

ILLINOIS POLLUTION CONTROL BOARD
May 28, 1987

IN THE MATTER OF:)		
)		
PROCEDURAL RULES)	R82-27	
)	R82-36	Consol.
)	R83-37	

ORDER OF THE BOARD (by J. Theodore Meyer):

The Board hereby adopts the following amendments to Title 35: Environmental Protection; Subtitle A: General Provisions; Chapter I: Pollution Control Board; Part 104. However, the Clerk is directed not to submit these rules for first notice publication until such time as the remaining rules in this subtitle are similarly adopted. The rules as hereby amended follow:

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104.103	References (Repealed)
104.104	RCRA Variances

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
104.126	RCRA Variances: Additional Material

SUBPART C: NOTICE, AND OBJECTIONS, JOINDER
AND INTERVENTION

Section	
104.140	Notice of Petition

104.141	Objections to Petition
104.142	RCRA Variances: Notice of Filing of Petition
<u>104.143</u>	<u>Intervention</u>
<u>104.144</u>	<u>Filing of Motions and Responses</u>
<u>104.145</u>	<u>Motions to Dismiss</u>
<u>104.146</u>	<u>Disposition of Motions</u>
<u>104.147</u>	<u>Consolidation and Severance of Claims and Joining Additional Parties</u>

SUBPART D: AUTHORIZATION, SCHEDULING AND NOTICE
OF HEARINGS

Section	
104.160	Board Action on Petitions for Variance and Authorization of Hearing
104.161	<u>Scheduling and Notice of Hearing</u>
<u>104.162</u>	<u>Continuances</u>

SUBPART E: RECOMMENDATION AND RESPONSE
DISCOVERY, ADMISSIONS AND SUBPOENAS

Section	
<u>104.170</u>	<u>Prehearing Conferences</u>
<u>104.171</u>	<u>Discovery</u>
<u>104.172</u>	<u>Admissions</u>
<u>104.173</u>	<u>Subpoenas</u>

SUBPART F: HEARINGS RECOMMENDATION AND RESPONSE

Section	
104.180	Agency Investigation and Recommendation
104.181	Response or Amended Petition
104.182	RCRA Variances: Additional Information in Recommendation
104.183	RCRA Variances: Public Comment

SUBPART G: FINAL ACTION CONDUCT OF HEARINGS
AND RULES OF EVIDENCE

Section	
104.200	<u>Proceedings Burden of Proof</u>
104.201	<u>Proceedings (Recodified) Authority of the Hearing Officer</u>
104.202	<u>Transcripts (Recodified) Authority of Board Members and Board Assistants</u>
<u>104.203</u>	<u>Order of Variance Hearing</u>
<u>104.204</u>	<u>Conduct of Hearing</u>
<u>104.205</u>	<u>Admissible Evidence</u>
<u>104.206</u>	<u>Written Narrative Testimony</u>
<u>104.207</u>	<u>Official Notice</u>

<u>104.208</u>	<u>Viewing of Premises</u>
<u>104.209</u>	<u>Admission of Business Records in Evidence</u>
<u>104.210</u>	<u>Examination of Adverse Party or Agent and Hostile Witnesses; Compelling Appearance Thereof at Hearing</u>

SUBPART H: POST HEARING PROCEDURE AND FINAL ACTION

Section	
104.220	<u>Decisions (Recodified) Default</u>
104.221	<u>Transcripts</u>
<u>104.222</u>	<u>Record</u>
<u>104.223</u>	<u>Briefs and Oral Argument</u>
104.224	<u>Calculation of Decision Deadline</u>
104.225	<u>RCRA Variances: Board Decision</u>
<u>104.226</u>	<u>Contents of Board Opinion and Orders</u>

SUBPART I: RELIEF FROM FINAL ORDERS

<u>Section</u>	
<u>104.240</u>	<u>Motions Subsequent to Entry of Final Order</u>
<u>104.241</u>	<u>Relief From Section 104.226 Final Orders</u>

APPENDIX A Old Rule Numbers Referenced (Repealed)

AUTHORITY: Implementing Sections 5, 35, 36, 37 and 38 and authorized by Section 26 of the Environmental Protection Act (Ill. Rev. Stat. 1985, ch. 111¹/₂, pars. 1005, 1035, 1037, 1038 and 1026)

SOURCE: Originally adopted as Chapter I: Procedural Rules, Part IV: Variances, in R70-4, at 1 PCB 43, October 8, 1970; amended in R77-16, 29 PCB 503, at 2 Ill. Reg. 16, p. 3, effective May 1, 1978, amended in R79-9, 35 PCB 433, at 3 Ill. Reg. 51, p. 128, effective December 7, 1979; amended in R80-12, 40 PCB 451, at 5 Ill. Reg. 2763, effective March 2, 1981; codified at 6 Ill. Reg. 8357; amended in R84-10 at 9 Ill. Reg. 1409, effective January 16, 1985; amended in R82-27, R82-36 and R83-37 at _____ Ill. Reg. _____, effective _____.

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

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, provided however, that the operation of any rule or regulation which implements, in whole or in part, a State RCRA, UIC or NPDES program shall not be stayed. 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.

(Source: Amended at _____ Ill. Reg. _____, effective _____)

Section 104.103 References (Repealed)

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: Repealed at _____ Ill. Reg. _____, effective _____)

Section 104.104 RCRA Variances

- a) As used in this Part, "petition for a RCRA variance" shall mean any pleading which meets either, or both, of the following criteria:
 - 1) It requests a variance from 35 Ill. Adm. Code 703, 720, 721, 722, 723, 724 or 725; or,
 - 2) It asks that the Board order the Agency to issue or modify any provision of a RCRA permit required pursuant to Section 21(f) of the Act.

- b) The federal RCRA rules contain procedures which are referred to as "Variances" (40 CFR 260, 261, 262, 263, 264, 265 and 270 (19846)). The petitioner should consult the comparable Board regulations to decide whether the variance procedures of this Part need to be followed. As provided in Title IX of the Act and Section 35 Ill. Adm. Code 104.160(f), the Board may grant a temporary variance. The Board may grant permanent relief from a rule pursuant to 35 Ill. Adm. Code 102. Pursuant to 35 Ill. Adm. Code 105 a permit applicant may request Board review of the Agency's denial of a permit or issuance with conditions.

(Source: Amended at _____ Ill. Reg. _____, effective _____)

SUBPART B: PETITION FOR VARIANCE

Section 104.120 Petition for Variance

A variance proceeding shall be commenced by any person Any person may initiate a variance proceeding by filing a petition for variance with the Agency and simultaneously filing 12 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.

(Source: Amended at _____ Ill. Reg. _____, effective _____)

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, including the county and county seat;
- 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 undertaken 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) If the requested variance involves an existing permit or a pending permit application, a copy of the permit or permit application;
- m) If the petition contains a claim of confidentiality, a justification for such confidentiality in accordance with 35 Ill. Adm. Code 101.107(c);
- n) A specific request for hearing or a clear statement waiving hearing and containing an affidavit in accordance with 35 Ill. Adm. Code 104.124;
- o) A statement whether the requested relief can be granted consistent with federal law in accordance with 35 Ill. Adm. Code 104.122; and
- p) Such other things as are required in this Subpart.

(Source: Amended at ____ Ill. Reg. _____, effective _____)

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~~7~~: ~~Ch. 7~~ (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 65.181. 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~~7~~: Water Pollution Ch. 7 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), USEPA effluent guidelines and standards, any other Federal regulations, or any areawide waste treatment management plan approved by the Administrator of USEPA 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~~7~~: ~~Ch. 7~~ (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 USEPA 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.
- e) All petitions for RCRA variances shall include a showing that the Board can grant the requested relief consistent with, and establish RCRA permit conditions no less stringent than, that which would be required by the Solid Waste Disposal Act as amended by the Resource Conservation and Recovery Act of 1976 (P.L. 94-580, as amended by P.L. 95-609, 42 U.S.C. 6901 et seq.), and the regulations thereunder promulgated by the United States

Environmental Protection Agency (40 CFR 260, 261, 262, 263, 264, 265 and 270 (19846)). Such petitions shall indicate whether any federal provisions authorize the relief requested, and shall include any facts necessary to show that the petitioner would be entitled to the requested relief pursuant to federal law.

(Source: Amended at _____ Ill. Reg. _____, effective _____)

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.~~ A petition to extend a prior variance shall be a new petition for variance before the Board and shall be assigned a new docket number by the Clerk.
- 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).

(Source: Amended at _____ Ill. Reg. _____, effective _____)

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 and orders of the Board in adopting the regulations or orders of the Board from which the variance is sought.

(Source: Amended at _____ Ill. Reg. _____, effective _____)

Section 104.125 Dismissal for Inadequacy

The failure to satisfy the requirements of this Subpart or to respond to Board orders for more information 7 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~~ rules otherwise.

(Source: Amended at _____ Ill. Reg. _____, effective _____)

Section 104.126 RCRA Variances: Additional Material

- a) The petitioner must clearly identify a petition for a RCRA variance as such.
- b) Persons who have, or are required to have, a RCRA permit and who seek a RCRA variance which could result in modification or issuance of the RCRA permit must have on file with the Agency a RCRA permit application reflecting the requested variance prior to filing the variance petition.
- c) Petitioner shall attach to the variance petition a copy of the RCRA permit application, or such portion as may be relevant to the variance request.
- d) Petitioner shall attach to the variance petition proof of service on USEPA as required by Section 35 Ill. Adm. Code 104.142.

(Source: Amended at _____ Ill. Reg. _____, effective _____)

SUBPART C: NOTICE, OF PETITION OBJECTION,
JOINDER AND INTERVENTION

Section 104.140 Notice of Petition

- a) The Board ~~shall give~~ will provide 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~~ issue published after the Board has considered the petition in accordance with Section 104.160(b).
- b) Within 10 days after a variance petition is filed ~~the~~ Agency shall:
 - 1) 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 is located who has in writing to the Agency requested notice of variance petitions, the State's

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~~

- 2) pPublish 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 is located.

(Source: Amended at _____ Ill. Reg. _____, effective _____)

Section 104.141 Objections to Petition

- a) 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~~ 35 Ill. Adm. Code 104.143. A copy of such objection shall be mailed to the petitioner and the Agency by the Clerk.
- b) Paragraph (a) does not apply to RCRA Variances. Sections 35 Ill. Adm. Code 104.183 and 104.200 provide for public comment and a public hearing on all such petitions.

(Source: Amended at _____ Ill. Reg. _____, effective _____)

Section 104.142 RCRA Variances: Notice of Filing of Petition

- a) Any petition requesting a RCRA variance shall not be deemed filed until proof of service has been filed with the Board. Petitioner shall serve the United States Environmental Protection Agency a copy of any petition requesting a RCRA variance at the following address:
- Director, Waste Management Division
USEPA, Region V
230 South Dearborn Street
Chicago, IL 60604
- b) In addition to the requirements of Section 37 of the Act and Section 35 Ill. Adm. Code 104.140, the Agency at a minimum shall give notice of the filing of a petition for a RCRA variance to the following persons:
- 1) Federal agencies as designated by the United States Environmental Protection Agency;

- 2) Illinois Department of Transportation;
 - 3) Illinois Department of Conservation;
 - 4) Illinois Department of Energy and Natural Resources;
 - 5) Illinois Department of Public Health;
 - 6) The Governor of any other State adjacent to the County in which the facility is located;
 - 7) Elected officials of any counties, in other states, adjacent to the county in which the facility is located, and elected officials in any municipality, in another state, if it is the closest population center to the facility.
- c) In addition to the methods of notice by publication of Section 35 Ill. Adm. Code 104.140, the Agency shall give notice by broadcast over at least one local radio station in the area of the facility containing the information required by paragraphs (d)(2) and (d)(4) through (d)(7).
- d) The notices required by paragraphs (b) and (c) shall be accomplished within the time limit established by Section 35 Ill. Adm. Code 104.140(b).
- e) A notice of the filing of a petition for a RCRA variance shall include the following information:
- 1) The address of the Board office;
 - 2) Name and address of the petitioner and, if different, of the facility for which the variance is sought;
 - 3) A brief description of the business conducted at the facility and the activity described in the petition;
 - 4) Name, address and telephone number of the Clerk of the Board, from whom interested persons may obtain further information, including copies of the variance petition;
 - 5) A statement that the Agency is preparing a recommendation, the date on which the recommendation is to be filed, and the name, address and telephone number of the Agency employee responsible for the recommendation;

- 6) A statement that a hearing will be held after the filing of the recommendation and that the record will remain open for written comments for 45 days after filing of the recommendation. The notice will include the address of the Board to which comments shall be mailed;
- 7) A statement that the record in the variance proceeding is available at the Board office for inspection, except those portions which are claimed to be trade secrets, and that procedures are available whereby disclosure may be sought by the public.
- 8) A statement that variances may be granted pursuant to Ill. Rev. Stat. 1983⁵, ch. 111^{1/2}, pars. 1035 et seq. and 35 Ill. Adm. Code 104, and a reference to the Board regulations or order from which a variance is sought.
- 9) Any additional information considered necessary or proper.

(Source: Amended at _____ Ill. Reg. _____, effective _____)

Section 104.143 Intervention

- a) Upon timely application and subject to the necessity for conducting an orderly and expeditious hearing, the Hearing Officer shall permit any person to intervene in a variance proceeding when either of the following conditions is met:
 - 1) The applicant is so situated that the applicant may be adversely affected by a final order of the Board; or
 - 2) An applicant's claim and the variance 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. The Hearing Officer may permit intervention at any time when good cause 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 only to the extent feasible within the statutory decision deadline and 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 previously 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 social and economic impact.

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

Section 104.144 Filing of 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 unless otherwise allowed by the Board or Hearing Officer. Unless made orally on the record during a hearing or unless the Hearing Officer directs otherwise, a motion shall be in writing, shall clearly designate whether a ruling is requested from the Hearing Officer or the Board, shall state the reasons for and grounds upon which the motion is made, and shall be accompanied by any affidavits or other evidence relied on and, when appropriate, by a proposed order. All motions must be served on all parties, including the Hearing Officer, with proof of service in accordance with 35 Ill. Adm. Code 103.123(b).
- b) 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.
- c) Oral argument on a motion may be permitted before the Board, at its discretion. A written brief may be filed with a motion or an answer to a motion, stating the arguments and authorities relied on.

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

Section 104.145 Motions to Dismiss

Motions by petitioner to voluntarily dismiss a variance petition

shall be directed to the Board and may be made at any time prior to issuance of the Board's decision.

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

Section 104.146 Disposition of Motions

- a) The Hearing Officer shall rule upon all motions, except that the Hearing Officer shall have no authority to rule upon any motion to dismiss, or to decide a proceeding on the merits. The Hearing Officer shall refer any such motions to the Board. The Board, in its discretion, may direct that hearing on the proceeding be conducted and 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 upon the completion of the hearing.
- b) 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 immediate appeal of any order 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.
- c) 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 or her rulings as Hearing Officer.
- d) 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 performance of any act.

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

Section 104.147 Consolidation and Severance of Claims and Joining Additional Parties

- a) 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 necessary parties to be brought in pursuant to the provisions of subsection(b).

- b) 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 joined as a party. If a person not a party has an interest which the order may affect, the Board or Hearing Officer may order that person joined as a party. The Board shall provide the joined party with service of process and copies of all pleadings filed prior to the joinder. Service of process and pleadings shall be by personal service or by First Class U. S. Mail.

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

SUBPART D: AUTHORIZATION, SCHEDULING AND NOTICE OF HEARINGS

Section 104.160 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 it shall determine:
- 1) The petition may be dismissed if the Board determines that it is not adequate under Subpart B or the Act; 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 petition for a RCRA variance has been filed; or,
 - 4) 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); or,
 - 5) When the requested variance relief, if granted, would necessitate a revision to the State Implementation Plan for a criteria pollutant under the federal Clean Air Act (42 USC 7401 et seq.).
- 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).
- ed) 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, within 120 days. except that the Board shall not act to grant or deny any petition until after 21 days have elapsed from the date of filing. The decision period on RCRA, VIE and NPDES variances is as provided in Section 38(c) of the Act.
- fe) 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.

(Source: Amended at _____ Ill. Reg. _____, effective _____)

Section 104.161 Scheduling and Notice of Hearing

- a) When a hearing is requested, required or authorized by the Board, the Clerk shall assign a Hearing Officer. The Hearing Officer shall set a date, time and place for hearing to be held at least 35 days prior to decision deadline. If the parties fail to provide an acceptable hearing date or if after a reasonable attempt the Hearing Officer is unable to consult with the parties, the Hearing Officer after appropriate consultation with the parties shall unilaterally set a time and place for hearing. to be held within 60 days of the filing of the petition, The Hearing Officer must provide the Clerk

with at least 40 days notice of the date, time and location of the scheduled hearing.

- b) The Hearing Officer, upon scheduling hearing, shall create a schedule for completion of the record. The schedule shall provide dates and deadlines for prehearing conferences, completion of discovery, hearing and submittal of briefs. The schedule must provide for a completed record at least 20 days before the decision deadline. The schedule shall be in the form of a Hearing Officer Order and shall be served on all parties and filed with the Clerk by personal service or First Class U.S. mail.
- cb) The Hearing Officer shall give notice of the hearing in accordance with 35 Ill. Adm. Code 103-123(b), by personal service or by First Class U.S. mail, at least 21 days before the hearing to the petitioner, the Agency, and anyone who has filed an objection to the petition.
- de) 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; give public notice of the date, time and location of the hearing:
- 1) By publication in the Environmental Register; and
 - 2) At least 21 days before the hearing, by public advertisement in a newspaper of general circulation in the county in which the subject facility is located.
- e) When the requested variance relief, if granted, would necessitate a revision to the State Implementation Plan for a criteria pollutant under the federal Clean Air Act(42 USC 7401 et seq.) a copy of the variance petition shall be sent to a public library in the air quality control region in which the subject facility is located for public inspection.
- fd) Notice of hearings on petitions for RCRA Variance shall be subject to the following provisions instead of paragraphs (a), (b), and (c), (d) and (e):
- 1) The Hearing Officer, after appropriate consultation with the parties, shall set a time and place for the hearing to be held not less than 30 days after the filing of the recommendation. The Hearing Officer may give notice of any hearing prior to the actual filing of the recommendation. If the recommendation is actually filed less than 30 days

before the scheduled date of the hearing, the Hearing Officer shall reschedule the hearing and give public notice again.

- 2) The hearing shall be held in the county in which the facility is located, in the population center in such county closest to the facility.
- 3) The Hearing Officer shall give notice of the hearing to the persons entitled to notice in Section 104.140 and 104.142, and to any other persons who have commented, requested to comment or requested notice.
- 4) Notice shall be mailed not less than 30 days before the hearing.

(Source: Amended at _____ Ill. Reg. _____, effective _____)

Section 104.162 Continuances

- a) A motion for continuance of a date or deadline not involving or affecting the hearing date or the date of decision may be granted by the Hearing Officer when justice requires. The motion must state the factual basis justifying continuance and must be supported by an affidavit by the person or persons having knowledge of the facts supporting the motion. If the Hearing Officer grants the motion, a revised schedule for completion of record must be filed with the Clerk and served on all parties in accordance with Section 104.161(b).
- b) A motion for continuance of a hearing date or a date or deadline affecting the date of decision in a variance proceeding may be granted by the Hearing Officer when justice requires and the requirements of paragraph (c) are met. Such a motion for continuance must state the factual basis justifying continuance and must be supported by an affidavit by the person or persons having knowledge of the facts supporting the motion.
- c) The Hearing Officer may grant a continuance under subsection(b) only where a waiver of the statutory decision deadline by the petitioner has been submitted, in writing, to the Hearing Officer or Clerk. Continuance can only be for an equivalent or fewer number of days that the decision deadline is waived. Waivers must be either a complete waiver of the statutory decision deadline or until a date certain that will allow time to reschedule hearing and provide adequate notice and sufficient time for Board decision making. Any waiver shall extend the time deadline of Section 104.180 regarding filing the Agency

recommendation by the equivalent number of days, but in any circumstance the recommendation must be filed at least 10 days before hearing. If the Hearing Officer grants the motion, a revised schedule for completion of the record must be filed with the Clerk and served on all parties in accordance with Section 104.161(a).

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

SUBPART E: DISCOVERY, ADMISSIONS AND SUBPOENAS

Section 104.170 Pre-hearing Conferences

- a) Upon the Hearing Officer's own motion or upon motion by a party, the Hearing Officer may, upon written notice, direct the parties or their attorneys 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 clarification, 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 prehearing conference shall be noted in the hearing record by the Hearing Officer, unless the parties enter upon written stipulation as to such matters.

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

Section 104.171 Discovery

- a) Information is obtainable through any of the following discovery methods: depositions upon oral or written questions, written interrogatories to parties, and discovery or inspection of documents or property. Duplication of discovery methods to obtain the same information should be avoided.

b) Regarding any matter not privileged, the Hearing Officer shall have the authority to order discovery upon the written request of any party when parties cannot agree to the legitimate scope of discovery. The Hearing Officer shall set a schedule for the orderly submission of discovery and shall file a copy of the schedule with the Clerk. 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.

c) The Hearing Officer may at any time on his or her own initiative, or on motion of any party or witness, issue a protective order as justice requires, denying, limiting, conditioning or regulating discovery to prevent unreasonable delay, expense, harassment, or oppression or to protect materials from disclosure by the party obtaining such materials consistent with the provisions of Sections 7 and 7.1 of the Act and 35 Ill. Adm. Code 101.107 and 120.

d) 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 the following purposes:

- 1) Impeachment of the testimony of the deposed or interrogated person;
- 2) Admissions of the deposed or interrogated person; or
- 3) 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.

- e) Upon transcription of the deposition, it shall be made available to the deponent for examination, unless the deponent and the parties who are represented at the deposition waive the deponent's signature. 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 the deponent 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.
- f) In addition to the limitations in (d) above, 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.
- g) 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 may 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.
- h) Section 104.146 shall apply regarding procedures for ruling on objections.
- i) Failure to comply with any ruling shall subject the persons to sanctions under 35 Ill. Adm. Code 109.

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

Section 104.172 Admissions

- a) Request for Admission of Fact. A party may serve on any other party a written request for the admission 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 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 28 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 or she 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 is 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 the party for any other purpose and may not be used against the party 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 35 Ill. Adm. Code 109.

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

Section 104.173 Subpoenas

- a) The Hearing Officer or the Board may issue a subpoena for attendance at a deposition or a hearing upon written motion by any party. 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 Part. 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 35 Ill. Adm. Code 109.

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

SUBPART EF: 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 in accordance with subsection (b). 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. The status of any permits or pending permit applications that are associated with or affected by the requested variance;
 - 7) An affidavit verifying the facts contained in the recommendation; and
 - 8) 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. The Agency shall file its recommendation within 30 days of the filing of the petition or amended petition, or at least 15 days before hearing, whichever is earlier. The Agency shall serve a copy of its recommendation on the petitioner and the Board by First Class U.S. mail.

(Source: Amended at _____ Ill. Reg. _____, effective _____)

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.

Within 7 days after the receipt of the Agency's recommendation, the petitioner may file a response or an amended petition, request a hearing if not previously requested, or both. Upon filing an amended petition or a request for hearing, the statutory decision period in Section 38 of the Act will begin anew.

(Source: Amended at _____ Ill. Reg. _____, effective _____)

Section 104.182 RCRA Variances: Additional Information
in Recommendation

- a) This section shall apply to Agency recommendations on petitions for RCRA Variances in addition to the provisions of Section 104.180
- b) The Agency shall file its recommendation with the Board within 30 days after the petition is filed.
- c) The recommendation shall include a fact sheet or statement of basis as provided in 35 Ill. Adm. Code 705.141 through 705.143, insofar as relevant to the variance requested.
- d) If the Agency recommends that the variance be granted, a partial draft permit reflecting the variance and recommended conditions shall be included with the recommendation.
- e) If the Agency recommends that the variance be denied, a notice of intent to deny shall be included with the recommendation.
- f) The Agency shall serve its recommendation on the United States Environmental Protection Agency and all persons who have notified the Agency that they intend to comment or have otherwise asked to be served a copy of the recommendation.

Section 104.183 RCRA Variances: Public Comment

- a) Any person, including the United States Environmental Protection Agency, may comment in writing within 45 days after the Agency files its recommendation.
- b) Comment may be on both the petition for a RCRA variance and on the recommendation.
- c) The Board will mail copies of any written comment to the petitioner, the Agency and the United States Environmental Protection Agency, unless the person filing the comment files a proof of service on the persons entitled to copies.

SUBPART FG: CONDUCT OF HEARINGS AND
RULES OF EVIDENCE

Section 104.200 Proceedings Burden of Proof

- a) Proceedings upon a petition for variance shall be in accordance with Part 1037, except as otherwise provided in this Part.

- b) In a hearing on a 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. that denial of the variance would cause an arbitrary or unreasonable hardship.

(Source: Amended at ____ Ill. Reg. _____, effective _____)

Section 104.201 Proceedings (Recodified) Authority of the 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, complete and timely record. The Hearing Officer must order a schedule for completion of the record that will result in a completed record at least 20 days before the statutory decision deadline. In addition to the powers enumerated in 35 Ill. Adm. Code 104.170 and 104.171, the Hearing Officer shall have all powers necessary to these ends including (but not limited to) the authority to:

- a) Set hearing dates unilaterally;
- b) Order schedules for completion of the record;
- c) Administer oaths and affirmations;
- d) Rule upon offers of proof and receive evidence and rule upon objections to the introduction of evidence;
- e) Regulate the course of the hearings and the conduct of the parties and their counsel;
- f) Examine witnesses for the sole purpose of clarifying the record established by the parties at the hearing. When any party is not represented by counsel, the Hearing Officer may examine and cross-examine any witness to insure a clear and complete record. However, the Hearing Officer may not exclude exhibits or other testimony as a result of his examination unless all parties so agree; and
- g) Except as otherwise provided in 35 Ill. Adm. Code 104.106, consider and rule upon motions.

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

Section 104.202 Transcripts (Recodified) Authority of Board Members and Assistants

Any Board Member or assistant to the Board who is an attorney licensed to practice in Illinois present at the hearing may advise the Hearing Officer and may interrogate witnesses but shall not have the authority to rule on objections or motions or to overrule the Hearing Officer during the hearing.

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

Section 104.203 Order of Variance Hearings

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

- a) Presentation, argument, and disposition of motions preliminary to a hearing;
- b) Presentation of opening statements;
- c) Petitioner's case in chief;
- d) Respondent's case in chief;
- e) Petitioner's case in rebuttal;
- f) Statements from interested citizens, as provided by 35 Ill. Adm. Code 104.204;
- g) Petitioner's closing argument, which may include legal argument;
- h) Respondent's closing argument, which may include legal argument;
- i) Presentation and argument of all motions prior to submission of the transcript to the Board; and
- j) A schedule for submission of briefs to the Board.

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

Section 104.204 Conduct of Hearing

- a) All hearings under this Part shall be public. The Hearing Officer shall permit any person not a party and not otherwise a witness for a party to submit written statements or reasonable oral testimony or to ask questions relevant to the subject matter of the hearing. Any person submitting such statement or testimony shall be subject to cross-examination by any party. If such person is not available for cross-examination upon timely request, the written statement or testimony may be stricken from the record.

- 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 35 Ill. Adm. Code 104.143 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 the Hearing Officer's legal judgment and experience and shall indicate whether the Hearing Officer finds credibility to be at issue in the case and if so, the reasons why. This statement shall become a part of the official record and shall be transmitted by the Hearing Officer to each of the parties in the case. No other statement shall be made or be appropriate unless otherwise ordered by the Board.

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

Section 104.205 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) 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 provided that the party requesting such incorporation has provided the Hearing Officer or Clerk with copies of the record or partial record to be incorporated.
- 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.

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

Section 104.206 Written Narrative Testimony

Written narrative testimony may be introduced by a party in a hearing only if provided to all other parties of record at least 10 days prior to the date of the hearing and only if actually read into the record by the party so testifying and who shall be subject to cross examination. The opposing parties may object to all or portions of the written testimony and obtain a ruling on said objections prior to its introduction at hearing.

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

Section 104.207 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.

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

Section 104.208 Viewing of Premises

Upon motion of any party or upon the Hearing Officer's own motion, the Hearing Officer and any Board Members 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.

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

Section 104.209 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.

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

Section 104.210 Examination of Adverse Party or Agency 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 a 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.

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

SUBPART G H: POST-HEARING PROCEDURE AND FINAL ACTION

Section 104.220 Decision (Recodified) 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 final order or make such final determination as it shall deem appropriate under the circumstances.

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

Section 104.221 Transcripts

- a) The Board will provide for a court reporter who shall transcribe the entire hearing.
- b) Any party or witness may move for correction of the transcript. When the transcript is filed with the Clerk, the Hearing Officer shall receive and rule on corrections. Failure of any witness or party to correct the transcript within 14 days after its receipt in Board offices shall constitute waiver of the right to correct, unless undue prejudice results.

(Source: Amended at _____ Ill. Reg. _____, effective _____)

Section 104.222 Record

The petition, objections, recommendation, transcript of the hearing approved by the Hearing Officer, written statements by the public in conformance with 35 Ill. Adm. Code 104.204 and all exhibits shall constitute the record.

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

Section 104.223 Briefs and Oral Argument

The parties may file briefs with the Board in accordance with the Hearing Officer's schedule for completion of the record or such other reasonable time as the Hearing Officer shall determine consistent with the statutory decision deadline and the needs of the parties. However, in no event may briefs be scheduled for submittal to the Board later than 20 days before the statutory decision deadline. Any modification to the schedule for completion of record must be by Hearing Officer Order filed with the Board and served on the parties.

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

Section 104.224 Calculation of Decision Deadline

- a) The Board shall render a final decision upon the petition within 90 days after the filing of the petition 120 days, except that any party petitioner may agree to waive his the right to a decision within 90 days the prescribed period. Time included in a continuance provided at the request of the petitioner shall not be counted towards the running of the 90 days.
- b) Where the petition for variance is amended or supplemental information is provided or hearing requested subsequent to the initial filing, the 90 day the 120 day decision period shall will commence from the date of filing with the Board and Agency of the

amendment, supplemental information or request for hearing.

(Source: Amended at ____ Ill. Reg. _____, effective _____)

Section 104.225 RCRA Variances: Board Decision

- a) Decision periods for RCRA Variances are as provided in Section 38(c) of the Act.
- b) The Board will not grant a variance from 35 Ill. Adm. code 703, 720, 721, 722, 723, 724 or 725, or order issuance or modification of a RCRA permit, unless the procedures of this Part applicable to petitions for RCRA Variances have been followed.
- c) The Board may grant a RCRA variance only to the extent consistent with, and with conditions no less stringent than, those which would be required by the Solid Waste Disposal Act as amended by the Resource Conservation and Recovery Act, and 40 CFR 260, 261, 262, 263, 264, 265 and 270. Variances shall require compliance with the regulations in the shortest possible time.
- d) The Board's final Order may direct the Agency to issue or modify a RCRA permit with conditions which may be set forth specifically in the Order, or which may consist of general guidelines to be followed by the Agency, together with applicable regulations, in issuing a permit.
- e) The Board shall send copies of its final Opinion and Order to the Agency by messenger, to the United States Environmental Protection Agency, the petitioner and any other party by certified mail, and to all other persons who have requested such information by first class mail.

Section 104.226 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 and conclusions of law 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) The grant, denial or revocation of a variance;
 - 2) Such conditions as the policies of the Act or Board regulations may require;

- 3) A time schedule for ultimate compliance with the Act and regulations;
 - 4) The posting of sufficient performance bond or other security as provided by the Act to assure compliance within the time prescribed; and
 - 5) 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.

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

SUBPART I: RELIEF FROM FINAL ORDERS

Section 104.240 Motions Subsequent to Entry of Final Order

Within 35 days after the adoption of a final order, any party may file a motion for reconsideration 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 until final disposition of such motion. 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 104.241.

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

Section 104.241 Relief from 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 on 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 the party's legal representative from a final order, for the following:
 - 1) Newly discovered evidence which existed at the time of hearing and which by due diligence could not have been timely discovered; or

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 28th day of May, 1987, by a vote of 6-0.

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