

ILLINOIS POLLUTION CONTROL BOARD  
September 8, 1988

PETER AREDOVICH AND	)	
PATRICIA A. LISTERMANN,	)	
	)	
Complainants,	)	
	)	
v.	)	PCB 88-127
	)	
KOPPERS COMPANY, INC.,	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by J. Anderson):

On September 2, 1988, the Respondent, Koppers Company, Inc. (Respondent) filed a motion to appear, a motion to file a motion to dismiss instant, and a motion to dismiss. The first two motions are granted.

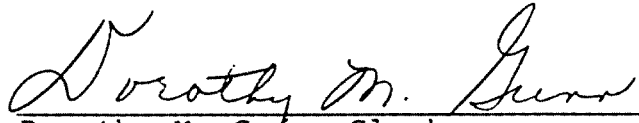
The Board reserves ruling on the motion to dismiss while awaiting a written reply from the Complainants. The Clerk is directed to set this matter for hearing.

For informational purposes only, the Board is also transmitting with this Order to both the Complainant and Respondent prior enforcement decisions involving violations of Section 9(a) of the Environmental Protection Act, as well as copies of its procedural rules. The Board emphasizes that it does not interact with the parties in enforcement proceedings except for strictly procedural matters; its role is to adjudicate the dispute and reach a final determination based solely on the testimony and pleadings presented in the public record.

Enclosed are the following: 1) Roger Diamond v. The Center for the Rehabilitation and Training of the Disabled. PCB 84-64. Opinion and Order, February 4, 1988. (air enforcement); 2) Citizens of Burbank v. Overnite Trucking. PCB 84-124. Interim Opinion and Order, August 1, 1985; Opinion and Order, April 21, 1988. (noise and air enforcement) and 3) General Provisions (Procedural Rules) of the Pollution Control Board, September 1, 1982.

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 8<sup>th</sup> day of September, 1988, by a vote of 7-0.

  
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Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board

ILLINOIS POLLUTION CONTROL BOARD  
February 4, 1988

RODGER DIAMOND,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 84-64
	)	
THE CENTER FOR THE	)	
REHABILITATION AND TRAINING	)	
OF THE DISABLED,	)	
	)	
Respondent.	)	

MR. RODGER DIAMOND APPEARED PRO SE; AND

MR. PAUL FINNEL APPEARED ON BEHALF OF RESPONDENT

OPINION AND ORDER OF THE BOARD (by B. Forcade):

This matter comes before the Board upon a formal complaint filed April 26, 1984, by Rodger Diamond (hereinafter "Diamond") against the Center for the Rehabilitation and Training of the Disabled (hereinafter "the Center"). Diamond alleges that buses which load and unload students in a driveway located between Diamond's property and a building owned by the Center be estopped from allowing buses to utilize the driveway for loading and unloading.

Hearing was held on December 10, 1986, at the State of Illinois Center, Chicago, Illinois. Only the parties and the Board's hearing officer were in attendance.

FACTS

Diamond owns a multi-story commercial-residential building located at 6040 North California Avenue, Chicago, Illinois. The building houses six apartments and two businesses. The building is approximately 60 years old (R. 4).

The Center is a private, non-profit, charitable social service organization. It owns and leases a number of facilities. The facility at issue consists of a two-story building located at 6050 North California Avenue, Chicago, Illinois, which is known as the Byron Center. The Byron Center was constructed in 1957 and offers a variety of services for the disabled, including both day-students and residential students.

Diamond's property and the Byron Center are separated by an alley which has an approximate 9-foot width. Twice daily, five

days a week, at approximately 9:00 a.m. and again at approximately 2:30 p.m. (R. 18), two to three small buses/vans (R. 31) enter the alley and stop adjacent to an entry/exit which opens from the Byron Center onto the alley. There the buses/vans discharge students during the morning period and load students during the afternoon period. The buses/vans remain in the alley for approximately 5 to 10 minutes during the morning period and for an average of 15 minutes during the afternoon period (R. 27-28).

Diamond alleges that the buses/vans, when stopped in the alley with their engines running, produce exhaust which enters his building through windows and vents on the alley-side of his building.

#### DISCUSSION

The burden of proof in an enforcement action before the Board is clearly specified in the Environmental Protection Act ("Act"), Ill. Rev. Stat. 1985, ch. 111<sup>1/2</sup>, par. 1033(c):

In hearings before the Board under this Title the burden shall be on the Agency or other complainant to show either that the respondent has caused or threatened to cause air or water pollution or that the respondent has violated or threatens to violate any provision of this Act or any rule or regulation of the Board or permit or term or condition thereof.

The complainant, Mr. Rodger Diamond, therefore, has the burden of showing that the Center has caused or threatened to cause air pollution or that the Center has violated or threatens to violate some provision of the Act or Board rules or regulations. The Board finds that the Diamond has failed to carry this burden and the Board will accordingly dismiss the complaint.

The Board is aware that Diamond is not an attorney and, that for this reason, he might not be expected to present a case in as reasoned a form as would be professional in the field. Nevertheless, the Board finds that the showings which would be necessary for the Board to find in Diamond's favor are absent in the instant matter.

The Board has reviewed the testimony at hearing and believes two concepts are important in discussing that testimony. First, the Board is required to accept, as true, the uncontroverted factual statements offered at hearing. Second, the Board is not required to accept as true, any conclusory opinions offered as testimony, where the underlying rationale and facts supporting the opinion is lacking. The great difficulty with the transcript



in this proceeding is the paucity of facts to support Diamond's position. The record discloses a surplus of unsupported conclusory opinions. As an example, Diamond testified that:

They come in with their buses. They stand there 10-15 minutes. And all the garbage from their exhaust pipes comes into our building, with the vents, with the bedroom windows. We got children sleeping there. We have people sleeping there when they come in with their buses. (R. 5)

From this uncontroverted factual statement, the Board can determine that for 10-15 minutes some exhaust fumes from the buses enter the Diamond's building through vents and windows at a time when children and adults are sleeping somewhere within the apartment building. It is not clear which vents or windows provide the pathway to the fumes in the alley. The location of the sleeping adults and children in relation to the portions of the building that experience fume problems is also unclear, as is the level of interference.

However, the above factual statements must be distinguished from the large quantity of conclusory opinions offered as testimony:

So, what point does he make that these children have to be in? Why does he have to kill us? We're next door. He's killing us normal people to save retarded people.

I believe in saving retarded people. But I don't believe in making money to kill normal people in the process. You see my point? Why kill people, normal people in the process of trying to save retarded people?

I'm willing to save retarded people and do everything for them, you know. But don't kill me in the process. That's all I'm saying. (R. 13)

The Board cannot conclude that the exhaust fumes present a danger of imminent mortality to the individuals in Diamond's building without some factual foundation for that conclusion. Diamond has presented no credentials to demonstrate his skill in the health effects of internal combustion engine exhaust fumes and has presented no rational theoretical basis for the conclusion of mortality. Additionally, the few facts presented indicate, at most, a short-term exposure of an unquantified number of people to some unquantified amount of fumes. This limited exposure does not support Diamond's bald assertions and opinions regarding the degree of interference.

Despite the repeated statements about "killing" (R. 13, 16), the Board cannot conclude, based on this record, that mortality is a reasonably anticipated consequence of the brief exposure to exhaust fumes.

When stripped of its emotional content, the Board finds the following facts: for 5-10 minutes in the morning and 10-15 minutes in the afternoon, small buses park adjacent to Diamond's property. While they are parked there, the exhaust pipes from the buses are approximately 12 inches from Diamond's building. While they are parked there, certain exhaust fumes from the buses enter Diamond's building through vents and windows. During the period the buses are parked, the fumes preclude Diamond from using the bathroom (R. 6, 16). During the period the buses are present, the fumes cause some unquantified level of interference with Diamond's use of the building.

Thus, the Board concludes that for a total of 15-30 minutes a day, Monday through Friday, exhaust fumes preclude Diamond from using the bathroom and cause some unquantified level of interference with other uses of the building.

The standard for finding a violation of Section 9(a) of the Environmental Protection Act ("Act") as a general nuisance claim is whether the activity in question causes an unreasonable interference with the enjoyment of life. Prior to reaching that conclusion, the Board must consider the factors in Section 33(c) of the Act:

In making its orders and determinations, the Board shall take into consideration all the facts and circumstances bearing upon the reasonableness of the emissions, discharges, or deposits involved including, but not limited to:

1. the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;
2. the social and economic value of the pollution source;
3. the suitability or unsuitability of the pollution source to the area in which it is located, including the question of priority of location in the area involved; and
4. the technical practicability and economic reasonableness of reducing or eliminating

the emissions, discharges or deposits resulting from such pollution source.

There is substantial testimony in the record regarding the social and economic value of the pollution source. The representative of the respondent testified on the following description of the center:

The Center for the Rehabilitation and the Training of the Disabled is a private, non-profit, charitable social service organization.

The Center provides rehabilitative services to individuals with disabling conditions. We have been doing this since 1919 and at this particular site since 1957.

At the site in question, we provide services to a variety of disabilities. The building was constructed in 1957 as a school for retarded children. And indeed we still are serving children with disabling conditions as well as adults with disabling conditions.

The children who are being served are children who have been excluded from the Chicago public schools. And they have been excluded because of the fact that they are behaviorally disordered, meaning they are prone to outbursts, uncontrollable behavior, running away, doing things that perhaps could not be predicted or dealt with in a normal fashion.

We provide specialized training and specialized staff for them so that they can learn to control their behaviors and perhaps someday be readmitted to the public school system and mainstreamed into society.

The Center, as it was stated, has been at the location since 1957. When the building was constructed, it was constructed with a side drive at the south end of the property which abuts the property that the Complainant represents or owns.

The school was constructed in such a way as to allow loading and unloading at that south end of the building so as to provide for a sheltered and protected way for these

disabled children to get into and out of the buses on a daily basis. (R. 9-11)

There was also testimony from respondent's representative on why use of the side drive was necessary.

The behaviorally disordered children, however, do not have any mobility problems. Perhaps their mobility problems might be in the other direction, in that they're too mobile. And they have a tendency to run outdoors, take off, act uncontrollably perhaps at times. So, they are loaded and unloaded using the side drive.

\* \* \* \*

There is a reason for our using the side drive. Our reason is that, as I stated, the children who are loaded using the side drive are the children who have in the past exhibited and continue to exhibit behavioral problems, outbursts and are difficult to control.

Our experience in loading these children out on the street or in the alley is that they can tend to run away, run out into traffic. And we feel that from a safety standpoint we're better off using that side drive for loading and unloading. That's what the side drive was designed for. (R. 23, 31-32)

Consequently, based on this factual testimony, the Board finds there is great social value to the Center's activities in general and to the use of the side drive for loading the behaviorly disordered children in particular.

In sum, the Board finds that for the very brief periods of time involved and the minimal factually proven interference to Diamond's use of property does not outweigh the social value of the Center's use of the side drive. Consequently, the Board finds that Diamond has failed to prove a violation of Section 9(a) of the Act and this matter is dismissed.

This Opinion constitute the Board finds of fact and conclusions of law in this matter.

#### ORDER

1. There is insufficient evidence in the record to show that respondent, The Center for the Rehabilitation and Training of


the Disabled, has violated the Environmental Protection Act or rules and regulations of the Illinois Pollution Control Board.

2. This proceeding is hereby dismissed.

IT IS SO ORDERED.

Board Members J.D. Dumelle, J. Anderson and J. Marlin dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 4th day of February, 1988, by a vote of 4-3.

  
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Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board

ILLINOIS POLLUTION CONTROL BOARD  
August 1, 1985

CITIZENS OF BURBANK,                     )  
  )  
                  Complainants,        )  
  )  
                  v.                     )                     PCB 84-124  
  )  
OVERNITE TRUCKING,                     )  
  )  
                  Respondents.        )

MRS. CAROL HARDING, APPEARED PRO SE, ON BEHALF OF COMPLAINANTS;  
AND  
MR. JOHN WOOD FAIN, GENERAL COUNSEL, APPEARED FOR RESPONDENTS.

INTERIM OPINION AND ORDER OF THE BOARD (by B. Forcade):

On August 13, 1984, Citizens of Burbank ("Citizens")<sup>1</sup> filed a complaint with the Board charging Overnite Trucking with violations of Sections 23 and 24 of the Environmental Protection Act ("Act"), respecting Noise Pollution and Sections 8 and 9 of the Act, respecting Air Pollution. Hearing was held December 13, 1984. Both parties waived final briefs.

On May 20, 1985, complainants filed a letter containing information pertaining to the subject matter of this case. This information is not a statement under oath and has not been subject to cross-examination. Consequently, the Board has not considered this information in its deliberations. The requirements of sworn testimony and the opportunity for cross-examination are for the protection of both parties in a contested case proceeding such as this one. Since the May 20 letter meets neither requirement, the Board, on its own motion, must strike the letter.

The facility in question, Overnite Transportation Company ("Overnite"), is located between West 75th Street and West 77th Street at approximately South Natoma Avenue. The property is approximately 600 feet wide in an east-west direction and 1300 feet long in a north-south direction. There are two predominant structures on the property: a centrally located terminal

<sup>1</sup> "Citizens" consists of residents from five (5) locations near Overnite including: Mr. & Mrs. James Harding, Mr. & Mrs. Vincent Bavirsch, Mr. & Mrs. Ken Myslik, Mr. & Mrs. Edward Myslek and Mr. & Mrs. Frank Lojas. As the complainants were identified by signature only, the Board apologizes for any misspelling of names.

building (approximately 550 feet by 100 feet) and a smaller shop or maintenance building (approximately 80 feet by 100 feet) at the southern end of the property (Resp. Ex. 1).

Overnite's operations involve the collection and distribution of freight in the Chicago area, as well as the transfer of freight from Overnite's terminal to terminals in other locations in the United States. Four types of activities are of concern here: (1) trucks entering or leaving the Overnite facility destined for customers or other terminals; (2) tractors and trailers being moved from one location on Overnite's property to another; (3) miscellaneous trucking activities including tractor-trailer repair, fueling and startup; and (4) the public address system. Overnite's operations, as is standard in the industry, depend on the pick-up and delivery schedules established by its customers. Consequently, very little activity occurs in the terminal or "yard" during the day time. Most activity is from six o'clock in the evening until six o'clock the next morning (R. 89-97). While Overnite has occupied the location since May of 1984, the location has been occupied by other trucking companies for many years preceding Overnite's acquisition of the property.

The complainants in this proceeding are residents from the area south of Overnite's facility. Testimony was provided at hearing by Mrs. Alice Bavirsch, who lives 7717 South Natoma, on the east side of the street, approximately 125 feet south of Overnite's southern fence line; Mr. Frank Lojas who resides at 7702 South Nashville, which would appear to be less than 100 feet from Overnite's southern fence line; and from Mrs. Carol Harding who resides at 7701 South Natoma, directly south of the maintenance building, which would appear from the testimony to be less than 50 feet from Overnite's southern fence line. In addition, two letters from other local residents similarly situated were admitted into evidence (Pet. Exs. 2, 3).

The complainants in this proceeding allege that Overnite's operations violate statutory provisions respecting noise and air pollution. The two aspects will be evaluated separately.

## NOISE

Title VI of the Act provides the procedures and standards for noise control. Sections 23 and 24 of that Title provide:

### TITLE VI: NOISE

#### Section 23

The General Assembly finds that excessive noise endangers physical and emotional health and well-being, interferes with legitimate business and recreational activities,

increases construction costs, depresses property values, offends the senses, creates public nuisances, and in other respects reduces the quality of our environment.

It is the purpose of this Title to prevent noise which creates a public nuisance.

#### Section 24

No person shall emit beyond the boundaries of his property any noise that unreasonably interferes with the enjoyment of life or with any lawful business or activity, so as to violate any regulation or standard adopted by the Board under this Act.

The Board has implemented these statutory sections in two ways. First, the Board has adopted specific numerical limitations on the characteristics of sound that may be transmitted from source to receiver. As no numerical test data were presented in this matter, those portions of the regulations are not at issue. The second method of implementing the noise provisions of the Act are found in 35 Ill. Adm. Code Sections 900.101 and 900.102.

#### Section 900.101 Definitions

\* \* \*

Noise pollution: the emission of sound that unreasonably interferes with the enjoyment of life or with any lawful business or activity.

\* \* \*

#### Section 900.102 Prohibition of Noise Pollution

No person shall cause or allow the emission of sound beyond the boundaries of his property, as property is defined in Section 25 of the Illinois Environmental Protection Act, so as to cause noise pollution in Illinois, or so as to violate any provision of this Chapter.

In effect, these two sections adopt a regulatory public nuisance provision for noise control using the statutory phrase "unreasonable interference with the enjoyment of life or with any lawful business or activity" as the standard. The pleadings, testimony and exhibits of the complainants, regarding noise, are founded in this public nuisance theory.



The judicial interpretation of Sections 900.101 and 900.102 which is most closely related to the facts of this case is Ferndale Heights Utilities Company v. Illinois Pollution Control Board and Illinois Environmental Protection Agency, 44 Ill. App. 3d 962, 358 N.E.2d 1224 (First District, 1976), (hereinafter "Ferndale"). In that case, which involved the exact statutory and regulatory language at issue in the instant proceeding<sup>2</sup>, the Board found that Ferndale Heights Utilities Company had violated the regulatory public nuisance standard in their operation of a pumping station. On appeal, the Utility Company argued that the regulatory language of Section 900.102 was unconstitutional in that it did not contain sufficient standards for determining what constitutes "noise pollution" and argued that the narrative testimony at hearing lacked sufficient specificity to sustain a finding of violation of noise pollution. The Ferndale Court found the regulatory language, when viewed in the entire statutory framework, including the factors listed in Section 33(c) of the Act, was sufficiently specific to pass Constitutional muster. In evaluating the adequacy and specificity of the citizen testimony, the court stated:

Ferndale next asserts that the Board's order should be reversed because its finding of a violation of Rule 102 is contrary to the manifest weight of the evidence. Specifically, Ferndale argues that the Pierson testimony failed to provide dates and times of noises, failed to show any disturbance in his house, failed to show physical damage to himself or any person or property, failed to show that he never lounged or entertained guests in his yard and failed to show when and how often he did not lounge or entertain guests in his yard. Other alleged testimonial deficiencies involve failure to cite dates and times when activities such as patio parties were prevented or when the various witness' sleep was interrupted. However, agency witnesses used such terms as "almost constant this summer", "five times this past summer" and "awakened once or twice this year" to describe generally how often they were disturbed by the noise emanating from the pumping station. Terms such as "a great source of irritation," "disturbing", "like ten air conditioners running at the same time" and

<sup>2</sup> Prior to Codification in the Illinois Administrative Code, Section 900.101, "Noise Pollution" was found at Illinois Pollution Control Board, Rules and Regulations, Chapter 8, Rule 101(j). Section 900.102 was Rule 102 of that same Chapter. The actual regulatory language was not modified.

"[like] a lawnmower running all day under my window" were used to describe the effect of this sound upon the individuals.

Based upon such testimony the Board properly found that the character and degree of interference with the enjoyment of life and lawful activity occasioned by sounds emanating from Ferndale's pumping operations to be "unreasonable." Our review of the record does not mandate a contrary conclusion. (Id.)

These statutory, regulatory and judicial standards provide the guidance by which the Board must evaluate the record in this proceeding.

At hearing, Mrs. Alice Bavirsch testified:

"But the smell is bad and the noise is bad. There is no doubt about it (R. 13).

\* \* \*

Q. When is the noise the heaviest, what time of day?

A. "Well, if you don't get to bed by 9:00 o'clock, you are up all night fighting it. And, of course, the smell seeps right through, right into the bedroom area, and we are used to it now." (R. 14)

\* \* \*

Q. Okay. Is there anything that you want to say about that maintenance building at Overnight?

A. "They are noisy. You could hear the banging of whatever they are doing. I don't know what they are doing. But you could hear it all the time. And I guess they must have a weighing station, the way I look at it. The trucks go right in there and they stop and then they go around and they keep going around and around, and it is noisy." (R. 15)

Mr. Lojas provided the best testimonial description of the frequency of the problem:

Q. Could you estimate the frequency that you have, the kinds of problems that you have been talking about, on a weekly or a

monthly basis with Overnite? Are you talking about once a week you get waked up, or once a month, or what?

A. "During the summertime, when our windows are open, usually during the night we are woken up.

One example is we were told there was going to be no repair at the facilities. Yet we found a few times that people were pounding late at night which woke us up, and the fellows were pounding out trailers. They had some damage to the trailers. They had ladders on there, and they were pounding them out."

Q. How often did that kind of thing happen?

A. "That happened about three or four times. We were awakened by P.A. systems, where people were talking over the P.A. system. In fact, one of my neighbors next to me, the home south of me, complained that he even got up one night and walked out into the back alley area and hollered at the terminal, telling them to shut up because his kids were being woken up."

Q. On a monthly basis during the summer, how many times do you think that you were disturbed yourself, or your family?

A. "I would say about two-thirds to three-fourths of the time."

Q. So does that mean 20 times a month?

A. "Yes." (R. 36-37)

This testimony meets the Ferndale standard of providing a description of the noise, explaining the type and severity of interference caused by the noise (sleep interruption) and providing information on the frequency and duration of the interference. This type of testimony must be provided in any proceeding for the Board to make a finding regarding interference with the enjoyment of life.

Mrs. Carol Harding testified:

THE WITNESS: "Okay. My name is Carol Harding. My address is 7701 South Natoma. I am the last house on the street there, and I

am dead center with the maintenance building of Overnite.

My bedroom windows and my kitchen windows face the north, and I don't appreciate being kept up nightly because of heavy truck movement going on in that maintenance area."

\* \* \*

To me, that is a lot of heavy polluted air that you are putting into my lungs, which I don't appreciate, and a lot of heavy noise. My house vibrates. I have to keep my TV on high if I want to sit down and try and enjoy watching my TV." (R. 50-51)

To support the testimony, Complainants introduced Pet. Gr. Ex. 5 which includes a listing of the dates and times that Mrs. Harding recorded "very unnecessarily loud noises" or odor problems from Overnite (R. 59). That exhibit contains 21 listings for June of 1984.

In addition to testimony from local residents, complainants provided testimony by Mr. Winfield Ferry, an enforcement officer from the Cook County Department of Environmental Control. While Mr. Ferry did not take noise level readings, he did express an opinion on the noise levels.

Q. Did you take any decibel readings at any point when you conducted this investigation?

A. "Let me read --"

Q. Did you take any yourself? Did you use a meter in the field to take any? I am not asking whether they violated the ordinance or not.

A. "It was not necessary to take a reading at this time because I can tell from my experience, and I have been an inspector for a while, that the noise is sufficient to warrant corrective action." (R. 76)

Overnite made no attempt to dispute or impeach the complainants' testimony on the severity or frequency of the noise problem. In discussing the issue, Counsel for Overnite tacitly admitted the problem:

MR. FAIN: "This is correct. We are not saying this is going to alleviate your

problem; and it will never alleviate the problem. That is part of the problem with living next door to a property that is zoned industrial and has a truck line sitting there. But we think these measures will appreciably help." (R. 125-126)

Based on the above-cited evidence, the Board finds that noises emanating from Overnite's facility, specifically from vehicle movement, maintenance, horns and the public address system, are causing interference with the sleep and normal leisure time activities of adjacent residents. Further, the Board finds this interference is frequent and severe.

### ODOR

The Environmental Protection Act, Board regulations and judicial interpretations adopt a similar approach to controlling odor problems. The Act defines and prohibits unreasonable interference with the enjoyment of life or property from odors.

#### Section 3

- b. "AIR POLLUTION" is the presence in the atmosphere of one or more contaminants in sufficient quantities and of such characteristics and duration as to be injurious to human, plant, or animal life, to health, or to property, or to unreasonably interfere with the enjoyment of life or property.

#### Section 9

No person shall:

- a. Cause or threaten or allow the discharge or emission of any contaminant into the environment in any State so as to cause or tend to cause air pollution in Illinois, either alone or in combination with contaminants from other sources, or so as to violate regulations or standards adopted by the Board under this Act;

Board regulations at 35 Ill. Adm. code Sections 201.102, "Air Pollution" and 201.141 "Prohibition of Air Pollution" contain identical language to the Act. Similar judicial interpretations apply to the "unreasonable interference" odor pollution cases. See: Incinerator, Inc. v. Pollution Control Board, 59 Ill.2d 290, 319 N.E.2d 794 (1974); Mystic Tape, Div. of Borden, Inc. v. Pollution Control Board, 60 Ill.2d 330, 328 N.E.2d 5 (1975); Processing & Books v. Pollution Control Board, 64 Ill.2d 68, 351 N.E.2d 865 (1976).

The hearing testimony on odor is similar in character to the testimony on noise:

"Well, if you don't get to bed by 9:00 o'clock, you are up all night fighting [the noise]. And, of course, the smell seeps right through, right into the bedroom area, and we are used to it now.

Q. Okay. What type of relief are you trying to seek here today?

A. Well, if they would limit their operations to daytime hours and, I don't know, sometimes when they start up those trucks the smog is so thick you could choke.

I used to walk my dog there every morning, and it was just overpowering. You could hardly breathe. And that just drifts all the way across to my yard, and I am 150 feet away." (R. 14)

\* \* \*

"Usually, you park cabs over there, usually three to six cabs. They have a tendency to start up in the morning, and when they do start up and the wind is out of the north, we get a foul smell and taste into our kitchen area, and this happens many times around breakfast time." (R. 32)

\* \* \*

"When you figure you have trucks lining up, getting ready to fuel, we get all the smell. This is all coming towards us.

If you get inversions it keeps it down on the ground, and we are finding that it does bother us. It affects our sleep, it affects our way that we operate during the day, because we could not relax during the night and get our proper sleep, or even during the days it affects your thinking because it cuts down the air, oxygen that you are taking in." (R. 34)

\* \* \*

"From, I would say, five o'clock at night, you will have up to 15 trucks waiting to fill up in this pumping area; up to 15 trucks, I counted.

To me, that is a lot of heavy polluted air that you are putting into my lungs, which I don't appreciate, and a lot of heavy noise." (R. 50-51)

In addition, Pet. Gr. Ex. 5 contains references from Mrs. Harding to "excessive odors of truck fumes" and "heavy odors" during June of 1984. Additionally, Pet. Ex. 1 (A through EE) contains photographs which show smoke surrounding truck tractors on Overnite's property. While the photographs certainly cannot demonstrate odor, they support the conclusion that Overnite is the source for the odor.

Again, Overnite made no attempt to dispute or impeach the complainants' evidence on severity or frequency of the odor problem.

Based on the above-cited evidence, the Board finds that odors from Overnite's facility, specifically truck operation, start-up and fueling, are causing interference with the sleep, food consumption and normal leisure time activities of adjacent residents. Further, the Board finds this interference is frequent and severe.

#### Section 33(c)

The Board may find severe and frequent interference with the enjoyment of life solely based on testimony describing the impacts of noise or odor. However, to evaluate whether those noise or odor impacts are "unreasonable," the Board must evaluate a series of factors listed in Section 33(c) of the Act:

#### Section 33

\* \* \*

- c. In making its orders and determinations, the Board shall take into consideration all the facts and circumstances bearing upon the reasonableness of the emissions, discharges, or deposits involved including, but not limited to:
  - 1. the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;
  - 2. the social and economic value of the pollution source;
  - 3. The suitability or unsuitability of the pollution source to the area in which it is located, including the

question of priority of location in the area involved; and

4. the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source.

The "unreasonableness" of the noise or odor pollution must be determined in reference to these statutory criteria. Wells Manufacturing Company v. Pollution Control Board, 73 Ill.2d 226, 383 N.E.2d 148 (1978); Mystic Tape, supra; Incinerator, supra, City of Monmouth v. Pollution Control Board, 57 Ill.2d 482, 313 N.E.2d 161 (1974). However, complainants are not required to introduce evidence on these points. Processing & Books, supra.

In evaluating the first of the Section 33(c) factors, the Board finds there is a frequent and severe interference with sleep, food consumption and normal leisure activities of adjacent residents caused by noise and odor from Overnite's facility. This interference goes far beyond trifling interference, petty annoyance or minor discomfort. The noise and odors constitute a substantial interference with the enjoyment of life and property.

Concerning the second of the Section 33(c) factors, the Board finds that Overnite is of substantial social and economic benefit in that it provides valuable services in the local and national movement of freight (R. 90-93) and employs many people (R. 109). However, the social and economic benefit is significantly reduced by the nature of noise and odor emissions from the property.

The third Section 33(c) factor concerns suitability of the pollution source to the area in which it is located and priority of location. The record contains very little descriptive information on the area beyond complainants' and defendant's property. It is clear that complainants' property is in the City of Burbank, while defendant's property is "across the street" in the Village of Bedford Park (R. 8, 49). While the property which Overnite's facility occupies was originally zoned for residential use R4 by Bedford Park, that zoning use was changed and the facility is in compliance with current Bedford Park zoning uses (R. 18, 32-33, 38). The Board finds that Overnite's facility is suitable for the area in which it is located if noise and odor problems can be reduced to acceptable levels.

On the priority of location issue, the Board finds that complainants have the clear priority. The record is undisputed that local area residents generally, and several complainants in particular, lived in the area in 1967 when the facility in question was undeveloped and uninhabited prairie land (R. 32).



Concerning the last of the Section 33(c) factors, the Board finds that there are technically feasible and economically reasonable methods of making some reductions in noise and odor levels, that Overnite has begun to implement some of these measures, but that the record is insufficient to support a detailed Order commanding what specific steps must be taken, by what certain time, and what steps will be necessary to completely cure the problems.

Additionally, the Board finds that to curtail all nighttime activities would amount to an Order for Overnite to cease operation and go out of business (R. 98). However, lack of a technologically feasible method of reducing the pollution is not an absolute defense to a finding of violation by this Board. Wells supra, Chicago Magnesium Casting Co. v. Pollution Control Board, 22 Ill.App.3d 489, 317 N.E.2d 689. The Board believes that the report required in today's Order will provide information on specific workable methods of reducing the noise and odor problems to acceptable levels without facing the difficult closure issue.

Based on the Board findings of substantial interference with the enjoyment of life and after consideration of the factors listed in Section 33(c), the Board finds that noise emissions from Overnite's facility are unreasonable and constitute a violation of 35 Ill. Adm. Code 900.102 and Section 24 of the Environmental Protection Act. Based on the Board findings of substantial interference with enjoyment of life and after consideration of the factors listed in Section 33(c), the Board finds the odor emissions from Overnite's facility are unreasonable and constitute a violation of 35 Ill. Adm. Code 201.141 and Section 9 of the Environmental Protection Act.

#### **Additional Information**

Throughout this proceeding, steps were mentioned which would have the effect of reducing the noise and odor emissions from Overnite's facility. These include:

1. Operational changes, such as rerouting on-site truck movement patterns;
2. Moving the electric hot lines from the south end of the terminal to decrease truck start-up at that location;
3. Building an acoustical barrier along the southern perimeter; and
4. Enclosing the maintenance building fuel bay area.

While these options were discussed favorably at hearing, certain informational deficiencies exist. For example, prior truck traffic patterns were not compared to future traffic patterns, plans for the acoustical barrier were produced and discussed at

hearing but not introduced as evidence, discussions of fuel bay enclosure were very general in nature, and most importantly, no attempt was made to quantify the reduction in noise and odor that would be accomplished by implementing these steps.

Additionally, the Board is concerned that moving certain operations may only shift the impact to persons not present in this proceeding. Therefore, the Board will order Overnite to prepare a report evaluating, to the maximum extent possible, the type and degree of noise and odor reductions possible by changes in operation or construction of noise and odor reduction devices. This report should be prepared by a competent individual or firm, and should evaluate all methods of control (not just those already discussed). Each control option should include anticipated pollution reductions, cost of implementation and an estimate of a reasonable time for implementation.

The Board will retain jurisdiction in this case pending receipt of the report, and final disposition of this matter. The report is to be filed with the Board and complainants' representative, Mrs. Carol Harding, not later than November 1, 1985. Unless a motion requesting a hearing on the contents of the report is received by November 30, 1985, the Board will proceed to issue a final Order regarding compliance as soon as possible thereafter.

This Interim Opinion constitutes the Board's initial findings of fact and conclusions of law in this matter.

#### ORDER

1. The Board finds that Overnite Trucking has violated 35 Ill. Adm. Code Sections 900.102 and 201.141, as well as Sections 24 and 9 of the Environmental Protection Act.
2. Overnite is Ordered to submit to the Board and complainants, not later than November 1, 1985, a report on methods of reducing or eliminating noise and odor pollution at its facility consistent with the Opinion.
3. The Board will retain jurisdiction in this matter pending receipt of the report. Unless a motion for hearing on the contents of that report is received by November 30, 1985, the Board will proceed to issue a final Order in this matter.

IT IS SO ORDERED

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Interim Opinion and Order was adopted on the 1st day of August, 1985, by a vote of 7-0.

Dorothy M. Gunn  
Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board

ILLINOIS POLLUTION CONTROL BOARD  
April 21, 1988

CITIZENS OF BURBANK,	)	
	)	
Complainants,	)	
	)	
v.	)	PCB 84-124
	)	
OVERNITE TRANSPORTATION COMPANY,	)	
	)	
Respondent.	)	

OPINION AND ORDER OF THE BOARD (by B. Forcade):

On August 1, 1985, the Board entered an Interim Opinion and Order in this matter which found that Overnite Transportation Company ("Overnite") had violated 35 Ill. Adm. Code 900.102 and 201.141, as well as Sections 9 and 24 of the Illinois Environmental Protection Act ("Act"). That Opinion and Order found unreasonable noise emissions and unreasonable odor emissions from Overnite's facility and found that those emissions constituted a substantial interference with enjoyment of life for complianants. After making this finding of a noise and odor public nuisance violation, the Board retained jurisdiction and ordered Overnite to prepare and submit a report on the methods, cost and timing of pollution reduction options. Overnite filed reports compiled by a contracted engineering firm, ETA, Inc., on June 16, 1986, and July 3, 1986. Citizens of Burbank ("Citizens") filed collective comments regarding the report on July 28, 1986. On January 7, 1987, Overnite filed a response to the complainants' comments.

By its January 8, 1987 Interim Order, this Board mandated that Overnite undertake certain actions to reduce its noise emissions to below complaint levels and its odor emissions to eliminate their nuisance. This order required Overnite to construct a 12-foot high wall along its southern and portions of its eastern or western boundaries and to reduce the engine RPM of its yard tractor for noise reduction. It left certain details of the wall construction to Overnite's discretion. The order required Overnite to reduce its odor emissions by reducing the number of trucks sitting at idle within its facility. Overnite was to permit only one truck at any time to await refueling, and it was to assure that its drivers did not start their vehicles until after they had first acquired their schedules and paperwork. Overnite was to file a final report with this Board no later than September 1, 1987 explaining the changes completed and results achieved. The Board retained jurisdiction pending final disposition. These requirements were based on the recommendations contained in a study contracted by Overnite and submitted to the Board June 16 and July 3, 1986.

Overnite requested an extension of time to construct the noise barrier, which this Board granted until July 1, 1987 by its June 10, 1987 Order. The Citizens complained by a letter dated June 29, 1987 that they felt the newly constructed wooden barrier was ineffective in its purpose.

Overnite submitted its final report to this Board on September 1, 1987 and its amended final report on September 17, 1987. Overnite reports having reduced the engine speed of its yard tractor, erected the primary noise barrier along its southern perimeter, erected a secondary noise barrier on the sides of its truck fueling area, restricted traffic and vehicular activities near the southern end of its facility, revised its public address system, and instituted a program of employee training to reduce its noise emissions. Part of the noise barrier along the southern boundary is a pre-existing structure of nearly the same height as the erected barrier. The erected barrier is of wood. Overnite claims to have expended about \$48,300 towards monitoring and controlling its noise emissions.

Monitoring at various points along the noise barrier indicates significant reductions in the center of the barrier, and some reduction at its eastern end. There was virtually no reduction at a point beyond the western end of the barrier. Much of the noise at that location was attributed to the neighboring property to the west: Advance Transportation. It is observed, however, that the engineers' report indicates that Overnite did not extend its noise barrier beyond the drivers' sleeping quarters building along the south wall to the western edge of its property. There is, therefore, about 50 feet of southern boundary not protected by the noise barrier. Overnite also did not build any barrier along the southern portion of either its eastern or western boundary.

Examination of the engineers' data tabulations indicates that although most of the noise recorded at the western site was attributable to Advance Transportation, a significant portion was attributable to Overnite. The record indicates this monitoring site is located about 150 feet west of Overnite's western boundary, or 200 feet from where the Overnite noise barrier ends at the western edge of the sleeping quarters.

### Discussion

Overnite has demonstrated significant reductions in noise at locations directly opposite its noise barrier as a result of its operational and facilities changes. Those changes, however, do not fully comply with this Board's January 8, 1987 Interim Order. That Order mandated, inter alia, that Overnite construct a noise barrier along its entire southern boundary, excluding that portion occupied by the drivers' sleeping quarters, and along so much of its eastern or western boundary as was necessary

to reduce its noise emissions. Overnite's discretion was not entirely unbridled in defining "necessary" for the purposes of compliance. The January 8, 1987 Order considered the July 3, 1986 ETA, Inc. study which indicated that the noise barrier should extend over the entire length of the southern boundary, except that portion occupied by the sleeping quarters, and along the southern 400 feet of the eastern boundary. That study indicated construction of a western barrier would avail little benefit because of the Advance Transportation activities in that area.

Overnite has failed to build a noise barrier along the western 50 feet of its southern perimeter. Overnite has failed to explain its decision not to do so. The January 8, 1987 Order, in light of the July 3, 1986 engineers' report, clearly required Overnite to do so. The monitoring data indicate that most of the noise at the western monitoring site beyond the Overnite noise barrier is from the Advance facility, but a significant portion of it emanated from Overnite operations. This could indicate that ideally any barrier would extend to include the southern boundary of the Advance property, but that is not the issue here. It indicates that noise emanates from the Overnite facility to this area and there is no noise barrier to protect this location. The Board realizes that maximum noise reductions from Overnite alone would require completion of the barrier along this 50 feet of south perimeter, then extension along some distance of the southern part of the west perimeter. Construction of a barrier along the western perimeter would only reduce Overnite's noise emissions and do nothing to alleviate those of Advance Transportation. The Advance Transportation emissions are not before the Board, and this Final Order can only address the Overnite emissions. The ETA, Inc. study recommended construction of the barrier along the western 50 feet of south perimeter, but not along any southern portion of the western perimeter. The Board will now explicitly require construction of this omitted 50 feet of barrier to complete the south perimeter noise barrier.

The engineers' July 3, 1986 recommendation was that Overnite construct a 12-foot noise barrier along the southern 400 feet of the east perimeter. Monitoring data from the east end of the south barrier indicate that the noise reduction in this area was less significant than that at the center of the south barrier. The significance of this result is greater in light of the expectation of greater noise emissions at the center location in the absence of the barrier. The adjoining land immediately to the east is a retention basin which would emit little if any noise, and emissions to that area are of little consequence. The land to the south and southeast, however, is residential, so minimization of noise emissions to this area is of interest. The Board believes that explicitly requiring Overnite to fully adopt the engineers' recommendation and construct the omitted 400 feet

of 12-foot noise barrier along the southern end of its eastern perimeter would minimize the noise emissions to the neighboring residential area.

With regard to all other noise reduction measures undertaken by Overnite, i.e., the operational changes made, the Board will require no more than that Overnite continue their exercise to minimize its noise emissions. The Citizens have failed to criticize the results of these measures as reported by the engineers' study.

The foregoing discussions, together with those included in the January 8, 1987 Interim Order, constitute the Board's findings of facts and conclusions of law in this matter.

#### ORDER

For the foregoing reasons, the Board hereby Orders Overnite to undertake and perform the following actions.

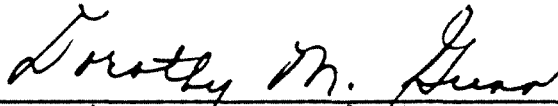
1. Erect, before July 31, 1988, a 12-foot tall noise barrier of solid construction along the south perimeter of its property extending from the western most end eastward to the western most end of the drivers' sleeping quarters;
2. Erect, before July 31, 1988, a 12-foot tall noise barrier of solid construction along the southernmost 400 feet of the east perimeter of its property;
3. Prohibit its drivers from starting their assigned trucks in the morning until they have first obtained their schedules and paperwork and otherwise fully prepared for immediate departure;
4. Prohibit more than one truck south of the north edge of the terminal building to await fueling at any one time;
5. Restrict or minimize all traffic and other vehicular traffic in the extreme southern end of its property;
6. Operate its public address system and orient its speakers in such a manner that noise emissions from this source are minimized to the lowest practicable level;

7. Operate and maintain its yard tractors and similar vehicles at such reduced engine speeds that their noise emission are kept at the lowest practicable level;
8. Train and educate all employees working on its property who perform duties capable of generating significant noise emissions in methods of performing those duties which would minimize noise emissions to the residential area south of the property; and
9. Post conspicuous warnings for all persons on the property against the generation of noise likely to emanate to the residential area to the south of property.

IT IS SO ORDERED

Board Member J. Theodore Meyer dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 21<sup>st</sup> day of April, 1988, by a vote of 6-1.

  
\_\_\_\_\_  
Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board



**State of Illinois**



**Rules and Regulations**

**TITLE 35:  
ENVIRONMENTAL PROTECTION**

**SUBTITLE A:  
GENERAL PROVISIONS**

**CHAPTER I:  
POLLUTION CONTROL BOARD**

**September 1, 1982**

**State of Illinois**



**Rules and Regulations**

**TITLE 35:  
ENVIRONMENTAL PROTECTION**

**SUBTITLE A:  
GENERAL PROVISIONS**

**CHAPTER I:  
POLLUTION CONTROL BOARD**

**This printing of Title 35: Environmental Protection  
Subtitle A: General Provisions, Chapter I: Pollution Control Board  
includes amendments through September 1, 1982.**

## TITLE 35: ENVIRONMENTAL PROTECTION

### SUBTITLE A: GENERAL PROVISIONS

#### CHAPTER I: POLLUTION CONTROL BOARD

##### PART 101 GENERAL RULES SUBPART A: GENERAL PROVISIONS

Section	
101.101	Applicability
101.102	Definitions
101.103	Filing
101.104	Form of Documents
101.105	Computation of Time
101.106	Appearances
101.107	Public Information
101.108	Publications
101.109	Board Meetings
101.110	Informal Complaints

##### SUBPART B: CANONS OF ETHICS

Section	
101.120	Financial Disclosure
101.121	Ex parte Contacts
101.122	Improper Publicity

##### SUBPART C: JUDICIAL REVIEW

Section	
101.140	Review of Final Orders and Stay Procedure

##### Appendix Old Rule Numbers Referenced

**AUTHORITY:** Authorized by Section 26 of the Environmental Protection Act (Ill. Rev. Stat. 1979, ch. 111 1/2, par. 1026); and implementing Sections 5, 7.1, 27, 28, 29, 31, 32, 33, 35, 36, 37, 38, 40 and 41 of the Environmental Protection Act (Ill. Rev. Stat. 1979, ch. 111 1/2, pars. 1005, 1007.1, 1027, 1028, 1029, 1031, 1032, 1033, 1035, 1036, 1037, 1038, 1040 and 1041); and Section 4 of "An Act in relation to natural resources, research, data collection and environmental studies," approved and effective July 14, 1978, as amended (Ill. Rev. Stat. 1979, ch. 96 1/2, par. 7404).

**SOURCE:** Filed with Secretary of State January 1, 1978; codified 6 Ill. Reg. 8357.

##### SUBPART A: GENERAL PROVISIONS

###### Section 101.101 Applicability

This Chapter governs the practices and procedures of the Board and all proceedings conducted by the Board. Unless the contrary is clearly indicated, all references to "Parts" or "Sections" are to Illinois Administrative Code, Title 35: Environmental Protection. For example, "Part 309" is 35 Ill. Adm. Code 309, and "Section 309.101" is 35 Ill. Adm. Code 309.101.

###### Section 101.102 Definitions

As used in Parts 101-107, the following terms mean:

"Act" means the Environmental Protection Act (Sections 1-51) and all amendments thereto (Ill. Rev. Stat. ch. 111 1/2, pars. 1001-1051 as amended).

"Agency" means the Illinois Environmental Protection Agency.

"Board" means the Illinois Pollution Control Board.

"Chairman" means the Chairman of the Board.

"Clerk" means the Clerk of the Board.

"Department" means the Illinois Department of Nuclear Safety.

"Document" means pleading, notice, motion, affidavit, memorandum, brief, petition, or other paper or combination of papers required or permitted to be filed.

"Economic Impact Study" means the study prepared by the Institute in accordance with Ill. Rev. Stat. 1979, ch. 96 1/2, par. 7404.

"Environmental Register" means the official Board publication containing information and legal notices regarding Board activities.

"Hearing Officer" means a person duly qualified and designated as a Hearing Officer under Section 5(a) of the Act.

"Institute" means the Illinois Department of Energy and Natural Resources, formerly the Institute of Natural Resources.

"Person" means any entity defined in Section 3 of the Act.

"NPDES" means the National Pollutant Discharge Elimination System for issuing, establishing conditions for, and denying permits under Section 402 of the Clean Water Act (PL 92-500) (33 U.S.C. 1251, 1342). All terms used in connection with NPDES which have been defined in the Clean Water Act or regulations adopted thereunder shall have the meanings specified therein, unless specifically noted otherwise.

"NPDES Permit" means an NPDES permit issued by the Agency or the United States Environmental Protection Agency.

###### Section 101.103 Filing

Documents and requests permitted or required to be filed with the Board or its Clerk shall be addressed and mailed to or filed with the Clerk at the office address. The office address of the Clerk is 309 West Washington Street, Suite 300, Chicago, Illinois 60606. The office of the Clerk is open for filing, inspection, and copying of documents from 8:30 a.m. to 5:00 p.m. Monday through Friday, except for national and state legal holidays.

###### Section 101.104 Form of Documents

- Documents shall clearly show the file or docket number and the title of the proceeding with which they are filed, and shall be designated "Petition for Amendment to Regulation", "Complaint", "Petition for Variance", "Petition for Review", "Motion", "Public Comment" or any other heading which describes the nature of the relief sought.
- Except as otherwise provided, 10 copies of all documents shall be filed with the Clerk. Only two copies of any discovery motion, deposition, interrogatories, answer to interrogatories, or subpoenas need be filed with the Clerk.
- Documents, excluding exhibits, shall be typewritten or reproduced from typewritten copy on unglazed white paper of greater than 12 pound weight and measuring 6" X 10 1/2" or 8 1/2" X 11". Reproductions may be made by carbon or electrostatic copying machine or any other process that produces legible black-on-white copies. All documents shall be fastened on the left side or in the upper left hand corner. The left margin of each page shall be at least 1 1/2 inches and the right margin at least one inch. The Board may make an exception from these requirements for citizen complaints.
- One copy of each document filed need be signed by the party or by his authorized representative or attorney. The first document filed in any cause or first served upon the opposite party shall bear the business address and telephone number, if any, of the attorney filing the same, or of the party who appears in his own proper person.

- e) Except as otherwise provided by Ill. Rev. Stat. 1979, ch. 116, pars. 35-39, or by leave of the Board, documents on microfiche are not acceptable for filing.

#### Section 101.105 Computation of Time

- a) Computation of any period of time prescribed by these rules or the Act shall begin with the first business day following the day on which the act, event, or development occurs and shall run until the end of the last day, or the next following business day if the last day is a Saturday, Sunday, or legal holiday. Where the period of time is five days or less, Saturdays, Sundays and legal holidays shall be excluded in the computation of time.
- b) Notice requirements shall be construed to mean notice received, but proof that notice was sent by means reasonably calculated to be received by the prescribed date shall be prima facie proof that notice was timely received.

#### Section 101.106 Appearances

- a) Any person entitled to participate in Board proceedings shall appear as follows:
  - 1) A natural person in his own behalf or by an attorney at law licensed and registered to practice in the State of Illinois, or both.
  - 2) Any other person through any bonafide officer, employee, or representative or by an attorney licensed and registered to practice in the State of Illinois, or both.
- b) Attorneys not licensed and registered to practice in the State of Illinois may request to appear on a particular matter on motion filed with the Board.
- c) An attorney appearing in a representative capacity shall file a written notice of appearance with the Clerk, together with proof of service on all parties or their respective attorneys.

#### Section 101.107 Public Information

- a) The Board shall maintain files containing all information submitted to or produced by the Board or any of its Members relating to matters within the Board's jurisdiction. Without limiting the foregoing, the files shall include: pleadings, motions, notices, minutes, transcripts, exhibits, orders and opinions, proposed and adopted regulations, communications to or from the Board or any Board Member, the Environmental Register and other Board releases, business records, informal complaints, and such internal communications filed at the request of any Board Member.
- b) All such files shall be open to reasonable public inspection and copying, except material stamped by Board Order, "Not Subject to Disclosure". Only the following materials may be so stamped by the Board:
  - 1) Information which constitutes a trade secret;
  - 2) Information privileged against introduction in judicial proceedings;
  - 3) Internal communications by the Board;
  - 4) Information concerning secret manufacturing processes or confidential data submitted by any person under the Act; and
  - 5) Income and earnings data when not an issue in the proceeding.

- c) Except in the case of internal communications, material shall be stamped "Not Subject to Disclosure" only upon written application at the time the material is submitted. An application for nondisclosure shall contain the following:

- 1) Identification of the precise material, or parts of material, for which nondisclosure is sought;
- 2) Indication of the particular nondisclosure category into which the material falls; and
- 3) A concise statement of the reasons for requesting nondisclosure. The application shall be verified and contain such data and information as will apprise the Board of the nature of the material for which nondisclosure is sought, the reasons why nondisclosure is necessary, the number and title of all persons familiar with such information, and how long the material has been limited for disclosure. A single copy of the material for nondisclosure shall be filed with the Clerk with the application and shall be available for examination only by Board Members. The Board shall promptly rule on every application and inform the applicant of its decision. An application shall bar public inspection of the material for nondisclosure until the application has been disposed of by the Board and the time for appeal has run. The Board may enter conditional nondisclosure orders allowing withdrawal by applicant of the material covered by such order, at which time the Board's ruling on the application shall be based on the record excluding the material so withdrawn.

- d) Internal communications may be stamped "Not Subject to Disclosure" by any Board Member at any time, subject to review by the Board.
- e) The Clerk shall maintain a comprehensive index of all Board files open to public inspection.
- f) Reasonable copying facilities shall be available at the Board offices. Requests by mail shall be honored. A single opinion or order will be furnished on request without cost, irrespective of length. Requests for multiple opinions or orders totalling 10 pages or less shall be furnished without cost. Requests for multiple opinions and orders totalling more than 10 pages shall be furnished at a cost to be determined by the Board plus mailing costs. However, the Board reserves the right to contract with a professional reproduction service for any copying that would impose a substantial administrative burden on the Board and to charge to the requesting party the reproduction and mailing costs incurred by the Board.

#### Section 101.108 Publications

The Board shall publish at least once every month an Environmental Register containing notices of meetings, hearings, and reports of Board activities. One copy shall be sent without charge to anyone requesting it. Copies of the Act and regulations proposed and in force shall be provided without charge in reasonable quantities by mail and at Board offices. The Board shall publish regularly its decisions and orders, which subscribers may buy and receive by mail at a reasonable cost.

#### Section 101.109 Board Meetings

- a) All decisions of the Board shall be made at meetings open to the public. Three members of the Board shall constitute a quorum, and three affirmative votes shall be required for any final determinations of the Board except in a proceeding to remove a seal under Section 34(d) of the Act.

- b) The Board shall hold at least one meeting a month and shall adopt at the beginning of each fiscal year a schedule of meetings which shall appear at least once in its minutes and Environmental Register. Special meetings may be called by the Chairman or by any two Board Members upon delivery of 24 hours' written notice to the office of each member. Public notice of all special meetings shall be given at least 24 hours in advance of each meeting by posting at the Board's offices. In emergencies in which a majority of the Board certifies that exigencies of time require a special meeting to be held immediately, the requirements of 24 hour written notice may be dispensed with, and Board Members shall receive such notice as is reasonable under the circumstances. Notice of changes in the regular meeting schedule shall be given in the manner used for special meetings.

- c) The Board shall keep a complete and accurate record of all meetings including the votes of individual members on all adjudications and proposed regulations.

#### Section 101.110 Informal Complaints

Complaints received by the Board against particular pollution sources shall be filed with the Clerk, who shall maintain a file and index of such complaints. The Clerk shall send a copy of the complaint to the Agency and request a response to the Board. At the time of the filing of the informal complaint, the Clerk shall notify the complainant of his right to commence an enforcement proceeding pursuant to 35 Ill. Adm. Code 103 by filing a formal complaint and shall provide a form on which a formal complaint may be filed with the Clerk.

### SUBPART B: CANONS OF ETHICS

#### Section 101.120 Financial Disclosure

Board Members shall comply with financial disclosure requirements as provided by Law and Executive Order.

#### Section 101.121 Ex parte Contacts

- a) No member, hearing officer, or employee of the Board shall communicate ex parte, directly or indirectly, with any person not employed by the Board with respect to any adjudicative proceeding pending before the Board. Ex parte contacts with respect to individual pollution sources which may become the subject of such a proceeding are permissible to the extent that information so received is relevant to possible rule-making proceedings, but caution shall be exercised by Board members and employees to avoid prejudging the merits of any potential individual case. Nothing in this section shall preclude Board members, hearing officers, or employees from receiving informal complaints about individual pollution sources in accordance with Section 101.110, or forbid such administrative contacts as would be appropriate for judges and other judicial officers.
- b) Board members and employees shall make every reasonable effort to assure that any ex parte communications with respect to nonadjudicative proceedings become a matter of public record, in order that information on which the Board bases its decisions can be subject to scrutiny and to rebuttal. Whenever practicable, communications shall be in writing and addressed to the Board rather than to individual members.

#### Section 101.122 Improper Publicity

- a) Hearings should be conducted with fitting dignity and decorum. The Hearing Officer may forbid the taking of photographs or the broadcasting or televising of all or part of the proceedings while the hearing is being conducted if he finds that such activities detract from the dignity of the proceedings or unduly distract participants and witnesses in giving testimony.
- b) Parties in proceedings brought before the Board shall at all times conduct themselves with the same degree of dignity and respect that they would before a Court.

### SUBPART C: JUDICIAL REVIEW

#### Section 101.140 Review of Final Orders and Stay Procedure

- a) Review of final orders of the Board in regulatory and adjudicatory proceedings shall be pursuant to Sections 29 and 41 of the Act respectively and to Rule 335 of the Rules of the Supreme Court of Illinois and any amendments thereto and the Administrative Review Act of the State of Illinois, as amended (Ill. Rev. Stat. 1979, ch. 110, par. 264).
- b) Procedure for stay of any order to the Board upon appeal shall be as provided in Rule 335 of the Rules of the Supreme Court of Illinois and amendments thereto.
- c) For purposes of judicial review, Board action becomes final upon enactment, or upon subsequent Board action on any Motion to Reconsider under Section 103.240.

### APPENDIX

#### OLD RULE NUMBERS REFERENCED

The following table is provided to aid in referencing old Board rule numbers to section numbers pursuant to codification.

<b>Chapter 1: Procedural Rules</b>	<b>35 Ill. Adm. Code Parts 101-107</b>
<b>Part I: General Rules</b>	<b>Part 101: General Rules</b>
Rule 101 .....	Section 101.101
Rule 102 .....	Section 101.102
Rule 103 .....	Section 101.103
Rule 104 .....	Section 101.104
Rule 105 .....	Section 101.105
Rule 106 .....	Section 101.106
Rule 107 .....	Section 101.107
Rule 108 .....	Section 101.108
Rule 109 .....	Section 101.109
Rule 110 .....	Section 101.110
Rule 801 .....	Section 101.120
Rule 802 .....	Section 101.121
Rule 803 .....	Section 101.122
Rule 901 .....	Section 101.140

## TITLE 35: ENVIRONMENTAL PROTECTION

### SUBTITLE A: GENERAL PROVISIONS

#### CHAPTER I: POLLUTION CONTROL BOARD

#### PART 102 REGULATORY AND OTHER NONADJUDICATIVE HEARINGS AND PROCEEDINGS SUBPART A: GENERAL PROVISIONS

Section	
102.101	Applicability
102.102	Adoption of Regulations

#### SUBPART B: PROPOSAL OF REGULATIONS

Section	
102.120	Proposal of Regulations
102.121	Authorization of Hearing
102.122	Notice of Hearing

#### SUBPART C: DISCOVERY

Section	
102.140	Discovery

#### SUBPART D: HEARINGS

Section	
102.160	Authority of Hearing Officer
102.161	Examination of Witnesses
102.162	Prior Submissions
102.163	Written Submissions
102.164	Record

#### SUBPART E: ECONOMIC IMPACT HEARINGS

Section	
102.180	Hearings on the Economic Impact Study of New Proposals
102.181	Hearings on the Economic Impact Study of Existing Regulations

#### SUBPART F: BOARD ACTION

Section	
102.200	Revision of Proposed Regulations
102.201	Notice of Adopted Regulations

#### SUBPART G: OTHER PROCEEDINGS

Section	
102.220	Other Proceedings

#### Appendix Old Rule Numbers Referenced

*AUTHORITY:* Authorized by Section 26 of the Environmental Protection Act (Ill. Rev. Stat. 1979, ch. 111 1/2, par. 1026), and implementing Sections 5, 27 and 28 of the Illinois Environmental Protection Act (Ill. Rev. Stat. 1979, ch. 111 1/2, pars. 1005, 1027 and 1028), and Section 4 of "An Act in relation to natural resources, research, data collection and environmental studies," approved and effective July 14, 1976, as amended (Ill. Rev. Stat. 1979, ch. 96 1/2, par. 7404).

*SOURCE:* Filed with Secretary of State January 1, 1978, codified 6 Ill. Reg. 8357

## SUBPART A: GENERAL PROVISIONS

### Section 102.101 Applicability

This Part shall apply to all regulatory and other nonadjudicative hearings and procedures. Hearings conducted pursuant to this Part shall be deemed in the nature of legislative hearings. Unless the contrary is clearly indicated, all references to "Parts" or "Sections" are to Illinois Administrative Code, Title 35: Environmental Protection. For example, "Part 309" is 35 Ill. Adm. Code 309, and "Section 309.101" is 35 Ill. Adm. Code 309.101.

### Section 102.102 Adoption of Regulations

- a) No substantive regulation shall be adopted, amended or repealed by the Board until after a public hearing within the area of the state concerned, and in the case of statewide regulations, until public hearings are held in at least two areas of the state.
- b) In adopting any such new regulation, the Board shall consider those elements detailed in the economic impact study of such regulation and the Board shall, in its written opinion, make a determination, based upon the economic impact study and other evidence in the public hearing record, as to whether the proposed regulation has any adverse economic impact on the people of the State of Illinois. When the Board finds that a severe public health emergency is involved in relation to any proposed regulation, the Board may provide that such regulation shall take effect without delay and permit the Board to proceed with the required economic impact hearings while the regulation continues in effect.

## SUBPART B: PROPOSAL OF REGULATIONS

### Section 102.120 Proposal of Regulations

Any person may submit a regulatory proposal for the adoption, amendment, or repeal of a substantive regulation. Ten (10) copies of each proposal shall be filed with the Clerk. Each proposal shall include

- a) The language of the proposed regulation or amendment; and
- b) A statement of the reasons supporting the proposal including a short and plain statement of facts known to the proponent which support the proposal, and a short and plain statement of the purpose and effect of the proposal. The applicable factors as listed in Section 27 of the Environmental Protection Act (Act) shall be discussed in regard to the proposal. Where the proposal covers more than one substantive point, the supporting statement shall include statements in support of each point.

### Section 102.121 Authorization of Hearing

- a) If the proposal is made by the Agency, the Institute, or a Board Member, or if it is accompanied by a petition signed by at least 200 persons with home addresses specified, the Clerk shall assign a docket number to the proposal and distribute copies to each Board Member. If the proposal is not made by the Agency or the Institute, the Chairman shall place the matter on the agenda for Board decision whether or not to authorize a hearing. The Board shall authorize a hearing unless it determines that the proposal is plainly devoid of merit or deals with a subject on which a hearing has been held within the preceding six months, or is not accompanied by an adequate statement of supporting reasons. If the Board rules against a hearing, it shall enter an order setting forth its reasons for so ordering and shall notify the proponent of its decision. The Board may hold a hearing on any proposal that does not meet the requirements of this section.

- b) If the proposal is made by the Agency, the Institute, or a Board Member, or if the Board authorizes a hearing, the Chairman shall designate an attending Board Member, and shall notify the proponent of such designation. A Member of the Board may serve as Hearing Officer if otherwise qualified, and such hearing need not be attended by another Member of the Board.
- c) In the case of a proposed regulatory change under the provisions of 35 Ill. Adm. Code 302.211(j) or 304.141(c), the requirement of Section 102.121(a) relating to a requirement of 200 signatures shall not apply; in such case only a single hearing shall be required, to be held in the area to be affected.
- d) The Clerk shall forward a copy of all proposed regulations authorized for hearing to the Institute and, if not proposed by the Agency, a copy to the Agency.
- e) The Board may consolidate two or more proposals for purpose of hearings and decision.

#### **Section 102.122 Notice of Hearing**

- a) The Hearing Officer, after appropriate consultation with the proponent, shall set a time and place for hearing, which shall be within a reasonable time after the date on which the proposal was received by the Clerk. The Clerk shall give notice at least 20 days prior to the date of the hearing as follows:
  - 1) To the proponent, by mail,
  - 2) To all persons on the Board's mailing list through notice in the Board's Environmental Register or by special mailing, and
  - 3) By public advertisement in a newspaper of general circulation in the area of the state affected.
- b) The Board shall make available to any person copies of proposed regulations and supporting statements at the time the hearing date is announced.
- c) Hearings which are continued on the hearing record do not require notice that complies with subsection 'a'.

### **SUBPART C: DISCOVERY**

#### **Section 102.140 Discovery**

The Board or the Hearing Officer on behalf of the Board may issue subpoenas for attendance of a witness at a hearing under this Part. Subpoenas may include a command to produce books, papers, documents, or tangible things designated therein and reasonably necessary to resolution of the matter under consideration. Subpoenas shall conform to the requirements of Section 103.163(b) and (c).

### **SUBPART D: HEARINGS**

#### **Section 102.160 Authority of Hearing Officer**

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 shall have all powers necessary to these ends including (but not limited to) the authority to:

- a) Require prior submission of expert testimony and written exhibits before hearing
- b) Require all parties to state their position with respect to the proposal.

- c) Administer oaths and affirmations,
- d) Examine witnesses and direct witnesses to testify,
- e) Regulate the course of the hearing;
- f) Establish reasonable limits on the frequency and duration of the testimony of any witness and limit repetitious or cumulative testimony; and
- g) When so directed by the Board to issue an order requiring the answering of interrogatories in the name of the Board.

#### **Section 102.161 Examination of Witnesses**

- a) Examination of witnesses by any member of the Board, by Board staff, by the Hearing Officer, by the proponent of the regulations under consideration, by representatives of the Agency, by the Institute, or by the Attorney General shall be permitted. Reasonable examination by any other person shall be permitted by the Hearing Officer. Repetitious examination may be limited by the Hearing Officer.
- b) All witnesses at hearings shall be sworn.

#### **Section 102.162 Prior Submissions**

When prior submission of written testimony is required or tendered, 10 copies shall be filed with the Clerk. Rebuttal testimony and exhibits may also be tendered in writing, not later than 14 days after the hearing on the direct testimony and exhibits. Notice of requirement for prior submission of written testimony and exhibits shall be given to all persons required to be notified by Section 102.122 not later than 21 days prior to the date that the testimony is to be given.

#### **Section 102.163 Written Submissions**

Any person may make a written submission on any proposal within 14 days of the close of the hearing or within 14 days after regulation revision under Section 102.200 by filing it with the Clerk and the parties, unless otherwise specified or limited by the Hearing Officer. The record will remain open for statements for 14 days following the close of the hearing, unless the Hearing Officer or Board directs otherwise.

#### **Section 102.164 Record**

All testimony shall be recorded stenographically. When the transcript is filed with the Clerk, the Hearing Officer shall receive and rule on corrections from any person who may examine the transcript for accuracy. Failure of any witness to correct the transcript within 14 days after its receipt in Board offices shall constitute a waiver of any right to correct, unless undue prejudice results. The transcript as so approved, all written testimony, all exhibits offered in connection with the hearing, and all written submissions filed with the Clerk under Sections 102.163 and 102.200 before or after the close of the hearing shall constitute the record. The Clerk shall certify the record to the Board when it is complete.

### **SUBPART E: ECONOMIC IMPACT HEARINGS**

#### **Section 102.180 Hearings on the Economic Impact Study of New Proposals**

- a) The Board, before the final adoption of any proposed regulations or amendment to existing regulations, shall conduct hearings on the economic impact study on such proposals.

- b) The provisions of this Part shall govern all hearings held pursuant to this section.
- c) Hearings held pursuant to this section may be consolidated with any other hearings held pursuant to this Part.

#### **Section 102.181 Hearings on the Economic Impact Study of Existing Regulations**

- a) Within a reasonable time, but not longer than 120 days, after each economic impact study has been filed, the Board shall conduct public hearings throughout the State on such study.
- b) The provisions of this Part shall govern all hearings held pursuant to this section.
- c) Upon conclusion of the hearings, the Board shall publish its findings and conclusions on the areas covered by the study and the testimony received by the Board.
- d) The Board shall also specifically determine whether, as a result of its findings and conclusions, any regulations of the Board shall be modified or eliminated.
- e) If the Board concludes that modification or elimination may be necessary, it shall propose such modification as regulations and conduct further hearings on said modification.
- f) Any such proposed modification shall not require any additional economic impact study.

### **SUBPART F: BOARD ACTION**

#### **Section 102.200 Revision of Proposed Regulations**

- a) After a rulemaking hearing, the Board may revise the proposed regulations before adoption in response to suggestions made at the hearing and written submissions received subsequent thereto, without conducting a further hearing on the revisions. The Board shall specify the portions of the final form of the regulations that differ from the proposal on which the hearing was held, shall send such statement of revisions to persons heard on the original proposal, and shall give notice to all persons on the Board's mailing list that such a statement is available. Any person may make a written submission concerning any revision by filing it with the Clerk within 14 days after such notice. The Board, in its discretion and in response to the written comments submitted on the proposed final draft, may make further revision on the proposed regulation. Such final regulation may be adopted without further hearing or publication in the Environmental Register.
- b) The Board may modify and subsequently adopt any proposed regulations or amendments to existing regulations without any additional economic impact study, provided that such modification by the Board does not significantly alter the intent and purpose of the proposed regulation which was the subject of the economic impact study.

#### **Section 102.201 Notice of Adopted Regulations**

Any person heard on the original proposal, who has submitted his name and address to the Clerk or is on the Board's mailing list, shall be given notice of the Board's final action. The Clerk shall file an affidavit of compliance with this section. The Board shall publish a written opinion stating its reasons supporting the regulations as adopted.

### **SUBPART G: OTHER PROCEEDINGS**

#### **Section 102.220 Other Proceedings**

The Board may conduct such other nonadjudicative or informational hearings as may be necessary to accomplish the purposes of the Act. Such other hearings shall be conducted according to these rules to the extent applicable.

### **APPENDIX OLD RULE NUMBERS REFERENCED**

*The following table is provided to aid in referencing old Board rule numbers to section numbers pursuant to codification.*

<b>Chapter 1: Procedural Rules 35 Ill. Adm. Code</b>	
<b>Parts 101-107</b>	
<b>Part II: Regulatory and other</b>	<b>Part 102: Regulatory and other</b>
<b>Non-adjudicative</b>	<b>Non-adjudicative</b>
<b>hearings and</b>	<b>hearings and</b>
<b>Proceedings</b>	<b>Proceedings</b>
Rule 201 .....	Section 102.101
Rule 202 .....	Section 102.102
Rule 203 .....	Section 102.120
Rule 204 .....	Section 102.121
Rule 205 .....	Section 102.122
Rule 206 .....	Section 102.160
Rule 207 .....	Section 102.140
Rule 208 .....	Section 102.161
Rule 209 .....	Section 102.162
Rule 210 .....	Section 102.163
Rule 211 .....	Section 102.164
Rule 212 .....	Section 102.200
Rule 213 .....	Section 102.201
Rule 214 .....	Section 102.180
Rule 215 .....	Section 102.181
Rule 216 .....	Section 102.220



## TITLE 35: ENVIRONMENTAL PROTECTION

### SUBTITLE A: GENERAL PROVISIONS

#### CHAPTER I: POLLUTION CONTROL BOARD

##### PART 103

##### ENFORCEMENT PROCEEDINGS

##### SUBPART A: GENERAL PROVISIONS

Section	
103.101	Applicability

##### SUBPART B: COMPLAINT, SERVICE AND AUTHORIZATION OF HEARING

Section	
103.120	Who May Initiate
103.121	Parties
103.122	Notice, Formal Complaint, and Answer
103.123	Service
103.124	Authorization of Hearing
103.125	Notice of Hearing

##### SUBPART C: MOTIONS, JOINDER AND INTERVENTION

Section	
103.140	Motions and Responses
103.141	Consolidation and Severance of Claims and Joining Additional Parties
103.142	Intervention
103.143	Continuances

##### SUBPART D: DISCOVERY, ADMISSIONS AND SUBPOENAS

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103.160	Prehearing Conferences
103.161	Discovery
103.162	Admissions
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##### SUBPART E: SETTLEMENT PROCEDURE

Section	
103.180	Settlement Procedure

##### SUBPART F: CONDUCT OF HEARINGS AND RULES OF EVIDENCE

Section	
103.200	Authority of Hearing Officer
103.201	Authority of Board Members and Board Assistants
103.202	Order of Enforcement Hearings
103.203	Conduct of Hearing
103.204	Admissible Evidence
103.205	Written Narrative Testimony
103.206	Official Notice
103.207	Viewing of Premises
103.208	Admission of Business Records in Evidence
103.209	Examination of Adverse Party or Agent and Hostile Witnesses; Compelling Appearance Thereof at Hearing
103.210	Amendment and Variance

## SUBPART G: POST-HEARING PROCEDURES

Section	
103.220	Default
103.221	Transcript
103.222	Record
103.223	Briefs and Oral Argument
103.224	Contents of Board Opinions and Orders

## SUBPART H: RELIEF FROM FINAL ORDERS

Section	
103.240	Motion Subsequent to Entry of Final Order
103.241	Relief from Section 103.224 Final Orders

### Appendix Old Rule Numbers Referenced

*AUTHORITY:* Authorized by Section 26 of the Environmental Protection Act (Ill. Rev. Stat. 1979, ch. 111 1/2, par. 1026) and implementing Sections 5 and 31 through 33 of the Illinois Environmental Protection Act (Ill. Rev. Stat. 1979, ch. 111 1/2, pars. 1005 and 1031 through 1033).

*SOURCE:* Filed with Secretary of State January 1, 1978, amended 4 Ill. Reg. 39, page 285, effective September 12, 1980, amended 5 Ill. Reg. 14146, effective December 3, 1981; codified 6 Ill. Reg. 8357.

### SUBPART A: GENERAL PROVISIONS

#### Section 103.101 Applicability

The Rules in this Part apply where applicable to proceedings to adjudicate alleged violations of the Environmental Protection Act (Act), regulations, orders of the Board, permit appeals, and variance petitions. Unless the contrary is clearly indicated, all references to "Parts" or "Sections" are to Illinois Administrative Code, Title 35: Environmental Protection. For example, "Part 309" is 35 Ill. Adm. Code 309, and "Section 309.101" is 35 Ill. Adm. Code 309.101.

### SUBPART B: COMPLAINT, SERVICE AND AUTHORIZATION OF HEARING

#### Section 103.120 Who May Initiate

An enforcement proceeding may be commenced by any person

#### Section 103.121 Parties

- a) The person initiating an enforcement proceeding shall be designated the complainant. Any adverse party shall be designated the respondent.
- b) Misnomer of a party is not a ground for dismissal; the name of any party may be corrected at any time.
- c) If a complete determination of a controversy cannot be had without the presence of other parties, the Board or Hearing Officer shall order them to be brought in. If a person not a party has an interest which the order may affect, the Board or Hearing Officer may order him to be made a party. Service of process and subsequent pleadings shall be had as directed by Section 103.123.

#### Section 103.122 Notice, Formal Complaint, and Answer

- a) An enforcement action shall be commenced by the service of a notice and formal complaint upon all respondents and the filing of 10 copies of the notice and formal complaint with the Clerk.

b) The notice shall be directed to the respondents notifying them of the filing of the accompanying complaint and that they may be required to attend a hearing at a date set by the Board.

c) The formal complaint shall contain:

- 1) A reference to the provision of the Act and regulations which the respondents are alleged to be violating;
  - 2) The dates, location, events, nature, extent, duration, and strength of discharges or emissions, and consequences alleged to constitute violations of the Act and regulations. The complaint shall advise respondents of the extent and nature of the alleged violations to reasonably allow preparation of a defense, and
  - 3) A concise statement of the relief which the complainant seeks.
- d) Respondent may file an answer within 30 days of receipt of the complaint. All material allegations of the complaint shall be taken as denied if not specifically admitted 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 prior to hearing in the answer or in a supplemental answer filed pursuant to Section 103.210(b).

(Source: Amended 5 Ill. Reg. 14146, effective December 3, 1981)

#### Section 103.123 Service

- a) A copy of the notice and complaint 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 complaint, all pleadings, motions, and discovery notices and all other notices shall be served personally or by First Class United States mail, and 10 copies of pleadings and motions shall be filed with the Clerk with proof of service. Two copies of any discovery motion, deposition, interrogatories, answer to interrogatories, or subpoena shall be filed with the Clerk with proof of service.
- c) Service by mail is presumed complete four days after mailing.

#### Section 103.124 Authorization of Hearing

- a) The Clerk shall assign a docket number to each complaint filed, deposit the complaint and notice in the Board's files, and distribute copies to each Board Member. If the complaint is filed by a person other than the Agency, the Clerk shall also send a copy to the Agency; the Chairman shall place the matter on the agenda for Board determination whether the complaint is duplicitous or frivolous. If the Board rules that the complaint is duplicitous or frivolous, it shall enter an order setting forth its reasons for so ruling and shall notify the parties of its decision. If the Board rules that the complaint is not duplicitous or frivolous, this does not preclude the filing of motions regarding the insufficiency of the pleadings.
- b) If the Board rules that the complaint is not duplicitous or frivolous, or if the complaint is filed by the Agency, 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.

#### Section 103.125 Notice of Hearing

- a) The Hearing Officer, after appropriate consultation with the parties, shall set a time and place for hearing to be held within 90 days after the filing of the complaint unless the Board orders otherwise.
- b) The hearing shall be held in the county in which the alleged violation occurred or in such other county as the Hearing Officer shall for stated cause designate. The Clerk shall give notice of the hearing at least 21 days before the hearing to:
  - 1) All persons on the Board's mailing list by notice in the Board's Environmental Register, or by special mailing; and
  - 2) Except when the Agency is complainant, by public advertisement in a newspaper of general circulation in the county in which the cause of action arose.
- c) The Hearing Officer shall give notice of the hearing at least 21 days before the hearing, to the parties in accordance with Section 103.123(b).
- d) The Agency, when complainant, shall give notice of each complaint and hearing at least 21 days before the hearing to:
  - 1) Any person who has complained to the Agency with respect to respondent within six months preceding the date of the complaint;
  - 2) Any person in the county in which the alleged offending activity occurred who has requested notice of enforcement proceedings;
  - 3) The public, by public advertisement in a newspaper of general circulation in the county in which the cause of action arose; and
  - 4) Such other persons as required by law.
- e) Failure to comply with the provisions of this section may not be used as a defense to an enforcement 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.
- f) Whenever a proceeding before the Board may affect the right of the public individually or collectively to the use of community sewer or water facilities provided by a municipally owned or publicly regulated company, the Board shall at least 30 days prior to the scheduled date of the first hearing in such proceeding, give notice of the date, time, place, and purpose of such hearing by public advertisement in a newspaper of general circulation in the area of the State concerned.

### SUBPART C: MOTIONS, JOINDER AND INTERVENTION

#### Section 103.140 Motions and Responses

- a) All motions preliminary to a hearing shall be presented to the Board or to the Hearing Officer at least 14 days prior to the date of the hearing, or on such other date as the Hearing Officer or the Board shall designate. All motions by respondent to dismiss or strike the complaint or challenging the jurisdiction of the Board shall be filed within 14 days after receipt of complaint, shall be

directed to the Board and shall be disposed of prior to hearing on the complaint, subject, however, to subsections (e) and (i). Motions by complainant to voluntarily dismiss an action against any or all parties 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. 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. Oral argument on motions before the Board shall be permitted only by order of the Board.

- b) 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. All written motions by complainant to voluntarily dismiss an enforcement action shall be accompanied by affidavit attesting to the truth of the facts alleged.
- c) 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.
- d) 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 and authorities relied on.
- e) The Hearing Officer shall rule upon all motions, except that he shall have 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. The Hearing Officer shall refer any such motions to the Board, pursuant to paragraph (a). Notwithstanding the provisions of paragraph (a) above, the Board in its discretion, may direct that hearing on the proceeding be conducted and, in its discretion, may take all motions directed to it with the case. This conditional ruling by the Board shall not foreclose a party from advancing the same contentions as to jurisdiction or adequacy of the complaint upon the completion of the hearing. When ruling on a motion by complainant for voluntary dismissal of an action the Board shall, for reasons stated in its Order, dismiss the action without leave to reinstate if justice so demands. Among the factors to be considered in making such a determination are evidence and arguments concerning the action's age and procedural history, and the prejudicial effects, if any, of dismissing the action with leave to reinstate.
- f) No interlocutory appeal of a motion may be taken to the Board from a ruling of the Hearing Officer, except by allowance of the Board after motion filed by a party or the Hearing Officer. When in the judgment of the Hearing Officer prompt decision is necessary to prevent harm to the public interest or to avoid unusual delay or expense, the Hearing Officer may refer the ruling promptly to the Board and notify the parties either by announcement on the record or by written notice if the hearing is not in session.
- g) 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

litigant. The Hearing Officer, if a member of the Board, may vote upon motions to review his rulings as Hearing Officer.

- h) Unless otherwise provided herein or ordered by the Board, neither the filing of a motion nor the certification of a question to the Board shall stay the proceeding or extend the time for the performance of any act.
- i) Any party may participate in the proceedings without forfeiting any jurisdictional objection, if such objection is raised at or before the time the respondent files his initial pleading or motion, or, if no pleading or motion is made, within 14 days after receipt of complaint. All jurisdictional objections shall conform to the requirements of subsection (a).

(Source: Amended 5 Ill. Reg. 14146, effective December 3, 1981)

#### **Section 103.141 Consolidation and Severance of Claims and Joining Additional Parties**

In the interest of convenient, expeditious, and complete determination of claims, the Board may consolidate or sever enforcement, variance, permit or other adjudicative claims involving any number of parties, and may order additional parties to be brought in pursuant to the provisions of Section 103.121(c).

#### **Section 103.142 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 to intervene in an enforcement proceeding when either of the following conditions is met:
  - 1) The applicant is so situated that he may be adversely affected by a final order of the Board, or
  - 2) An applicant's claim or defense and the enforcement proceeding involve a common question of law or fact.
- 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. Upon allowance of intervention the Hearing Officer shall notify the parties and the Clerk and may allow a continuance of the hearing to enable adequate pre-hearing procedures as justice may require.
- 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.
- d) Whenever a proceeding before the Board may affect the right of the public individually or collectively to the use of community sewer or water facilities provided by a municipally owned or publicly regulated company, all persons claiming an interest shall have the right to intervene as parties pursuant to this section and present evidence of such social and economic impact.

#### **Section 103.143 Continuances**

- a) A motion for continuance for any enforcement, variance or permit appeal 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 sup-

porting the motion. Provided, however, that if the Board determines, in its discretion, that any variance petition, permit appeal, or enforcement case is not proceeding expeditiously to a conclusion, the Board shall order such actions as it deems appropriate to reach an expeditious conclusion.

- b) No continuance shall be granted to the petitioner for any variance or permit appeal proceeding unless the deadline for final Board action, whenever applicable, is extended by the petitioner for a like period, as a minimum.

(Source: Amended 4 Ill. Reg. 39, page 285, effective September 12, 1980.)

## **SUBPART D: DISCOVERY, ADMISSIONS AND SUBPOENAS**

### **Section 103.160 Prehearing Conferences**

- a) Upon written notice by the Hearing Officer in any proceeding parties or their attorneys may be directed to appear at a specified time and place for a conference, prior to or during the course of hearing for the purposes of:
  - 1) Simplifying the issues.
  - 2) Amending the pleadings for clarifications, amplification, or limitation.
  - 3) Making admissions of facts or stipulating to the admissibility of any matters to expedite the hearing.
  - 4) Limiting the number of witnesses.
  - 5) Exchanging prepared testimony and exhibits, and
  - 6) Aiding in the simplification of the evidence and disposition of the proceeding.
- b) Action taken at the conference shall be noted in the hearing record, unless the parties enter upon written stipulation as to such matters, or agree to a statement in another appropriate ruling.

### **Section 103.161 Discovery**

- a) Regarding any matter not privileged the Hearing Officer shall order discovery upon the written request of any party when parties cannot agree on the legitimate scope of discovery. It is not a ground for objection that the testimony 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. The Hearing Officer shall order:
  - 1) The production of the identity and location of persons having knowledge of relevant facts.
  - 2) The taking of the deposition of any witness including expert witnesses expected to testify at the hearing.
  - 3) The taking of the interrogatory of any party.
  - 4) 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 premises of any party.
- b) The Hearing Officer may at any time on his own initiative or on motion of any party or witness, make a protec-

tive 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.

- c) All depositions and interrogatories taken pursuant to this section shall be for purposes of discovery only, except as herein provided. Depositions and interrogatories may be used for purposes of impeachment and as admissions of the deposed or interrogated person. Upon application to the Hearing Officer either before or after the taking of such deposition or interrogatories and upon a showing at the time of the hearing that the person deposed or interrogated will not be available to participate in the hearing because of death, age, sickness, infirmity, absence from the country or other exceptional circumstances, the Hearing Officer may order that the deposition or interrogatories be used as evidence in the hearing.
- d) Upon transcription of the deposition, it shall be made available to the deponent for examination, unless his signature is waived by him and by the parties who are represented at the deposition. Any changes in form or substance which the deponent desires to make shall be entered upon the deposition by the Hearing Officer with a statement of the reasons given by the deponent making them. The deposition shall then be signed by the deponent unless he is ill or cannot be found or refuses to sign, in which event the Hearing Officer's certificate shall state the reason for the omission of the signature.
- e) A party at hearing may exclude by objection those portions of any deposition which contain evidence that would be excluded if the witness were testifying in person.
- f) All objections to rulings of the Hearing Officer shall be made in the record. When in the judgment of the Hearing Officer prompt decision by the Board is necessary the Hearing Officer may request the Board to rule on the objection. The Board shall grant or deny the objection or in its discretion rule that the Hearing Officer's ruling be conditionally upheld and take the objection with the case. Any ruling by the Board to grant or deny the objections or to conditionally uphold the ruling of the Hearing Officer shall not relieve the objecting party of otherwise complying with the requirements of Section 103.140 e.
- g) Subsections 103.140(b), (c), (d), (e), (g), (h), and (i) shall apply regarding procedures for ruling on objections.
- h) Failure to comply with any ruling shall subject the person to sanctions under Part 107.

### **Section 103.162 Admissions**

- a) Request for Admission of Fact. A party may serve on any other party, no sooner than 21 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.
- b) Request for Admission of Genuineness of Document. A party may serve on any other party, no sooner than 21 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.
- c) 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 20 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.

- d) **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.
- e) **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.

#### **Section 103.163 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 deposition or 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 Chapter. A copy of the subpoena shall be served upon the Clerk for Board files. If the witness 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.

#### **SUBPART E: SETTLEMENT PROCEDURE**

##### **Section 103.180 Settlement Procedure**

- a) No case pending before the Board shall be disposed of or modified without an order of the Board. 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 resulting 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 penalty.
- b) When the parties submit a proposed settlement or stipulation to the Hearing Officer, the Hearing Officer shall conduct a hearing in which all interested persons may testify with respect to the nature of the alleged violation and its impact on the environment, together with their views on the proposed stipulation and settlement. The Hearing Officer shall transmit such record of hearing to the Board, together with all exhibits.
  - c) The Board shall consider such proposed settlement and stipulation and the hearing record. The Board may accept, suggest revisions in, reject the proposed settlement and stipulation, or direct further hearings as it appears appropriate. Where an NPDES (National Pollutant Discharge Elimination System) permit is involved in the settlement, notice of hearing shall be published in the Environmental Register at least 30 days prior to such hearing.

#### **SUBPART F: CONDUCT OF HEARINGS AND RULES OF EVIDENCE**

##### **Section 103.200 Authority of Hearing Officer**

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 shall have all powers necessary to these ends including (but not limited to) the authority to:

- a) Issue discovery orders;
- b) Rule upon objections to discovery orders;
- c) 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;
- d) Hold pre-hearing conferences for settlement, simplification of the issues, or any other proper purposes;
- e) Administer oaths and affirmations;
- f) Rule upon offers of proof and receive evidence and rule upon objections to the introduction of evidence, subject to Section 103.203;
- g) Regulate the course of the hearings and the conduct of the parties and their counsel;
- h) 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.

- i) Except as otherwise provided, consider and rule as justice may require upon motions appropriate to an adjudicative proceeding.

#### **Section 103.201 Authority of Board Members and Board Assistants**

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.

#### **Section 103.202 Order of Enforcement Hearings**

The following shall be the order of all enforcement hearings, subject to modification by the Hearing Officer for good cause:

- a) Presentation, argument, and disposition of motions preliminary to a hearing on the merits of the matters raised in the complaint.
- b) Presentation of opening statements.
- c) Complainant's case in chief.
- d) Respondent's case in chief.
- e) Complainant's case in rebuttal.
- f) Statements from interested citizens, as authorized by the Hearing Officer.
- g) Complainant's opening argument, which may include legal argument.
- h) Respondent's closing argument, which may include legal argument.
- i) Complainant's closing argument, which may include legal argument.
- j) Presentation and argument of all motions prior to submission of the transcript to the Board, and
- k) A schedule for submission of briefs to the Board.

#### **Section 103.203 Conduct of Hearing**

- a) 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 shall 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.
- b) All witnesses shall be sworn.
- c) Whenever a proceeding before the Board may affect the right of the public individually or collectively to the use of community sewer or water facilities provided by a municipally owned or publicly regulated company, evidence of any social and economic impact which would result from restriction or denial of the right to use such facilities shall be admissible in such proceeding. The Hearing Officer shall allow all persons claiming an interest to intervene as parties pursuant to Section 103.142 and to present evidence of such social and economic impact.

- 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.

#### **Section 103.204 Admissible Evidence**

- a) The Hearing Officer shall receive evidence which is admissible under the rules of evidence as applied in the Courts of Illinois pertaining to civil actions except as these rules otherwise provide. The Hearing Officer may receive evidence which is material, relevant, and would be relied upon by reasonably prudent persons in the conduct of serious affairs provided that the rules relating to privileged communications and privileged topics shall be observed.
- b) When the admissibility of evidence depends upon an arguable interpretation of substantive law, the Hearing Officer shall admit such evidence.
- c) Upon stipulation of the parties, the Hearing Officer may order the record of any relevant prior proceeding before the Board or part thereof incorporated into the record of the present proceeding. Accordingly, the Hearing Officer shall direct the Clerk to physically incorporate the entire or appropriate portions of the record constituting such prior proceeding into the present proceeding.
- d) Relevant scientific or technical articles, treatises or materials may be introduced into evidence subject to refutation or disputation through any introduction of comparable documentary evidence or expert testimony.

#### **Section 103.205 Written Narrative Testimony**

Written narrative testimony may be introduced by a party in a hearing only if provided to all other parties of record prior to the date of the hearing and only after the opposing parties have had an opportunity to object to all or portions of the written testimony and to obtain a ruling on said objections prior to its introduction. The person on whose behalf the testimony is submitted shall be available at hearing for cross-examination.

#### **Section 103.206 Official Notice**

Official notice may be taken of all facts of which judicial notice may be taken and of other facts within the specialized knowledge and experience of the Board.

#### **Section 103.207 Viewing of Premises**

Upon motion of any party or upon the Hearing Officer's own motion, the Hearing Officer and any Board Members present may view the premises in question to establish a more comprehensive record but no such viewing by less than the whole Board shall be made if any party objects. No stenographic record need be taken of what transpires at the viewing.

#### **Section 103.208 Admission of Business Records in Evidence**

Any writing or record, whether in the form of any entry in a book or otherwise made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of the act, transaction, occurrence, or event. To be admissible the writing or record shall have been made in the regular course of any business, provided it was the regular course of the business to make such a memorandum or record at the time of such an act, transaction, occurrence, or event or within a reasonable time

thereafter. All other circumstances of the making of the writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but shall not affect its admissibility. The term "business", as used in this rule, includes business, profession, occupation, and calling of every kind.

**Section 103.209 Examination of Adverse Party or Agent and Hostile Witnesses; Compelling Appearance Thereof at Hearing**

- a) Upon the hearing of any action, any party thereto, or any person for whose immediate benefit the action is prosecuted or defended, or the officers, directors, managing agents or foreman of any party to the action, may be called and examined as if under cross-examination at the instance of any adverse party. The party calling for the examination may rebut the testimony given by counter-testimony and may impeach the witness by proof of prior inconsistent statements.
- b) If the Hearing Officer determines that a witness is hostile or unwilling, the witness may be examined by the party calling him as if under cross-examination.
- c) The party calling an occurrence witness, upon the showing that he called the witness in good faith and is surprised by his testimony, may impeach the witness by proof of prior inconsistent statements.
- d) The appearance at the hearing of a party or a person who at the time of the hearing is an officer, director or employee of a party may be required by serving the party with a notice designating the person who is required to appear. If the party or person is a non-resident of the State, the Hearing Officer shall provide by order such terms and conditions in connection with his appearance at the hearing as are just, including payment of his reasonable expenses. The notice also may require production at the hearing of documents or tangible things.

**Section 103.210 Amendment and Variance**

- a) Proof may depart from pleadings and pleadings may be amended to conform to proof, so long as no undue surprise results that cannot be remedied by a continuance.
- b) At any time prior to commencement of hearing and prior to the close of hearing, the Hearing Officer may upon motion of a party permit a supplemental pleading setting forth continuing transactions or occurrences which have continued or occurred subsequent to the date of the filing of the initial pleading or any amendment thereto, so long as no undue surprise results that cannot be remedied by a continuance.

**SUBPART G: POST-HEARING PROCEDURES**

**Section 103.220 Default**

Failure of a party to appear on the date set for hearing or failure to proceed as ordered by the Board shall constitute a default. The Board shall thereafter enter such order as appropriate, as limited by the pleadings and based upon the evidence introduced at the hearing.

**Section 103.221 Transcript**

- a) The Board shall provide for or arrange a court reporter who shall transcribe the entire hearing. Seven (7) copies, of which one (1) must be an original, of the transcript shall be filed with the Board within 15 days following the close of the hearing.
- b) Any party or witness may correct the transcript, as provided in Section 102.164.

**Section 103.222 Record**

The transcript of the hearing approved by the Hearing Officer and all exhibits shall constitute the record. The Clerk shall certify the record to the Board when it is complete.

**Section 103.223 Briefs and Oral Argument**

The parties may submit briefs to the Board within 14 days after receipt of final transcripts in Board offices or such other reasonable time as the Hearing Officer shall determine consistent with the Board's responsibility for expeditious decision and the needs of the parties under Section 103.202(k). Upon request at the time of the submission of briefs or on its own motion, the Board may permit oral argument by the parties before the whole Board.

**Section 103.224 Contents of Board Opinions and Orders**

The Board shall prepare a written opinion and order for all final determinations which shall include:

- a) 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 final order or determination of the Board. The Board Order may include any or all of the following:
  - 1) A direction to cease and desist from violations of the Act or of the Board's rules and regulations,
  - 2) The imposition of money penalties in such amounts as appropriate in each case,
  - 3) The grant, denial, or revocation of a variance,
  - 4) The grant, denial, or revocation of a permit,
  - 5) The posting of sufficient performance bond or other security as provided by the Act to assure the correction of such violation within the time prescribed, and
  - 6) Such other order that may be appropriate.
- c) 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.

**SUBPART H: RELIEF FROM FINAL ORDERS**

**Section 103.240 Motion Subsequent to Entry of Final Order**

Within 35 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 14 days from the filing thereof. A motion filed within 35 days stays enforcement of the final order and the time for appeal from such order runs anew after the Board rules upon the motion. Failure of a party to appeal a final order or to file for appellate court review within 35 days of adoption of the final order waives all right to review except as set out in Section 103.241.

**Section 103.241 Relief from Section 103.224 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 103.224; or
- 2) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; or
- 3) Void order.

c) 1) 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 103.123(a).

2) The motion shall be filed with the Board within one year after entry of the order except that a motion pursuant to subsection (b)(3) shall be filed within a reasonable time after entry of the order.

Rule 332 .....	Section 103.224
Rule 333 .....	Section 103.240
Rule 334 .....	Section 103.241

#### APPENDIX

#### OLD RULE NUMBERS REFERENCED

*The following table is provided to aid in referencing old Board rule numbers to section numbers pursuant to codification.*

<b>Chapter 1: Procedural Rules</b>	<b>35 Ill. Adm. Code</b>
	<b>Parts 101-107</b>
<b>Part III: Enforcement Proceedings</b>	<b>Part 103: Enforcement Proceedings</b>

Rule 301 .....	Section 103.101
Rule 302 .....	Section 103.120
Rule 303 .....	Section 103.121
Rule 304 .....	Section 103.122
Rule 305 .....	Section 103.123
Rule 306 .....	Section 103.124
Rule 307 .....	Section 103.125
Rule 308 .....	Section 103.140
Rule 309 .....	Section 103.141
Rule 310 .....	Section 103.142
Rule 311 .....	Section 103.143
Rule 312 .....	Section 103.160
Rule 313 .....	Section 103.161
Rule 314 .....	Section 103.162
Rule 315 .....	Section 103.163
Rule 316 .....	Section 103.200
Rule 317 .....	Section 103.201
Rule 318 .....	Section 103.202
Rule 319 .....	Section 103.203
Rule 320 .....	Section 103.204
Rule 321 .....	Section 103.205
Rule 322 .....	Section 103.206
Rule 323 .....	Section 103.207
Rule 324 .....	Section 103.208
Rule 325 .....	Section 103.209
Rule 326 .....	Section 103.210
Rule 327 .....	Section 103.220
Rule 328 .....	Section 103.221
Rule 329 .....	Section 103.222
Rule 330 .....	Section 103.223
Rule 331 .....	Section 103.180



## TITLE 35: ENVIRONMENTAL PROTECTION

### SUBTITLE A: GENERAL PROVISIONS

#### CHAPTER I: POLLUTION CONTROL BOARD

#### PART 104 VARIANCES SUBPART A: GENERAL PROVISIONS

Section	
104.102	Variance from New Regulation
104.103	References

#### SUBPART B: PETITION FOR VARIANCE

Section	
104.120	Petition for Variance
104.121	Contents of Variance Petition
104.122	Consistency with Federal Law
104.123	Extension of Prior Variance
104.124	Hearing Request or Waiver; Affidavit
104.125	Dismissal for Inadequacy

#### SUBPART C: NOTICE AND OBJECTIONS

Section	
104.140	Notice of Petition
104.141	Objections to Petition

#### SUBPART D: AUTHORIZATION OF HEARINGS

Section	
104.160	Board Action on Petitions for Variance and Authorization of Hearing

#### SUBPART E: RECOMMENDATION AND RESPONSE

Section	
104.180	Agency Investigation and Recommendation
104.181	Response or Amended Petition

#### SUBPART F: HEARINGS

Section	
104.200	Notice of Hearing
104.201	Proceedings
104.202	Transcripts

#### SUBPART G: FINAL ACTION

Section	
104.220	Decision

#### Appendix Old Rule Numbers Referenced

**AUTHORITY:** Authorized by Section 26 of the Environmental Protection Act (Ill. Rev. Stat. 1979, ch. 111 1/2, par. 1026) and implementing Sections 5 and 35 through 38 of the Illinois Environmental Protection Act (Ill. Rev. Stat. 1979, ch. 111 1/2, pars. 1005 and 1035 through 1036).

**SOURCE:** Filed with Secretary of State January 1, 1978, amended 2 Ill. Reg. 16, page 3, effective May 1, 1978, amended 5 Ill. Reg. 2763, effective March 2, 1981, codified 6 Ill. Reg. 8357.

## SUBPART A: GENERAL PROVISIONS

### Section 104.102 Variance from New Regulation

If any person files a petition for variance from a regulation within 20 days after the effective date of such regulation, the operation of such rule or regulation shall be stayed as to such person pending the disposition of the petition. The Board may hold a hearing upon the petition five days from the notice of such hearing, and in all other respects the rules in this Part shall apply to the extent they are consistent with the hearing date set by the Board.

### Section 104.103 References

Unless the contrary is clearly indicated, all references to "Parts" or "Sections" are to Illinois Administrative Code, Title 35 Environmental Protection. For example, "Part 309" is 35 Ill. Adm. Code 309, and "Section 309.101" is 35 Ill. Adm. Code 309.101.

(Source: Added at 6 Ill. Reg. 8357, effective July 16, 1982.)

## SUBPART B: PETITION FOR VARIANCE

### Section 104.120 Petition for Variance

A variance proceeding shall be commenced by any person by filing a petition for variance with the Agency and simultaneously filing 10 copies with the Clerk of the Board. All additional information or amendments to the petition for variance shall be filed with the Agency and Board in the same manner as that required for commencing the action.

### Section 104.121 Contents of Variance Petition

To enable the Board to rule on the petition for variance, the following information, where applicable, shall be included in the petition:

- a) A clear and complete statement of the precise extent of the relief sought, including specific identification of the particular provisions of the regulations or Board Order from which the variance is sought;
- b) A description of the business or activity of the petitioner including the size of the business and number of employees and a description of the location and area affected by petitioner's operations;
- c) The quantity and types of materials used in the process or activity for which the variance is required and a full description of the particular process or activity in which the materials are used;
- d) The quantity and types of materials discharged from the process or activity requiring the variance, the location of the points of discharge, and, as applicable, the identification of the receiving waterway or land, or the location of the nearest air monitoring station maintained by the Agency;
- e) Data describing the nature and extent of the present failure to meet the numerical standards or particular provisions from which the variance is sought and a factual statement why compliance with the Act and regulations was not or cannot be achieved by the required compliance date;
- f) A detailed description of the existing and proposed equipment or proposed method of control to be under-

taken to achieve full compliance with the Act and regulations, including a time schedule for the implementation of all phases of the control program from initiation of design to program completion and the estimated costs involved for each phase and the total cost to achieve compliance;

- g) An assessment, with supporting factual information, of the environmental impact that the variance will impose on human, plant, and animal life in the affected area, including, where applicable, data describing the existing air and water quality which the discharge may affect;
- h) Past efforts to achieve compliance including costs incurred, results achieved, permit status, and, for publicly-owned treatment works or connections thereto, construction grant status;
- i) A discussion of the availability of alternate methods of compliance, the extent that such methods were studied, and the comparative factors leading to the selection of the control program proposed to achieve compliance;
- j) A statement of the measures to be undertaken during the period of the variance to minimize the impact of the discharge of contaminants on human, plant, and animal life in the affected area, including the numerical interim discharge limitations which can be achieved during the period of the variance;
- k) A concise factual statement of the reasons the petitioner believes that compliance with the particular provisions of the regulations or Board Order would impose an arbitrary or unreasonable hardship, and
- l) Such other things as are required in this Subpart.

#### Section 104.122 Consistency with Federal Law

- a) All petitions for variances from Title II of the Act or from 35 Ill. Adm. Code, Subtitle B, Ch. 1 (prior to codification, Subtitle B, Chapter I was Ch. 2: Air Pollution), shall indicate whether the Board may grant the requested relief consistent with the Clean Air Act (42 U.S.C. 7401 et seq.) and the Federal regulations adopted pursuant thereto. If granting a variance would constitute issuance of a delayed compliance order as that term is defined in 40 CFR 65.01(e), the petition shall indicate whether the requested relief is consistent with Section 113(d) of the Clean Air Act and 40 CFR 65.01-65.10 and 65.161. If granting a variance would require revision of the State Implementation Plan, the petition shall indicate whether the requirements of Section 110(a) of the Clean Air Act and 40 CFR 51 will be satisfied.
- b) All petitions for variances from Title III of the Act; from 35 Ill. Adm. Code, Subtitle C, Ch. 1; or from water pollution related requirements of any other title of the Act or chapter of the Board's Regulations shall indicate whether the Board may grant the relief consistent with the Clean Water Act (33 U.S.C. 1251), U.S.E.P.A. effluent guidelines and standards, any other Federal regulations, or any areawide waste treatment management plan approved by the Administrator of U.S.E.P.A. pursuant to Section 208 of the Clean Water Act.
- c) All petitions for variances from Title IV of the Act or from 35 Ill. Adm. Code, Subtitle F, Ch. 1 (prior to codification, Subtitle F, Chapter I was Ch. 6: Public Water Supplies), shall indicate whether the Board may grant the relief consistent with the Safe Drinking Water Act (42 U.S.C. 300(f) et seq.) and the U.S.E.P.A. National Interim Primary Drinking Water Regulations (40 CFR 141).

- d) The petition may include an analysis of applicable federal law and legal arguments and facts which may be necessary to show compliance with federal law. If it does not and petitioner subsequently files a pleading containing such, it will be deemed an amended petition, thereby restarting the decision period. However, petitioner may, pursuant to Section 104.181, file a response to the Agency's analysis of federal laws without amending the petition.

(Source: Amended 5 Ill. Reg. 2763, effective March 2, 1981)

#### Section 104.123 Extension of Prior Variance

- a) A petition to extend a prior variance granted by the Board shall be commenced by filing a petition for variance with the Agency and the Board in accordance with the requirements of Sections 104.120 and 104.121. To the extent that the information required by Sections 104.120 and 104.121 has been included in the prior petition for variance for which extension is sought, a resubmission of that information shall not be required provided that the petition shall request the incorporation of the record, opinion and order in the prior proceeding into the new petition.
- b) A petition to extend a prior variance shall be a new petition for variance before the Board and shall be subject to all of the requirements of this Part except as provided in subsection (a).

#### Section 104.124 Hearing Request or Waiver; Affidavit

The petition shall contain a request for a hearing on the petition if desired by petitioner, or, in the alternative, a statement waiving a hearing, accompanied by such affidavits or other proof in support of the material facts alleged in the petition as the petitioner may submit, sufficient to enable the Board, if it so decides to rule upon the petition without a hearing. In the event that a hearing on the variance petition has been waived by the petitioner and no hearing is held, the petition for variance, the Agency recommendation, and any amendments or responses thereto shall constitute the entire record in the proceeding and the decision of the Board shall be rendered after consideration of the record except that the Board may take official notice of prior regulatory proceedings and opinions of the Board in adopting the regulations or orders of the Board from which the variance is sought.

#### Section 104.125 Dismissal for Inadequacy

The failure to satisfy the requirements of this Subpart, to the extent that the Board is not reasonably informed of petitioner's circumstances, will render the petition for variance subject to dismissal for inadequacy, unless the Board shall rule otherwise.

(Source: Amended 5 Ill. Reg. 2763, effective March 2, 1981)

### SUBPART C: NOTICE AND OBJECTIONS

#### Section 104.140 Notice of Petition

- a) The Board shall give notice of all variance petitions to all persons on its mailing list through publication of notice of the petition in the Board's Environmental Register in the first publication of the Environmental Register after the Board has considered the petition in accordance with Section 104.160(b).
- b) The Agency shall give written notice of all variance petitions to any person in the county in which the installation or property is located for which the variance is sought who has in writing to the Agency requested notice of variance petitions, the States Attorney of such county,

the Chairman of the County Board of such county, and to each member of the General Assembly from the legislative district in which the installation or property is located and to other persons as required by law. Within 10 days after the petition is filed, the Agency shall publish notice of such petition in a newspaper of general circulation in the county in which the installation or property is located for which the variance is sought.

(Source: Amended 2 Ill. Reg. 16, page 3, effective May 1, 1978)

#### **Section 104.141 Objections to Petition**

Any person may file with the Clerk, within 21 days after the filing of the petition, a written objection to the grant of the variance. Such objection may or may not be accompanied by a petition to intervene in accordance with Section 103.220. A copy of such objection shall be mailed to the petitioner and the Agency by the Clerk.

#### **SUBPART D: AUTHORIZATION OF HEARINGS**

##### **Section 104.180 Board Action on Petitions for Variance and Authorization of Hearing**

- a) The Clerk shall assign a docket number to each petition filed, deposit the petition in the Board's files, and distribute copies to each Board Member. Copies of objections to the petition, amendments, the Agency's recommendations and responses to the recommendation shall be filed and distributed as received.
- b) All petitions for variance shall be placed on the Board agenda and the Board will authorize one or more of the following actions, as they shall determine:
  - 1) The petition may be dismissed if the Board determines that it is not adequate under the Act and Subpart B hereof, or,
  - 2) The Board may enter an order for additional information in support of the petition; or,
  - 3) The Board may accept the petition and defer decision until an Agency recommendation has been served upon the petitioner and filed with the Board; or,
  - 4) The Board may authorize a hearing on the petition.
- c) The Board shall authorize a hearing on any petition for variance, determined to be an adequate petition by the Board, in any of the following circumstances:
  - 1) When a hearing is requested by the petitioner on filing the petition in accordance with Section 104.124; or,
  - 2) When an objection to the variance has been filed within 21 days after the filing of the petition in accordance with Section 104.141, or,
  - 3) When a hearing is requested by an amended petition within 7 days after receipt of the Agency recommendation by the petitioner in accordance with Section 104.181(b).
- d) When a hearing has been authorized by the Board pursuant to subsections (b)(4) or (c), the Chairman shall designate a Hearing Officer in accordance with Section 103.181(b).
- e) If no hearing has been authorized pursuant to subsections (b)(4) or (c), the Board shall act within 90 days of the filing of the petition and shall prepare an opinion

stating reasons supporting the grant or denial of the petition, except that the Board shall not act to grant or deny any petition until after 21 days have elapsed from the date of filing.

- f) No variance shall be granted, with or without hearing, without a showing by affidavits or other adequate proof by the petitioner that compliance with the regulations or Board order would impose an arbitrary or unreasonable hardship upon the petitioner.

#### **SUBPART E: RECOMMENDATION AND RESPONSE**

##### **Section 104.180 Agency Investigation and Recommendation**

- a) After investigating the variance petition and considering the views of persons who might be adversely affected by the grant of the variance, the Agency shall within 30 days of the filing of the petition or any amendment thereto make a recommendation to the Board on the disposition of the petition. The recommendation shall include:
  - 1) A description of the efforts made by the Agency to investigate the facts as alleged and to ascertain the views of persons who might be affected and a summary of the views so ascertained;
  - 2) A statement of the degree to which, if at all, the Agency disagrees with the facts as alleged in the petition, including facts refuting any allegations in the petition for variance;
  - 3) Allegations of any other facts the Agency believes relevant to the disposition of the petition;
  - 4) The Agency's estimate of the costs that compliance would impose on the petitioner and on others and of the injury that the grant of the variance would impose on the public including the effect that continued discharge of contaminants will have upon the environment;
  - 5) The Agency's analysis of applicable federal laws and regulations and an opinion concerning the consistency of the petition with such federal laws and regulations; and
  - 6) The Agency's conclusion of what disposition should be made of the petition.
- b) The Agency shall serve a copy of its recommendation on the petitioner in accordance with Section 103.123(b). Failure of the Agency to timely file its recommendation shall be grounds for the Hearing Officer to adjourn the hearing to a date which will allow reasonable time to prepare.

(Source: Amended 5 Ill. Reg. 2763, effective March 2, 1981)

##### **Section 104.181 Response or Amended Petition**

Within 7 days after receipt of the Agency Recommendation, the petitioner may:

- a) File with the Board a response to any Agency recommendation and a copy shall be served upon the Agency; or,
- b) File an amended petition for variance in accordance with Section 104.121, requesting that the matter be set for hearing. The Board shall authorize the matter for hearing and render a final decision within 90 days after the filing of the amended petition.

## SUBPART F: HEARINGS

### Section 104.200 Notice of Hearing

- a) The Hearing Officer, after appropriate consultation with the parties, shall set a time and place for hearing to be held within 60 days of the filing of the petition.
- b) The Hearing Officer shall give notice of the hearing in accordance with Section 103.123(b), at least 21 days before the hearing to the petitioner, the Agency, and anyone who has filed an objection to the petition.
- c) The Clerk shall publish the time and place of the hearing in the Board's Environmental Register in the first publication of the Environmental Register after the Hearing Officer shall have set the date for hearing.

### Section 104.201 Proceedings

- a) Proceedings upon a petition for variance shall be in accordance with Part 103, except as otherwise provided in this Part.
- b) In a hearing on the petition for variance the burden of proof shall be on the petitioner and it shall be the duty of the petitioner, at hearing, to prove each material fact alleged in the petition for variance.

### Section 104.202 Transcripts

- a) In any proceeding brought pursuant to this Part, where a hearing has been authorized by the Board, the petitioner at its own cost shall furnish to the Board within 15 days following the completion of the hearing seven legible copies of a complete stenographic transcript of the proceedings of the hearing and any delay in the filing of the transcript shall constitute waiver of the right to a decision within 90 days under Section 38 of the Act.
- b) Upon petition and good cause shown, the Board may assume the cost of the stenographic transcript of the hearing provided, however, that such petition shall have been filed with and granted by the Board prior to the hearing.

## SUBPART G: FINAL ACTION

### Section 104.220 Decision

The Board shall render a final decision upon the petition within 90 days after the filing of the petition, except that any party may agree to waive his right to a decision within 90 days. Time included in a continuance granted at the request of the petitioner shall not be counted towards the running of the 90 days. When exigencies of time require, the Board may delay the filing of an opinion for 30 days after the filing of its final order under this Part. Where the petition for variance is amended, the 90 day period shall commence from the date of filing of the amendment. Any order for the filing of a bond shall be in accordance with the Act.

## APPENDIX OLD RULE NUMBERS REFERENCED

*The following table is provided to aid in referencing old Board rule numbers to section numbers pursuant to codification.*

Chapter 1: Procedural Rules	35 Ill. Adm. Code Parts 101-107
Part IV: Variances	Part 104: Variances
Rule 401(a) .....	Section 104.120
Rule 401(a) & (c) .....	Section 104.121
Rule 401(b) .....	Section 104.124
Rule 401(d)-(g) .....	Section 104.122
Rule 401(h) .....	Section 104.125
Rule 402 .....	Section 104.123
Rule 403 .....	Section 104.140
Rule 404 .....	Section 104.141
Rule 405 .....	Section 104.180
Rule 406 .....	Section 104.181
Rule 407 .....	Section 104.160
Rule 408 .....	Section 104.200
Rule 409 .....	Section 104.201
Rule 410 .....	Section 104.220
Rule 411 .....	Section 104.102
Rule 412 .....	Section 104.202

## TITLE 35: ENVIRONMENTAL PROTECTION

### SUBTITLE A: GENERAL PROVISIONS

#### CHAPTER I: POLLUTION CONTROL BOARD

##### PART 105 PERMITS

###### Section

105.101	Setting Standards
105.102	Permit Appeals
105.103	Permit Review
105.104	Cost of Review

###### Appendix Old Rule Numbers Referenced

**AUTHORITY:** Authorized by Section 26 of the Environmental Protection Act (Ill. Rev. Stat. 1979, ch. 111 1/2, par. 1026) and implementing Sections 5, 39, 40 and 40.1 of the Illinois Environmental Protection Act (Ill. Rev. Stat. 1979, ch. 111 1/2, pars. 1005, 1039, 1040 and 1040.1, as amended by P.A. 82-682).

**SOURCE:** Filed with Secretary of State January 1, 1978, amended 4 Ill. Reg. 52, page 41, effective December 11, 1980, codified 6 Ill. Reg. 8357.

###### Section 105.101 Setting Standards

The Board shall prescribe standards for the issuance of permits in accordance with the procedures set forth in Part 102. Unless the contrary is clearly indicated, all references to "Parts" or "Sections" are to Illinois Administrative Code, Title 35, Environmental Protection. For example, "Part 309" is 35 Ill. Adm. Code 309 and "Section 309.101" is 35 Ill. Adm. Code 309.101.

###### Section 105.102 Permit Appeals

###### a) Permit Appeals Other than NPDES (National Pollutant Discharge Elimination System) Permit Appeals

- 1) If the Agency denies the permit, it shall advise the permit applicant in writing in accordance with the requirements of Section 39(a) of the Environmental Protection Act (Act).
- 2) In the case of a denial of a permit or issuance by the Agency of a permit with one or more conditions or limitations to which an applicant objects, an applicant who seeks to appeal the Agency decision shall file a petition for a hearing before the Board within 35 days of the date of mailing of the Agency's final decision. The petition shall include:
  - A) Citation of the particular standards under which a permit is sought.
  - B) A complete and precise description of the facility, equipment, vehicle, vessel, or aircraft for which a permit is sought, including its location.
  - C) A complete description of contaminant emissions and of proposed methods for their control, and
  - D) Such other materials as may be necessary to demonstrate that the activity for which the permit is sought will not cause a violation of the Act or the regulations.

- 3) The method of filing service shall be in accordance with Sections 103.122 and 103.123.

- 4) The Agency shall appear as respondent in the hearing and shall, within 14 days, upon notice of the

petition, file with the Board the entire Agency record of the permit application, including:

- A) The application;
- B) Correspondence with the applicant, and
- C) The denial.

- 5) The Clerk shall give notice of the petition and hearing in accordance with Part 103.

- 6) The proceedings shall be in accordance with the rules set forth in Part 103.

###### b) NPDES Permit Appeals:

- 1) If the Agency denies an NPDES Permit, it shall advise the permit applicant in writing in accordance with the requirements of Section 39(a) of the Act.
- 2) In the case of the denial of an NPDES Permit or the issuance by the Agency of an NPDES Permit with one or more conditions or limitations to which the applicant objects, the applicant may contest the decision of the Agency by filing with the Clerk of the Board a petition for review of the Agency's action in accordance with this Section.
- 3) Any person other than the applicant who has been a party to or participant at an Agency hearing with respect to the issuance or denial of an NPDES Permit by the Agency, or any person who requested such a hearing in accordance with applicable rules, may contest the final decision of the Agency by filing with the Clerk a petition for review of the Agency's action.
- 4) The petition shall be filed and notice issued within 30 days from the date the Agency's final decision has been mailed to the applicant and all other persons who have right of appeal. The method of filing and service shall be in accordance with Sections 103.122 and 103.123.
- 5) The Agency shall appear as respondent and shall file an answer consisting of the hearing file of any hearing which may have been held before the Agency, including any exhibits, and the following documents: NPDES Permit application, NPDES Permit denial or issuance letter, and all correspondence with the applicant concerning the application.
- 6) All parties other than the petitioner who were parties to or participants at any Agency hearing shall be made respondents.
- 7) The petition shall contain a statement of the decision or part thereof to be reviewed. The Board upon motion of any respondent shall, or upon its own motion may, require of the petitioner a specification of the errors upon which the petitioner relies in his petition.
- 8) The hearings before the Board shall extend to all questions of law and fact presented by the entire record. The Agency's findings and conclusions on questions of fact shall be prima facie true and correct. If the Agency's conclusions of fact are disputed by the party or if issues of fact are raised in the review proceeding, the Board may make its own determination of fact based on the record. If any party desires to introduce evidence before the Board with respect to any disputed issue of fact, the Board shall conduct a de novo hearing and receive evidence with respect to such issue of fact.

- 9) This proceeding shall be in accordance with Part 103.
- 10) The order of the Board entered pursuant to hearing may affirm or reverse the decision of the Agency, in whole or in part, may remand the proceeding to the Agency for the taking of further evidence, or may direct the issuance of the permit in such form as it deems just, based upon the law and the evidence.

(Source: Amended 4 Ill. Reg. 52, page 41, effective December 11, 1980)

#### Section 105.103 Permit Review

##### a) Permit Review for Hazardous Waste Disposal Sites:

- 1) Any person other than the applicant or the Agency may petition the Board for a hearing to contest the issuance of a permit for a hazardous waste disposal site. The petition shall be filed within 35 days of the date of mailing of the Agency's final decision to the applicant. The Agency and the applicant shall be named co-respondents. The Board shall conduct a public hearing, in accordance with Section 105.102 and Part 103 hereof, unless it determines that:

- A) The petition is duplicitous or frivolous.
- B) The petitioner is so located as not to be affected by the permitted facility; or
- C) The permit was granted for the disposal or utilization of sludge from publicly owned sewage works

- 2) The hearing shall be based exclusively on the record before the Agency at the time the permit was issued. The burden of proving that the Agency's action was in violation of the Act or applicable Board regulations shall be upon the petitioner.

##### b) NPDES Permit Review

Any person may file a complaint, whether or not a party to or participant to any earlier proceeding before the Agency, or for modification, suspension, or revocation of an NPDES Permit in accordance with 35 Ill. Adm. Code 309.182. Such a complaint shall be commenced in accordance with Section 103.122. Part 103 shall govern the proceeding.

(Source: Amended 4 Ill. Reg. 52, page 41, effective December 11, 1980)

#### Section 105.104 Cost of Review

In any proceeding brought pursuant to this Part, including an NPDES Permit review, the petitioner shall pay all costs of review except that he shall not be required to reimburse the Agency for expenses incurred in the preparation of the record or otherwise, and shall furnish the Board within 14 days following the completion of said hearing, at petitioner's cost, seven copies of a complete stenographic transcript of the proceedings of the hearing. Upon petition and good cause shown, the Board may assume all or any part of the costs of said review or transcript or may allocate the costs among the parties as it deems equitable. Any delay in the filing of the transcript shall constitute a waiver of the right to decision within 90 days under Section 40 of the Act, where applicable, for the period of the delay.

#### APPENDIX OLD RULE NUMBERS REFERENCED

The following table is provided to aid in referencing old Board rule numbers to section numbers pursuant to codification.

Chapter 1: Procedural Rules	35 Ill. Adm. Code
	Parts 101-107
Part V: Permits	Part 105: Permits
Rule 501 .....	Section 105.101
Rule 502 .....	Section 105.102
Rule 503 .....	Section 105.103
Rule 504 .....	Section 105.104

## 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

##### Appendix Old Rule Numbers Referenced

**AUTHORITY:** Authorized by Section 26 of the Environmental Protection Act (Ill. Rev. Stat. 1979, ch. 111 1/2, par. 1026) and implementing Sections 5, 27 and 28 of the Illinois Environmental Protection Act (Ill. Rev. Stat. 1979, ch. 111 1/2, pars. 1005, 1027 and 1028).

**SOURCE:** Filed with Secretary of State January 1, 1978, amended 4 Ill. Reg. 2, page 186, effective December 27, 1979, codified 6 Ill. Reg. 8357.

##### SUBPART A: HEATED EFFLUENT DEMONSTRATIONS

###### Section 106.101 Petition

- a) A hearing pursuant to 35 Ill. Adm. Code 302.211(f) shall be commenced by filing a petition for Section 302.211(f) hearing with the Agency and by filing ten copies with the Clerk of the Board.
- b) At the time of filing its petition, petitioner shall submit to the Agency and to the Board any reports or other evidence in accord with Section 106.102 including all evidence petitioner intends to introduce at the hearing.
- c) Unless the contrary is clearly indicated, all references to "Parts" or "Sections" are to Illinois Administrative Code, Title 35 Environmental Protection. For example, "Part 309" is 35 Ill. Adm. Code 309, and "Section 309.101" is 35 Ill. Adm. Code 309.101.

###### Section 106.102 Requirements for Petition

The following information, where applicable, shall be filed

###### a) General Plant Description

- 1) Generating capacity;
- 2) Type of fuel used;
- 3) Operating characteristics of the condenser cooling system;
- 4) History of the load factor of the plant for the last five years;
- 5) Projected load factors for the life of the plant;
- 6) Estimated date of retirement for each unit at the plant and any plans for additional units at the plant;
- 7) History of plant shutdowns; and,
- 8) Planned, emergency, and projected shutdowns with frequency and duration.

###### b) Description of Method for Heat Dissipation

- 1) Type of system used (once-through, mechanical draft cooling towers, etc.) in narrative form, and,
- 2) Summary information on temperature of discharge to receiving waters in narrative form.

###### c) Plume Studies

- 1) Actual plume studies in the last five years correlated with plant operation and meteorological conditions.
- 2) Theoretical plume studies for all four seasons for typical and worst case conditions. Worst case conditions shall be identified as worst conditions of plant load factor, precipitation, ambient water temperature, air temperature; such studies shall consider the frequency of occurrence and their joint probabilities of occurrence; and
- 3) Theoretical plume studies which identify isotherms at 3° Fahrenheit (1.7° Centigrade) intervals down to ambient temperature indicating three dimensional effects.

###### d) The discharger shall satisfactorily demonstrate that discharges from that source have not caused and cannot be reasonably expected to cause significant ecological damage to the receiving waters, including but not limited to:

- 1) Biological studies in the last five years on receiving waters, including species studied, location of studies, and conclusions reached, including conclusions as to both the lethal and sublethal effects of the thermal discharge;
- 2) The impact on other animal life (wildfowl, amphibians, etc.) in the area as a result of the thermal discharge;
- 3) Secondary Considerations
  - A) Possible and known impact on recreation from thermal discharges; and
  - B) Management practices employed or planned in order to limit the effect of any environmental harm established under paragraph (d) above.
- 4) The required showing in this paragraph (d) may take the form of an acceptable and still accurate

final environmental impact statement or pertinent provisions of environmental assessments used in the preparation of the final environmental impact statement, or may take the form of a showing pursuant to Section 304.141(c) or Section 302.211(j).

#### **Section 106.103 Parties**

The Agency shall be joined as a party in any hearing pursuant to this Part.

#### **Section 106.104 Recommendation**

- a) Within sixty days of the filing of the petition, the Agency may make a recommendation to the Board as to the ecological impact of the thermal discharges from petitioner's source upon the receiving waters. Such recommendation may include:
  - 1) A description of the efforts made by the Agency in conducting its review.
  - 2) The Agency's conclusion as to whether discharges from the source have caused or can reasonably be expected to cause significant ecological damage to the receiving waters.
  - 3) The factual basis for the Agency's conclusion.
  - 4) Any corrective measures which the Agency recommends be taken and the recommended time period for implementation of such measures, and
  - 5) The Agency's conclusion of what disposition should be made of the petition.
- b) The Agency shall serve a copy of its recommendation upon petitioner personally or by First Class United States mail, and ten copies shall be filed with the Clerk with proof of service. Filing of a recommendation by the Agency beyond the sixty-day period shall be grounds for the Board to postpone consideration of the petition to a date which will allow reasonable time to prepare.
- c) The petitioner or any other person may file a response to the Agency recommendation within 14 days with proper notice given to the Board and the Agency.

#### **Section 106.105 Notice and Hearing**

- a) The Clerk shall give notice of the petition and hearing in accordance with Part 103. The proceedings shall be in accordance with Part 103. However, the Part 103 requirements as to the county in which the hearing is to be held shall be inapplicable.
- b) In a hearing, the burden of proof shall be on petitioner.
- c) The record from any proceeding pursuant to Section 302.211(j) or Section 304.141(c), in which the source which is the subject of the Section 302.211(f) hearing was a party, shall be incorporated into the record of the Section 302.211(f) hearing.

#### **Section 106.106 Transcripts**

- a) In any proceeding brought pursuant to Section 302.211(f), the petitioner at its own cost shall furnish to the Board within 15 days following the completion of the hearing seven legible copies of a complete stenographic transcript of the proceedings of the hearing.
- b) Upon petition and good cause shown, the Board may assume such cost.

#### **Section 106.107 Opinion and Order**

- a) Subsequent to hearing, the Board shall prepare a written Opinion and Order, which shall include:
  - 1) Findings of fact, with references to principal supporting items of evidence in the record.
  - 2) The Board's final determination as to whether discharges from the source have caused or can reasonably be expected to cause significant ecological damage to the receiving waters; and
  - 3) Any corrective measures the Board finds appropriate.
- b) If the Board requires corrective measures to be taken, it may require the posting of sufficient performance bond or other security to insure the implementation of such corrective measures within the time prescribed.
- c) The Clerk shall publish the Opinion and Order with the vote of each Board Member recorded and shall notify petitioner of such Opinion and Order.

### **SUBPART B: ARTIFICIAL COOLING LAKE DEMONSTRATIONS**

#### **Section 106.201 Petition**

A hearing pursuant to 35 Ill. Adm. Code 302.211(j), shall be commenced by filing a petition for a determination of specific thermal standards pursuant to Section 302.211(j)(5). At the time such petition is filed, the petitioner shall submit to the Agency and to the Board any reports or other evidence which it plans to introduce in support of said petition.

#### **Section 106.202 Notice and Hearing**

- a) The Clerk shall give notice of the petition and hearing in accordance with Part 103. The proceedings shall be in accordance with Part 103, except as otherwise provided herein.
- b) In a hearing, the burden of proof shall be on the petitioner.
- c) Intervention shall be allowed by any party in accordance with Section 103.142, except that such intervention shall not be limited by subsections 103.142(a)(1) and 103.142(a)(2).

#### **Section 106.203 Transcripts**

- a) In any proceeding brought pursuant to Section 302.211(j), the petitioner at its own cost shall furnish to the Board within 15 days following the completion of the hearing seven legible copies of a complete stenographic transcript of the proceedings of the hearing.
- b) Upon petition and good cause shown, the Board may assume such cost.

#### **Section 106.204 Effective Date**

This Subpart B shall apply to petitions filed subsequent to April 1, 1977.

### **SUBPART C: SULFUR DIOXIDE DEMONSTRATIONS**

#### **Section 106.301 Petition**

- a) A hearing pursuant to Rule 204(e)(3) of the Air Pollution Control Regulations, Chapter 2 (to be codified as Subtitle



B, Chapter I) of the Board's Rules and Regulations, shall be commenced by filing a petition for a Rule 204(e)(3) hearing with the Agency and by filing ten copies with the Clerk of the Board.

- b) At the time of filing of its petition, petitioner shall submit to the Agency and to the Board any reports or other evidence in accord with Section 106.302.
- c) Petitioner shall ensure that the procedural requirements of 40 CFR Sec. 51.4 (1977) are met. At least 30 days prior to the date of the hearing, petitioner shall:
  - 1) Give notice to the public by prominent advertisement in the Air Quality Control Region affected announcing the date, time and place of such hearing.
  - 2) Make available a copy of the petition for public inspection in at least one location in the Air Quality Control Region in which the source is located;
  - 3) Notify the Administrator of the U.S. Environmental Protection Agency (through the appropriate Regional Office);
  - 4) Notify each local air pollution control agency located within the aforementioned Air Quality Control Region;
  - 5) Notify, in the case of an interstate Air Quality Control Region, any air pollution control agencies of other states included, in whole or in part, in the Region.

(Source: Amended 4 Ill. Reg. 2, page 186, effective December 27, 1979)

#### Section 106.302 Requirements for Petition

The petition shall include but not be limited to the following information:

- a) An explicit statement of the site-specific emission limitation (in pounds of sulfur dioxide per million btu actual heat input and total pounds of sulfur dioxide per hour) which is proposed for the facility.
- b) Emission Sources Description
  - 1) The diameter, height, exit gas temperature, and exit gas velocity for all stacks or vents through which sulfur dioxide is emitted into the atmosphere;
  - 2) A description of the fuels used including type, ultimate analysis, sulfur content, and heat content;
  - 3) A description of the type of fuel combustion equipment including method of firing and size (in million btu per hour capacity);
  - 4) A topographic map of terrain within 30 miles of the emission source(s);
  - 5) A specific description of the location of the emission sources, including a plot plan.
  - 6) A specific description of the operating conditions which produce maximum sulfur dioxide emissions.
- c) A summary of any and all ambient air quality data collected by the owner or operator of the source(s) since January 1, 1973. The summary shall include annual averages, maximum and second-highest one-hour, three-hour, and 24-hour averages for each month, and the

number of times the three-hour and 24-hour sulfur dioxide standards were exceeded during each month.

- d) A summary of any and all meteorological data collected by the owner or operator of the source(s) since January 1, 1973, if such data are used in the development of the site-specific emission standard.
- e) A complete description of and justification for all dispersion models and plume rise equations which were used to develop the site-specific emission limitation including all model equations.
- f) A description of and justification for the use of all data which were inputs to the dispersion and plume rise formulas used to establish the site-specific emission standard. The description and justification shall cover, as a minimum, the following input data:
  - 1) Stack diameters, stack heights, exit gas temperatures, and exit gas velocities for all stacks and vents emitting sulfur dioxide at the subject facility as well as for any other sources of sulfur dioxide which were modeled;
  - 2) All sulfur dioxide emission sources which were modeled;
  - 3) All meteorological data.
- g) Calculated maximum ground-level concentrations using the following method, or such other method (or modification of the hereinafter stated method) which the petitioner proves to the satisfaction of the Board to be acceptable.
  - 1) Selection of simulation model:
    - A) Gaussian models which allow the input of hourly meteorological data shall be used which are appropriate for the specific location and type of source(s) in question.
    - B) Dispersion models presented in "Guidelines on Air Quality Models" (EPA-450/2-78-027), as amended from time to time, or those deemed by the Board to be equivalent to these models shall be used for detailed air quality studies.
  - 2) Selection of meteorological data and stack parameters:
    - A) The most recent five years of hour-by-hour meteorological data reasonably available, including wind speed, wind direction, atmospheric stability, mixing height and surface temperature shall be used, unless the petitioner demonstrates that one of the five years causes substantially higher concentrations than the other four, in which case detailed analyses conducted for only that "worst case" year would be acceptable. Notwithstanding the previous sentence, one year of on-site data may be used in lieu of the 5-year data requirement.
    - B) Data shall be from the nearest, representative, quality controlled meteorological collecting site.
    - C) Stack parameters (including emission rate, stack height, stack diameter, exit velocity, and exit temperature) shall reflect the maximum operating rate for comparison with the 24-hour and 3-hour sulfur dioxide standards.

3) Receptors.

- A) Receptors shall be located so as to ensure that the source's maximum impact is detected.
- B) The determination of the receptor grid shall be fully documented in the modeling study.

4) Special conditions:

- A) All special conditions which may affect the dispersion of the effluent plume, including local terrain effects and aerodynamic downwash, shall be considered in the modeling study.
- B) If terrain is a factor in the vicinity of the source, a model capable of handling variable-height receptors shall be used.
- C) If the computed height of the effluent plume is less than 2.5 times the height of nearby buildings or local obstructions, aerodynamic downwash shall be studied and considered as a possible factor in the dispersion of that effluent.

5) Determination of violation:

The determination of whether an applicable air quality increment or standard is being violated shall be based on the second highest predicted concentration over the receptor grid for short-term averaging times and on the highest predicted concentration for annual averaging times. However, if only one year of meteorological data is used in the short-term analysis, then the highest-predicted concentration may be compared to the applicable standard to determine whether a violation has occurred.

6) Other sources:

Effects of other sources of sulfur dioxide shall be taken into account in the modeling study.

- A) An acceptable method is to estimate the "background" from monitoring data which has been subjected to adequate quality control where available. When monitored data is used, the background shall be estimated using monitoring days with meteorological conditions similar to those identified as "worst case" for the source in question.
- B) If monitoring data is not available, then all sources of sulfur dioxide having a significant impact in the area of the source's impact area shall be used in the simulation model. These sources of sulfur dioxide shall also be modeled at their maximum allowable emission rate for any studies addressing 24-hour or 3-hour averaging times.
- h) Estimates of the frequency, characteristics, probable time of occurrence, and duration of the meteorological conditions associated with the maximum ground-level concentration of sulfur dioxide to which the facility under study contributes. A description of the techniques used in arriving at the above estimates shall be included.
- i) Background concentrations which were determined for all meteorological conditions required to be examined

under subsection (g) and for any other meteorological conditions considered in the development of the alternative standard.

- j) A description of the method that was used to determine background sulfur dioxide concentrations in the vicinity of the subject facility for each of the meteorological conditions required to be examined under subsection (g) and for any additional meteorological conditions considered in developing the alternative standard.
- k) An evaluation and calibration of the dispersion model if air quality monitoring data were available to perform such evaluation and calibration.

*(Source: Amended 4 Ill. Reg. 2, page 186, effective December 27, 1979)*

**Section 106.303 Parties**

The Agency shall be a party to any hearing held pursuant to Rule 204(e)(3) of the Air Pollution Control Regulations.

*(Source: Amended 4 Ill. Reg. 2, page 186, effective December 27, 1979)*

**Section 106.304 Recommendation**

- a) Within 90 days of the filing of the petition the Agency shall make a recommendation to the Board as to the proposed site-specific emission limitation. Such recommendation may include the following:
  - 1) A description of the efforts made by the Agency in conducting its review;
  - 2) The Agency's conclusion as to whether the proposed site-specific emission limitation is adequate to prevent violations of the Primary and Secondary Sulfur Dioxide Ambient Air Quality Standards;
  - 3) The Agency's conclusion as to what disposition should be made of the petition.
- b) The Agency shall serve a copy of its recommendation upon petitioner, and ten copies shall be filed with the Clerk with proof of service.
- c) The petitioner or any other person may file a response to the Agency recommendation within 14 days with proper notice given to the Board and the Agency.

*(Source: Amended 4 Ill. Reg. 2, page 186, effective December 27, 1979)*

**Section 106.305 Notice and Hearing**

- a) The Clerk shall give notice of the petition and hearing in accordance with Part 103. The proceedings shall be in accordance with Part 103. The hearing shall be held in the county in which the source is located.
- b) In a hearing, the burden of proof shall be on the petitioner.

*(Source: Amended 4 Ill. Reg. 2, page 186, effective December 27, 1979)*

**Section 106.306 Transcripts**

- a) In any proceeding brought pursuant to this Part, the petitioner at its own cost shall furnish to the Board within 15 days following the completion of the hearing seven

legible copies of a complete stenographic transcript of the proceedings of the hearing.

- b) Upon petition and good cause shown, the Board may assume such cost.

(Source: Amended 4 Ill. Reg. 2, page 186, effective December 27, 1979)

#### APPENDIX OLD RULE NUMBERS REFERENCED

*The following table is provided to aid in referencing old Board rule numbers to section numbers pursuant to codification.*

<b>Chapter 1: Procedural Rules</b>	<b>35 Ill. Adm. Code</b>
	<b>Parts 101-107</b>
<b>Part VI: Hearings Pursuant to Specific Rules</b>	<b>Part 106: Hearings Pursuant to Specific Rules</b>

Rule 601 .....	Section 106.101
Rule 602 .....	Section 106.102
Rule 603 .....	Section 106.103
Rule 604 .....	Section 106.104
Rule 605 .....	Section 106.105
Rule 606 .....	Section 106.106
Rule 607 .....	Section 106.107
Rules 608-610 Reserved .....	Deleted
Rule 611 .....	Section 106.201
Rule 612 .....	Section 106.202
Rule 613 .....	Section 106.203
Rule 614 .....	Section 106.204
Rules 615-620 Reserved .....	Deleted
Rule 621 .....	Section 106.301
Rule 622 .....	Section 106.302
Rule 623 .....	Section 106.303
Rule 624 .....	Section 106.304
Rule 625 .....	Section 106.305
Rule 626 .....	Section 106.306
Rules 627-629 Reserved .....	Deleted

## TITLE 35: ENVIRONMENTAL PROTECTION

### SUBTITLE A: GENERAL PROVISIONS

#### CHAPTER I: POLLUTION CONTROL BOARD

##### PART 107 SANCTIONS

###### Section

107.100

###### References

107.101

Consequences of Refusal to Comply With  
Procedural Rules or Orders of the Hearing  
Officer or Board

###### Appendix Old Rule Numbers Referenced

*AUTHORITY:* Authorized by and implementing Section 26 of the Illinois Environmental Protection Act (Ill. Rev. Stat. 1979, ch. 111 1/2, par. 1026).

*SOURCE:* Filed with Secretary of State January 1, 1978, codified 6 Ill. Reg. 8357.

###### Section 107.100 References

Unless the contrary is clearly indicated, all references to "Parts" or "Sections" are to Illinois Administrative Code, Title 35: Environmental Protection. For example, "Part 309" is 35 Ill. Adm. Code 309, and "Section 309.101" is 35 Ill. Adm. Code 309.101.

###### Section 107.101 Consequences of Refusal to Comply with Procedural Rules or Orders of the Hearing Officer or Board

- a) If a party or person refuses to answer any question propounded at deposition, the deposition shall be completed on other matters or adjourned, as the proponent of the question may prefer. Thereafter, on notice to all persons affected thereby, the proponent may move the Hearing Officer for an order compelling an answer. If a party fails to answer any interrogatory served upon him, the proponent of the interrogatory may on like notice move for an order compelling an answer. If the Hearing Officer finds that the refusal or failure was without substantial justification, the Hearing Officer shall require the person to answer. When the Board or the Hearing Officer orders the person to answer under Sections 102.140 or 103.161 and the Board finds that the refusal or failure to answer was without substantial justification, the Board may require the offending person to pay to the aggrieved party the amount of the reasonable expenses incurred in obtaining the order. If a motion to answer is denied and the Board finds that the motion was made without substantial justification, the Board may require the moving party to pay to the refusing party the amount of the reasonable expenses incurred in opposing the motion.
- b) 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 documents or the truth of the matter of fact, he may apply to the Board for an order requiring the other party to pay him the reasonable expenses incurred in making the proof.
- c) If a party or any person unreasonably refuses to comply with any provision of the Board's Procedural Rules or fails to comply with any order entered under this Chapter, including any subpoena issued by the Board or Hearing Officer on any witness, the Board may enter, in

addition to remedies elsewhere specifically provided, such orders as are just including, among others, the following:

- 1) That further proceedings be stayed until the order or rules are complied with, except that if the proceeding is on a petition for variance or permit denial appeal, such proceeding shall be dismissed prior to the 90th day after the petition was filed.
  - 2) That the offending party be debarred from filing any other pleading relating to any issue to which the refusal or failure relates;
  - 3) That the offending party be debarred from maintaining any particular claim, counterclaim, third-party complaint, or defense relating to that issue.
  - 4) That a witness be barred from testifying concerning that issue;
  - 5) That, as to claims or defense asserted in any pleading to which that issue is material, a judgment by default be entered against the offending party or that his suit be dismissed with or without prejudice.
  - 6) That any portion of the offending party's pleadings relating to that issue be stricken and, if thereby made appropriate, judgment be entered as to that issue.
- d) The Board or the Hearing Officer may order that information obtained through abuse of discovery procedures be suppressed. If a party wilfully obtains or attempts to obtain information by an improper discovery method, wilfully obtains or attempts to obtain information to which he is not entitled, or otherwise abuses these discovery rules, the Board may enter any order provided for in this rule.

##### APPENDIX

##### OLD RULE NUMBERS REFERENCED

*The following table is provided to aid in referencing old Board rule numbers to section numbers pursuant to codification*

Chapter 1: Procedural Rules	35 Ill. Adm. Code Parts 101-107
Part VII: Sanctions	Part 107: Sanctions
Rule 701	Section 107.101