

ILLINOIS POLLUTION CONTROL BOARD
August 20, 1998

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

ORDER OF THE BOARD (by K.M. Hennessey):

On August 17, 1998, the Illinois Environmental Protection Agency (Agency) filed a proposal to amend 35 Ill. Adm. Code 106, Involuntary Termination Procedures for Environmental Management System Agreements (EMSAs), 35 Ill. Adm. Code 106, Subpart K. Today, the Board adopts the proposal for first notice.

BACKGROUND

In 1996, the General Assembly amended the Act to create a pilot program under which the Agency could enter into EMSAs with persons regulated under the Act. See 415 ILCS 5/52.3 (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 Agency states that this program was in part developed as a result of 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 was intended to allow regulated entities to develop alternative strategies to replace certain regulatory requirements if they produced greater environmental benefits, reduced administrative burdens, and enhanced public participation. See 415 ILCS 5/52.3-1(a)(6) (1996). Section 52.3 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 ICLS 5/52.3-1(a)(6) (1996). The Agency notes that the Federal XL Program has not met expectations, but further notes that the EMSA pilot program is not limited to only those projects accepted into the Federal XL Program. Statement of Reasons at 3, citing 415 ILCS 5/52.3-1(a)(5) and 52.3-1(b) (1996).

Section 52.3 directed the Agency to develop Agency rules establishing (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 review by the Agency of an EMSA, (4) the procedures for public participation in, including notice and comment on, EMSAs and stakeholder involvement in design and implementation of specific projects, (5) the procedures for voluntary termination of an EMSA, and (6) the type of performance guarantee to be provided by an applicant for participation in this program. 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 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 and is set forth in the order that follows this opinion. 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 specific time frames” for various events within the process. Statement of Reasons at 5.

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 sends the Agency’s proposal to first notice today, without commenting on the merits of the proposal. The Board directs the hearing officer assigned to this matter to issue an order setting forth a schedule for hearings and public comment periods that is consistent with this deadline.

Along with the proposal, the Agency filed a Motion for Waiver of Requirements (cited as “Mot. at ___”). First, the Agency moved that the Board waive the requirement that it

provide the Attorney General's Office and the Department of Natural Resources with a copy of the proposed amendments. Mot. at 1. The Agency asserts that it has discussed the matter with both offices, who agreed that the Agency need not supply their offices with a copy of the entire proposal. Mot. at 1-2. Second, the Agency moved that the Board waive any requirement to file with the Board a copy of all documents that it relied upon in the development of the proposal or upon which it intends to rely at hearing. Mot. at 2. The Agency states that these documents include the Act and 35 Ill. Adm. Code, Subtitle A: General Provisions, Chapter I: Pollution Control Board. Mot. at 2. The Agency states that these documents are readily accessible to the Board. Mot. at 2. The Board grants the motion.

ORDER

The Board directs the Clerk to cause publication of the proposed amendments in the *Illinois Register* for first notice.

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

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 PROCEDURES FOR EMSAs

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

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 at 22 Ill. Reg. _____, effective _____.

SUBPART K: INVOLUNTARY TERMINATION PROCEDURES FOR EMSAsSection 106.940 Purpose, Applicability

- a) The purpose of this Subpart is to set forth the criteria and procedures for involuntary termination of an EMSA, as defined in Section 106.942 of this 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.
- c) 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.

(Source: Added at 22 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 as provided in the Act.

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

“Agency” means the *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 (EMSA)” means the agreement between the Agency and a sponsor that describes the innovative environmental measures to be implemented, schedules for attaining goals, and mechanisms for accountability.

“Innovative 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” means an innovative environmental project 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 22 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, 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 22 Ill. Reg. _____, effective _____.)

Section 106.946 Who May Initiate, Parties

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

(Source: Added at 22 Ill. Reg. _____, effective _____.)

Section 106.948 Notice, Statement of Deficiency, and Answer

- a) A proceeding to involuntarily terminate an EMSA shall be commenced by the service of a notice and a statement of deficiency upon the respondent and the filing of 10 copies of the notice 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.
- c) The statement of deficiency shall contain:
 - 1) The stated basis for respondent's alleged deficient performance as provided in Section 106.954 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 constitute violations of the provisions of the Act or regulations applicable to the Pilot Project and not 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 constitute violations of the EMSA; and
 - 4) With respect to subsections (c)(1) through (c)(3) of this Section, the complaint shall contain sufficient detail to advise respondent of the extent and nature of the alleged violations to reasonably allow preparation of a defense.
- d) Respondent must file an answer within 15 days of receipt of the statement of deficiency. All material allegations of the complaint shall be taken as admitted if not specifically denied by the answer, or if no answer is filed. Any facts constituting an affirmative defense which would be likely to take the

complainant by surprise must be plainly set forth in the answer prior to hearing.

(Source: Added at 22 Ill. Reg. _____, effective _____.)

Section 106.950 Service

- a) A copy of the notice and statement of deficiency shall either be served personally on the respondent or his authorized agent, or shall be served by registered or certified mail with return receipt signed by the respondent or his authorized agent. Proof shall be made by affidavit of the person making personal service, or by properly executed registered or certified mail receipt. Proof of service of the notice and complaint shall be filed with the Clerk immediately upon completion of service.
- b) After notice and statement of deficiency, all motions and all other notices shall be served personally, by First Class United States mail, sufficient postage affixed thereto, or by overnight delivery by a nationally recognized courier service, and 10 copies of 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, sufficient postage affixed thereto, or the next business day upon deposit with a nationally recognized courier service for overnight delivery.

(Source: Added at 22 Ill. Reg. _____, effective _____.)

Section 106.952 Notice of Hearing

- a) The Clerk 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 shall be held not later than 60 days after filing of the notice and statement of deficiency.
- b) The Chairman shall designate a Hearing Officer and the Clerk shall notify the parties of such designation. The Hearing Officer may be a Member of the Board if otherwise qualified.
- c) The Hearing Officer, after appropriate consultation with the parties, shall set a time and place for hearing to be held within 60 days after the filing of the statement of deficiency. The Board shall not extend the time for hearing unless all parties agree to the extension or there are extreme and unanticipated or uncontrollable circumstances warranting the delay of hearing. In any such event, the Board shall grant no delay of hearing in excess of 30 additional days.

- d) The hearing shall be held in the county in which the Pilot Project is located, or in such other county as the Hearing Officer shall for stated cause designate.
- e) The Hearing Officer shall give notice of the hearing, at least 20 days before the hearing, to the parties in accordance with Section 106.950(b) of this Part.
- 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.
- g) Failure to comply with the provisions of this section may not be used as a defense to an involuntary termination action, but 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 22 Ill. Reg. _____, effective _____.)

Section 106.954 Deficient Performance

For purposes of this Subpart, the performance of a sponsor is deficient if the Agency asserts and the Board finds that any of the following conditions exist:

- a) The factual basis for entering into the EMSA was misrepresented by the sponsor.
- b) The sponsor has failed to provide access to the Pilot Project for the Agency to monitor compliance with an EMSA.
- c) The sponsor has falsified any monitoring data, recordkeeping information or reports.
- d) 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.
- e) The sponsor or the owner or operator of the Pilot Project has failed to comply

with one or more requirements of any state environmental law or regulation applicable to the Pilot Project and not addressed by the EMSA, and the Agency has mailed a notice of violation to the sponsor or the owner or operator of the Pilot Project pursuant to Section 31(a) or (b) of the Act.

- f) The 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 therein.

(Source: Added at 22 Ill. Reg. _____, effective _____.)

Section 106.956 Board Decision

- a) The Board shall prepare a written opinion and order for all final determinations 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 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.
- c) If an answer has been timely filed by a sponsor, the Board 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, during which the sponsor may rectify the deficient performance; or
 - 3) Rejects termination of the EMSA.
- d) The final Board opinion and order may include any or all of the following:
- 1) A direction to cease and desist from violations of the Act, of the Board's rules and regulations, or the provisions of the EMSA;
 - 2) The imposition of performance assurance compensation in such amounts as appropriate in each case;
 - 3) If the Board allows respondent an opportunity to come into compliance, the posting of sufficient performance bond or other security as provided by the Act or EMSA to assure the correction of such violation within the time prescribed; and

- 4) Such other order that may be appropriate.
- e) The Clerk shall publish the order and opinion with the vote of each Board Member recorded and shall notify the parties required to be notified of the hearing from which the order arose of such order and opinion.

(Source: Added at 22 Ill. Reg. _____, effective _____.)

Section 106.958 Burden of Proof

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

(Source: Added at 22 Ill. Reg. _____, effective _____.)

Section 106.960 Motions and Responses

- a) All motions preliminary to a hearing shall be presented to the Hearing Officer at least 10 days prior to the date of the hearing.
- b) Motions by complainant to voluntarily dismiss an action as to any or all claims shall be directed to the Board and may be made orally upon the hearing record, or may be made in writing at any time 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 designated by the Board, with proof of service.
- d) Unless made orally on the record during a hearing or unless the Hearing Officer directs otherwise, a motion shall be in writing, 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, or such other period as the Board or Hearing Officer may prescribe, a party may file a response in support of or in opposition to the motion, accompanied by affidavits or other evidence. If no response is filed, the parties shall be deemed to have waived objection to the granting of the motion, but such waiver of objection does not bind the Board in its determination. The moving party shall not have the right to reply, except as permitted by the Hearing Officer or the Board.
- f) No oral argument will be heard on a motion before the Board unless the Board

so directs. A written brief may be filed with a motion or an answer to a motion, stating the arguments.

- g) The Hearing Officer may rule upon all motions.
- h) No interlocutory appeal of a motion may be taken to the Board from a ruling of the Hearing Officer.
- i) Rulings of the Hearing Officer may be reviewed by the Board after conclusion of the hearing, but will be set aside only to avoid material prejudice to the rights of a party. The Hearing Officer, if a member of the Board, may vote upon motions to review his or her rulings as Hearing Officer.
- j) Unless otherwise provided herein or ordered by the Board, the filing of a motion shall not stay the proceeding or extend the time for the performance of any act.

(Source: Added at 22 Ill. Reg. _____, effective _____.)

Section 106.962 Intervention

- a) Upon timely written application and subject to the necessity for conducting an orderly and expeditious hearing, the Hearing Officer shall permit any person who participated in the public hearing on the sponsor's EMSA, as provided in 35 Ill. Adm. Code 187.404, and 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) Ten (10) copies of a petition for intervention shall be filed with the Board and the applicant shall also serve copies on each party not later than 48 hours prior to the date set for hearing. The Hearing Officer may permit intervention at any time before the beginning of the hearing when good cause for delay is shown.
- c) An intervenor shall have all the rights of an original party, except that the intervenor shall be bound by orders theretofore issued and shall not raise issues which actually were raised or were required to be raised at an earlier stage of the proceeding.

(Source: Added at 22 Ill. Reg. _____, effective _____.)

Section 106.964 Continuances

A motion for continuance for any involuntary termination proceeding shall be granted by the Hearing Officer whenever justice may require. All motions for continuance must be supported by an affidavit or written motion before the Hearing Officer by the person or persons having

knowledge of the facts supporting the motion. However, if the Board determines, in its discretion, that any involuntary termination proceeding is not proceeding expeditiously to a conclusion, the Board shall order such actions as it deems appropriate to reach an expeditious conclusion.

(Source: Added at 22 Ill. Reg. _____, effective _____.)

Section 106.966 Discovery, Admissions

- a) Pre-trial discovery, except requests for production of documents, admissions of fact and the production of the identity and location of persons having knowledge of facts, as set forth in subsection (b) below, shall not be permitted except as agreed to by all parties and directed pursuant to a Hearing Officer order.
- b) Regarding any matter not privileged, the Hearing Officer shall order requests for production of documents and the production of the identity and location of persons having knowledge of facts upon the written request of any party when parties cannot agree on the legitimate scope of 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 shall order:
 - 1) The production of the identity and location of persons having knowledge of relevant facts.
 - 2) The production of evidence under the control or possession of any party for the purposes of inspection and where necessary for purposes of copying or duplication. This shall include the right of reasonable inspection of the Pilot Project.
- d) The 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, denying, limiting, conditioning or regulating discovery to prevent unreasonable delay, expense, harassment, or oppression, or to protect materials from disclosure by the party 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 shall be made in the record.
- f) 35 Ill. Adm. Code 106.960(d), (e), (f), (g), (h), (i) and (j) shall apply regarding procedures for ruling on objections.

- g) Failure to comply with any ruling shall subject the person to sanctions under Part 107.
- h) Request for Admission of Fact. A party may serve on any other party, no sooner than 15 days after filing of the complaint, a written request for the admission by the latter of the truth of any specified relevant fact set forth in the request.
- i) Request for Admission of Genuineness of Document. A party may serve on any other party, no sooner than 15 days after filing of the complaint, a written request for admission of the genuineness of any relevant documents described in the request. Copies of the document 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 thereof, the party to whom the request is directed serves upon the party requesting the admission either a sworn statement denying specifically the matters of which admission is requested or setting forth in detail the reasons why 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 written objections to a part of the request are made, the remainder of the request shall be answered within the period designated in the request. A denial 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, he shall specify so much of it as is true and deny only the remainder. 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 is for the purpose of the pending action only. It does not constitute an admission by him for any other purpose and may not be used against 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 thereof, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter of fact, he may apply to the Board for an order under Part 107.

(Source: Added at 22 Ill. Reg. _____, effective _____.)

Section 106.968 Subpoenas

- a) Upon timely motion to the Board by any party, or on motion of the Hearing Officer or the Board, the Hearing Officer or the Board shall issue a subpoena for attendance at a hearing. The subpoena may include a command to produce evidence reasonably necessary to resolution of the matter under consideration, subject to the limitations on discovery prescribed by this Subpart. A copy of the subpoena shall be served upon the Clerk for Board files. If the witness, other than a sponsor, is a non-resident of the state, the order may provide such terms and conditions in connection with his appearance at the hearing as are just, including payment of his reasonable expenses.
- b) Every subpoena 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 or the Board, upon motion made promptly and in any event at or before the time specified 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 shall subject the witness to sanctions under Part 107.

(Source: Added at 22 Ill. Reg. _____, effective _____.)

Section 106.970 Settlement Procedure

- a) All parties to any case in which a settlement or compromise is proposed shall file with the Hearing Officer at the time of the scheduled hearing a written statement, signed by the parties or their authorized representatives, outlining the nature of, the reasons for, and the purpose to be accomplished by the settlement. Such statement shall contain:
 - 1) A full stipulation of all material facts 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 such noncompliance;
 - 4) Details as to future plans for compliance, including a description of additional control measures and the dates 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 agreed settlement under this Section.

(Source: Added at 22 Ill. Reg. _____, effective _____.)

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

- a) The 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. 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, denying, limiting, conditioning or regulating discovery to prevent unreasonable delay, expense, harassment, or oppression, or to protect materials from disclosure by the party obtaining such materials;
 - 4) Administer oaths and affirmations;
 - 5) Rule upon offers of proof and receive evidence and rule upon objections to 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 for the sole purpose of clarifying the record established by the parties at the hearing. When any party is not represented by counsel, the Hearing Officer may examine and cross examine any witness to insure a clear and complete record. However, the Hearing Officer may not exclude exhibits or other testimony as a result of 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 the Board Member present at the hearing may advise the Hearing Officer and may interrogate witnesses but shall not have the authority to rule on objections or motions or to overrule the Hearing Officer during the hearing.

(Source: Added at 22 Ill. Reg. _____, effective _____.)

Section 106.974 Order and Conduct of Hearing

- a) The following shall be the order of all involuntary termination hearings, subject to modification by the Hearing Officer for good cause:
- 1) Presentation, argument, and disposition of motions preliminary to a hearing on the merits of the matters raised in the complaint;
 - 2) 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;
 - 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) Presentation and argument of all motions prior to submission of the transcript to the Board; and
 - 11) A schedule for submission of briefs to the Board.
- b) All hearings under this 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 person submitting such a statement may be subject to cross-examination by any party. If such person is not available for cross-examination upon timely request, the written statement may be stricken from the record. The Hearing Officer shall permit any person to offer reasonable oral testimony whether or not a party to the proceedings.
- c) All witnesses shall be sworn.
- d) Upon the conclusion of the hearing, the Hearing Officer shall make a statement as to the credibility of witnesses. This statement shall be based upon his legal judgment and experience and shall indicate whether he finds credibility to be at

issue in the case and if so, the reasons why. This statement shall become a part of the official record and shall be transmitted by the Hearing Officer to each of the parties in the case. No other statement shall be made or be appropriate unless otherwise ordered by the Board.

(Source: Added at 22 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, admission of business records, examination of adverse party or agent, hostile witnesses and compelling appearance thereof at hearing, and amendment and variance of pleadings and proof, shall apply to proceedings under this Subpart.

(Source: Added at 22 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 shall apply to proceedings under this Subpart.

(Source: Added at 22 Ill. Reg. _____, effective _____.)

Section 106.980 Motion Subsequent to Entry of Final Order

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

(Source: Added at 22 Ill. Reg. _____, effective _____.)

Section 106.982 Relief from Section 106.956 Final Orders

- a) Clerical mistakes in orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the Board at any time 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, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.
- b) On motion and upon such terms as are just, the Board may relieve a party or his

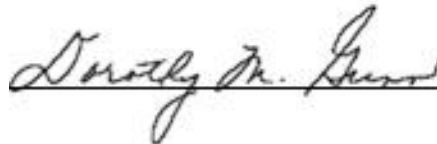
legal representative from a final order, for the following:

- 1) Newly discovered evidence which by due diligence could not have been discovered in time under Section 106.956; or
 - 2) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; or
 - 3) Void order.
- c) A motion under this 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 order was entered but 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 to the motion shall be notified as provided by Section 106.950(b) of this Subpart.
- d) This motion shall be filed with the Board within 30 days after entry of the order.

(Source: Added at 22 Ill. Reg. _____, effective

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 20th day of August 1998 by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board