ILLINOIS POLLUTION CONTROL BOARD
February 4, 1999

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

Adopted Rule. Final Order.

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

Today, the Board adopts final rules regarding Environmental Management System Agreements (EMSAs). An EMSA is an agreement between the Illinois Environmental Protection Agency (Agency) and a regulated entity that allows the entity to implement alternatives to ordinarily applicable environmental laws or regulations. These alternatives should yield greater environmental benefits than would the entity's compliance with ordinarily applicable environmental laws or regulations. The rules that the Board adopts today set forth the criteria and procedures under which the Board or the Agency may terminate an EMSA without a regulated entity's consent (*i.e.*, "involuntarily").

## BACKGROUND

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

> implement innovative environmental measures not otherwise recognized or allowed under existing laws and regulations of this State if those measures:
>
> 1) achieve emissions reductions or reductions in discharges of wastes beyond the otherwise applicable statutory and regulatory requirements through pollution prevention or other suitable means; or
>
> 2) achieve real environmental risk reduction or foster environmental compliance by other persons regulated under this Act in a manner that is clearly superior to the existing regulatory system. 415 ILCS 5/52.3-1(b) (1996).

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

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

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

Section 52.3 also directed the Agency to propose to the Board procedures and criteria for the involuntary termination of EMSAs. See 415 ILCS 5/52.3-2(c) (1996). The Agency's proposal, filed on August 17, 1998, is the subject of this rulemaking.

## PROCEDURAL MATTERS

Section 52.3-2(c) of the Act requires the Agency to propose to the Board "criteria and procedures for involuntary termination of [EMSAs]." 415 ILCS 5/52.3-2(c) (1996). That section required the Agency to propose rules to the Board by December 31, 1996. However, the Agency did not file its proposed rules until August 17, 1998. The Agency "acknowledges that it is late in filing these rules before the Board." Statement of Reasons at 2.

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

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

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

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

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

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

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

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

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

The Board issued a second-notice opinion and order on December 17, 1998. Readers seeking a detailed discussion of the changes to the Agency's proposal that the Board made at second notice should consult the Board's opinion and order at second notice. See Hearings Pursuant to Specific Rules, Proposed New Subpart K, Involuntary Termination of Environmental Management System Agreements, 35 Ill. Adm. Code 106, Subpart K (December 17, 1998), R99-9.

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[1] The transcript of the September 29, 1998 hearing is cited as "Tr.1 at __;" the transcript of the October 6, 1998 hearing is cited as "Tr.2 at __."

The Board filed the Agency's proposal, as modified at second notice, with the Joint Committee on Administrative Rules (JCAR). JCAR considered the rules at its January 12, 1999 meeting and issued a certificate of no objection. The final rules reflect minor, non-substantive modifications that JCAR requested. These changes do not merit discussion.

## Agency's Motion to Reconsider

On January 25, 1999, the Agency filed a motion for the Board to reconsider its opinion and order at second notice (Mot.). The Agency asks the Board to change the rules regarding two issues. First, the Agency proposes that the Board amend the rule on appeals of summary terminations. Second, the Agency proposes that the Board add a deadline for Board decisions in other involuntary termination proceedings. Mot. at 1-2, 7-8.

The Agency requests that the Board not adopt the rules at this time and instead resubmit the rules for first notice with the Agency's proposed changes. Alternatively, the Agency asks that the Board open a docket to address its proposed changes. Mot. at 7-8.

Below, the Board discusses the Agency's arguments for changing the rules with respect to (1) the appeal of summary terminations and (2) a Board decision deadline. The Board then rules on the Agency's motion.

### Appeals of Summary Terminations

There are two types of involuntary termination. The first requires the Agency to request the Board to terminate the EMSA. In the second type of involuntary termination, the Agency may terminate the EMSA without a Board order. The Agency may effect the latter type of termination when the sponsor's performance of the EMSA is so deficient that it "prevents achievement" of the purposes of the EMSA program as set forth in Section 52.3-1(b) of the Act. See 415 ILCS 5/52.3-1(b) and 52.3-4(b) (1996). The Agency refers to this type of termination as "summary termination."

Under Section 106.945(b) of the rules, the sponsor may appeal a summary termination to the Board. The rules further provide that the appeal "will be in the manner provided for review of permit decisions in Section 40 of the Act." The Board explained in its opinion at second notice that appeals of summary terminations will proceed like permit appeals and that Part 105 of the Board's procedural rules addresses permit appeals.

The Agency asks the Board to revise the rules to include appeal procedures that are specific to appeals of summary terminations. Mot. at 7-8. The Agency states that it is inappropriate for summary termination appeals to proceed like permit appeals for several reasons. Mot. at 2. First, the Agency argues that its permit decisions are different from its summary terminations. The Agency describes its permit decisions as "front-end action" and its summary terminations as "back-end action." The Agency urges the Board to use appeal procedures designed to address "back-end action." Mot. at 2-3.

The Board does not understand the distinction that the Agency draws between its "front-end" and "back-end" actions. In appeals of both types of actions, the Board must review the Agency's actions and its record of decision. Agency permit decisions often come at the end of a long permit application process that generates an extensive record. The Agency fails to provide any examples of "back-end action" appeal procedures or explain why different appeal procedures are necessary.

Second, the Agency argues that Board review under Section 40 of the Act applies only to appeals of Agency determinations to grant or deny permits under Section 39 of the Act. Mot. at 3. The Board disagrees. Board review under Section 40 of the Act is not limited to appeals of Agency permit decisions under Section 39 of the Act. Several Board rules call for Board review under Section 40 of appeals of Agency determinations that are not permit decisions. For example, Agency denials of applications under the Site Remediation Program (SRP) are appealable to the Board "in the manner provided for the review of permit decisions in Section 40 of the Act." See 35 Ill. Adm. Code 740.215(d). That provision and others in the SRP rules make Agency determinations that do not involve permits (see, *e.g.*, 35 Ill. Adm. Code 740.310(c)) appealable to the Board in the manner provided for in Section 40 even though the underlying legislation for SRP, like the underlying legislation for EMSAs, did not expressly provide for such appeal of these determinations. See 415 ILCS 5/58-58.14 (1996). The Board notes that the Agency proposed the SRP rules, including these provisions providing for Board review of Agency decisions in the manner provided for in Section 40 of the Act. See Site Remediation Program and Groundwater Quality (35 Ill. Adm. Code 740 and 35 Ill. Adm. Code 620) (February 6, 1997), R97-11.

Third, the Agency argues that the permit appeal rules use terminology (*e.g.*, "record of the 'permit application'") that does not apply to summary terminations. Mot. at 4. The Agency is also concerned about Section 40(a)(2) of the Act, which provides that a petitioner may deem a permit granted if the Board does not take final action on the petition within 120 days. The Agency states that this provision could be interpreted to nullify the summary termination if the Board does not meet the 120-day deadline. *Id*.

The Board notes that when it revises its procedural rules,[2] it may consider a separate set of rules for appeals of Agency determinations other than permit decisions. However, as noted above, other regulatory programs (*e.g.*, SRP) treat appeals like permit appeals even though they do not involve a "permit application." Appeals of summary terminations, like appeals in these other programs, are "in the manner provided" for the review of permit decisions in Section 40 of the Act. This provision does not mean that there must be a "permit application." Instead, this provision refers to procedural matters such as the time to file an appeal, the time to file the Agency record, the designation of the parties as petitioner and respondent, the conduct of hearings, the burden of proof, and the Board's decision deadline. The Agency correctly points out that the 120-day decision deadline of Section 40(a)(2) will

[2] See Revision of the Board's Procedural Rules: 35 Ill. Adm. Code 101-130 (October 3, 1996), R97-8.

apply to appeals of summary terminations, as it applies to appeals of Agency SRP determinations (discussed above). However, the Board takes this deadline very seriously.

Lastly, the Agency notes that the Board may stay the Agency's permit determination pending the Board's decision of the appeal. Mot. at 4. The Agency believes that a stay of a summary termination of an EMSA should not be allowed and that the Board should revise the rules to prohibit stays. The Agency argues that a stay of summary termination would prevent it from immediately subjecting a sponsor to environmental laws and regulations that the EMSA operates in lieu of, which, in turn, would endanger the environment and undermine public confidence in the EMSA program. Mot. at 4-5. The Agency also states that permit appeal case law should not apply to appeals of summary terminations. Mot. at 4.

The Board understands that the Agency needs the ability to summarily terminate EMSAs in certain situations. This is reflected in the rules, which do not require the Agency to go through a Board proceeding before summarily terminating an EMSA. See Sections 106.940(b) and 106.945. However, the Board concludes that there may be circumstances that will justify a stay of a summary termination. Accordingly, the rules do not prohibit the Board from staying summary terminations. In addition, the Agency has not explained why permit appeal case law should not be applied to summary termination appeals. The Board will decide the relevance of permit appeal case law when it has a summary termination case before it.

Board Decision Deadline

The Agency maintains that the Board should have a deadline to decide cases in which the Agency initiates a proceeding before the Board to involuntary terminate an EMSA. Mot. at 6-7. The Agency asks the Board to revise the rules to provide that Board decisions are due within 120 days after the Agency files its statement of deficiency, the filing that initiates an involuntary termination proceeding under these rules. The Agency argues that a decision deadline will be beneficial because it will expedite the proceeding, even though the rules impose no consequences if the Board fails to meet the deadline. The Agency refers to another Board rule, the Clean Air Act Permit Program (CAAPP) permit revocation and reopening procedures, as an example of a decision deadline that has no consequence if the Board fails to meet it. Mot. at 6-8; see 35 Ill. Adm. Code 106.915(a).

The Board does not believe that the rules should contain a decision deadline. The statute does not mandate such a deadline and failure to meet it would be of no consequence. The Board adopted the CAAPP rule that the Agency cites in a different type of rulemaking proceeding and, accordingly, does not find it persuasive here. See 415 ILCS 5/28.5 (1996); Amendments to the Rules for Clean Air Act Permit Appeals and Hearings Pursuant to Specific Rules 35 Ill. Adm. Code 105 and 106 (March 3, 1994), R93-24. The Board will, however, decide these matters as expeditiously as practicable. See 35 Ill. Adm. Code 106.956(b).

Board Conclusion

The Board denies the Agency's motion. Under 52.3-2(c) of the Act, the Board must complete this rulemaking no later than 180 days after it received the Agency's proposal, *i.e.*, by February 16, 1999. See 415 ILCS 5/52.3-2(c) (1996) and 5 ILCS 70/1.11 (1996). Because the Board has long since submitted the rules to JCAR, the Board would violate the Administrative Procedure Act, 5 ILCS 100/1-1 *et seq*. (1996), and the Board's procedural rules if the Board now adopted changes that JCAR did not request. See 5 ILCS 100/5-40(c) (1996); 35 Ill. Adm. Code 102.361(a). If the Board resubmitted the rules for first notice, the Board would miss the statutory deadline. The Board will not ignore this directive of the General Assembly.

Even if there were no statutory deadline, the Board will not reconsider a second-notice order unless the proponent of a motion to reconsider shows that material prejudice will result. See 35 Ill. Adm. Code 102.361(a). As set forth above, the Agency has not met that burden.

The Agency also has not persuaded the Board that it is necessary to open a separate docket. The Board already has heard testimony, asked questions, and received comment relating to the issues that the Agency raises in its motion to reconsider. See Tr.1 at 32-35, 38-39, 45-51; Tr.2 at 13-17, 21, 40-41; Exh. 4 at 3; PC 1 at 7-9, 17-18. Further proceedings are not necessary.

## OVERVIEW OF THE FINAL RULES

As discussed above, there are two types of involuntary termination: involuntary termination by Board order; and summary termination, which the Agency executes without a Board order. Section 106.945 of the rules addresses the criteria that the Agency must apply to summarily terminate an EMSA and provides that summary terminations may be appealed to the Board in the manner provided for review of permit decisions in Section 40 of the Act. See Sections 106.940(b) and 106.945. The Agency has indicated that it will develop its own procedural rules under Section 52.3-4(d) of the Act for summary terminations. PC 1 at 7. The Board emphasizes that the provisions of Section 106.945 supplement, rather than substitute for, the procedures that the Agency will develop.

If the Agency wishes to have the Board terminate an EMSA, the Agency must follow the procedures set forth in the rules besides Section 106.945. See Section 106.940(c). The rules govern the involuntary termination proceedings from the initial filing with the Board through the Board's decision and after the Board enters its final order (*e.g.*, motion to rehear or modify the order). The rules are modeled on the Board's existing Part 103 procedural rules for enforcement proceedings (35 Ill. Adm. Code 103, Subparts A-H). However, the rules have shorter and more specific timeframes, and fewer, or more limited, procedural mechanisms than Part 103.

Only the Agency can initiate a proceeding to involuntarily terminate an EMSA. The Agency is designated the "complainant." The Agency must file a "statement of deficiency" with the Board to initiate the proceedings. The statement of deficiency must set forth the

alleged deficient performance under the EMSA. The person who enters into the EMSA, also known as a "sponsor,"[3] is designated the "respondent" in the involuntary termination proceeding. The respondent has to file an answer within 15 days after receipt of the statement of deficiency. The Board or the hearing officer may extend the 15-day period for good cause. All material allegations of the statement of deficiency are taken as admitted if not specifically denied in the answer or if the respondent fails to file an answer. See Sections 106.946 and 106.948.

If the respondent timely files an answer, a hearing must be held within 60 days after the respondent files an answer. This time period can be extended for up to 30 days in narrow circumstances. The 30-day limit applies to each extension. The hearing officer or the Clerk must provide 30 days notice of the hearing to the public by newspaper publication and to the parties. See Section 106.952. Depositions and interrogatories will be permitted if the hearing officer allows it. See Section 106.966.

The Agency has the burden to prove, by a preponderance of the evidence, that the sponsor's performance under the EMSA is deficient. See Section 106.958. There are six grounds on which the Board may find that the performance of a sponsor is deficient: (1) the sponsor misrepresented the factual basis for entering into the EMSA; (2) the sponsor failed to provide the Agency access to the pilot project to monitor compliance with the EMSA; (3) the sponsor falsified monitoring data, recordkeeping information, or reports about the pilot project; (4) the sponsor or the owner or operator of the pilot project failed to comply with any federal or local environmental law or regulation that applies to the pilot project and that the EMSA does not address, and for which a citizen's complaint has been filed or the appropriate authority has sent a notice of violation, complaint, or other notice of failure to comply; (5) the sponsor or the owner or operator of the pilot project failed to comply with any State environmental law or regulation that applies to the pilot project and that the EMSA does not address, and for which a citizen's complaint has been filed or the Agency has mailed a notice of violation under Section 31(a) or (b) of the Act; and (6) the sponsor failed to comply with its EMSA, subject to any grace or cure period or rights contained in the EMSA. See Section 106.954(a). Any Board finding of deficient performance on the fourth or fifth ground will not be binding for any other purposes. See Section 106.954(b).

The Board will render its decisions as expeditiously as practicable. The Board's order will terminate the EMSA, reject termination of the EMSA, or defer termination for a specified time, not to exceed 90 days, to allow the respondent to rectify its deficient performance. See Section 106.956(b). The Board may extend the 90-day period for good cause. See Section 106.956(c).

The Board's order may (1) direct the respondent to cease and desist from violating the Act, Board regulations, or the EMSA, (2) require the respondent to provide "performance assurance compensation" in appropriate amounts, (3) require the respondent to post a sufficient

[3] "Sponsor" is defined in Section 106.942, which sets forth definitions for use in Subpart K. Defined terms include "Environmental Management System Agreement" or "EMSA," "innovative environmental measures," and "pilot project."

performance bond or other security to assure that the respondent corrects the violation within the time that the Board prescribes, (4) enforce the remedy provisions of the EMSA, and (5) order other relief that may be appropriate. See Section 106.954(d).

Within 35 days after the Board adopts a final order, any party may file a motion to rehear, modify, or vacate the order or for other relief. Responses must be filed within 14 days after the motion is filed. In addition, any party has 60 days after the Board enters its final order to file a motion for relief from that order. See Sections 106.980 and 106.982.

## CONCLUSION

The Board finds that the Agency's proposal, with the Board's revisions, is economically reasonable and technically feasible. The Board adopts the revised proposal as final rules.

## ORDER

The Board adopts as final rules the following amendments to 35 Ill. Adm. Code 106. The Board directs the Clerk of the Board to file the following revised proposal with the Secretary of State for publication as final rules.

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



SUBPART D: RCRA ADJUSTED STANDARD PROCEDURES



SUBPART E: AIR ADJUSTED STANDARD PROCEDURES



SUBPART F: WATER WELL SETBACK EXCEPTION PROCEDURES

SUBPART G: ADJUSTED STANDARDS

Section



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

Section

SUBPART I: MAXIMUM ACHIEVABLE CONTROL TECHNOLOGY DETERMINATIONS



SUBPART J: CULPABILITY DETERMINATIONS



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

AUTHORITY: Implementing Sections 5, 14.2(c), 22.4, 27, 28, 28.1, 28.5, 39.5 and 52.3 and authorized by Sections 26, 39.5 and 52.3 of the Environmental Protection Act [415 ILCS 5/5, 14.2(c), 22.4, 27, 28, 28.1, 28.5, 26, 39.5 and 52.3]

SOURCE: Filed with Secretary of State January 1, 1978; amended at 4 Ill. Reg. 2, p. 186, effective December 27, 1979; codified at 6 Ill. Reg. 8357; amended in R85-22 at 10 Ill. Reg. 992, effective February 2, 1986; amended in R86-46 at 11 Ill. Reg. 13457, effective August 4, 1987; amended in R82-1 at 12 Ill. Reg. 12484, effective July 13, 1988; amended in R88-10 at 12 Ill. Reg. 12817, effective July 21, 1988; amended in R88-5(A) at 13 Ill. Reg. 12094, effective July 10, 1989; amended in R88-5(B) at 14 Ill. Reg. 9442, effective June 5, 1990; amended in R93-24 at 18 Ill. Reg. 4230, effective March 8, 1994; amended in R93-30 at 18 Ill. Reg. 11579, effective July 11, 1994; amended in R99-9 at 23 Ill. Reg. _____, effective _____.

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

### Section 106.940 Purpose, Applicability

a) The purpose of this Subpart is to set forth the criteria and procedures under which the Board or the Agency may terminate an EMSA, as defined in Section 106.942 of this Subpart.

b) When the Agency terminates an EMSA under Section 52.3-4(b) of the Act, only Sections 106.942 and 106.945 of this Subpart apply.

c) This Subpart, except for Section 106.945, applies to proceedings in which the Board will determine whether to terminate an EMSA.

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

### Section 106.942 Definitions

For purposes of this Subpart, the words and terms used in this Subpart have the meanings given below. Words and terms not defined in this Subpart, if defined in the Act, have the

meanings that the Act provides.

"Act" means the Environmental Protection Act [415 ILCS 5].

"Agency" means the Environmental Protection Agency.

"Board" means the Pollution Control Board.

"Clerk" means the Clerk of the Board.

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

"Innovative environmental measures" means any procedures, practices, technologies or systems that pertain to environmental management and are expected to improve environmental performance when applied.

"Pilot project" means an innovative environmental project that covers one or more designated facilities, designed and implemented in the form of an EMSA.

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

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

Section 106.944 Severability

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

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

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

a) To terminate an EMSA under Section 52.3-4(b) of the Act, the Agency must determine that the sponsor's performance under the EMSA has failed to:

1) *Achieve emissions reductions or reductions in discharges of wastes beyond the otherwise applicable statutory and regulatory requirements through pollution prevention or other suitable means; or*

2) *Achieve real environmental risk reduction or foster environmental*

*compliance by other persons regulated under this Act in a manner that is clearly superior to the existing regulatory system*. (Section 52.3-1(b) of the Act)

b) If the Agency terminates an EMSA under Section 52.3-4(b) of the Act, the sponsor may, within 35 days after receipt of the Agency's notification of the termination, file an appeal with the Board. Appeals to the Board will be in the manner provided for review of permit decisions in Section 40 of the Act.

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

Section 106.946 Who May Initiate, Parties

a) Only the Agency may commence a proceeding to terminate an EMSA under this Subpart.

b) The Agency will be designated the complainant. The sponsor will be designated the respondent.

c) Misnomer of a party is not a ground for a dismissal; the name of any party may be corrected at any time.

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

Section 106.948 Notice, Statement of Deficiency, Answer

a) A proceeding to terminate an EMSA will be commenced when the Agency serves a notice of filing and a statement of deficiency upon the respondent and files 10 copies of the notice of filing and statement of deficiency with the Clerk.

b) The statement of deficiency must contain:

1) The stated basis for the respondent's alleged deficient performance under Section 106.954(a) of this Subpart;

2) The dates, location, nature, extent and duration of any act or omission, and amount and other characteristics of any discharges or emissions, alleged to violate provisions of the Act or regulations that apply to the pilot project that the EMSA does not address;

3) The dates, location, nature, extent and duration of any act or omission, and amount and other characteristics of any discharges or emissions, alleged to violate the EMSA; and

4) With respect to subsections (b)(1) through (b)(3) of this Section, the

statement of deficiency must contain sufficient detail to advise the respondent of the extent and nature of the alleged violations to reasonably allow the respondent to prepare a defense.

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

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

Section 106.950 Service

a) The Agency must serve a copy of the notice of filing and statement of deficiency either personally on the respondent or the respondent's authorized agent, or by registered or certified mail with return receipt signed by the respondent or the respondent's authorized agent. Proof must be made by affidavit of the person who makes personal service, or by properly executed registered or certified mail receipt. The Agency must file proof of service of the notice of filing and statement of deficiency with the Clerk immediately upon completion of service.

b) The Agency and the respondent must serve all motions and all other notices personally, by First Class United States mail, with sufficient postage, or by overnight delivery by a nationally recognized courier service. The Agency and the respondent must file 10 copies of the motions and notices with the Clerk with proof of service.

c) Service is presumed complete upon personal service, four days after deposit in the United States First Class mail, with sufficient postage, or the next business day upon deposit with a nationally recognized courier service for overnight delivery.

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

Section 106.952 Notice of Hearing

a) The Clerk will assign a docket number to each statement of deficiency filed. Any hearing will be held not later than 60 days after the respondent files the answer, subject to any extensions ordered under subsection (c) of this Section.

b) The Chairman of the Board will designate a hearing officer and the Clerk will notify the parties of the designation. The hearing officer may be a Member of

the Board if otherwise qualified.

c) The hearing officer, after reasonable efforts to consult with the parties, will set a time and place for hearing. The Board or the hearing officer may extend the time for hearing if all parties agree or there are extreme and unanticipated or uncontrollable circumstances that warrant a delay. The Board or the hearing officer may delay the hearing more than once. In each event, the Board or the hearing officer will not delay the hearing for more than 30 days.

d) The hearing will be held in the county in which the pilot project is located, or in another county that the hearing officer designates for cause.

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

f) The Agency must give notice of each statement of deficiency and hearing under Section 106.950(b) at least 10 days before the hearing to:

1) All stakeholders named or listed in the EMSA; and

2) Any person who submitted written comments on the respondent's EMSA or participated in the public hearing on the respondent's EMSA by signing an attendance sheet or signature card under the procedures set forth in 35 Ill. Adm. Code 187.404, if less than 100 persons attended the public hearing on the respondent's EMSA as indicated by signatures on the attendance sheet or signature cards.

g) Failure to comply with this Section is not a defense to an involuntary termination action under this Subpart, but the hearing officer may postpone the hearing upon the motion of any person prejudiced by a failure to comply with this Section.

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

Section 106.954 Deficient Performance

a) For purposes of this Subpart, a respondent's performance under its EMSA is deficient if the Agency asserts and the Board finds that any of the following conditions exist:

1) The respondent misrepresented the factual basis for entering into the EMSA.

2) The respondent failed to provide access to the pilot project for the Agency to monitor compliance with an EMSA.

3) The respondent falsified any monitoring data, recordkeeping information or reports regarding the pilot project.

4) The respondent or the owner or operator of the pilot project failed to comply with any requirement of any federal or local environmental law or regulation that applies to the pilot project and that the EMSA does not address, and for which a citizen's complaint has been filed with a court of competent jurisdiction or the appropriate authority has sent a notice of violation, complaint or other notice of failure to comply to the respondent or the owner or operator of the pilot project.

5) The respondent or the owner or operator of the pilot project failed to comply with any requirement of any State environmental law or regulation that applies to the pilot project and that the EMSA does not address, and for which a citizen's complaint has been filed with the Board or the Agency has mailed a notice of violation to the respondent or the owner or operator of the pilot project under Section 31(a) or (b) of the Act.

6) The respondent failed to comply with its EMSA, subject to any grace or cure periods or rights contained in the EMSA.

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

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

Section 106.956 Board Decision

a) The Board will prepare a written opinion and order for all final determinations that will include findings of fact (with specific page references to principal supporting items of evidence in the record) and conclusions of law (supported by adequate reasoning) on all material issues.

b) The Board will render its decision as expeditiously as practicable. The Board will render a decision as an order that:

1) Terminates the EMSA;

2) Defers termination for a specified time, not to exceed 90 days from the date of the order, during which the respondent may rectify the deficient

performance; or

3) Rejects termination of the EMSA.

c) The Board may extend the time period under subsection (b)(2) of this Section for good cause.

d) The Board may order any or all of the following:

1) Direct the respondent to cease and desist from violating the Act, the Board's regulations, or the EMSA;

2) Require the respondent to provide performance assurance compensation in appropriate amounts;

3) Require the respondent to post a sufficient performance bond or other security to assure that the respondent corrects the violation within the time that the Board prescribes;

4) Enforce any remedy provision of the EMSA; and

5) Order other relief as appropriate.

e) The Clerk will publish the order and opinion with the vote of each Board Member recorded and will notify the parties required to be notified of the hearing from which the order arose of the order and opinion.

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

Section 106.958 Burden of Proof

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

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

Section 106.960 Motions, Responses

a) All motions before a hearing must be presented to the hearing officer at least 10 days before the date of the hearing.

b) The complainant's motion to voluntarily dismiss an action as to any or all claims must be directed to the Board and may be made orally upon the hearing record, or may be made in writing at any time before the Board issues its decision.

c) All motions must be served on all parties, including the Agency and its representative and the hearing officer, with proof of service.

d) Unless made orally on the record during a hearing or unless the hearing officer directs otherwise, a motion must be in writing, must state the reasons for and grounds upon which the motion is made, and may be accompanied by any affidavits or other evidence relied on and, when appropriate, by a proposed order.

e) Within 7 days after a written motion is served, or another period that the Board or hearing officer may prescribe, a party may file a response to the motion, accompanied by affidavits or other evidence. If no response is filed, the parties will be deemed to have waived objection to the motion, but the waiver of objection does not bind the Board. The moving party does not have the right to reply, except as the hearing officer or the Board permits.

f) No oral argument will be heard on a motion before the Board unless the Board directs otherwise. A written brief may be filed with a motion or an answer to a motion.

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

h) No interlocutory appeal of a motion may be taken to the Board from a ruling of the hearing officer.

i) After the hearing, the Board may review the hearing officer's rulings. The Board will set aside the hearing officer's ruling only to avoid material prejudice to the rights of a party. The hearing officer, if a member of the Board, may vote upon motions to review his or her rulings as hearing officer.

j) Unless the Board orders or this Subpart provides otherwise, the filing of a motion will not stay the proceeding or extend the time to perform any act.

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

Section 106.962 Intervention

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

hearing on the respondent's EMSA by signing an attendance sheet or signature card at hearing under the procedures set forth in 35 Ill. Adm. Code 187.404, or is named or listed in the respondent's EMSA as a stakeholder, and if the Board's final order may adversely affect him or her.

b) The applicant must file 10 copies of a petition to intervene with the Board and serve copies on each party not later than 48 hours before the hearing. The hearing officer may permit a person to intervene at any time before the beginning of the hearing when that person shows good cause for the delay.

c) An intervenor has all the rights of an original party, except that the intervenor is bound by orders issued before the hearing officer permitted the intervenor to intervene and the intervenor cannot raise issues that were raised or were required to be raised at an earlier stage of the proceeding.

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

Section 106.964 Continuances

The hearing officer will grant a motion to continue an involuntary termination proceeding under this Subpart when justice requires. All motions to continue must be supported by an affidavit or written motion before the hearing officer by the person or persons with knowledge of the facts that support the motion. However, if the Board determines that any involuntary termination proceeding under this Subpart is not proceeding expeditiously, the Board may order actions that it deems appropriate to expedite the proceeding.

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

Section 106.966 Discovery, Admissions

a) Discovery, except requests to produce documents, admit facts and state the identity and location of persons with knowledge of facts, as set forth in subsection (b) of this Section, is not permitted unless the hearing officer orders otherwise.

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

c) The hearing officer may order a party:

1) To state the identity and location of persons with knowledge of relevant facts.

2) To produce evidence that a party controls or possesses so that it may be inspected, copied or duplicated. The order may grant the right to reasonably inspect the pilot project.

d) The hearing officer may at any time on his or her own initiative, or on motion of any party or witness, make a protective order as justice requires. The protective order may deny, limit, condition or regulate discovery to prevent unreasonable delay, expense, harassment, or oppression, or to protect materials from disclosure by the party who obtains the materials consistent with Sections 7 and 7.1 of the Act.

e) All objections to rulings of the hearing officer must be made in the record.

f) Section 106.960(d), (e), (f), (g), (h), (i) and (j) of this Subpart applies regarding procedures to rule on objections.

g) Failure to comply with any ruling will subject the person to sanctions under 35 Ill. Adm. Code 101, Subpart J.

h) Request to Admit Facts. A party may serve on any other party, no sooner than 15 days after the Agency files the statement of deficiency, a written request that the latter admit the truth of any specified relevant fact set forth in the request.

i) Request to Admit to the Genuineness of Document. A party may serve on any other party, no sooner than 15 days after the Agency files the statement of deficiency, a written request to admit to the genuineness of any relevant documents described in the request. Copies of the document must be served with the request unless copies have already been furnished.

j) Admission in the Absence of Denial. Each of the matters of fact and the genuineness of each document of which admission is requested is admitted unless, within 15 days after service under subsection (h) or (i) of this Section, the party to whom the request is directed serves upon the party requesting the admission either a sworn statement that denies specifically the matters on which the admission is requested or that sets forth in detail the reasons why the party cannot truthfully admit or deny those matters or written objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper in whole or in part. If a party objects in writing to a part of the request, the remainder of the request must be answered within the period designated in the request. A denial must fairly meet the substance of the requested admission. If good faith requires that a party deny only a part, or requires qualification, of a matter of which an admission is

requested, the party must specify so much of it as is true and deny only the remainder. The hearing officer will hear any objection to a request or to an answer upon prompt notice and motion of the party making the request.

k) Effect of Admission. Any admission made under this Section is for the purpose of the pending action only. It does not constitute an admission by the party for any other purpose and may not be used against the party in any other proceeding.

l) Expenses of Refusal to Admit. If a party, after being served with a request to admit the genuineness of any documents or the truth of any matters of fact, serves a sworn denial in response to the request, and if the party requesting the admissions later proves the genuineness of the document or the truth of the matter of fact, the latter party may apply to the Board for an order, under 35 Ill. Adm. Code 101, Subpart J, for payment of reasonable expenses incurred.

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

Section 106.968 Subpoenas

a) Upon any party's timely motion to the Board, or on motion of the hearing officer or the Board, the hearing officer or the Board may issue a subpoena to attend a hearing. The subpoena may include a command to produce evidence reasonably necessary to resolve the matter under consideration, subject to this Subpart's limitations on discovery. A copy of the subpoena must be served upon the Clerk. If the witness, other than a respondent or owner or operator of a pilot project, is a non-resident of the State, the order may provide terms and conditions regarding his or her appearance at the hearing that are just, including payment of his or her reasonable expenses.

b) Every subpoena must state the title of the action and command each person to whom it is directed to attend and give testimony at the time and place specified.

c) The hearing officer or the Board, upon motion made promptly and in any event at or before the time specified for compliance with the subpoena, may quash or modify the subpoena if it is unreasonable and oppressive.

d) Failure of any witness to comply with a Board subpoena will subject the witness to sanctions under 35 Ill. Adm. Code 101, Subpart J.

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

Section 106.970 Settlement Procedure

a) All parties to any case in which a settlement or compromise is proposed must

file with the Clerk before the time of the scheduled hearing a written statement, signed by the parties or their authorized representatives, that outlines the nature of, the reasons for, and the purpose to be accomplished by, the settlement. The statement must contain:

1) A full stipulation of all material facts that pertain to the nature, extent and causes of the alleged violations;

2) The nature of the relevant parties' operations and control equipment;

3) Any explanation for past failures to comply and an assessment of the impact on the public from the failure to comply;

4) Details about future plans for compliance, including a description of additional control measures and the dates on which they will be implemented; and

5) The proposed performance assurance payment, if any.

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

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

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

a) The hearing officer has the duty to conduct a fair hearing, to take all necessary action to avoid delay, to maintain order, and to ensure development of a clear and complete record. The hearing officer has all powers necessary to these ends including, but not limited to, the authority to:

1) Issue discovery orders;

2) Rule upon objections to discovery orders;

3) Make protective orders as justice requires, which may deny, limit condition or regulate discovery to prevent unreasonable delay, expense, harassment, or oppression, or to protect materials from disclosure by the party who obtains the materials;

4) Administer oaths and affirmations;

5) Rule upon offers of proof, receive evidence and rule upon objections to introducing evidence, subject to Section 106.974(b) of this Subpart;

6) Regulate the course of the hearings and the conduct of the parties and their counsel;

7) Examine witnesses solely to clarify the record of 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 because of the examination unless all parties agree; and

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

b) Any Board Member or assistant to a Board Member present at the hearing may advise the hearing officer and may interrogate witnesses but does not have the authority to rule on objections or motions or to overrule the hearing officer during the hearing.

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

Section 106.974 Order and Conduct of Hearing

a) The following will be the order of all involuntary termination hearings under this Subpart, unless modified by the hearing officer for good cause:

1) Present, argue and dispose of preliminary motions on the matters that the statement of deficiency raises;

2) Present opening statements;

3) Complainant's case in chief;

4) Respondent's case in chief;

5) Complainant's case in rebuttal;

6) Statements from interested citizens, as the hearing officer authorizes;

7) Complainant's opening argument, which may include legal argument;

8) Respondent's closing argument, which may include legal argument;

9) Complainant's closing argument, which may include legal argument;

10) Present and argue all motions before submitting the transcript to the Board; and

11) A schedule to submit briefs to the Board.

b) All hearings under this Subpart will be public, and any person not a party and not otherwise a witness for a party may submit written statements relevant to the subject matter of the hearing. Any party may cross-examine any person who submits a statement. If the person is not available to be cross-examined upon timely request, the written statement may be stricken from the record. The hearing officer will permit any person to offer reasonable oral testimony whether or not a party to the proceedings.

c) All witnesses will be sworn.

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

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

Section 106.976 Evidentiary Matters

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

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

Section 106.978 Post-Hearing Procedures

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

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

Section 106.980 Motion After Entry of Final Order

Within 35 days after the Board adopts a final order, any party may file a motion to rehear, modify or vacate the order or for other relief. Response to the motion must be filed within 14 days after the motion is filed. A motion filed within 35 days stays enforcement of the final

order.

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

Section 106.982 Relief from Section 106.956 Final Orders

a) The Board may at any time correct errors in orders or other parts of the record that arise from oversight or omission or clerical mistakes. The Board may do so on its own initiative or on the motion of any party and after notice, if any, as the Board orders. During the pendency of an appeal, the Board may correct the mistakes before the appeal is docketed in the appellate court. While the appeal is pending, the Board may correct the mistakes with leave of the appellate court.

b) On motion and upon terms that are just, the Board may relieve a party or a party's legal representative from a final order, for the following:

1) Newly discovered evidence that by due diligence could not have been discovered in time under Section 106.956 of this Subpart; or

2) Fraud (whether previously denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; or

3) Void order.

c) A motion under this Section does not affect the finality of a Board order or suspend the operation of a Board order. The motion must be filed in the same proceeding in which the Board entered the order but the motion is not a continuation of the proceeding. The motion must be supported by affidavit or other appropriate showing as to matters not of record. All parties must be notified under Section 106.950(b) of this Subpart.

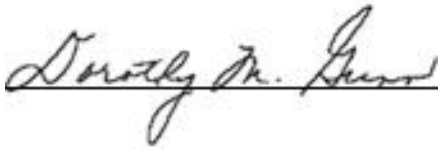
d) This motion must be filed with the Board within 60 days after entry of the order.

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

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1996)) provides for the appeal of final Board orders to the Illinois Appellate Court within 35 days of service of this order. Illinois Supreme Court Rule 335 establishes such filing requirements. See 172 Ill. 2d R. 335; see also 35 Ill. Adm. Code 101.246, Motions for Reconsideration.

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 1999 by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board