guarantee that an applicant must provide. See 415 ILCS 5/52.3-2(b) (1996). The Agency adopted these rules, which were published in the *Illinois Register* on April 3, 1998, with an effective date of March 20, 1998. See 22 Ill. Reg. 6217 (April 3, 1998).

Section 52.3 also directed the Agency to propose to the Board procedures and criteria for the involuntary termination of EMSAs. See 415 ILCS 5/52.3-2(c) (1996). The Agency’s proposal, filed on August 17, 1998, is the subject of this rulemaking. Generally, the Agency states that its proposal is “closely modeled on the Board’s enforcement procedures found at 35 Ill. Adm. Code 103 (Part 103), Subparts A through H, but with shorter and more specific time frames for various events within the process.” Public Comment of the Agency (PC 1) at 2.

### PROCEDURAL MATTERS

Section 52.3-2(c) of the Act requires the Agency to propose to the Board “criteria and procedures for involuntary termination of [EMSAs].” 415 ILCS 5/52.3-2(c) (1996). That section required the Agency to propose these rules to the Board by December 31, 1996. In its filing of August 17, 1998, the Agency “acknowledges that it is late in filing these rules before the Board.” Statement of Reasons at 2.

Section 52.3-2(c) requires the Board to complete this rulemaking no later than 180 days after it receives the Agency's proposal. To meet that deadline, the Board sent the Agency's proposal to first notice on August 20, 1998, without commenting on the merits of the proposal. The proposed rules were published in the *Illinois Register* on September 4, 1998. See 22 Ill. Reg. 15926 (Sept. 4, 1998).

The Board held two public hearings in this matter: the first, in Chicago, on September 29, 1998; and the second, in Springfield, on October 6, 1998.<sup>1</sup> The purpose of the hearings was to allow the Board to receive testimony from the Agency and other interested persons on the merits and economic impact of the proposal. Two witnesses, each of whom is an Agency employee, testified at each hearing: Laurel Kroack, Assistant Counsel; and Roger Kanerva, Environmental Policy Advisor.

The first hearing also provided the public an opportunity to testify on the decision of the Department of Commerce and Community Affairs (DCCA) not to perform an economic impact study on the Agency's proposed rules. Public Act 90-849, effective January 1, 1998, requires the Board to ask DCCA to conduct an economic impact study on certain proposed rules before the Board adopts the rules. The Board must make the economic impact study, or DCCA's explanation for not conducting the study, available to the public at least 20 days before a public hearing on the economic impact of the proposed rules. The Board fulfilled these requirements. No one testified on this issue at the hearing.

At the hearings, the hearing officer accepted into the record the following exhibits:

Exhibit 1: Testimony of Roger Kanerva of the Agency (Exh. 1);

Exhibit 2: June 1998 Comments of the Chemical Industry Council of Illinois on Draft Rules of the Agency Regarding Involuntary Termination Procedures for EMSAs (Exh. 2);

Exhibit 3: Agency's Proposed Revisions to its Proposal Regarding Involuntary Termination Procedures for EMSAs (Exh. 3); and

Exhibit 4: Response of the Agency to Questions of the Board Raised at Hearing on 9/29/98 (Exh. 4).

At the end of the second hearing, the hearing officer established a deadline of November 4, 1998, for interested persons to file public comments. The Board received one public comment: Public Comment of the Agency (PC 1).

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<sup>1</sup> The transcript of the September 29, 1998 hearing is cited as "Tr.1 at \_\_\_;" the transcript of the October 6, 1998 hearing is cited as "Tr.2 at \_\_\_."

The Board now sends the Agency's proposal, as modified in this order, to the Joint Committee on Administrative Rules (JCAR). Following JCAR's review, the Board will consider the rules for final adoption.

### DISCUSSION

First, the Board provides an overview of the Agency's proposal and the significant changes to that proposal that the Board makes at second notice. Second, the Board addresses the specific issues raised during the first-notice period and explains the reasons for the Board's changes.

#### Overview of the Agency Proposal and the Board's Significant Changes at Second Notice

The Agency's proposal sets forth procedures to involuntarily terminate an EMSA, but does not apply to all involuntary terminations of EMSAs. Under the Agency's proposal, the Agency may terminate an EMSA under Section 52.3-4(b) of the Act, without going through the proposed involuntary termination procedures, when deficient performance under the EMSA prevents achievement of the purposes set forth in Section 52.3-1(b) of the Act (see above at pages 1-2). This type of termination is referred to as "summary termination" and is further discussed below at pages 7-10. With this exception, the Agency's proposed rules apply to all proceedings to involuntarily terminate an EMSA.

The Board agrees that the Agency, in certain circumstances, may summarily terminate an EMSA without first going through the proposed involuntary termination procedures before the Board. However, the Board specifies in the proposed rules at second notice (1) the criteria that the Agency must apply to summarily terminate an EMSA and (2) that summary terminations may be appealed to the Board in the manner provided for review of permit decisions in Section 40 of the Act. See Section 106.940 and 106.945. If the Agency wishes to have the Board involuntarily terminate an EMSA, the Agency must follow the involuntary termination procedures set forth in the proposed rules.

The proposed rules govern the involuntary termination proceedings from the initial filing with the Board through the Board's decision and after the Board enters its final order (*e.g.*, motion to rehear or modify the order). The Agency's proposal is modeled on the Board's existing Part 103 procedural rules for enforcement proceedings (35 Ill. Adm. Code 103, Subparts A-H). However, the proposed rules have shorter and more specific timeframes, and fewer, or more limited, procedural mechanisms than Part 103. Tr.1 at 11; Tr.2 at 44.

Only the Agency can initiate a proceeding to involuntarily terminate. The Agency is designated the "complainant." The Agency must file a "statement of deficiency" with the Board to initiate the proceedings. The statement of deficiency must set forth the alleged deficient performance under the EMSA. The person who enters into the EMSA, also known as a "sponsor,"<sup>2</sup> is designated the "respondent" in the involuntary termination proceeding.

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<sup>2</sup> "Sponsor" is defined in Section 106.942, which sets forth definitions for use in Subpart K. Defined terms include "Environmental Management System Agreement" or "EMSA,"

Under the Agency's proposal, the respondent has to file an answer within 15 days after receipt of the statement of deficiency. At second notice, the Board amends the Agency's proposal so that the Board or the hearing officer may extend the 15-day period for good cause. All material allegations of the statement of deficiency are taken as admitted if not specifically denied in the answer or if the respondent fails to file an answer. See Section 106.946 and 106.948.

Under the Agency's proposal, if the respondent timely files an answer, a hearing must be held within 60 days after the Agency files the statement of deficiency. This time period can be extended for up to 30 days in narrow circumstances. At second notice, the Board amends the Agency proposal to clarify that the 30-day limit applies to each extension. In addition, the 60-day time period runs not from when the Agency files the statement of deficiency, but from when the respondent files the answer. See Section 106.952.

Under the Agency's proposal, the hearing officer must provide the parties with notice of the hearing at least 20 days before hearing. The Board amends this requirement so that the hearing officer or the Clerk must provide 30 days notice and the notice also must be provided to the public by newspaper publication. See Section 106.952.

Under the Agency's proposal, discovery, except requests to produce documents, admit facts, and state the identity and location of persons having knowledge of facts, is not permitted unless all parties agree and the hearing officer orders it. At second notice, the Board eliminates the requirement that all parties agree, so that broader discovery, including depositions and interrogatories, will be permitted if the hearing officer allows it. See Section 106.966.

The Agency has the burden to prove, by a preponderance of the evidence, that the sponsor's performance under the EMSA is deficient. See Section 106.958. Under the Agency's proposal, there are six grounds on which the Board may find that the performance of a sponsor is deficient: (1) the sponsor misrepresented the factual basis for entering into the EMSA; (2) the sponsor failed to provide the Agency access to the pilot project; (3) the sponsor falsified monitoring data, recordkeeping information, or reports; (4) the sponsor or the owner or operator of the pilot project failed to comply with any federal or local environmental law or regulation that applies to the pilot project and that the EMSA does not address, and for which the appropriate authority has sent a notice of violation, complaint, or other notice of failure to comply; (5) the sponsor or the owner or operator of the pilot project failed to comply with any State environmental law or regulation that applies to the pilot project and that the EMSA does not address, and for which the Agency has mailed a notice of violation under Section 31(a) or (b) of the Act; and (6) the sponsor or the owner or operator of the pilot project failed to comply with its EMSA, subject to any grace or cure periods or rights contained in the EMSA.

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"innovative environmental measures," and "pilot project." At second notice, the Board has deleted "Director," "environmental management system," and "pilot program" from Section 106.942 because those terms are not used in Subpart K.

At second notice, the Board modifies these grounds. The Board modifies the third ground to clarify that the falsified information must be about the pilot project; the fourth and fifth grounds so that citizen complaints may trigger a finding of deficient performance; and the sixth ground so that it refers only to sponsor and not to owner or operator of the pilot project. See Section 106.954(a).

Under the Agency's proposal, the Board must render a final decision within 30 days after the hearing. If the respondent fails to timely file an answer, no hearing is held and the Board must, within 30 days after the Agency filed the statement of deficiency, order the EMSA terminated. At second notice, the Board eliminates these decision deadlines and provides that the Board will render its decisions as expeditiously as practicable. See Section 106.956(b).

Under the Agency's proposal, the Board's order must terminate the EMSA, reject termination of the EMSA, or defer termination for a specified time, not to exceed 90 days, to allow the respondent to come into compliance. At second notice, the Board allows the 90 day period to be extended for good cause. See Section 106.956(c).

Under the Agency's proposal, the Board's order may (1) direct the respondent to cease and desist from violations of the Act, Board regulations, or the EMSA, (2) require the respondent to provide "performance assurance compensation" in appropriate amounts, (3) require the respondent to post a sufficient performance bond or other security if the Board allows a respondent an opportunity to come into compliance, and (4) order other relief that may be appropriate. At second notice, the Board also specifies that the Board's order may enforce the remedy provisions of the EMSA. See Section 106.956(d)(4).

Under the Agency's proposal, within 15 days after the Board adopts a final order, any party may file a motion to rehear, modify, or vacate the order or for other relief. Responses must be filed within ten days after the motion is filed. At second notice, the Board changes these time periods to 35 days and 14 days, respectively. In addition, under the Agency's proposal, a person has 30 days after the Board enters its final order to file a motion for relief from that order. The Board extends that period to 60 days at second notice. See Sections 106.980 and 106.982.

#### Issues Raised During the First-Notice Period

In response to questions of Board personnel at hearing, the Agency addressed six issues: (1) the applicability of the proposed rules; (2) the grounds for deficient performance under the EMSA; (3) the scope and effect of Board orders; (4) the adequacy of various time periods; (5) the authority of the hearing officer; and (6) the notice of hearings.

## Applicability of the Proposed Rules

At hearing, Board personnel asked why termination under Section 52.3-4(b) of the Act (referred to in this rulemaking as “summary termination”) was not subject to the Agency’s proposed proceedings to involuntarily terminate. Board personnel also asked whether a summary termination could be appealed to the Board. In addition, Board personnel asked whether only the Agency may initiate proceedings under the proposed rules and who may intervene in these proceedings. The Agency’s responses and the Board’s findings are set forth below.

Whether Summary Termination is Subject to the Proposed Rules. The Agency’s proposed Section 106.940(c) provides that these involuntary termination procedures do not apply when the Agency summarily terminates an EMSA under Section 52.3-4(b). The Agency maintains that summary termination is not subject to these rules and thus the Agency may terminate an EMSA under Section 52.3-4(b) without going through the procedures in the proposed rules.

Section 52.3-4(b) of the Act provides:

In the case of deficient performance of any term or condition in an Environmental Management System Agreement that prevents achievement of the stated purposes in subsection (b) of Section 52.3-1, the Agency may terminate the Agreement and the participant may be subject to enforcement in accordance with the provisions of Section 31 and 42 of this Act. 415 ILCS 5/52.3-4(b) (1996).

The purposes set forth in Section 52.3-1(b) are to:

implement innovative environmental measures not otherwise recognized or allowed under existing laws and regulations of this State if those measures:

- 1) achieve emissions reductions or reductions in discharges of wastes beyond the otherwise applicable statutory and regulatory requirements through pollution prevention or other suitable means; or
- 2) achieve real environmental risk reduction or foster environmental compliance by other persons regulated under this Act in a manner that is clearly superior to the existing regulatory system. 415 ILCS 5/52.3-1(b) (1996).

Board personnel asked the Agency to identify the basis for its claim that it could summarily terminate EMSAs without going through the procedures in the proposed rules. The Agency provided two reasons for maintaining the distinction: (1) the intent of the EMSA legislation; and (2) the need to subject a sponsor to immediate enforcement when the sponsor’s

performance is so deficient that the project cannot achieve the basic purposes of the EMSA program.

The Agency explained that it was the primary author of the EMSA legislation and that it intended to create “two avenues for involuntary termination of an EMSA: through a proceeding before the Board under Section 52.3-2(c) [the subject of this rulemaking] and under Section 52.3-4(b).” PC 1 at 6; Tr.1 at 13, 37; Tr.2 at 37-38. Section 52.3-4(b) is the summary termination provision. Another subsection of Section 52.3-4 allows, but does not require, the Agency to adopt rules to carry out its duties under Section 52.3-4. See 415 ILCS 5/52.3-4(d). The Agency concluded that it need not apply to the Board when the Agency summarily terminates an EMSA. PC 1 at 7; Tr.1 at 37-38.

The Agency noted that while an EMSA is in effect, it operates in lieu of otherwise applicable environmental laws and regulations identified in the EMSA. The Agency argued that if a sponsor’s performance is so deficient that the project cannot achieve Section 52.3-1(b)’s purposes, the Agency must be able to immediately terminate the EMSA and require the sponsor to comply with existing environmental laws and regulations without going through a Board proceeding. The Agency argued that this ability is critical both to protect the environment and to maintain public confidence in the EMSA program. The Agency maintained that the procedural safeguards of the proposed rules are appropriate only for the types of deficient performance that Section 106.954(a) describes, which are less egregious. Tr.1 at 15-16, 39-43, 50-55, 59; Tr.2 at 34-35, 37-39.

The Board agrees that the Agency may summarily terminate an EMSA under Section 52.3-4(b) of the Act without going through a Board proceeding. However, unlike the Agency, the Board does find that the proposed rules apply to summary terminations, as explained below.

Whether Summary Terminations May Be Appealed to the Board. The Agency argued that Section 5(d) of the Act does not support appeals of its summary terminations to the Board. Section 5(d) states:

The Board shall have authority to conduct hearings upon complaints charging violations of the Act or of regulations thereunder; upon petitions for variances; upon petitions for review of the Agency’s denial of a permit in accordance with Title X of this Act; upon petition to remove a seal under Section 34 of this Act; upon other petitions for review of final determinations which are made pursuant to the Act or Board rule and which involve a subject which the Board is authorized to regulate; and such other hearings as may be provided by rule.  
415 ILCS 5/5(d) (1996).

The Agency argued that Section 5(d) provides that the Board has the authority to conduct hearings (1) upon complaints charging violations of the Act or regulations thereunder and (2) upon petitions for review of final determinations made under the Act or Board rule and



which involve a subject matter the Board is authorized to regulate. The Agency concluded that a summary termination:

does not involve a complaint, nor is the Board authorized to regulate EMSAs. The Board's sole role in the EMSA process is to act as the adjudicator of certain involuntary termination proceedings under Section 52.3-2(c). PC 1 at 9.

The Board disagrees. First, summary terminations under Section 52.3-4(b) are "final determinations which are made pursuant to the Act." See 415 ILCS 5/5(d) (1996). Second, those final determinations do "involve a subject which the Board is authorized to regulate." *Id.* Section 52.3-4(c) plainly states that "the Board shall promulgate[] criteria and procedures for the involuntary termination of Environmental Management System Agreements." 415 ILCS 5/52.3-4(c) (1996). Summary terminations are merely one type of involuntary termination. Because Section 52.3-4(c) authorizes the Board to regulate involuntary terminations of EMSAs, Section 5(d) authorizes the Board to review Agency final determinations under Section 52.3-4(b), *i.e.*, summary terminations.

At second notice, the Board specifies (1) the criteria that the Agency must satisfy to summarily terminate an EMSA and (2) that summary terminations are appealable to the Board. Specifically, the Board proposes a new Section 106.945:

- a) To terminate an EMSA under Section 52.3-4(b) of the Act, the Agency must determine that the sponsor's performance under the EMSA has failed to:
- 1) *Achieve emissions reductions or reductions in discharges of wastes beyond the otherwise applicable statutory and regulatory requirements through pollution prevention or other suitable means; or*
  - 2) *Achieve real environmental risk reduction or foster environmental compliance by other persons regulated under this Act in a manner that is clearly superior to the existing regulatory system. (Section 52.3-1(b) of the Act)*
- b) If the Agency terminates an EMSA under Section 52.3-4(b) of the Act, the sponsor may, within 35 days after receipt of the Agency's notification of the termination, file an appeal with the Board. Appeals to the Board will be in the manner provided for review of permit decisions in Section 40 of the Act.

Consistent with Section 52.3-4(b) (see above at page 7), the Board quotes the purposes set forth in Section 52.3-1(b) as the criteria for summary termination. Appeals of summary terminations to the Board will proceed like permit appeals. Permit appeals are addressed in

Part 105 of the Board's procedural rules. See 35 Ill. Adm. Code 105. The Board accordingly changes the applicability section as follows:

- a) The purpose of this Subpart is to set forth the criteria and procedures under which the Board or the Agency may terminate for involuntary termination of an EMSA, as defined in Section 106.942 of this Subpart Part.
- b) ~~This Subpart shall apply to all proceedings to involuntarily terminate an EMSA entered into pursuant to Section 52.3 of the Act and 35 Ill. Adm. Code 187, except as set forth in subsection (c) of this Section.~~
- b)e) When the Agency terminates an EMSA under This Part is not applicable to any Sponsor that is subject to termination of an EMSA by the Agency pursuant to Section 52.3-4(b) of the Act, only Sections 106.942 and 106.945 of this Subpart apply.
- c) This Subpart, except for Section 106.945, applies to proceedings in which the Board will determine whether to terminate an EMSA.

The Board notes that the Agency has indicated that it will develop its own procedural rules under Section 52.3-4(d) for summary terminations. PC 1 at 7. The Board emphasizes that the provisions of Section 106.945 compliment, rather than substitute for, the procedures that the Agency will develop.

Initiating a Proceeding to Involuntarily Terminate. At hearing, Board personnel noted that the Agency's proposed Section 106.946(a) provides that a proceeding to involuntarily terminate an EMSA may "only be commenced by the Agency" and inquired about the role of the Attorney General Office (AGO) in these proceedings. The Agency explained that since the AGO is authorized to act on behalf of the Agency, the AGO presumably will either "file a notice and statement of deficiency at the request of the Illinois EPA and act as lead in these cases or, as with permit appeals, . . . appoint one or more attorneys at the Illinois EPA to act as 'Special Assistant Attorney General' in these proceedings." PC 1 at 13-14; Tr.1 at 59-62, 73-74. The Board agrees and does not modify the references to "Agency" in the proposed rules.

Intervening in a Proceeding to Involuntarily Terminate. In describing who may intervene, the Agency's originally proposed Section 106.962(a) refers to "any person who participated in the public hearing on the sponsor's EMSA." At hearing, Board personnel asked the Agency to clarify this language. Tr.1 at 92-93; Tr.2 at 20-21. In response, the Agency proposed the following modification:

any person who submitted written comments on the sponsor's EMSA or participated in the public hearing on the sponsor's EMSA by signing an

attendance sheet or signature card at hearing, as provided in 35 Ill. Adm. Code 187.404 . . . . PC 1 at 16.

Section 187.404, part of the Agency's rules on EMSAs, sets forth public comment and hearing requirements that the Agency must meet before it enters into an EMSA. See 35 Ill. Adm. Code 187.404.

The Board finds that the Agency's proposed language more clearly identifies who may intervene. However, consistent with Agency's proposed revisions to Section 106.952(f) (discussed below at pages 20-21), the Board finds that the intervention provision also should refer to stakeholders named or listed in the EMSA. Accordingly, the Board amends Section 106.962(a) as follows:

if the person submitted written comments on the respondent's EMSA or participated in the public hearing on the respondent's sponsor's EMSA by signing an attendance sheet or signature card at hearing under the procedures set forth in ~~as provided in~~ 35 Ill. Adm. Code 187.404, or is named or listed in the respondent's EMSA as a stakeholder . . . .

The Board notes that a person who intervenes also must show that the Board's final order may adversely affect him or her. See Section 106.962(a).

#### Grounds for a Finding of Deficient Performance Under the EMSA

At hearing, Board personnel had several questions about the grounds on which the Board may find that a sponsor has performed deficiently under Section 106.954(a). Under the Agency's proposal, one of the grounds is that the sponsor or owner or operator of the pilot project has not complied with environmental laws or regulations or the EMSA. Board personnel asked if, in certain circumstances, the noncompliance of a person who is not a party to the EMSA or noncompliance at a facility that the EMSA does not cover are grounds for a finding of deficient performance. Board personnel also asked if a citizen complaint may serve as a basis for a finding of deficient performance. The Agency's responses and the Board's findings are set forth below.

Noncompliance of a Person Who is Not a Party to the EMSA. Under the Agency's proposal, Section 106.954(a)(4)-(6) (formerly Section 106.954(d)-(f)) provides that the noncompliance of the "sponsor or the owner or operator of the pilot project" with environmental laws or regulations or the EMSA are grounds for the Board to find deficient performance. Section 106.942 defines "sponsor" and "pilot project." A "sponsor" is "the proponent of a pilot project that enters into an EMSA with the Agency." A "pilot project" is "an innovative environmental project that covers one or more designated facilities, designed and implemented in the form of an EMSA."

Board personnel asked whether Section 106.954(a)(4)-(6) should refer only to the “sponsor” or the “owner or operator of the pilot project.” The Agency maintained that subsections (a)(4) and (a)(5) should refer to both entities because:

the situation could arise that the sponsor to an EMSA is the corporate parent or intermediary, but not the actual owner or operator of the Pilot Project that is in violation of a law or regulation not covered by the EMSA. Such a situation presents a serious question as to whether the Pilot Project should be allowed to continue. PC 1 at 5; Tr.1 at 93-96; Tr.2 at 19-20.

The Board agrees and retains the reference to both “sponsor” and “owner or operator of the pilot project” in subsections (a)(4) and (a)(5).<sup>3</sup>

However, the Agency proposed that the Board modify Section 106.954(a)(6), which provides that failure to comply with one or more provisions of the EMSA is a ground for a finding of deficient performance. This subsection originally referred to both “sponsors” and “owners or operators.” The Agency noted that only a party to the EMSA can fail to comply with it. The Agency therefore proposed that the subsection refer only to sponsor. Tr.1 at 95; Tr.2 at 19-20. The Board agrees and modifies subsection (a)(6) accordingly.

Noncompliance at a Facility that the EMSA Does Not Cover. Board personnel asked whether an EMSA may be terminated if a sponsor fails to comply with environmental laws or regulations at a facility that the EMSA does not cover. The Agency stated that it does not intend to seek to involuntarily terminate an EMSA solely on this basis. PC 1 at 12; Tr.1 at 78-79. The Board finds that the language “law or regulation that applies to the pilot project” in Section 106.954(a)(4) and (a)(5) means that the noncompliance of the sponsor or the owner or operator must be in connection with the pilot project.

For consistency, the Board modifies Section 106.954(a)(3) as follows:

The respondent sponsor ~~has~~ falsified any monitoring data, recordkeeping information or reports regarding the pilot project. Tr.1 at 16-17, 81.

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<sup>3</sup> For similar reasons, the Agency wants to add a reference to “owner or operator” in Section 106.968, which deals with subpoenas to attend a hearing. As originally proposed, if the witness, other than the sponsor, is a non-resident of the State, the order to attend the hearing may include payment of the witness’ reasonable expenses. The Agency would amend the exception to refer not only to the sponsor but also to the “owner or operator of a pilot project.” The Agency stated that it should not bear these appearance costs because the owner or operator “will derive the most direct benefit from the EMSA, and therefore, stands in the shoes of the sponsor for purposes of defending an EMSA against involuntary termination.” PC 1 at 6; Tr.1 at 95; Tr.2 at 21. The Board accepts the Agency’s suggested revision for second notice.

Citizen Complaint. Board personnel asked whether the Board may terminate an EMSA because a citizen has filed a complaint. The Agency answered this question affirmatively and proposed the following change to Section 106.954(a)(4):

The sponsor or the owner or operator of the Pilot Project has failed to comply with one or more requirements of any federal or local environmental law or regulation applicable to the Pilot Project and not addressed by the EMSA and for which the appropriate authority has sent a notice of violation, complaint or other notice of failure to comply to the sponsor or the owner or operator of the Pilot Project or a citizen's complaint has been filed with the Board. PC 1 at 13, 15; Tr.1 at 79-80.

The Board notes that subsection (a)(4) refers to “any federal or local environmental law or regulation” while subsection (a)(5) refers to “State environmental law or regulation.” The Board has no jurisdiction over citizen complaints that allege violations of federal or local environmental laws or regulations unless the violations are also violations of State environmental laws or regulations. Accordingly, the Board will add the Agency’s proposed language to subsection (a)(4) but replace “the Board” with “a court of competent jurisdiction.”

In addition, the Board modifies subsection (a)(5) for consistency as follows:

~~The respondent sponsor or the owner or operator of the pilot project Pilot Project has failed to comply with any requirement one or more requirements of any State state environmental law or regulation that applies applicable to the pilot project and that the EMSA does not address, Pilot Project and not addressed by the EMSA, and for which a citizen's complaint has been filed with the Board or the Agency has mailed a notice of violation to the respondent sponsor or the owner or operator of the pilot project under Pilot Project pursuant to Section 31(a) or (b) of the Act.~~

### Scope and Effect of Board Orders

At hearing, Board personnel asked questions about the Agency’s proposed Section 106.956(c), which sets forth provisions on Board decisions. Board personnel also asked questions about the effect of termination, the effect of a Board finding that a violation of the Act has occurred, and the remedies that the Board may order. Those questions are discussed below.

Interim Orders. Under the Agency’s proposal, Section 106.956(c) allows the Board to defer termination for up to 90 days to allow sponsors to come into compliance. However, the subsection refers to a Board “final decision.” Board personnel noted and the Agency agreed that when the Board defers termination as described above, it is not a final Board decision, but rather an interim one. Tr.1 at 81-83; Tr.2 at 20. Accordingly, the Board deletes the word “final.” See Section 106.956(b).

Similarly, the Agency's proposed Section 106.956(d) refers to the "final Board opinion and order" and yet contains a provision on requiring a performance bond or other security if the Board allows an opportunity to come into compliance. The Board therefore deletes the word "final" from subsection (d) as well.

Effect of Termination. Board personnel asked the Agency what effect a Board termination of an EMSA would have on the respondent's liability for violating environmental laws or regulations. Initially, the Agency noted that unless an EMSA specifically addresses given statutory or regulatory requirements, those requirements are "not covered by the EMSA and a sponsor or owner or operator is not excused from compliance with these requirements during the term of the EMSA." PC 1 at 10. The Agency explained that upon termination, "the owner or operator would be required to come into immediate compliance with all applicable environmental laws." PC 1 at 10.

However, the Agency also noted that Section 52.3-4(c) gives sponsors or owners or operators sufficient time to obtain certain permits if an EMSA is terminated:

If the Agreement is terminated, the facility shall have sufficient time to apply for and receive any necessary permits to continue the operations in effect during the course of the Environmental Management System Agreement. Any such application shall also be deemed a timely and complete application for renewal of an existing permit under applicable law. PC 1 at 9; 415 ILCS 5/52.3-4(c).

Because of this language, the Agency explained that:

the sponsor or owner or operator is not subject to an enforcement action for failure to have the necessary permits, as long as the sponsor or owner or operator has timely applied for such permits. The term "sufficient time" is not defined, in part, because the time necessary to apply for and receive a permit varies on the type of permit required. PC 1 at 9; Tr.1 at 56-58.

The Board finds that the sponsor or owner or operator generally must comply immediately with all applicable environmental laws and regulations when the Board terminates the EMSA, although they will have time to apply for permits. In addition, to allow time to comply with applicable environmental laws and regulations, the Board may stay its termination order under 35 Ill. Adm. Code 101.103 or adopt a compliance schedule in its termination order.

Effect of a Finding that a Violation of the Act has Occurred. Section 106.954(a)(4) and (a)(5) describe the failure to comply with certain environmental laws or regulations as part of grounds for the Board to find deficient performance. Section 106.956(d)(1) provides that the Board may order someone to cease and desist from violating the Act and Board regulations.

Board personnel asked the Agency about the effect of a Board finding in an involuntary termination proceeding that a violation of the Act or Board regulations has occurred. The Agency explained that it did not intend the Board order “to act as an adjudication on the merits of a violation of the Act, other than under Section 52.3 of the Act, or of the Board’s rules and regulations.” PC 1 at 10-11. The Agency further explained that it would be required to bring an enforcement case against the owner or operator for the alleged violations and that the Board could not impose statutory penalties for the alleged violations. PC 1 at 10-11; Tr.1 at 69-73; Tr.2 at 22-23.

To clarify its position, the Agency proposed language for Section 106.954, the section that sets forth the grounds for deficient performance:

- b) Any finding of deficient performance of an EMSA by the Board pursuant to subsection (a)(4) or (a)(5) of this Section shall not be binding for any purpose or in any other enforcement proceeding under the Act other than as provided under this Subpart K. PC 1 at 16.

The Board agrees with the Agency and adopts the proposed language with minor modifications.

Available Remedies. Under the Agency’s proposal, Section 106.956(d)(2) allows the Board to require “performance assurance compensation” in such amounts as appropriate in each case. The Agency’s proposed Section 106.956(d)(4) allows the Board to impose “[s]uch order that may be appropriate.” At hearing, Board personnel asked the Agency to explain these provisions.

The Agency stated that “performance assurance compensation” is a monetary payment that the Board deems appropriate under the circumstances, but that it is not a statutory penalty imposed under Section 42 of the Act. The Agency explained that “performance assurance compensation” includes the Board enforcing a stipulated penalties provision in an EMSA. The Agency stated that it believed the Board can “order the sponsor to comply with any performance assurance provisions or other remedies contained in [the] EMSA as part of the Board’s general authority to act as the adjudicator under involuntary termination proceedings.” PC 1 at 12; Tr.1 at 83-88.

The Board agrees with the Agency’s analysis and, for clarity, has added a new subsection (d)(4) to Section 106.956:

Enforce any remedy provision of the EMSA; and

The former subsection (d)(4) is now subsection (d)(5):

Order ~~Such other~~ relief as ~~order that may be~~ appropriate

### Adequacy of Various Time Periods

At hearing, Board personnel asked whether several provisions of the Agency's proposed rules provided adequate time periods. Generally, the Agency believed that its proposal effectively balances two competing interests: (1) providing EMSA participants with "procedural safeguards in the event of involuntary termination, except in the most egregious circumstances [summary termination];" and (2) expeditiously terminating EMSAs so that the facilities will quickly become subject to all applicable environmental laws, thereby protecting the environment and maintaining citizen confidence in the EMSA program. PC 1 at 17; Tr.1 at 15-16, 26, 30-32, 37-38, 86.

Set forth below are the Agency's comments about specific provisions and the Board's related findings.

Time Period for Filing an Answer. Under the Agency's proposal, the answer must be filed within 15 days after the respondent receives the statement of deficiency. The Agency explained that it contemplated no extensions of time to file answers. Tr.1 at 35-36. The Board believes it appropriate to extend the 15-day period if a respondent shows that there is good cause for an extension. Accordingly, the Board amends the first sentence of Section 106.948(c) as follows:

The respondent ~~Respondent~~ must file an answer within 15 days after ~~of~~ receipt of the statement of deficiency, unless the Board or the hearing officer extends the 15-day period for good cause.

The Time Period in Which Hearings Must Take Place. Under the Agency's proposed Section 106.952(a), any hearing would have to be held within 60 days after the Agency filed the statement of deficiency. In narrow circumstances, the Board could delay the hearing for no more than 30 days.

Board personnel asked the Agency if the Board could order more than one 30-day extension. The Agency stated that the Board could, but added that the Board does not have to order a 30 day extension each time. The Agency stated that the Board should delay the hearing "for the number of days necessary to alleviate the conditions requiring the extension." PC 1 at 3-4; Tr.1 at 74-75; Tr.2 at 18. The Agency also stated that the hearing officer should be able to order these extensions. Tr.1 at 74-75.

The Board agrees and accepts, with several changes, the Agency's suggested revision to Section 106.952(c) to clarify the 30-day extension. However, the Board further amends that subsection so that the 60-day period runs not from when the Agency files the statement of deficiency, but from when the respondent files the answer. This change is necessary because the hearing officer or the Clerk must provide 30 days notice of hearing. Whether there will be a hearing is not clear until an answer is filed. Accordingly, if a hearing must be held within 60 days after the Agency files the statement of deficiency, there is not enough time to schedule



the hearing and provide the required newspaper notice. As modified, Section 106.952(c) reads as follows:

~~The hearing officer~~ Hearing Officer, after reasonable efforts to consult appropriate consultation with the parties, ~~will~~ shall set a time and place for hearing ~~to be held within 60 days after the filing of the statement of deficiency.~~ The Board or the hearing officer may ~~The Board shall not~~ extend the time for hearing if ~~unless~~ all parties agree ~~to the extension~~ or there are extreme and unanticipated or uncontrollable circumstances that warrant a ~~warranting the delay of hearing.~~ The Board or the hearing officer may delay the hearing more than once. In each ~~any such~~ event, the Board or the hearing officer will not ~~shall grant no~~ delay the ~~of~~ hearing for more than ~~in excess of~~ 30 ~~additional~~ days.

The Board makes corresponding changes to the second sentence of Section 106.952(a):

Any hearing will ~~shall~~ be held not later than 60 days after the respondent files filing of the answer notice and statement of deficiency, subject to any extensions ordered under subsection (c) of this Section.

If no answer is filed, the Board may terminate the EMSA without a hearing, as explained below.

Time Period for a Board Final Decision. If a hearing is held, the Agency's proposed Section 106.956(c) requires the Board to render its decision within 30 days after the hearing. If a hearing is not held, Section 106.956(b) under the Agency's proposal states that the Board "shall" order an EMSA terminated and that the Board's order must be entered within 30 days after the Agency files the statement of deficiency.

If a hearing is held, Board personnel pointed out that the Agency's proposed Section 106.956(c) does not give the Board sufficient time to review transcripts and post-hearing briefs. Specifically, under 35 Ill. Adm. Code 103.221 and 103.223, both of which apply under the proposed rules,<sup>4</sup> transcripts must be filed with the Board within 15 days after the close of hearing and the parties may submit briefs within 14 days after the Board receives the final transcripts. In addition, the Board may take action only at its meetings, which are generally held twice per month. Tr.1 at 32-33.

If a hearing is not held, the Board finds that Section 106.956(b) should not require the Board to terminate an EMSA. Even if the respondent fails to timely file an answer, the Agency still has the burden of proof, under Section 106.958, to establish deficient performance by a preponderance of the evidence. Thus, the Agency's statement of deficiency must contain adequate information for the Board to find deficient performance. See Section 106.948(b). If it does not, the Board cannot be required to terminate the EMSA.

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<sup>4</sup> See Section 106.978.

Accordingly, the Board finds that 30 days from when the Agency files the statement of deficiency is not sufficient time for the Board to deliberate and decide the matter. Most of this 30-day period would be taken up waiting for the respondent's answer.

Besides the fact that the decision deadlines of the Agency's proposed Section 106.956(b) and (c) are impractical for the reasons stated above, they are of no consequence. The Agency stated that it did not intend to have a default judgment in favor of either party if the Board failed to make its decision in time. Tr.1 at 34-35. The Agency also stated that it:

recognize[s] that the Board may believe that the rule needs additional revisions consistent with its ability to act as a fair arbitrator in the context of the expedited process set forth in these proposed rules. PC 1 at 17-18; Tr.1 at 33-34; Tr.2 at 40-41.

The Board finds that the decision deadlines are inappropriate and deletes them at second notice. Nevertheless, the Board will decide these matters as expeditiously as practicable and provides so in the first sentence of Section 106.956(b).

Ninety Days to Rectify Deficient Performance. Section 106.956(c)(2) of the Agency's proposed rules states that the Board may defer termination for a specified time, not to exceed 90 days, to allow the respondent to come into compliance. At hearing, Board personnel noted that it may be appropriate in certain circumstances to grant extensions of this time period. For example, a respondent may be making good progress toward compliance but still require additional time. The Agency stated that it was amenable to the Board granting extensions for good cause. Tr.2 at 23-27. The rules at second notice provide for these extensions in Section 106.956(c).

Time Period for Motion Subsequent to Final Order. Under the Agency's proposal, Section 106.980 provides that within 15 days after the Board adopts a final order, any party may file a motion to rehear, modify, or vacate the order or for other relief. Responses must be filed within 10 days after the motion is filed. The Board is concerned that these time periods may be inadequate given the time that may expire before the interested parties receive either the Board order or the motion. Accordingly, the Board amends this Section's time periods to 35 days and 14 days, respectively.

Time Period To Move for Relief from Final Orders. Under the Agency's proposal, a person has 30 days after the Board enters its final order to file a motion for relief from that order. Again, the Board is concerned that this is not an adequate period of time. The Board extends that period to 60 days at second notice. See Section 106.982.

#### Authority of the Hearing Officer

At second notice, the Board changes the proposed rules regarding motions that the hearing officer may rule on and the scope of discovery. The Agency's proposed Section 106.960(g) provides that the hearing officer may rule on all motions. The Board finds this provision overbroad because it would allow the hearing officer to decide dispositive motions.

The Agency explained that it did not intend this result. Tr.1 at 96-97. Accordingly, the Board adds to subsection (g) language from the analogous provision in Part 103 (35 Ill. Adm. Code 103.140(e)):

The hearing officer ~~Hearing Officer~~ may rule upon all motions, except that the hearing officer has no authority to dismiss, or rule upon a motion to dismiss or decide a proceeding on the merits, for failure to state a claim, for want of jurisdiction, or to strike any claim or defense for insufficiency or want of proof.

Under the Agency's proposal, Section 106.966(a) provides that discovery, except requests to produce documents, admit facts, and state the identity and location of persons having knowledge of facts, is not be permitted unless all parties agree and the hearing officer orders it. The Agency stated that it felt depositions and interrogatories were time-consuming and did not fit within the timeframes of its proposed procedures. However, the Agency added that its proposal allows for additional discovery to be ordered as the Board deems necessary.

The Agency's language, however, does not leave expanded discovery solely to the hearing officer's discretion. It also requires that all parties agree to the expanded discovery. At second notice, the Board deletes the latter requirement. The Board finds that there may be circumstances when additional discovery tools, such as depositions and interrogatories, are appropriate and the hearing officer should be able to order their use. The rules still do not specifically provide for depositions or interrogatories, but the hearing officer may order them if appropriate. The Board amends Section 106.966(a) as follows:

~~Pre trial discovery~~Discovery, except requests to produce for production of documents, admit facts ~~admissions of fact and state the production of the identity and location of persons with~~ having knowledge of facts, as set forth in subsection (b) of this Section below, ~~is shall not be permitted unless the hearing officer except as agreed to by all parties and directed pursuant to a Hearing Officer orders otherwise.~~

### Notice of Hearings

Under the Agency's originally proposed Section 106.952, the hearing officer must give notice of the hearing to the parties at least 20 days before the hearing. The Agency must give notice of the hearing and statement of deficiency at least ten days before the hearing to (1) all stakeholders named or listed in or otherwise involved in the development of the EMSA and (2) the public in a newspaper of general circulation.

At hearing, Board personnel had several questions about this provision. The Board discusses the Agency's responses and the Board's findings below.

Public Notice. Board personnel noted 30 days notice of an involuntary termination hearing, rather than the 20 days set forth in the Agency's originally proposed Section 106.952,

may be required under the Clean Air Act if EMSAs are submitted as revisions to Illinois' State Implementation Plan.

The Agency was unsure if the Clean Air Act's notice requirements would apply, but agreed that it would be prudent to modify Section 106.952(e) to require a 30-day notice. Given the short time frame for holding a hearing, the Agency also requested that the hearing officer, rather than the Agency, provide notice to the public by publication in a newspaper of general circulation where the pilot project is located. PC 1 at 4; Tr.1 at 100-106; Tr.2 at 18-19. The Board agrees with the Agency's proposed changes to Section 106.952(e) and makes other minor modifications:

The hearing officer or the Clerk will ~~Hearing Officer shall~~ give notice of the hearing, at least 30 ~~20~~ days before the hearing, to the parties under ~~in~~ accordance with Section 106.950(b) of this Subpart, and to the public by public advertisement in a newspaper of general circulation in the county in which the pilot project is located ~~Part.~~

Notice to Specific Persons. Under the Agency's original proposal, Section 106.952(f) reads as follows:

- f) The Agency shall give notice of each complaint and hearing at least 10 days before the hearing to:
  - 1) All stakeholders named or listed in the EMSA or otherwise involved in the development of the EMSA for the Pilot Project in accordance with Section 106.950(b); and
  - 2) The public, by public advertisement in a newspaper of general circulation in the county in which the Pilot Project is located.

At hearing, Board personnel asked the Agency what it meant by stakeholders "otherwise involved in the development of the EMSA for the Pilot Project" and whether the Agency had considered notice by publication rather than notice to each individual if a large number of individuals attended the hearing on the EMSA. Tr.1 at 89-93; Tr.2 at 41-43.

In response, the Agency proposed changes to subsection (f). PC 1 at 14-15. With a few revisions (reflected below), the Board adopts the Agency's suggested changes for second notice:

- f) The Agency must ~~shall~~ give notice of each statement of deficiency complaint and hearing under 106.950(b) at least ten days before the hearing to:
  - 1) All stakeholders named or listed in the EMSA ~~or otherwise involved in the development of the EMSA for the Pilot Project in~~

~~accordance with Section 106.950(b); and~~

- 2) Any person who submitted written comments on the respondent's EMSA or participated in the public hearing on the respondent's EMSA by signing an attendance sheet or signature card under the procedures set forth in 35 Ill. Adm. Code 187.404, if less than 100 persons attended the public hearing on the respondent's EMSA as indicated by signatures on the attendance sheet or signature cards ~~The public, by public advertisement in a newspaper of general circulation in the county in which the Pilot Project is located.~~

As noted above, Section 187.404 is part of the Agency's rules on EMSAs and sets forth public comment and hearing requirements that the Agency must meet before it enters into an EMSA. See 35 Ill. Adm. Code 187.404. The Agency also noted that notice by publication in a newspaper under Section 106.952(e) would act as notice to persons at the hearing on the EMSA if 100 or more persons attended. PC 1 at 4-5.

### CONCLUSION

In addition to the changes discussed above, the Board has made minor changes to the rules for clarity and consistency, and to comply with changes that JCAR has requested. These changes do not merit discussion. Additions to the Agency's proposal are underlined; deletions to the Agency's proposal are stricken through.<sup>5</sup> The Board finds that the proposed rules, as modified at second notice, are economically reasonable and technically feasible.

### ORDER

The Board directs the Clerk to file these proposed amendments with JCAR.

TITLE 35: ENVIRONMENTAL PROTECTION  
SUBTITLE A: GENERAL PROVISIONS  
CHAPTER I: POLLUTION CONTROL BOARD

PART 106  
HEARINGS PURSUANT TO SPECIFIC RULES

SUBPART A: HEATED EFFLUENT DEMONSTRATIONS

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<sup>5</sup> All of proposed Subpart K to Part 106 is a new rule. However, to identify changes to the Agency's proposal, the Board underlines only those portions of Subpart K that are additions to the Agency's proposal. As discussed above at page 3, because of the Board's statutory deadline to adopt these rules, for first notice the Board adopted the Agency's proposal without modification.

Section	
106.101	Petition
106.102	Requirements for Petition
106.103	Parties
106.104	Recommendation
106.105	Notice and Hearing
106.106	Transcripts
106.107	Opinion and Order

#### SUBPART B: ARTIFICIAL COOLING LAKE DEMONSTRATIONS

Section	
106.201	Petition
106.202	Notice and Hearing
106.203	Transcripts
106.204	Effective Date

#### SUBPART C: SULFUR DIOXIDE DEMONSTRATIONS

Section	
106.301	Petition
106.302	Requirements for Petition
106.303	Parties
106.304	Recommendation
106.305	Notice and Hearing
106.306	Transcripts

#### SUBPART D: RCRA ADJUSTED STANDARD PROCEDURES

Section	
106.401	Petition (Repealed)
106.402	Notice of Petition (Repealed)
106.403	Recommendation (Repealed)
106.404	Response (Repealed)
106.405	Public Comment (Repealed)
106.406	Public Hearings (Repealed)
106.407	Decision (Repealed)
106.408	Appeal (Repealed)
106.410	Scope and Applicability
106.411	Joint or Single Petition
106.412	Request to Agency to Join as Co-Petitioner
106.413	Contents of Petition
106.414	Response and Reply
106.415	Notice and Conduct of Hearing
106.416	Opinions and Orders

## SUBPART E: AIR ADJUSTED STANDARD PROCEDURES

Section	
106.501	Scope and Applicability
106.502	Joint or Single Petition
106.503	Request to Agency to Join As Co-Petitioner
106.504	Contents of Petition
106.505	Response and Reply
106.506	Notice and Conduct of Hearing
106.507	Opinions and Orders

## SUBPART F: WATER WELL SETBACK EXCEPTION PROCEDURES

Section	
106.601	Scope and Applicability
106.602	Contents of Petition
106.603	Response and Reply
106.604	Notice and Conduct of Hearing
106.605	Opinions and Orders

## SUBPART G: ADJUSTED STANDARDS

Section	
106.701	Applicability
106.702	Definitions
106.703	Joint or Single Petition
106.704	Request to Agency to Join As Co-Petitioner
106.705	Petition Contents
106.706	Petition Verification
106.707	Federal Procedural Requirements
106.708	Incorporated Material
106.709	Motions
106.710	Service of Filings
106.711	Petition Notice
106.712	Proof of Petition Notice
106.713	Request for Public Hearing
106.714	Agency Response
106.715	Amended Petition and Amended Response
106.801	Hearing Scheduled
106.802	Hearing Notice
106.803	Pre-Hearing Submission of Testimony and Exhibits
106.804	Discovery
106.805	Admissible Evidence
106.806	Order of Hearing

106.807	Post-hearing Comments
106.808	Burden of Proof
106.901	Board Deliberations
106.902	Dismissal of Petition
106.903	Board Decision
106.904	Opinion and Order
106.905	Appeal of Board Decisions
106.906	Publication of Adjusted Standards
106.907	Effect of Filing a Petition

SUBPART H: REVOCATION AND REOPENING OF CLEAN AIR ACT PERMIT  
PROGRAM (CAAPP) PERMITS

Section	
106.910	Applicability
106.911	Definitions
106.912	Petition
106.913	Response and Reply
106.914	Notice and Hearing
106.915	Opinion and Order
106.916	USEPA Review of Proposed Determination

SUBPART I: MAXIMUM ACHIEVABLE CONTROL TECHNOLOGY  
DETERMINATIONS

Section	
106.920	Applicability
106.921	Definitions
106.922	Petition
106.923	Response and Reply
106.924	Notice and Hearing
106.925	Opinion and Order

SUBPART J: CULPABILITY DETERMINATIONS

Section	
106.930	Applicability
106.931	Petition for Review
106.932	Response and Reply
106.933	Notice and Hearing
106.934	Opinion and Order

SUBPART K: INVOLUNTARY TERMINATION OF PROCEDURES FOR  
ENVIRONMENTAL MANAGEMENT SYSTEM AGREEMENTS (EMSAs)

Section



106.940	Purpose, Applicability
106.942	Definitions
106.944	Severability
106.945	Termination Under Section 52.3-4(b) of the Act
106.946	Who May Initiate, Parties
106.948	Notice, Statement of Deficiency, <del>and</del> Answer
106.950	Service
106.952	Notice of Hearing
106.954	Deficient Performance
106.956	Board Decision
106.958	Burden of Proof
106.960	Motions, <del>and</del> Responses
106.962	Intervention
106.964	Continuances
106.966	Discovery, Admissions
106.968	Subpoenas
106.970	Settlement Procedure
106.972	Authority of Hearing Officer, Board Members and Board Assistants
106.974	Order and Conduct of Hearing
106.976	Evidentiary Matters
106.978	Post-Hearing Procedures
106.980	Motion <u>After</u> <del>Subsequent to</del> Entry of Final Order
106.982	Relief from Section 106.956 Final Orders

#### APPENDIX A Old Rule Numbers Referenced

AUTHORITY: Implementing Sections 5, 14.2(c), 22.4, 27, 28, 28.1, 28.5 and 39.5 and authorized by Sections 26 and 39.5 of the Environmental Protection Act (Ill. Rev. Stat. 1991, ch. 111 ½, pars. 1005, 1014.2(c), 1022.4, 1027, 1028, 1028.1, 1028.5, 1039.5, and 1026)(P.A. 87-1213, effective September 26, 1992, and P.A. 88-464, effective August 28, 1993)[415 ILCS 5/5, 14.2(c), 22.4, 27, 28, 28.1, 28.5, 39.5 and 26]; implementing and authorized by Section 52.3 of the Environmental Protection Act, 415 ILCS 5/52.3, P.A. 76-2429, §52.3 added by P.A. 89-465, §10, effective June 13, 1996.

SOURCE: Filed with the Secretary of State January 1, 1978; amended at 4 Ill. Reg. 2, p. 186, effective December 27, 1979; codified at 6 Ill. Reg. 8357; amended in R85-22 at 10 Ill. Reg. 992, effective February 2, 1986; amended in R86-46 at 11 Ill. Reg. 13457, effective August 4, 1987; amended in R82-1 at 12 Ill. Reg. 12484, effective July 13, 1988; amended in R88-10 at 12 Ill. Reg. 12817, effective July 21, 1988; amended in R88-5(A) at 13 Ill. Reg. 12055, effective July 10, 1989; amended in R88-5(B) at 14 Ill. Reg. 9442, effective June 5, 1990; amended at 18 Ill. Reg. 4230, effective March 8, 1994; amended in R99-9 at 23 Ill. Reg. \_\_\_\_\_, effective \_\_\_\_\_.

#### SUBPART K: INVOLUNTARY TERMINATION OF PROCEDURES FOR ENVIRONMENTAL MANAGEMENT SYSTEM AGREEMENTS (EMSAs)

## Section 106.940 Purpose, Applicability

- a) The purpose of this Subpart is to set forth the criteria and procedures under which the Board or the Agency may terminate ~~for involuntary termination of an EMSA, as defined in Section 106.942 of this Subpart Part.~~
- b) ~~This Subpart shall apply to all proceedings to involuntarily terminate an EMSA entered into pursuant to Section 52.3 of the Act and 35 Ill. Adm. Code 187, except as set forth in subsection (c) of this Section.~~
- b)e) When the Agency terminates an EMSA under This Part is not applicable to any Sponsor that is subject to termination of an EMSA by the Agency pursuant to Section 52.3-4(b) of the Act, only Sections 106.942 and 106.945 of this Subpart apply.
- c) This Subpart, except for Section 106.945, applies to proceedings in which the Board will determine whether to terminate an EMSA.

(Source: Added at 23 Ill. Reg. \_\_\_\_\_, effective \_\_\_\_\_)

## Section 106.942 Definitions

For purposes of this Subpart, the words and terms used in this Subpart ~~shall~~ have the meanings given below. Words and terms not defined in this Subpart, if defined in the Act, ~~shall~~ have the meanings that the Act provides ~~as provided in the Act.~~

“Act” means the Environmental Protection Act [415 ILCS 5].

“Agency” ~~“Agency”~~ means the Environmental Protection Agency. ~~*Environmental Protection Agency established by the Act.* (Section 3.08 of the Act).~~

“Board” means the ~~Illinois Pollution Control Board established by the Act.~~ ~~(Section 5 of the Act).~~

“Clerk” means the Clerk of the Board.

~~“Director” means the Director of the Illinois Environmental Protection Agency.~~

~~“Environmental Management System” means the system by which an entity achieves continuous environmental improvement by integrating environmental management into on-going business planning and manages environmental performance, including, but not limited to, environmental management systems implementing International Organization for Standardization (ISO) 14001 standard.~~

“Environmental Management System Agreement” or “EMSA” (~~EMSA~~)” means the agreement between the Agency and a sponsor, entered into under Section 52.3 of the Act and 35 Ill. Adm. Code 187, that describes the innovative environmental measures to be implemented, schedules to attain ~~for attaining~~ goals, and mechanisms for accountability.

“~~Innovative environmental measures~~” ~~Environmental Measures~~” means any procedures, practices, technologies or systems that pertain to environmental management and are expected to improve environmental performance when applied.

~~“Pilot Program” means the program described in this Part that allows the use of EMSAs to promote innovative environmental measures.~~

“Pilot project” ~~Project~~” means an innovative environmental project that covers ~~covering~~ one or more designated facilities, designed and implemented in the form of an EMSA ~~executed by the Agency and a sponsor in accordance with this Part.~~

“Sponsor” means the proponent of a pilot project that enters into an EMSA with the Agency.

(Source: Added at 23 Ill. Reg. \_\_\_\_\_, effective \_\_\_\_\_)

#### Section 106.944 Severability

If any provision of this Subpart is adjudged invalid, or if its application to any person or in any circumstance is adjudged invalid, the such invalidity does not affect the validity of this Subpart as a whole, or any Section, subsection, sentence or clause not adjudged invalid.

(Source: Added at 23 Ill. Reg. \_\_\_\_\_, effective \_\_\_\_\_)

#### Section 106.945 Termination Under Section 52.3-4(b) of the Act

- a) To terminate an EMSA under Section 52.3-4(b) of the Act, the Agency must determine that the sponsor’s performance under the EMSA has failed to:
- 1) *Achieve emissions reductions or reductions in discharges of wastes beyond the otherwise applicable statutory and regulatory requirements through pollution prevention or other suitable means; or*
  - 2) *Achieve real environmental risk reduction or foster environmental compliance by other persons regulated under this Act in a manner that is clearly superior to the existing regulatory system. (Section 52.3-1(b) of the Act)*
- b) If the Agency terminates an EMSA under Section 52.3-4(b) of the Act, the

sponsor may, within 35 days after receipt of the Agency's notification of the termination, file an appeal with the Board. Appeals to the Board will be in the manner provided for review of permit decisions in Section 40 of the Act.

(Source: Added at 23 Ill. Reg. \_\_\_\_\_, effective \_\_\_\_\_)

#### Section 106.946 Who May Initiate, Parties

- a) Only the Agency may commence a A proceeding to ~~involuntarily~~ terminate an EMSA under this Subpart may only be commenced by the Agency.
- b) The Agency will ~~shall~~ be designated the complainant. The sponsor will ~~of an~~ EMSA ~~shall~~ be designated as, ~~and shall be,~~ the sole respondent.
- c) Misnomer of a party is not a ground for a dismissal; the name of any party may be corrected at any time.

(Source: Added at 23 Ill. Reg. \_\_\_\_\_, effective \_\_\_\_\_)

#### Section 106.948 Notice, Statement of Deficiency, ~~and~~ Answer

- a) A proceeding to ~~involuntarily~~ terminate an EMSA will ~~shall~~ be commenced when the Agency serves by the service of a notice of filing and a statement of deficiency upon the respondent and files the filing of 10 copies of the notice of filing and statement of deficiency with the Clerk.
- ~~b) The notice shall be directed to the respondent notifying the respondent of the filing of the accompanying statement of deficiency.~~
- b) e) The statement of deficiency must ~~shall~~ contain:
  - 1) The stated basis for the respondent's alleged deficient performance under as provided in Section 106.954(a) of this Subpart below;
  - 2) The dates, location, nature, extent and duration of any act or omission, and amount and other characteristics of any discharges or emissions, alleged to violate ~~constitute violations of~~ the provisions of the Act or regulations that apply applicable to the pilot project ~~Pilot Project and that the EMSA does not address~~ addressed by the EMSA;
  - 3) The dates, location, nature, extent and duration of any act or omission, and amount and other characteristics of any discharges or emissions, alleged to violate ~~constitute violations of~~ the EMSA; and
  - 4) With respect to subsections (b)(1) through (b)(3) ~~(c)(1) through (c)(3)~~ of

this Section, the statement of deficiency must ~~complaint shall~~ contain sufficient detail to advise the respondent of the extent and nature of the alleged violations to reasonably allow the respondent to prepare preparation of a defense.

- c) ~~d)~~ The respondent ~~Respondent~~ must file an answer within 15 days ~~after~~ ~~of~~ receipt of the statement of deficiency, unless the Board or the hearing officer extends the 15-day period for good cause. All material allegations of the statement of deficiency will ~~complaint shall~~ be taken as admitted if not specifically denied by the answer, or if no answer is filed. Any facts that constitute ~~constituting~~ an affirmative defense that ~~which~~ would be likely to surprise ~~take~~ the complainant ~~by surprise~~ must be plainly set forth in the answer before ~~prior to~~ hearing.

(Source: Added at 23 Ill. Reg. \_\_\_\_\_, effective \_\_\_\_\_)

#### Section 106.950 Service

- a) The Agency must serve a ~~A~~ copy of the notice of filing and statement of deficiency ~~shall~~ either ~~be served~~ personally on the respondent or the respondent's ~~his~~ authorized agent, or ~~shall be served~~ by registered or certified mail with return receipt signed by the respondent or the respondent's ~~his~~ authorized agent. Proof ~~must~~ ~~shall~~ be made by affidavit of the person who makes ~~making~~ personal service, or by properly executed registered or certified mail receipt. The Agency must file proof ~~Proof~~ of service of the notice of filing and statement of deficiency ~~complaint shall be filed~~ with the Clerk immediately upon completion of service.
- b) The Agency and the respondent must serve ~~After notice and statement of deficiency,~~ all motions and all other notices ~~shall be served~~ personally, by First Class United States mail, with sufficient postage ~~affixed thereto~~, or by overnight delivery by a nationally recognized courier service., ~~and~~ The Agency and the respondent must file 10 copies of the motions and notices ~~shall be filed~~ with the Clerk with proof of service.
- c) Service is presumed complete upon personal service, four days after deposit in the United States First Class mail, with sufficient postage ~~affixed thereto~~, or the next business day upon deposit with a nationally recognized courier service for overnight delivery.

(Source: Added at 23 Ill. Reg. \_\_\_\_\_, effective \_\_\_\_\_)

#### Section 106.952 Notice of Hearing

- a) The Clerk will ~~shall~~ assign a docket number to each statement of deficiency filed, ~~deposit the statement of deficiency and notice in the Board's files, and~~

~~distribute copies to each Board Member.~~ Any hearing ~~will shall~~ be held not later than 60 days after the respondent files filing of the answer notice and statement of deficiency, subject to any extensions ordered under subsection (c) of this Section.

- b) The Chairman ~~of the Board will shall~~ designate a hearing officer Hearing Officer and the Clerk ~~will shall~~ notify the parties of the such designation. The hearing officer Hearing Officer may be a Member of the Board if otherwise qualified.
- c) The hearing officer Hearing Officer, after reasonable efforts to consult appropriate consultation with the parties, ~~will shall~~ set a time and place for hearing ~~to be held within 60 days after the filing of the statement of deficiency.~~ The Board or the hearing officer may ~~The Board shall not~~ extend the time for hearing if unless all parties agree ~~to the extension~~ or there are extreme and unanticipated or uncontrollable circumstances that warrant a warranting the delay of hearing. The Board or the hearing officer may delay the hearing more than once. In each any such event, the Board or the hearing officer will not shall grant no delay the of hearing for more than in excess of 30 additional days.
- d) The hearing ~~will shall~~ be held in the county in which the pilot project Pilot Project is located, or in another such other county that as the hearing officer designates for cause Hearing Officer shall for stated cause designate.
- e) The hearing officer or the Clerk will Hearing Officer shall give notice of the hearing, at least 30 20 days before the hearing, to the parties under in ~~accordance with~~ Section 106.950(b) of this Subpart, and to the public by public advertisement in a newspaper of general circulation in the county in which the pilot project is located Part.
- f) The Agency must shall give notice of each statement of deficiency complaint and hearing under 106.950(b) at least 10 days before the hearing to:
- 1) All stakeholders named or listed in the EMSA ~~or otherwise involved in the development of the EMSA for the Pilot Project in accordance with Section 106.950(b);~~ and
  - 2) Any person who submitted written comments on the respondent's EMSA or participated in the public hearing on the respondent's EMSA by signing an attendance sheet or signature card under the procedures set forth in 35 Ill. Adm. Code 187.404, if less than 100 persons attended the public hearing on the respondent's EMSA as indicated by signatures on the attendance sheet or signature cards ~~The public, by public~~

~~advertisement in a newspaper of general circulation in the county in which the Pilot Project is located.~~

- g) ~~Failure to comply with the provisions of this Section is not section may not be used as a defense to an involuntary termination action under this Subpart, but the hearing officer may postpone the hearing upon the motion of any person prejudiced by a failure to comply with this Section any person adversely affected by such failure of compliance may upon motion to the Hearing Officer have the hearing postponed if prejudice is shown.~~

(Source: Added at 23 Ill. Reg. \_\_\_\_\_, effective \_\_\_\_\_)

#### Section 106.954 Deficient Performance

- a) For purposes of this Subpart, a respondent's the performance under its EMSA ~~of a sponsor~~ is deficient if the Agency asserts and the Board finds that any of the following conditions exist:
- 1)a) ~~The respondent misrepresented the factual basis for entering into the EMSA was misrepresented by the sponsor.~~
  - 2)b) ~~The respondent sponsor has failed to provide access to the pilot project Pilot Project for the Agency to monitor compliance with an EMSA.~~
  - 3)e) ~~The respondent sponsor has falsified any monitoring data, recordkeeping information or reports regarding the pilot project.~~
  - 4)d) ~~The respondent sponsor or the owner or operator of the pilot project Pilot Project has failed to comply with any requirement one or more requirements of any federal or local environmental law or regulation that applies applicable to the pilot project and that the EMSA does not address, Pilot Project and not addressed by the EMSA and for which a citizen's complaint has been filed with a court of competent jurisdiction or the appropriate authority has sent a notice of violation, complaint or other notice of failure to comply to the respondent sponsor or the owner or operator of the pilot project Pilot Project.~~
  - 5)e) ~~The respondent sponsor or the owner or operator of the pilot project Pilot Project has failed to comply with any requirement one or more requirements of any State state environmental law or regulation that applies applicable to the pilot project and that the EMSA does not address, Pilot Project and not addressed by the EMSA, and for which a citizen's complaint has been filed with the Board or the Agency has mailed a notice of violation to the respondent sponsor or the owner or~~

operator of the pilot project under Pilot Project pursuant to Section 31(a) or (b) of the Act.

~~6)f)~~ The respondent sponsor or owner or operator of the Pilot Project has failed to comply with ~~one or more provisions in~~ its EMSA, subject to any grace or cure periods or rights contained in the EMSA therein.

b) Any Board finding of deficient performance under subsection (a)(4) or (a)(5) of this Section will not be binding for any purpose or in any other proceeding under the Act, other than under this Subpart.

(Source: Added at 23 Ill. Reg. \_\_\_\_\_, effective \_\_\_\_\_)

#### Section 106.956 Board Decision

- a) The Board will ~~shall~~ prepare a written opinion and order for all final determinations that will ~~which shall~~ include findings of fact (with specific page references to principal supporting items of evidence in the record) and conclusions of law (supported by adequate reasoning) on all material issues.
- b) The Board will render its decision as expeditiously as practicable ~~shall order an EMSA terminated if a sponsor does not respond to the Agency's statement of deficiency within the specified time. Such order shall be entered not later than 30 days after the filing of the petition.~~
- ~~e)~~ ~~If an answer has been timely filed by a sponsor, the~~ The Board will ~~shall~~ render a final decision as an order ~~within 30 days after the hearing~~ that either:
- 1) Terminates the EMSA;
  - 2) Defers termination for a specified time, not to exceed 90 days from the date of the order ~~Order~~, during which the respondent sponsor may rectify the deficient performance; or
  - 3) Rejects termination of the EMSA.
- c) The Board may extend the time period under subsection (b)(2) of this Section for good cause.
- d) The ~~final Board opinion and~~ may order ~~may include~~ any or all of the following:
- 1) Direct the respondent ~~A direction~~ to cease and desist from violating ~~violations of the Act, of the Board's rules and regulations, or the provisions of the EMSA;~~



- 2) Require the respondent to provide The imposition of performance assurance compensation in such amounts as appropriate amounts in each case;
  - 3) ~~If the Board allows respondent an opportunity to come into compliance,~~ Require the respondent to post a posting of sufficient performance bond or other security as provided by the Act or EMSA to assure that the respondent corrects the correction of such violation within the time that the Board prescribes prescribed; and
  - 4) Enforce any remedy provision of the EMSA; and
  - 5)4) Order Such other relief as order that may be appropriate.
- e) The Clerk will shall publish the order and opinion with the vote of each Board Member recorded and will shall notify the parties required to be notified of the hearing from which the order arose of the such order and opinion.

(Source: Added at 23 Ill. Reg. \_\_\_\_\_, effective \_\_\_\_\_)

#### Section 106.958 Burden of Proof

The Agency ~~has shall~~ have the burden to prove of proving, by a preponderance of the evidence, that there has been deficient performance under the EMSA, as set forth in Section 106.954(a) of this Subpart.

(Source: Added at 23 Ill. Reg. \_\_\_\_\_, effective \_\_\_\_\_)

#### Section 106.960 Motions, ~~and~~ Responses

- a) All motions before preliminary to a hearing must shall be presented to the hearing officer Hearing Officer at least 10 days before prior to the date of the hearing.
- b) The complainant's motion Motions by complainant to voluntarily dismiss an action as to any or all claims must shall be directed to the Board and may be made orally upon the hearing record, or may be made in writing at any time before the Board issues its decision prior to issuance of the Board's decision.
- c) All motions must be served on all parties, including the Agency and its representative and the hearing officer Hearing Officer ~~designated by the Board~~, with proof of service.
- d) Unless made orally on the record during a hearing or unless the hearing officer Hearing Officer directs otherwise, a motion must shall be in writing, must shall

state the reasons for and grounds upon which the motion is made, and may be accompanied by any affidavits or other evidence relied on and, when appropriate, by a proposed order.

- e) Within 7 days after ~~service of~~ a written motion is served, or another such other period that as the Board or hearing officer ~~Hearing Officer~~ may prescribe, a party may file a response to in support of or in opposition to the motion, accompanied by affidavits or other evidence. If no response is filed, the parties will shall be deemed to have waived objection to the granting of the motion, but the such waiver of objection does not bind the Board in its determination. The moving party does shall not have the right to reply, except as permitted by the hearing officer ~~Hearing Officer~~ or the Board permits.
- f) No oral argument will be heard on a motion before the Board unless the Board ~~so~~ directs otherwise. A written brief may be filed with a motion or an answer to a motion, ~~stating the arguments~~.
- g) The hearing officer ~~Hearing Officer~~ may rule upon all motions, except that the hearing officer has no authority to dismiss, or rule upon a motion to dismiss or decide a proceeding on the merits, or for failure to state a claim, or for want of jurisdiction, or to strike any claim or defense for insufficiency or want of proof.
- h) No interlocutory appeal of a motion may be taken to the Board from a ruling of the hearing officer ~~Hearing Officer~~.
- i) After the hearing, the Board may review the hearing officer's rulings. The Board Rulings of the Hearing Officer may be reviewed by the Board after conclusion of the hearing, but will be set aside the hearing officer's ruling only to avoid material prejudice to the rights of a party. The hearing officer ~~Hearing Officer~~, if a member of the Board, may vote upon motions to review his or her rulings as hearing officer ~~Hearing Officer~~.
- j) Unless the Board orders or this Subpart provides otherwise provided herein or ordered by the Board, the filing of a motion will shall not stay the proceeding or extend the time to perform for the performance of any act.

(Source: Added at 23 Ill. Reg. \_\_\_\_\_, effective \_\_\_\_\_)

#### Section 106.962 Intervention

- a) Upon timely written application and subject to the need to conduct necessity for conducting an orderly and expeditious hearing, the hearing officer ~~Hearing Officer~~ will shall permit any person who a person to intervene in an involuntary termination proceeding under this Subpart if the person submitted written comments on the respondent's EMSA or participated in the public hearing on

the respondent's sponsor's EMSA by signing an attendance sheet or signature card at hearing under the procedures set forth in as provided in 35 Ill. Adm. Code 187.404, or is named or listed in the respondent's EMSA as a stakeholder, and if the Board's final order may adversely affect him or her is so situated that he or she may be adversely affected by a final order of the Board, to intervene in an involuntary termination proceeding.

- b) The applicant must file ten Ten (10) copies of a petition to intervene for intervention shall be filed with the Board and the applicant shall also serve copies on each party not later than 48 hours before prior to the date set for hearing. The hearing officer Hearing Officer may permit a person to intervene intervention at any time before the beginning of the hearing when that person shows good cause for the delay is shown.
- c) An intervenor has shall have all the rights of an original party, except that the intervenor is shall be bound by orders theretofore issued before the hearing officer permitted the intervenor to intervene and the intervenor cannot shall not raise issues that which actually were raised or were required to be raised at an earlier stage of the proceeding.

(Source: Added at 23 Ill. Reg. \_\_\_\_\_, effective \_\_\_\_\_)

#### Section 106.964 Continuances

The hearing officer will grant a A motion to continue an for continuance for any involuntary termination proceeding under this Subpart when shall be granted by the Hearing Officer whenever justice may requires. All motions to continue for continuance must be supported by an affidavit or written motion before the hearing officer Hearing Officer by the person or persons with having knowledge of the facts that support supporting the motion. However, if the Board determines, in its discretion, that any involuntary termination proceeding under this Subpart is not proceeding expeditiously to a conclusion, the Board may shall order such actions that as it deems appropriate to expedite the proceeding reach an expeditious conclusion.

(Source: Added at 23 Ill. Reg. \_\_\_\_\_, effective \_\_\_\_\_)

#### Section 106.966 Discovery, Admissions

- a) Pre trial discovery Discovery, except requests to produce for production of documents, admit facts admissions of fact and state the production of the identity and location of persons with having knowledge of facts, as set forth in subsection (b) of this Section below, is shall not be permitted unless the hearing officer except as agreed to by all parties and directed pursuant to a Hearing Officer orders otherwise.
- b) Regarding any matter not privileged, the hearing officer may Hearing Officer

~~shall order a party to produce requests for production of documents and to state the production of the identity and location of persons with having knowledge of facts upon the written request of any party when parties cannot agree on the legitimate scope of the such requests. It is not a ground for objection that the documents will be inadmissible at hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence or is relevant to the subject matter involved in the pending action.~~

- c) The hearing officer ~~Hearing Officer shall~~ order a party:
- 1) To state ~~The production of~~ the identity and location of persons with having knowledge of relevant facts.
  - 2) To produce ~~The production of~~ evidence that a party controls or possesses so that it may be inspected, copied or duplicated under the control or possession of any party for the purposes of inspection and where necessary for purposes of copying or duplication. ~~The order may grant This shall include the right to reasonably inspect of reasonable inspection of the pilot project Pilot Project.~~
- d) The hearing officer ~~Hearing Officer~~ may at any time on his or her own initiative, or on motion of any party or witness, make a protective order as justice requires.~~;~~ The protective order may deny, limit, condition or regulate denying, limiting, conditioning or regulating discovery to prevent unreasonable delay, expense, harassment, or oppression, or to protect materials from disclosure by the party who obtains the obtaining such materials consistent with ~~the provisions of Sections 7 and 7.1 of the Act.~~
- e) All objections to rulings of the hearing officer ~~must Hearing Officer shall~~ be made in the record.
- f) Section 35 Ill. Adm. Code 106.960(d), (e), (f), (g), (h), (i) and (j) of this Subpart applies shall apply regarding procedures to rule for ruling on objections.
- g) Failure to comply with any ruling will shall subject the person to sanctions under 35 Ill. Adm. Code 101, Subpart J Part 107.
- h) Request to Admit Facts for Admission of Fact. A party may serve on any other party, no sooner than 15 days after the Agency files the statement of deficiency filing of the complaint, a written request that for the admission by the latter admit of the truth of any specified relevant fact set forth in the request.
- i) Request to Admit to the for Admission of Genuineness of Document. A party may serve on any other party, no sooner than 15 days after the Agency files the

~~statement of deficiency filing of the complaint~~, a written request to admit to ~~for admission~~ of the genuineness of any relevant documents described in the request. Copies of the document ~~must shall~~ be served with the request unless copies have already been furnished.

- j) Admission in the Absence of Denial. Each of the matters of fact and the genuineness of each document of which admission is requested is admitted unless, within 15 days after service under subsections (h) or (i) of this Section thereof, the party to whom the request is directed serves upon the party requesting the admission either a sworn statement that denies denying specifically the matters on of which the admission is requested or that sets forth setting forth in detail the reasons why the party he cannot truthfully admit or deny those matters or written objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper in whole or in part. If a party objects in writing written objections to a part of the request ~~are made~~, the remainder of the request ~~must shall~~ be answered within the period designated in the request. A denial ~~must shall~~ fairly meet the substance of the requested admission. If good faith requires that a party deny only a part, or requires qualification, of a matter of which an admission is requested, the party must he shall specify so much of it as is true and deny only the remainder. The hearing officer will hear any Any objection to a request or to an answer ~~shall be heard by the Hearing Officer~~ upon prompt notice and motion of the party making the request.
- k) Effect of Admission. Any admission made ~~by a party pursuant to request~~ under this ~~Section section~~ is for the purpose of the pending action only. It does not constitute an admission by the party him for any other purpose and may not be used against the party him in any other proceeding.
- l) Expenses of Refusal to Admit. If a party, after being served with a request to admit the genuineness of any documents or the truth of any matters of fact, serves a sworn denial in response to the request thereof, and if the party requesting the admissions later thereafter proves the genuineness of the document or the truth of the matter of fact, the latter party he may apply to the Board for sanctions an order under 35 Ill. Adm. Code 101, Subpart J Part 107.

(Source: Added at 23 Ill. Reg. \_\_\_\_\_, effective \_\_\_\_\_)

#### Section 106.968 Subpoenas

- a) Upon any party's timely motion to the Board ~~by any party~~, or on motion of the ~~hearing officer Hearing Officer~~ or the Board, the ~~hearing officer Hearing Officer~~ or the Board ~~may shall~~ issue a subpoena to attend for attendance at a hearing. The subpoena may include a command to produce evidence reasonably necessary to resolve resolution of the matter under consideration, subject to this

~~Subpart's~~ ~~the~~ limitations on discovery ~~prescribed by this Subpart~~. A copy of the subpoena ~~must shall~~ be served upon the Clerk ~~for Board files~~. If the witness, other than a ~~respondent sponsor or owner or operator of a pilot project~~, is a non-resident of the ~~State state~~, the order may provide ~~such~~ terms and conditions ~~regarding in connection with his or her~~ appearance at the hearing ~~that as are~~ just, including payment of his ~~or her~~ reasonable expenses.

- b) Every subpoena ~~must shall~~ state the title of the action and ~~shall~~ command each person to whom it is directed to attend and give testimony at the time and place ~~therein~~ specified.
- c) The ~~hearing officer~~ ~~Hearing Officer~~ or the Board, upon motion made promptly and in any event at or before the time specified ~~for compliance with in~~ the subpoena ~~for compliance therewith~~, may quash or modify the subpoena if it is unreasonable and oppressive.
- d) Failure of any witness to comply with a Board subpoena ~~will shall~~ subject the witness to sanctions under 35 Ill. Adm. Code 101, Subpart J Part 107.

(Source: Added at 23 Ill. Reg. \_\_\_\_\_, effective \_\_\_\_\_)

#### Section 106.970 Settlement Procedure

- a) All parties to any case in which a settlement or compromise is proposed ~~must shall~~ file with the Clerk ~~before Hearing Officer~~ at the time of the scheduled hearing a written statement, signed by the parties or their authorized representatives, ~~that outlines~~ ~~outlining~~ the nature of, the reasons for, and the purpose to be accomplished by the settlement. ~~The~~ ~~Such~~ statement ~~must shall~~ contain:
  - 1) A full stipulation of all material facts ~~that pertain~~ ~~pertaining~~ to the nature, extent and causes of the alleged violations;
  - 2) The nature of the relevant parties' operations and control equipment;
  - 3) Any explanation for past failures to comply and an assessment of the impact on the public from ~~the failure to comply~~ ~~such noncompliance~~;
  - 4) Details ~~about as to~~ future plans for compliance, including a description of additional control measures and the dates ~~on which they will be implemented~~ ~~for their implementation~~; and
  - 5) The proposed performance assurance payment, if any.
- b) ~~No hearing is required by the Board to dismiss a complaint pursuant to an~~ If an

agreed settlement is filed under this Section, the Board may dismiss the case without holding a hearing.

(Source: Added at 23 Ill. Reg. \_\_\_\_\_, effective \_\_\_\_\_)

#### Section 106.972 Authority of Hearing Officer, Board Members and Board Assistants

- a) The hearing officer ~~Hearing Officer shall have~~ the duty to conduct a fair hearing, to take all necessary action to avoid delay, to maintain order, and to ensure development of a clear and complete record. The hearing officer has ~~He or she shall have~~ all powers necessary to these ends including, ~~(but not limited to,)~~ the authority to:
- 1) Issue discovery orders;
  - 2) Rule upon objections to discovery orders;
  - 3) Make ~~such~~ protective orders as justice requires, which may deny, limit condition or regulate ~~denying, limiting, conditioning or regulating~~ discovery to prevent unreasonable delay, expense, harassment, or oppression, or to protect materials from disclosure by the party who obtains the ~~obtaining such~~ materials;
  - 4) Administer oaths and affirmations;
  - 5) Rule upon offers of proof, ~~and~~ receive evidence and rule upon objections to introducing the introduction of ~~the introduction of~~ evidence, subject to Section 106.974(b) of this Subpart;
  - 6) Regulate the course of the hearings and the conduct of the parties and their counsel;
  - 7) Examine witnesses solely to clarify ~~for the sole purpose of clarifying~~ the record of established by the parties ~~at the hearing~~. When any party is not represented by counsel, the hearing officer ~~Hearing Officer~~ may examine and cross examine any witness to insure a clear and complete record. However, the hearing officer ~~Hearing Officer~~ may not exclude exhibits or other testimony because as a result of the ~~his~~ examination unless all parties ~~so~~ agree; and
  - 8) Except as otherwise provided, consider and rule as justice may require upon motions appropriate to an adjudicative proceeding.
- b) Any Board Member or assistant to a ~~the~~ Board Member present at the hearing may advise the hearing officer ~~Hearing Officer~~ and may interrogate witnesses

but ~~does shall~~ not have the authority to rule on objections or motions or to overrule the hearing officer ~~Hearing Officer~~ during the hearing.

(Source: Added at 23 Ill. Reg. \_\_\_\_\_, effective \_\_\_\_\_)

#### Section 106.974 Order and Conduct of Hearing

- a) The following will shall be the order of all involuntary termination hearings under this Subaprt, unless modified by ~~subject to modification by~~ the hearing officer ~~Hearing Officer~~ for good cause:
- 1) Present, argue and dispose ~~Presentation, argument, and disposition of preliminary motions on preliminary to a hearing on the merits of the matters that raised in the statement of deficiency raises complaint;~~
  - 2) Present ~~Presentation of~~ opening statements;
  - 3) Complainant's case in chief;
  - 4) Respondent's case in chief;
  - 5) Complainant's case in rebuttal;
  - 6) Statements from interested citizens, as ~~authorized by the hearing officer~~ authorizes ~~Hearing Officer~~;
  - 7) Complainant's opening argument, which may include legal argument;
  - 8) Respondent's closing argument, which may include legal argument;
  - 9) Complainant's closing argument, which may include legal argument;
  - 10) Present and argue ~~Presentation and argument of~~ all motions before submitting prior to submission of ~~submitting prior to submission of~~ the transcript to the Board; and
  - 11) A schedule to submit ~~for submission of~~ briefs to the Board.
- b) All hearings under this Subpart will ~~Part shall~~ be public, and any person not a party and not otherwise a witness for a party may submit written statements relevant to the subject matter of the hearing. Any party may cross-examine any person who submits ~~submitting such a statement may be subject to cross-examination by any party.~~ If the such person is not available to be cross-examined for cross-examination upon timely request, the written statement may be stricken from the record. The hearing officer will ~~Hearing Officer shall~~ permit any person to offer reasonable oral testimony whether or not a party to



the proceedings.

- c) All witnesses will ~~shall~~ be sworn.
- d) ~~At Upon~~ the conclusion of the hearing, the hearing officer will ~~Hearing Officer shall~~ make a statement about ~~as to~~ the credibility of witnesses. This statement will ~~shall~~ be based upon the hearing officer's ~~his~~ legal judgment and experience and will ~~shall~~ indicate whether he or she finds credibility to be at issue in the case and if so, the reasons why. This statement will ~~shall~~ become a part of the official record and will ~~shall~~ be transmitted by the hearing officer ~~Hearing Officer~~ to each of the parties ~~in the case~~. No other statement will ~~shall~~ be made or be appropriate unless the Board orders ~~otherwise ordered by the Board~~.

(Source: Added at 23 Ill. Reg. \_\_\_\_\_, effective \_\_\_\_\_)

#### Section 106.976 Evidentiary Matters

The provisions of 35 Ill. Adm. Code ~~Sections~~ 103.204 through 103.210 regarding admissible evidence, written narrative testimony, official notice, viewing of premises, admitting ~~admission of~~ business records, examining adverse parties or agents and ~~examination of adverse party or agent~~, hostile witnesses and compelling them to appear ~~appearance thereof~~ at hearing, and amendment and variance of pleadings and proof, will ~~shall~~ apply to proceedings under this Subpart.

(Source: Added at 23 Ill. Reg. \_\_\_\_\_, effective \_\_\_\_\_)

#### Section 106.978 Post-Hearing Procedures

The provisions of 35 Ill. Adm. Code ~~Sections~~ 103.220 through 103.223 regarding default, transcripts, the record, briefs and oral arguments will ~~shall~~ apply to proceedings under this Subpart.

(Source: Added at 23 Ill. Reg. \_\_\_\_\_, effective \_\_\_\_\_)

#### Section 106.980 Motion After ~~Subsequent to~~ Entry of Final Order

Within 35 ~~15~~ days after the Board adopts ~~adoption of~~ a final order, any party may file a motion to rehear, modify or vacate ~~for rehearing or modification of the order or to vacate the order~~ or for other relief. Response to the said motion must ~~shall~~ be filed within 14 ~~10~~ days after the motion is filed ~~from the filing thereof~~. A motion filed within 35 ~~15~~ days stays enforcement of the final order.

(Source: Added at 23 Ill. Reg. \_\_\_\_\_, effective \_\_\_\_\_)

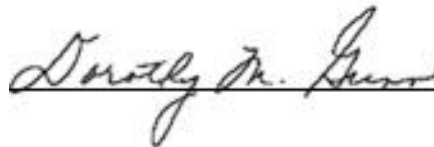
#### Section 106.982 Relief from Section 106.956 Final Orders

- a) ~~The Board may at any time correct Clerical mistakes in orders or other parts of the record and errors in orders or other parts of the record that arise therein arising from oversight or omission or clerical mistakes. may be corrected by the Board at any time~~ The Board may do so of its own initiative or on the motion of any party and after ~~such~~ notice, if any, as the Board orders. During the pendency of an appeal, ~~the Board may correct the such mistakes may be so corrected before the appeal is docketed in the appellate court., and thereafter while~~ While the appeal is pending, the Board may correct the mistakes may be so corrected with leave of the appellate court.
- b) On motion and upon ~~such~~ terms that as are just, the Board may relieve a party or a party's ~~his~~ legal representative from a final order, for the following:
- 1) Newly discovered evidence that ~~which~~ by due diligence could not have been discovered in time under Section 106.956 of this Subpart; or
  - 2) Fraud (whether previously ~~heretofore~~-denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; or
  - 3) Void order.
- c) A motion under this ~~Section~~ section does not affect the finality of a Board order or suspend the operation of a Board order. The motion must be filed in the same proceeding in which the Board entered the order ~~was entered~~ but the motion is not a continuation of the proceeding. The motion must be supported by affidavit or other appropriate showing as to matters not of record. All parties ~~must to the motion shall~~ be notified under ~~as provided by~~ Section 106.950(b) of this Subpart.
- d) This motion must ~~shall~~ be filed with the Board within 60 ~~30~~ days after entry of the order.

(Source: Added at 23 Ill. Reg. \_\_\_\_\_, effective \_\_\_\_\_)

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 17th day of December 1998 by a vote of 6-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", written in black ink. The signature is positioned above a horizontal line.

Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board