ILLINOIS POLLUTION CONTROL BOARD

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

COMMENTS ON FIRST NOTICE PROPOSAL

Mayer, Brown & Platt welcomes the opportunity to provide its comments on the First Notice proposal of the revisions to the Board's Procedural Rules published March 16, 2000.

The comments below are referenced to the section of the proposed rules involved. In some cases comments relate as well to overall issues and these are noted.

Section 101.110 Public Participation.

(b) This subsection implies that there are no "parties" in regulatory proceedings. It is believed this is consistent with Board practice, but it may be useful to say so explicitly.

(c) Where amicus curiae briefs are allowed by the Board it is unreasonable not to allow a response by the party impacted by the amicus curiae argument.

Section 101.114 Ex Parte Communications.

(a) It is not clear what the second sentence regarding information in a regulatory proceeding means, but it would seem to be improper to suggest that the Board could consider information from regulatory proceedings, without at least some notice to the party so that misinformation or dated information can be corrected.

Section 101.200 Definitions.

"Administrative Citation." Query whether the term should be "delegate" rather than "delegee."

"Amicus Curiae Brief." Presumably this does not include a brief filed by a party.

"Authorized representative." Usually a formal agreement or contract is not required to create an authorized representative. (For example, is consideration needed?) Is it sufficient to say that an authorized representative is any person authorized by another person to act on his behalf?

"Clean Water Act," Resource Conservation and Recovery Act," the "Safe Drinking Water Act." Why don't the definitions include subsequent amendments, as for the Clean Air Act?

"Counter-complaint" and "cross-complaint." We recommend deleting the term "in its favor" in these definitions to avoid disagreements as to who may be "favored" by a particular claim.

"Discovery." On some occasions in the past discovery has been used in regulatory proceedings. Is this now excluded?

"Enforcement proceeding." Query whether a complaint can be brought before the Board for violation of a Board order (complaints for enforcement of Board orders must usually be brought in court under Section 42 of the Environmental Protection Act) or permit term (is it more correct to think of this as a violation of the requirement to have a permit and comply with its conditions. See Section 9(b) of the Act.)

"Frivolous." While this definition at first seems new, in fact asking the court to grant relief it cannot grant or act on a complaint which doesn't state a legal claim is an inappropriate use of the Board's resources and this may be a useful definition.

"Interlocutory appeal." The proposed rules do not include a section 101.1008(b)(4). Moreover, it is not clear that there is any general right of interlocutory appeal from the Board to the appellate court.

"Intervention." We suggest the definition add the idea that the person entering a proceeding also becomes bound by the Board's orders in the proceeding. The idea is established by case law but it may be useful to state it explicitly.

"Misnomer." It is assumed that this definition assumes the person is right, and properly included, but that the name is mistaken. This is not a way to add previously omitted parties.

"Non-disclosable information." Note that the courts have determined there is no deliberative process privilege in Illinois.

"Participant." It is assumed that the definition is not intended to broaden a participant's rights in any adjudicatory hearing.

"Rule or regulation of general applicability." This definition seems circular in that it defines a regulation which covers all those it doesn't exclude. In fact, most specific regulations could meet this definition, e.g. a regulation covering a cement plant in Naperville would also be applicable to all persons not specifically exempted.

"Sanction." Can't a sanction also punish noncompliance and compensate the party negatively impacted by the noncompliance?

"Summary judgment." Normally depositions and other discovery are not part of a record before a court or an agency unless specifically offered as part of a motion for summary judgment. The record in support of a motion would include the pleadings, the motions and any briefs and accompanying material.

"Third party." An additional defendant added by the original plaintiff would not ordinarily be considered a third party. It is more correct to say a third party is a party added by a defendant or respondent.

Section 101.300 Computation of Time.

(b)(4) Is the implication of this rule that a properly filed (e.g. mailed) document is in fact not considered filed if it is inadvertently missing its date stamp? This seems harsh.

Section 101.302 Filing of Documents.

(b) This requirement for filing with the clerk in all cases will create confusion for parties and participants offering documents to the hearing officer at hearings. This may particularly impact citizen participants.

(g) Letters, original documents and perhaps other papers as well, have not been required to be on recycled paper in the past. Has this changed?

Section 101.306 Incorporation of Documents by Reference.

In addition to relevance, incorporation of documents from other proceedings should also consider authenticity and credibility.

Section 101.308 Statutory Decision Deadlines.

(c)(2) The term "negotiation" waiver is unclear.

(c)(3) The last sentence is unclear. Is the intention that the waiver, whether or not an extension, provide or allow at least 90 days before the decision date?

Section 101.402 Intervention of Parties.

(e) The last sentence of (e) is really contradicted by the second. It would seem more accurate to say that the intervener's rights may be limited to the extent that the provisions of the second sentence apply.

Section 101.406 Consolidation of Claims.

It is hard to determine what kinds of cases could be consolidated. Could two enforcement cases against different parties be consolidated, forcing one party to at least sit through, if not deal with the case presented against the other defendants? This seems unfair and perhaps a denial of due

process. "Material prejudice" doesn't seem to provide any guidance or criteria for consolidation decisions.

Section 101.500 Filing of Motions and Responses.

(d) If action on a motion is to be taken before the seven day period, the respondent should be given notice and a reasonable opportunity to file a response.

Section 101.502 Motions Directed to the Hearing Officer.

(b) It is presumed that the purpose is to require oral motions which are not granted at hearing to be restated in writing. Perhaps this could be clarified.

Section 101.506 Motions Attacking the Pleadings.

It is suggested that to avoid confusion and to be consistent with state practice motions attacking the pleadings should be due within the same time frame as an answer, i.e. 30 days.

Section 101.508 Motions to Board Preliminary to Hearing.

This is generally a useful rule but sometimes issues come up too late to meet such deadlines, e.g. issues raised by late-filed Agency recommendations or recalcitrance in complying with Hearing Officer orders. See comments on Section 101.610 below. The instructions in this section should be followed "to the extent possible."

Section 101.512 Motions for Expedited Review.

It is not clear what sort of motion this covers: expedited review of a hearing officer order or expedited consideration of a case or something else? In subsection (a) it is probably not correct to require an oath that "reasons," rather than "facts," are true.

Section 101.516 Motions for Summary Judgment.

(d) Subsection (d) seems unnecessary. There may be circumstances where the Board may find it useful to rule on such a motion even though the hearing has technically commenced (e.g. commenced and then been continued).

Section 101.520 Motions for Reconsideration.

(b) The time for filing response should probably run from the date of service, rather than the date of filing, of the motion.

Section 101.608 Default.

(b) If a complainant or petitioner, or any party with the burden of proof, fails to appear, it should be defaulted and defendant or respondent should not have to put on a prima facie case to prevail. The principle in subsection (b) works only when the defaulting party is the respondent.

Section 101.610 Duties and Authority of the Hearing Officer.

There is no explicit statement in this list of the Hearing Officer's authority to impose sanctions to protect his or her own rulings and authority. This can and has created serious problems where the Hearing Officer did not feel she had the power to protect her own rulings even though she recognized the need. (Refusal to provide a viable witness list in a citizens complaint.) If it is determined that such authority cannot be delegated to the Hearing Officer then provision should be made for immediate reference to the Board so that Hearing Officers are not left helpless in such a situation. See also comments on Section 101.508, above.

Section 101.614 Production of Information.

This section appears overbroad, and perhaps beyond the Board's authority, if it contemplates production of information not requested by the parties in discovery. The hearing officer does not have investigatory authority under the Act. To the extent this authority is to order information properly requested by the parties, it should be clarified. Further, it is assumed that this represents authority to require production of existing information, not to research or assemble new information.

Section 101.616 Discovery.

(c) Completion 10 days before hearing may be unreasonable in a time-limited proceeding.

Section 101.618 Admissions.

(h) It is not clear why notice in this case must be "prompt" (as opposed to notice of other motions).

Section 101.620 Interrogatories.

(c) Do objections to interrogatories need to be more specific than in the case of requests for admission, and, if so, why? Waiver of grounds for objection that are not timely raised is a very severe sanction for delay in answering an interrogatory and seems inconsistent with the concern regarding the consequences of delay in answering requests to admit in Section 101.618(c).

Section 101.622 Subpoenas.

(b) Should it be clarified that the service required 10 days before appearance is service on the witness, not the hearing officer. (Indeed is it correct to think of documents being filed with or served on the hearing officer?)

(e) We believe there has always been question about the authority of the Board to issue subpoenas on persons outside Illinois.

(g) The rules on depositions may be lost in a section on subpoenas. Should the title be broadened? In addition, in a technical area involving environmental issues compliance

with the three hour time limit for depositions is usually unrealistic (as opposed to usual circuit court practice where it is more common to deal with occurrence witnesses, e.g. slip and fall and fender bender cases).

Section 101.628 Statements from Participants.

(c) Should it be made clear that amicus briefs will be allowed in accordance with the standards of Section 101.110 (not just filed in accordance with that section)? We respectfully continue to urge that in an adjudicatory proceeding it is unfair to receive public comments without giving the respondent an opportunity to reply, even if the time frame for reply must be abbreviated.

Section 101.800 Sanctions.

(a) Note that the Board anticipates motions for sanctions but in theory would not hear such motions within 10 days of hearing, the very time when the Board's supervision may be most necessary.

(b) A continuing problem for the regulated community is delay by the Agency in filing records, recommendations, and other statements of position. Agency delays force petitioners to give up their statutory deadline rights or proceed to hearing without opportunity for preparation. It should be clear that the sanctions listed apply to filing pleadings "or other documents" (2) or maintaining claims.

Section 102.202 Proposal Contents for Regulations of General Applicability.

(i) Requiring a "complete justification" for inapplicability or unavailability appears unreasonable. Justifying inapplicability is really a matter of definition. What kind of complete justification is necessary? Justifying unavailability would appear to require speculation about the very existence of information.

Section 102.210 Proposal Contents for Site-Specific Regulations.

(b) Requiring information on "similar persons'" ability to comply will often be difficult, both because it may be difficult to decide who is similar and because the information desired may not be publicly available. This requirement should at least be limited to reasonably available information.

(f) See the comment to Section 102.202(i).

Section 102.408 Prehearing Order.

(b) Delineating agreed facts in a conference which may be attended by less than all interested persons is problematic.

Section 102.420 Authority of the Hearing Officer.

This section purports to give the hearing officer in a regulatory proceeding the same power as one in a regulatory proceeding, but providing a broad reference to the powers of Section 101, Subpart F is vague and likely overbroad, and even a more specified reference to Section 101.610 is problematic. Can the hearing officer really require discovery or admissions in a regulatory proceeding, allow interrogatories to "parties" or issue subpoenas? The authority for these powers appears questionable.

Section 102.424 Prehearing Submission.

(b) Prehearing submission of questions and responses is quite difficult and often not very productive.

Section 102.502 Challenge to Agency Certification.

(a) Does the 21 day period for objection to Agency certification leave time for interested persons to get notice of the certification and respond? How is notice provided?

Section 102.600 Revision of Proposed Regulations.

(a) As a matter of statutory authority there would appear to be a limit on the kinds of revisions the Board may make to a proposed regulation without further hearing.

Section 102.614 Peremptory Regulations.

Is there any explanation of the definition of a peremptory regulation?

Section 102.702 Motions for Reconsideration.

There appears to be no means of giving the Board notice of clerical or other errors after First Notice. This seems very unwise.

Section 103.202 Parties.

(b) It is not clear why leave of the Board is required for cross or counter-complainants to appear as parties. These entities would normally be parties anyway as respondents.

(e) There is currently much confusion as to the use of affirmative defenses and whether certain elements are affirmative defenses or part of the case in chief, e.g. issues of technological feasibility and economic reasonableness of control in a 9(a) case for odors, with the Attorney General's office arguing it need not show the same thing in court as before the Board, and further arguing that such matters may not even be raised as affirmative defenses. While these are substantive issues not appropriate for resolution in procedural rules, caution is recommended in describing the requirements for affirmative defenses as there is apparently a risk that they will be over interpreted in a way that will have substantive consequences.

Section 103.206 Adding Parties.

(c) It is not clear what standards apply to dismissing a complaint for failure to file an amended complaint adding a party.

(e) It is also not clear why counter-complaints, cross-complaints or third party complaints, or amended complaints require leave of the Board.

Section 103.210 Notice of Complaint.

(b) It is unreasonable to penalize the respondent by postponement of a hearing for which it is ready because the Agency has failed to give notice of a complaint. Prejudice to respondent should be taken into account as well in deciding whether to postpone the hearing.

Section 103.212 Hearing on Complaint.

This section deals primarily with citizens suits and it is not clear why it is headed as it is. Does the subsection (d) reference to bifurcated hearings apply in the case of suits brought by the state as well as citizens suits?

Section 103.300-306 Request for Relief from Hearing and other Settlement Provisions.

The Board's authority to insist on reviewing settlements has always been subject to some question. To require further that third persons may demand a hearing on a settlement, Section 103.300 (a) and (b), appears beyond the authority of the Board, putting the Board into the prosecutor's role in its insistence that a hearing be held even though the actual entity with authority, the complainant and/or the Attorney General has decided not to proceed. (See 415 ILCS 5/32). In addition, in Section 103.302, requiring a full stipulation of material facts, discussions of operations and control equipment, degree of injury and future plans for compliance, all assume guilt, despite the fact that many if not most settlements occur so that the parties, who disagree over the issue of guilt, don't have to litigate the matter at great expense. Moreover, suggesting revisions in a settlement without having been part of the discussions (Section 103.306) assumes an insight which may not be well-founded. It is urged that the Board take care not to overreach in settlement circumstances. It seems to be taking aim at a problem which does not exist.

Section 103.400 Proceedings Regarding RCRA Permits.

(b) It is unclear what circumstances could give the Board authority to order a RCRA permit issued. It is suggested that the Board consider the scope of this set of rules. This reference to the ordering of a RCRA permit appears in many forms throughout the proposal.

Section 103.402 Interim Order.

(b) It is presumed that the Agency's partial draft permit contemplated by (4) is one determined by the Board's ruling and that this is not a delegation by the Board to the Agency, which would probably be illegal as well as a denial of due process. As to the

finding of violation in (1), does this suggest that you can't have a stipulation settling a RCRA case without a finding of violation or penalty? If so, that seems unwise.

Section 103.406 Draft Permit.

See comments on Section 103.402 above. This clearly presents the problem of allowing the Agency to determine the remedy required. Further, what "agreements as to the substance" of the draft permit may the Agency reach and with whom? It appears that an unknown third party is determining the remedy.

Section 103.408 Stipulated Draft Remedy.

(b)(1)(D) The "shortest possible time" standard is inconsistent with the "as soon as practicable" standard in Section 103.416(C)(1).

Section 103.410 Contents of Public Notice.

(d)(1) Note again the assumption that a violation exists, rather than an agreement to avoid litigation and expedite a resolution.

Section 103.414 Hearing.

(e) Here again the respondent is penalized by delay for the Board's noncompliance. See the comment in Section 103.210 above.

Section 103.502 Civil Penalties.

(a) It is assumed the agreement for judgment applies only to installment payments.

Section 104.204 Variance Petition Content Requirements.

(b)(6) The process involved may not be especially relevant to the activity or equipment for which the variance is requested. It is suggested that some relevance standard be incorporated in the descriptions required.

(d) Discussion of "all possible compliance alternatives," with costs, appears overbroad. Some alternatives, plant shutdown is an example, would take extraordinary efforts to document.

(f)(1) Why is "full" compliance referenced? What does it mean other than "compliance"?

(3) Phased costs may be difficult to estimate for many types of control and it is not clear why that information is necessary.

(h) Why are supporting documents required to be appended to the petition?

(i) It is not clear how a permit is "involved" in a variance. Is this applicable to any permit covering the equipment or only permits creating the need for variance? Note that Section 104.216(b)(8) uses the different term "associated with" for the same idea. Overall this section represents an expansion of the variance rules and it is not clear why such expansion is thought to be necessary. Many of these new provisions will probably be most burdensome for smaller petitioners.

Section 104.218 RCRA Variance.

(b) Do all RCRA variances involve permits?

Section 104.224 Objections to Petition.

It is important that the petitioner have a chance to respond to comments received on its petition.

Section 104.226 Amended Petition.

(a) An amended petition which essentially conforms the pleadings to the proof or to the Agency's recommendation assists the Board, by eliminating disagreement, and should not extend the decision date. Extensions would appear to be necessary only where the amendment seeks expanded relief. On the other hand, an amended recommendation at or after the hearing which is more restrictive puts the petitioner at a disadvantage which often can't be corrected by a response.

Section 104.240 Certificate of Acceptance.

This could be read to require acceptance of the variance before seeing the Agency's recommendation or any Board conditions. That creates an impossible situation and is beyond the Board's authority. Why is acceptance required with the "petitioner's filing?" Moreover, this provision is inconsistent with Section 104.248 as well.

Section 104.250 Revocation.

The Board's authority to revoke a variance appears substantially overstated. What reasons besides "noncompliance" justify such action? Would justification be different for failure to meet interim milestones or conditions or for failure to meet a final variance end date? Do you even need revocation for failure to meet an end date; when the variance expires the operation is subject to enforcement. What authority does the Board have to conduct a revocation hearing on its own motion? Doesn't it need a complainant to present the case for revocation?

Section 104.310 Simultaneous Variance.

Presumably a conventional variance could follow a provisional variance. Should this be made clearer?

Section 104.306 Adjusted Standard Petition.

(e) As with variances, requiring all costs of all alternatives may be overbroad.

Section 105.204 Who may file a petition for review.

It would be useful to add a subsection expressly identifying parties aggrieved by an Agency trade secret determination under proposed Part 130.

(f) It may be advisable to specify that the right to third party appeal is limited to those specifically authorized by law.

Section 105.212 Agency Record.

(b) The Agency's record often includes decision documents such as the traveler sheet, the permit engineer's calculation sheets, etc. Sometimes those are provided with the record, more often the applicant must pursue discovery to get them. This data should be a standard part of the record as filed. It would substantially expedite permit appeals.

Section 105.302 CAAPP General Requirements.

(d) It appears to be overbroad, and productive of much unnecessary paperwork, to consider anyone who requests notice of final action to be a participant in the public comment process and eligible to appeal.

Section 105.600 Appeals of Other Final Decisions.

It is unclear what types of proceedings this Subpart applies to.

Section 105.604 Burden of Proof.

Specifying the burden of proof for what is by definition an unknown type of proceeding seems highly premature. That issue is best addressed as specific cases arise.

Section 106.408 CAAPP Revocation Response.

It is not clear why the Agency is given the right to file a response to what is essentially the permittee's answer.

It is assumed that discovery is available in a CAAPP revocation or modification proceeding.

Section 108.206 Petition Contents - Administrative Citation.

It is assumed that this is not an exhaustive list of bases for believing the citation was improperly issued.

Section 108.300 Administrative Citation Hearings.

(a) The provision for hearing in 60 days is extremely tight where respondent seeks discovery to aid in preparation of its case.

Section 130.106 Definitions.

(1)Part 130 should include a statement comparable to that in 35 Ill. Admin. Code 120.103(b) in order to clarify that, for purposes of Part 130 only, the term "Agency" means the Illinois Pollution Control Board, the Illinois Environmental Protection Agency or the Illinois Department of Natural Resources. While it is recognized that Section 101.202, as proposed, instructs that a term may be defined by the context in which it used, greater clarity is necessary in Part 130 to avoid undue confusion. For clarity, the term "Agency" should be capitalized throughout Part 130.

Section 130.200 Initiation of Trade Secret Claim.

(a) This section should be revised to clarify that an article must generally conform with the content requirements of subsection (b) in order to entitle the article to protection under subsection (c). The stakes associated with trade secrets are high, and an unduly technical application of subsection (a), as currently drafted, could result in the unnecessary and inappropriate release of information otherwise subject to protection simply based on a minor omission or ambiguity. Such an approach would be consistent with treatment of trade secrets under the federal FOIA, which errs on the side of caution in the context of trade secrets and confidential business information. For example, Executive Order 12,600 mandates that, prior to disclosure, each federal agency notify a submitter whenever the agency determines that it may be required to disclose confidential business information under the FOIA. Such notification is typically made even where an agency cannot readily determine whether information is subject to protection. See e.g. 7 C.F.R. § 1.11 (setting forth USDA policy). In other words, where it's a close call, the government should be disinclined to release confidential business information or trade secrets. The Board's rule would benefit from greater flexibility at the earliest stage when a submitter must act, while still requiring the submitter to support its claim in accordance with the remaining provisions of Part 130.

(b) Subsection (b) and (d) are vague in that they do not clearly distinguish the contexts in which information is submitted. The section would be improved by separately addressing information submitted in the ordinary course of dealing with an agency and information submitted in a Board proceeding.

Section 130.204 Waiver of Deadlines.

It is not clear where the Board obtains authority to require waiver of rights to statutory deadlines in order to protect trade secrets. Such a choice likely represents either a denial of due process or a taking of property. Moreover, it is unclear why the underlying proceeding has to await ruling on the trade secret claim. See also similar problems with Section 130.404(f)(5).

This section appears to suffer from the same flaw identified in connection with proposed Sections 130.202(b) and (d); namely, it fails to distinguish between "ordinary course" submittals

and submittals incidental to proceeding before the Board, such as a permit appeal or enforcement case. It is very unclear what an "underlying" case before the DNR or the Illinois Environmental Protection Agency would be.

Section 130.216 Review of Agency Determinations.

(a) Provided that the term "Agency" becomes defined in Part 130 to include the DNR and the Illinois Environmental Protection Agency, subsection 130.216 should refer to the Illinois Environmental Protection Agency to avoid confusion.

Section 130.218 Effect on Other Agencies.

The "agencies" should be identified by name to avoid confusion.

Section 130.222 Extension of Deadlines to Participate in Proceedings.

This section is unclear. The Board's opinion should explain the context in which it believes this language will be implicated.

Respectfully submitted,

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