

ILLINOIS POLLUTION CONTROL BOARD
February 8, 1990

IN THE MATTER OF:)
)
PROCEDURAL RULES REVISION) R88-5(B)
35 ILL. ADM. CODE 102 AND) (Rulemaking)
106 (Subparts D, E, and F))

PROPOSED RULE. SECOND NOTICE.

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

This matter is before the Board for second notice consideration of proposed new procedural rules for rulemaking proceedings. On September 8, 1988, the Board proposed for first notice revisions to Parts 101, 102, 106, and 107 of its procedural rules, found at Title 35 of the Illinois Administrative Code. After two public hearings and consideration of written comments, the Board split the docket. Docket R88-5(A) contained new rules in Part 101 (general provisions) and Subpart G of Part 106 (adjusted standard proceedings), and the repeal of Part 107 (sanctions, which are now covered in Part 101). The rules in docket R88-5(A) were adopted by the Board and became effective on July 10, 1989. This docket (R88-5(B)) contains proposed new rules for regulatory proceedings (Part 102), the repeal of the existing Part 102 rules, and revisions to Subparts D, E, and F of Part 106. (Please note that these Subparts are being revised only to update references to Part 102.) On August 31, 1989, the Board adopted a second first notice order, after revising the rules in response to comment. First notice of the rules was published on September 22, 1989, beginning at 13 Ill. Reg. 14693. A public hearing was held on November 9, 1989, and written comments were received. After consideration of those comments and further revision to the proposed rules, the Board today proposes the rules in R88-5(B) for second notice.

The Board received fifteen written public comments during the 1988 first notice period (Public Comments (P.C.) # 11-25), and ten written comments during the 1989 comment period (P.C. # 41-50).¹ The Board has considered all of these comments, and all testimony received at the hearings, when revising these rules for second notice. This opinion will touch upon each Subpart in the proposed

¹ Public comments 49 and 50 are date-stamped December 1, 1989, one day after the close of the public comment period. However, those comments were received at the Board on November 30, but are date-stamped December 1 because they were received after 4:30 p.m. (See 35 Ill. Adm. Code 101.102(b).) Those comments were accompanied by motions to file instanter, which are granted.

rules, but will only discuss those rules which were the subject of comments and those rules which have been revised.

PART 102--REGULATORY AND INFORMATIONAL HEARINGS
AND PROCEEDINGS

Subpart A: General Provisions

The only change to this Subpart is a revision to the definition of "undue delay" in Section 102.101. The Board has deleted the phrase "or is more delay than necessary" from that definition. This change is made in response to a suggestion from the Illinois Environmental Protection Agency (Agency) (P.C. # 48), who felt that the language of the definition assumed that delay is always part of a regulatory proceeding, and suggested that the Board add the language "unnecessary or which impedes expeditious rulemaking". In response, the Illinois Steel Group (ISG) commented that while expeditious rulemaking is a worthy goal, that goal must be balanced against the need for a fair process which provides due process. (P.C. # 50.) The Board did not intend to imply that it considered delay a part of the rulemaking process, but agrees with the ISG that the goal of quick rulemaking is not the only consideration. The Board believes that the revised definition of "undue delay" reflects both concerns.

Several commenters asked why the definition of "proponent" excluded the Board and its staff, whether the Board no longer intends to propose rules, and what procedures the Board would follow when proposing a rule itself. As stated at the November 9, 1989 hearing, one of the reasons for exempting the Board from the definition of "proponent" is that some of the requirements which a proponent must fulfill are simply not applicable to the Board. For instance, Section 102.121(c) requires all proponents to recommend whether an economic impact study (EcIS) should be performed. Since the Board determines whether an EcIS should be done, it would be inappropriate to require the Board to make a recommendation to itself. Additionally, in the rare cases where the Board does propose a regulation, there is a written opinion which provides much of the information that a proponent would be required to furnish under the proposed rules. There is also often a supporting technical document which is added to the record of the proceeding, so that material is available in advance of hearing. It must be remembered that the Board is not the primary rule proponent for the state, and is neither funded nor staffed so as to allow it to always comply strictly with the requirements established for those who, in the ordinary course of events, are proponents. When the Board finds it necessary to propose rules itself, it will comply with the requirements for any other proponent to the extent logical and possible. It is not the Board's intent to exempt itself from providing support for the rules it proposes.

The Agency suggested that detailed requirements for obtaining a waiver from the requirements of this Part be added to Section 102.103 "Waiver Of Requirements". (Tr. 554-555.) The Board has not done so, since it believes that the standard in that Section (that a person demonstrate that a non-statutory requirement creates an undue burden) is sufficient to require it (the Board) to consider all aspects of a request for waiver. The Board specifically states that it does not intend to grant requests pursuant to Section 102.103 except in exceptional circumstances.

Subpart B: Regulations of General Applicability

The Board has made only one change to this Subpart. Subsection (i) of Section 102.121 "Contents" has been revised to clarify that when any information required by the Section is either inapplicable or unavailable, the proponent must supply a complete justification for that inapplicability or unavailability. This change was made in response to an Agency suggestion. (Tr. 558.)

The Agency suggested several specific revisions to Section 102.121 which the Board has not made. The Agency felt that subsection (b), which requires a statement of reasons supporting the proposal, including a technical and economic justification, is duplicative and should be deleted. The Agency stated that economic analysis is required by subsection (c), and that technical analysis is required by subsection (d). (Tr. 555.) The Board does not agree. The requirements of subsection (b) go beyond economic and technical analysis, and include a statement of the facts supporting the proposal, a statement of the purpose and effect of the proposal, and a discussion of the applicable factors listed in Section 27(a) of the Environmental Protection Act (Act). Ill.Rev.Stat. 1987, ch. 111 1/2. par. 1027(a). The Board does not believe that subsection (d), which requires a synopsis of all testimony to be presented by the proponent at hearing, is sufficient to inform the proponent of what exactly is required in support of a proposal. The Agency also suggested that the Board revise subsection (c) to require the EcIS recommendation to address, to the extent reasonably practicable, the questions contained in the Analysis of Economic and Budgetary Effects of Proposed Rulemaking, 1 Ill. Adm. Code 220.Exhibit B. The Agency maintains that it is often not in possession of this information at the beginning of the proceeding. (Tr. 556.) The Board sympathizes, since it has often struggled with this form, but believes that the changes to subsection (i) will allow a proponent to provide the information it does have and explain any missing information. Finally, the Agency suggested that the Board should take official notice of some material to be incorporated by reference which is voluminous and already in the Board's possession, instead of requiring that the proponent submit copies pursuant to subsection (f). (Tr. 557.) Because the Board must maintain accessible copies of all materials incorporated by reference, the Board will not narrow the requirements of subsection

(f). See Section 6.02 of the Illinois Administrative Procedure Act (APA), Ill.Rev.Stat.1987, ch. 127, par. 1006.02. If a proponent knows that a specific document which it wishes to incorporate by reference is already in the Board's possession, he may move for a waiver of subsection (f), pursuant to Section 102.103.

At hearing, the ISG asked for clarification of subsection (d)'s requirement that the proponent provide a synopsis of all testimony to be presented by the proponent at hearing: whether a synopsis of each witness' testimony is required, how detailed must it be, and whether any determination will be made as to completeness. As stated in the Board's August 31, 1989 second first notice opinion, the proponent need not identify specific witnesses, but must provide a summary of the information which will be presented at hearing in support of the proposal. Although a specific witness need not be identified, the synopses must be geared to individual witnesses. For example, if a proponent expects to present one witness on economic impact and two witnesses on technical considerations, the proposal should include a synopsis of the testimony of each of those witnesses. The synopsis must be as detailed as possible, so that the Board and other participants will have a general idea of the supporting testimony when the proposal is filed. Any determination of the completeness of the synopses will be done by the Board pursuant to Section 102.160.²

Another issue raised in the course of this proceeding is whether the Board should continue its prior practice of occasionally allowing the proposal of a site-specific rule (or rules) in a general rulemaking proceeding. In its comments, the ISG contends that Section 27(a) of the Act specifically contemplates such action, and that in some circumstances it is more efficient to create a site-specific rule during a general rulemaking than to force participants to open dockets for variances, adjusted standards, and site-specific rules. In response, the Agency maintains that carving out exceptions in a rule of general applicability will sometimes call into question the rule's federal approvability. The Agency argues that such a risk is not necessary, since options such as an adjusted standard or site-specific proceeding are available. After reviewing these comments, the Board will continue with its existing policy of sometimes allowing for proposal of a site-specific rule during a general rulemaking, where circumstances are appropriate. The Board notes, however, that the issue of federal approvability will be a consideration in deciding whether to allow proposal of a site-specific in a general rulemaking.

² The Board notes that a proponent will have an opportunity to update the testimony, and must identify witnesses, when he or she submits the required pre-filed testimony 21 days before hearing, pursuant to Section 102.280.

Subpart C: Site-Specific Regulations

The Board has made only clarifying changes to Subpart C. Subsection (a) of Section 102.141 "Contents" now states that where a proponent seeks exemption from or modification of a rule of general applicability, the proposed site-specific rule may not be proposed as an amendment to that general rule. Instead, the site-specific rule must be proposed as its own section. Additionally, subsection (g) has been revised to conform with revised Section 102.121(i), regarding unavailable or inapplicable information.

The Agency suggested several non-substantive changes to this Subpart, such as deleting Section 102.141(b) as already contained in Section 102.121, and combining Sections 102.122 and 102.142, which both deal with dismissal. The Board has not done so, because Subparts B and C are separate and distinct subparts. The proponent of a site-specific rule need not comply with any of the requirements of Subpart B, except as specifically required in Subpart C. Therefore, Subpart C must be complete in and of itself.

The Illinois Environmental Regulatory Group (IERG) believes that the content requirements of Section 102.141 are overly detailed and elaborate, and make it very difficult for a company to file an acceptable site-specific proposal with the Board. (P.C. #46.) IERG suggests that a statement be included in the rules that the Board will construe the content requirements liberally. The Board has not done so for two reasons. First, the Board does not agree that the content requirements are "overly detailed and elaborate". The Board believes that the requirements of Section 102.141 are fair representations of what must be included in the record of all site-specific rule changes. It must be remembered that a site-specific rule proposal generally seeks to exempt an individual company or municipality from a more stringent rule. Thus, the proponent of a site-specific does have a burden of providing sufficient information for the Board to be able to make an informed and reasoned decision. Second, the Board believes that the waiver provision of Section 102.103, combined with Section 102.141(g), will allow the proponent of a site-specific rule who has good reason for an inability to fulfill a given requirement to explain that situation.

IERG also contends that the detail required for site-specific petitions is another way to limit access to Board rulemaking procedures and increase the cost to industry of making proposals to the Board. The Board does not agree. To the contrary, the Board finds that by informing all potential proponents and participants of exactly what is required to support a proposal, that information will be provided "up front", instead of requiring a series of additional submissions during a rulemaking. The need for additional hearings and comment periods will be greatly reduced, saving money and time for the proponent, participants, and the Board, and the state in general. The Board specifically finds

that these content requirements do not limit access to the Board, but simply help the proceeding run more smoothly.

A related issue to the content requirements for site-specific rule proposals is whether the Board should promulgate detailed additional requirements for site-specifics according to media. As the Board stated in its August 31, 1989 opinion, the Board decided not to proceed with specific rules for site-specific petitions dealing with water, air, land, or groundwater. This decision was based on the Board's findings that Section 102.141 will address the most common information problems in site-specific proposals, and that some of the requirements previously set forth were indeed overly detailed for many proposals. The Agency objects to this decision, and urges the Board to reconsider and add rules for site-specifics by media. On the other hand, IERG supports the Board's decision. After further consideration, the Board will not add media-specific rules. If a proposal does not contain sufficient information for proper evaluation of that proposal, the missing information can be required by a more information order, just like any proposal of rules of general applicability. If the information is not provided, the proposal is subject to dismissal pursuant to Section 102.142. The Board fails to see why the proponent of a site-specific rule should be required to always provide certain information by media, when no suggestion has been made that the Board establish media-specific content rules for proposals of general applicability. The Board continues to believe that specific information required in a given proceeding can be acquired through the use of Board and hearing officer orders geared to that proceeding.

Subpart D: Authorization, Scheduling, And Notice Of Hearings

Section 102.161 "Scheduling Of Hearings" has been revised to provide that the hearing officer, rather than the Board, will issue an order preliminarily specifying the number of hearings on a proposal. Motions to exceed that number are to be directed to the hearing officer, either orally (but only at hearing) or in writing. The movant must show that he or she would suffer material prejudice if an additional hearing was not held. The movant must also show due diligence in its prior participation in the proceeding, and that an additional hearing rather than the opportunity to present public comment is necessary. These changes were made in response to comments by ISG, IERG, and the Agency. The Board believes that the revisions will provide flexibility in each rulemaking proceeding, and will cut down on the delay which would necessarily occur if motions for additional hearing had to be in writing and directed to the Board. ISG also suggested that the rule address a situation where the proposal is "significantly" amended, by providing at least two more hearings when this happens, and that the rule should allow some minimum number of hearings for the participants, to avoid a situation where the proponent might consume all of allocated days of hearing. The Board has not made

those suggested changes, because it believes that the provision allowing the Board or the hearing officer to schedule additional hearing(s) will satisfy those concerns raised by ISG. The Board cannot foresee any situation where it would proceed to decision on a proposal after allowing only the proponent to state its case at hearing.

Subpart E: Economic Impact Study Determinations

The Board did not make any changes to this Subpart. The major issue raised by commenters in connection with EcIS determinations is whether economic considerations, and thus the issue of whether to request an EcIS, should be an issue in a federally required rulemaking pursuant to Section 28.2 of the Act. The United States Environmental Protection Agency (USEPA) maintained that economic impact studies are not appropriate for federally required rules, and stated that if a rule is federally required, it should be adopted within the specified federal time frame irrespective of any possible economic impacts. USEPA asserts that "[t]he applicability of economic impact analysis is irrelevant in federally mandated rulemakings, and...this distinction should be incorporated into these rules." (P.C. #43, p. 2.) The Agency took a middle ground, arguing that although an EcIS and hearing are appropriate in some federally required rulemakings, there may well be cases where the Board will have little, if any, ability to modify the proposed regulation in order to adopt a rule which fully meets federal law. In that case, the Agency contends that an EcIS and hearing should not be conducted. (P.C. #48.)

In response to the positions articulated by USEPA and the Agency, ISG, IERG, and James T. Harrington presented their contention that the Act does not allow the Board to dispense with the EcIS determination requirements set forth in Section 28.2 of the Act and in the proposed rules in Subpart E. These commenters argued that nothing in Section 28.2 or in the legislative history of the amendments to the Act which allow the Board to make EcIS determinations (P.A. 85-1048) supports the positions of either USEPA or the Agency. (P.C. # 46, 49, & 50.)

After review of the arguments presented by all commenters, the Board finds that it is obvious that it may order an EcIS in a federally required rulemaking, consistent with the requirements of Section 28.2. If the Board were to accept USEPA's claim that an EcIS is never appropriate in a federally required rulemaking, the Board would have to ignore the provisions of Section 28.2 which require the Board to make an EcIS determination within 60 days of the Board's acceptance of a proposal for a federally required rule, and require the Department of Energy and Natural Resources (ENR) to perform an EcIS within six months. Those provisions clearly allow, and indeed require, the Board to at a minimum make its determination as to whether an EcIS should be performed in a given rulemaking. The Board refuses to ignore those requirements.

Subpart F: Certification Of Required Rules

The only revision made to this Subpart is the addition of subsection (d) to Section 102.202 "Board Determination". The new subsection provides that Board orders ruling upon any objection to an Agency certification that proposed rule is federally required are interlocutory in nature and may be appealed only pursuant to 35 Ill. Adm. Code 101.304. This subsection was inadvertently left out of the second first notice order, and is based upon proposed Section 102.183.

Both the Agency and USEPA have taken the position that this Subpart should be deleted entirely. They argue that there is no statutory authority for the Board to entertain or rule upon challenges to an Agency certification, and that the procedure could further delay the regulatory process. On the other hand, IERG and ISG contend that this procedure is necessary and consistent with Section 28.2 and the Board's ultimate rulemaking authority. IERG maintains, however, that the time periods established in which to challenge an Agency certification are much too short, since it may be difficult for a potential objector to learn of the Board's order accepting the proposal for hearing and file a challenge which contains all of its arguments within the 21 days allowed by Section 102.201. ISG argues that the burden of proof that a proposed rule is federally required should be upon the Agency, instead of upon the objector, as the proposed rule provides.

The Board finds that it has the authority to entertain and rule upon challenges to an Agency certification of a federally required rule. Although Section 28.2 does not specifically allow the Board to take such action, that section does not bar the Board from doing so, nor does the section provide that an Agency certification is dispositive. The Board's general authority to promulgate regulations, conduct its own proceedings, and review Agency "determinations" allow the Board to review the Agency certification. See Sections 5(d), 27, and 28 of the Act.³ However, the Board will not extend the time frames for such a challenge. As the Board noted in its August 31 second first notice opinion, it is aware that the time frames are very tight. Nevertheless, because Section 28.2 requires that Board to publish first notice of all required rules in the Illinois Register no later than six months from the date the Board determines whether an EcIS should be prepared, it is very important that any question as to whether a proposal is federally required be resolved at the

³ The Board today reached the same conclusion on the issue of whether the Board may review an Agency certification that a proposed rule is federally required in RACT Deficiencies-- Amendments to 35 Ill. Adm. Code Parts 211 and 215, R89-16, February 8, 1990.

beginning of a proceeding. As to ISG's assertion that the burden of proof should be on the Agency, the Board believes that it is up to the objector to prove the substance of his claim, as is the case for any movant.

Subpart G: Authority Of Hearing Officer

The only revision to this Subpart is the addition of the phrase "and this Part" to subsection (1) of Section 102.220 "Authority Of Hearing Officer."

Subpart H: Pre-Hearing Conferences

Subsection (c) of Section 102.242 "Pre-hearing Order" has been revised to clarify that only the participants in a pre-hearing conference, not participants in general, will be involved in the preparation of an order setting forth the substance of any agreements reached at a pre-hearing conference. This change is made in response to a question from ISG. (Tr. 514-517.)

Subpart I: Motions And Discovery

No changes were made to this Subpart.

Subpart J: Regulatory Hearings

Just one change was made to this Subpart. At the Agency's suggestion, a sentence has been added to Section 102.284 "Questioning Of Witnesses" to state that the Board will not consider as substantive evidence any unsworn information which is presented in the form of a question during questioning of any witness.

The Board received quite a bit of comment on Section 102.280 "Pre-hearing Submission Of Testimony And Exhibits". USEPA and the Agency argue that all participants should always be required to pre-file testimony, not just the proponent. The Agency contends that required pre-filing for all participants is a necessary element of the streamlining of the rulemaking process. The Agency suggests that if it, by motion, can demonstrate that it has provided adequate opportunity for review and comment upon its proposal before the proposal is filed with the Board (through workshop sessions and mailings), the Board shall enter an order mandating pre-filing by all participants. The Agency alleges that a failure to require pre-filing in such a situation gives an unfair advantage to the participants, as well as obstructing the efficiency of the regulatory process.

IERG and ISG, on the other hand, support the rule as proposed. IERG notes that the proposed rule gives the hearing officer authority to require pre-filing by participants as well as the proponent, and contends that that is a much preferred method of

handling the problem. IERG further submits that there is no way that the Agency can demonstrate to the Board that it has contacted all industry which might possibly be affected by the proposal. ISG also maintains that there are practical problems with the Agency's suggestion, including a complex or poorly drafted proposal, or the possibility of an amended proposal. ISG also contends that regardless of whether the Board adopts the Agency's suggestion, the rule should guarantee the allowance of a minimum preparation time, such as 21 days, between the receipt of the most recent proposal and any required pre-submission of testimony.

The Board continues to believe, as stated in the August 31 second first notice opinion, that the proposed rule will result in efficient hearings while allowing the Board and the hearing officer to conduct proceedings in response to the circumstances of the individual proceeding. The Board believes that this scenario is much more efficient and reasonable than strict requirements which could actually slow a proceeding down. The Board has not adopted the Agency's suggestion because the practical problems associated with it could well overwhelm a proceeding and make procedure, rather than the substantive issues raised by the proposal, the focus of the proceeding. As the Board has stated repeatedly, the Board strongly believes that pre-submission of testimony and exhibits by all participants is important. It is the Board's intent that the hearing officer require all participants to pre-submit their testimony pursuant to subsection (b) in the majority of cases, and that the hearing officer take all possible steps to assure that no proponent or participant is taken by surprise by another participant's testimony. The Board also notes that issues which are raised at one hearing may be responded to at another scheduled hearing. The Board specifically states, however, that the rules will not be used to bar spontaneous citizen participation at hearing. The Board merely feels that it is important that the procedural rules retain as much flexibility as possible. For the same reason, the Board has not adopted ISG's suggestion that the rule provide a minimum preparation time for pre-submissions. While the Board and its hearing officers strive to give all participants as much preparation time as possible, the establishment of such a rule would remove the flexibility which is absolutely necessary to efficient and fair rulemaking.

The Agency also commented on subsection (f) of Section 102.280, which permits the hearing officer to allow modifications to pre-filed testimony under certain circumstances. The Agency is concerned that the wording of the sentence would limit or eliminate rebuttal testimony or revisions to initially-filed testimony to be presented at a future hearing. The Agency thus suggested that modifications to pre-submitted testimony should be allowed if accompanied by an "adequate explanation". The Board does not believe that the rule as proposed limits rebuttal testimony in any way: the rule merely refers to modifications to testimony pre-submitted for direct presentation at a given hearing.

The Agency proposed substantial additions to Section 102.284 "Questioning of Witnesses", which the Agency contends is too general and does not provide sufficient guidance to the hearing officer to eliminate abusive cross-questioning practices. In response, ISG maintains that the Agency's suggestions could prohibit long-standing Board practices such as the proposal of alternative language at hearing and then the questioning of a witness about that language. The Board has not adopted the Agency's suggestions, because it believes that the rule establishes sufficient limitations on questioning.

Subpart K: Economic Impact Hearings

The only revision made to this Subpart is a reference to Section 28 of the Act in Section 102.300 "Hearings On The Economic Impact Study Of New Proposals".

Subpart L: Public Comments

The Board has added language to Section 102.320 "Public Comments" to specify that all public comments must be served upon the Agency, ENR, the Attorney General (if a participant), and the proponent, as well as on the participants on any service list established by the hearing officer. The Sanitary District of Rockford suggested that a minimum of 120 days be provided for comment on all technical rules, to allow comprehensive consideration of the proposed rules and their effects. (P.C. #41.) While the Board appreciates the difficulties with reviewing a technical proposal and providing thorough comments in a limited amount of time, the Board simply cannot allow four months for comment on all rules. Again, as much time as possible will be provided, but the need for flexibility in the procedural rules will not allow a set comment period for every rulemaking.

There were several suggestions that the Board or its hearing officer notify all participants when the hearing transcript is received, since the time for public comments begins when the transcript is received in the Board's office. As discussed at hearing, such notification will not be done. Because the Board's contract with its court reporting service specifies when the transcript is due, the hearing officer will always be able to give participants a good idea of when the transcript will be received. Participants can then easily verify that the transcript actually was received by calling the Clerk's Office. As a practical matter, the hearing officer almost always sets a date certain as the deadline for comments, so the situation will rarely arise.

Subpart M: Board Action

Only small revisions have been made to this Subpart. In subsection (b) of Section 102.343 "Second Notice Of Proposed

Regulations", the word "substantive" has been added. Finally, the word "may" has been changed to the word "will" in Section 102.347(a) "Adoption Of Peremptory Regulations".

Subpart N: Motions For Reconsideration And Appeal

The Board made no changes to this Subpart.

PART 106--HEARINGS PURSUANT TO SPECIFIC RULES

No changes were made to the non-substantive revisions of Sections 106.415, 106.506, 106.602, and 106.604. In order to conserve resources, these sections are not reprinted in the order adopted today.

ORDER

The Board hereby proposes the following amendments for second notice, which are to be filed with the Joint Committee on Administrative Rules.

TITLE 35: ENVIRONMENTAL PROTECTION
SUBTITLE A: GENERAL PROVISIONS
CHAPTER I: POLLUTION CONTROL BOARD

PART 102
REGULATORY AND INFORMATIONAL
HEARINGS AND PROCEEDINGS

SUBPART A: GENERAL PROVISIONS

Section
102.100 Applicability
102.101 Definitions
102.102 Types Of Regulatory Proposals
102.103 Waiver Of Requirements
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SUBPART B: REGULATIONS OF GENERAL APPLICABILITY

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102.120 Proposal
102.121 Contents
102.122 Dismissal
102.123 Proposal Of RCRA Amendments

SUBPART C: SITE-SPECIFIC REGULATIONS

Section
102.140 Proposal
102.141 Contents
102.142 Dismissal

SUBPART D: AUTHORIZATION, SCHEDULING, AND NOTICE OF HEARINGS

Section
102.160 Authorization Of Hearing
102.161 Scheduling Of Hearings
102.162 Notice Of Hearing
102.163 Notice Of Site-Specific RCRA Proposals

SUBPART E: ECONOMIC IMPACT STUDY DETERMINATIONS

Section
102.180 Board Determinations
102.181 Request For Determination
102.182 Basis For Board Determination
102.183 Notice Of Board Determination

SUBPART F: CERTIFICATION OF REQUIRED RULES

Section
102.200 Agency Certification
102.201 Challenge To Agency Certification
102.202 Board Determination

SUBPART G: AUTHORITY OF HEARING OFFICER

Section
102.220 Authority Of Hearing Officer
102.221 Notice And Service Lists
102.222 Effect Of Hearing Officer Ruling

SUBPART H: PRE-HEARING CONFERENCES

Section
102.240 Initiation And Scheduling
102.241 Purpose
102.242 Pre-hearing Order

SUBPART I: MOTIONS AND DISCOVERY

Section
102.260 Motion Practice
102.261 Production Of Information
102.262 Subpoenas

SUBPART J: REGULATORY HEARINGS

Section
102.280 Pre-hearing Submission Of Testimony And Exhibits
102.281 Transcript
102.282 Admissible Information

102.283 Presentation Of Testimony
 102.284 Questioning Of Witnesses
 102.285 Record For Decision

SUBPART K: ECONOMIC IMPACT HEARINGS

Section
 102.300 Hearings On The Economic Impact Study Of New Proposals
 102.301 Hearings On The Economic Impact Study Of Existing
 Regulations

SUBPART L: PUBLIC COMMENTS

Section
 102.320 Public Comments

SUBPART M: BOARD ACTION

Section
 102.340 Revision Of Proposed Regulations
 102.341 Adoption Of Regulations
 102.342 First Notice Of Proposed Regulations
 102.343 Second Notice Of Proposed Regulations
 102.344 Notice Of Board Final Action
 102.345 Adoption Of Identical In Substance Regulation
 102.346 Adoption Of Emergency Regulations
 102.347 Adoption Of Peremptory Regulations
 102.348 Adoption Of Temporary Regulations

SUBPART N: MOTIONS FOR RECONSIDERATION AND APPEAL

Section
 102.360 Filing Of Motion For Reconsideration
 102.361 Disposition Of Motions For Reconsideration
 102.362 Correction of Publication Errors
 103.363 Appeal

AUTHORITY: Implementing Sections 5, 7.2, 13(c), 13.3, 17.5, 22.4(a), 22.4(d), 22.7(d), 27, 28, 28.2, 29, and 41 of the Environmental Protection Act (Ill. Rev. Stat. 1987 and 1988 Supp., ch. 111½, pars. 1005, 1007.2, 1013(c), 1013.3, 1017.5, 1022.4(a), 1022.4(d), 1022.7(d), 1027, 1028, 1028.2, 1029, and 1041) and Section 4 of "AN ACT in relation to natural resources, research, data collection and environmental studies" (Ill. Rev. Stat. 1987 and 1988 Supp., ch. 96½, par. 7404) and authorized by Section 26 of the Environmental Protection Act (Ill. Rev. Stat. 1987, ch. 111½, par. 1026).

SOURCE: Originally adopted as Chapter 1: Procedural Rules, Part II: Regulatory and Other Nonadjudicative Hearings and Proceedings, in R70-4, 1 PCB 43, October 8, 1970; codified at 6 Ill. Reg. 8357; amended in R84-10 at 9 Ill. Reg. 1398, effective January 16, 1985;

Part repealed, new Part adopted in R88-5(B) at _____ Ill. Reg.
 _____, effective _____.

NOTE: Capitalization denotes statutory language.

SUBPART A: GENERAL PROVISIONS

Section 102.100 Applicability

This Part applies to all regulatory and informational hearings and proceedings, and shall be read in conjunction with 35 Ill. Adm. Code 101. Hearings conducted pursuant to this Part shall be quasi-legislative in nature. All testimony shall be sworn. All persons taking part in these hearings are participants, rather than parties as in contested cases.

Section 102.101 Definitions

The following definitions shall apply to this Part:

"Act" means the Environmental Protection Act (Ill. Rev. Stat. 1987, ch. 111 1/2, par. 1001 et seq.).

"Agency" means the Illinois Environmental Protection Agency.

"APA" means the Illinois Administrative Procedure Act (Ill. Rev. Stat. 1987, ch. 127, par. 1001 et seq.).

"Attorney General" means the Office of the Attorney General of the State of Illinois.

"Board" means the Illinois Pollution Control Board.

"Chairman" means the Chairman of the Board.

"Clerk" means the Clerk of the Board.

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

"DNS" means the Illinois Department of Nuclear Safety.

"Economic impact study" means the economic impact study performed by ENR pursuant to Board determination under Section 27 of the Act.

"ENR" means the Illinois Department of Energy and Natural Resources.

"Fire Marshal" means the Office of the State Fire

Marshal.

"Identical in substance regulations" means STATE REGULATIONS WHICH REQUIRE THE SAME ACTIONS WITH RESPECT TO PROTECTION OF THE ENVIRONMENT, BY THE SAME GROUP OF AFFECTED PERSONS, AS WOULD FEDERAL REGULATIONS IF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY ADMINISTERED THE SUBJECT PROGRAM IN ILLINOIS. (Section 7.2 of the Act.)

"Identical in substance rulemakings" are those proceedings conducted pursuant to specific authorization of the Act, including but not limited to Sections 13(c), 13.3, 17.5, 22.4(a), 22.4(d) and 22.7(d).

"JCAR" means the Joint Committee on Administrative Rules.

"Material" means relating to any substantive issue that is of consequence to the determination of a proceeding.

"Participant" means any person, not including the Board or its staff but including the proponent, who takes part in a regulatory or other quasi-legislative proceeding before the Board. A person becomes a participant in any of several ways, including, but not limited to, filing a comment, being added to the notice list of a particular proceeding or testifying at hearing.

"Peremptory rulemaking" means ANY RULEMAKING WHICH IS REQUIRED AS A RESULT OF FEDERAL LAW, FEDERAL RULES AND REGULATIONS, OR AN ORDER OF A COURT, UNDER CONDITIONS WHICH PRECLUDE COMPLIANCE WITH THE GENERAL RULEMAKING REQUIREMENTS OF SECTION 5.01 OF THE APA AND WHICH PRECLUDE THE EXERCISE BY THE BOARD AS TO THE CONTENT OF THE RULE. (Section 5.03 of the APA.)

"Person" means any entity defined in Section 3.26 of the Act, including but not limited to any individual, partnership, company, corporation, political subdivision, or state agency.

"Proponent" means any person, not including the Board or its staff, who submits a regulatory proposal to the Board for the adoption, amendment, or repeal of a regulation.

"RCRA" means the Resource Conservation and Recovery Act of 1976 (42 U.S.C. 6901 et seq.).

"RCRA rules" means 35 Ill. Adm. Code 702, 703, 720, 721, 722, 723, 724, 725, 726, and 728.

"Relevant" means having any tendency to make the existence of any act that is of consequence to the determination of the proceeding more probable or less probable that it would be without the information.

"Required rule" means a rule that is NEEDED TO FULFILL THE REQUIREMENTS OF THE FEDERAL CLEAN WATER ACT (33 U.S.C. 1251 ET SEQ.), SAFE DRINKING WATER ACT, (42 U.S.C. 300f ET SEQ.), CLEAN AIR ACT (42 U.S.C. 7401 ET SEQ.), OR RESOURCE CONSERVATION AND RECOVERY ACT (42 U.S.C. 6901 ET SEQ.) OTHER THAN A RULE TO BE ADOPTED UNDER SECTION 13(c), 13.3, 17.5, 22.4(a), 22.4(d), OR 22.7 OF THE ACT. (Section 28.2 of the Act.)

"Site-specific regulation" means a proposed or adopted regulation SPECIFIC TO INDIVIDUAL PERSONS OR SITES. (Section 27(a) of the Act.)

"Undue delay" means delay which is unwarranted, unjustified, or improper.

"USEPA" means the United States Environmental Protection Agency.

Section 102.102 Types Of Regulatory Proposals

- a) The Act provides for three types of regulatory proposals:
 - 1) Identical in substance rulemakings, as defined in Section 102.101;
 - 2) Federally required rules, as defined in Section 102.101; and
 - 3) Other regulatory proposals, both of general applicability and not of general applicability.
- b) Regulations arising from these types of proposals may be adopted through four types of rulemaking:
 - 1) General rulemaking pursuant to Section 5.01 of the APA and Sections 26 and 27 of the Act;
 - 2) Emergency rulemaking pursuant to Section 5.02 of the APA and Section 27 of the Act;
 - 3) Peremptory rulemaking pursuant to Section 5.03 of the APA; and
 - 4) Temporary rulemaking pursuant to Section 27(b) of the Act.

- c) The provisions of Subpart B of this Part apply to all types of regulatory proposals except identical in substance proposals.

Section 102.103 Waiver Of Requirements

The Board may waive any of the non-statutory requirements of this Part upon a showing by a person that a particular requirement would create an undue burden on that person.

Section 102.104 Other Proceedings

The Board may conduct such other noncontested or informational hearings as may be necessary to accomplish the purposes of the Act.

SUBPART B: REGULATIONS OF GENERAL APPLICABILITY

Section 102.120 Proposal

Any person may submit a regulatory proposal for the adoption, amendment, or repeal of a regulation. The original and nine (9) copies of each proposal shall be filed with the Clerk and one copy each with the Attorney General, the Agency and ENR.

Section 102.121 Contents

Each proponent shall provide:

- a) The language of the proposed regulation or amendment, including an identification of the existing regulatory language proposed to be amended or deleted. Language being added shall be indicated by underscoring and language being deleted shall be indicated by strike-outs. The proposed rule shall be drafted in accordance with 1 Ill. Adm. Code 100.Subpart C;
- b) A statement of the reasons supporting the proposal, including a statement of the facts which support the proposal, and a statement of the purpose and effect of the proposal. The statement shall discuss the applicable factors listed in Section 27(a) of the Act. Where the proposal covers more than one substantive point, the statement of reasons shall include statements in support of each point. The statement of reasons shall include a technical and economic justification for the proposal;
- c) Pursuant to Section 27 of the Act, A RECOMMENDATION OF WHETHER AN ECONOMIC IMPACT STUDY IS ADVISABLE. The recommendation shall describe, TO THE EXTENT REASONABLY PRACTICABLE, THE UNIVERSE OF AFFECTED SOURCES AND FACILITIES AND THE ECONOMIC IMPACT OF THE PROPOSED RULE.

The recommendation shall also address the questions contained in the Analysis of Economic and Budgetary Effects of Proposed Rulemaking, set forth at 1 Ill. Adm. Code 220.Exhibit B, and identify issues to be addressed by any economic impact study;

- d) A synopsis of all testimony to be presented by the proponent at hearing;
- e) If the Agency is the proponent, and if the Agency believes that the proposed rule is a required rule pursuant to Section 28.2 of the Act, citation to the specific section of the specific federal act;
- f) Copies of any material to be incorporated by reference within the proposed regulation pursuant to Section 6.02 of the APA;
- g) Proof of service upon all persons required to be served pursuant to Section 102.120;
- h) Unless the proponent is the Agency, ENR, or DNS, a petition signed by at least 200 persons, pursuant to Section 28 of the Act and Section 102.160(a); and
- i) Where any information required by this Subpart is inapplicable or unavailable, a complete justification for such inapplicability or unavailability.

Section 102.122 Dismissal

- a) Failure of the proponent to satisfy the content requirements of Section 102.121 or failure to respond to Board requests for additional information will render a proposal subject to dismissal for inadequacy.
- b) Failure of the proponent to pursue disposition of the proposal in a timely manner will render a proposal subject to dismissal.
- c) Any person may file a motion challenging the sufficiency of a proposal pursuant to 35 Ill. Adm. Code 101.243.

Section 102.123 Proposal Of RCRA Amendments

In addition to satisfying the requirements of Section 102.121, any proposal to amend the RCRA regulations shall:

- a) Indicate whether it is made pursuant to the provisions of Section 22.4(a), 22.4(b) or 22.4(c) of the Act;
- b) Include a listing of all amendments to the corresponding

federal regulations since the period encompassed by the last amendment of the Board's RCRA rules; and

- c) Include a certificate of service indicating that a copy of the proposal has been served on the United States Environmental Protection Agency (USEPA). Service shall be made at the following address:

Director, Waste Management Division
USEPA, Region V
230 South Dearborn Street
Chicago, Illinois 60604

SUBPART C: SITE-SPECIFIC REGULATIONS

Section 102.140 Proposal

Any person may submit a written proposal for the adoption, amendment or repeal of a substantive site-specific regulation. The original and nine (9) copies of each proposal shall be filed with the Clerk and one copy each served upon the Agency, ENR, and the Attorney General.

Section 102.141 Contents

- a) The proponent shall identify the regulations which are to be addressed by the proposed amendment and the language to be added, deleted, or repealed. Language being added shall be indicated by underscoring and language being deleted shall be indicated by strike-outs. If the proposed site-specific rule seeks an exemption from or modification of a rule of general applicability, the proposed site-specific rule may not be proposed as an amendment to the general rule. Instead, the site-specific rule must be proposed as its own section.
- b) The proponent shall provide a statement of reasons and facts supporting the proposal, and a statement of the purpose and effect of the proposal.
- c) The proposal shall also comply with all requirements set forth in Section 102.121.
- d) In the event that the proposed rule would replace the applicability of a general rule to the pollution source, the proposal shall specify, with supporting documentation, the reasons why the general rule is not technically feasible or economically reasonable for the person or site. Such documentation shall include relevant information on other similar persons' or sites'

ability to comply with the general rule.

- e) The proposal shall describe the person or site for which regulatory change is sought and the area affected by the proposed change. The proposal shall also include a detailed assessment of the environmental impact of the proposed change, and include a description of all available treatment or control options.
- f) The proposal shall demonstrate that the Board may grant the requested relief consistent with federal law.
- g) Where any information required by this Subpart is inapplicable or unavailable, the proposal shall include a complete justification for such inapplicability or unavailability.

Section 102.142 Dismissal

- a) Failure of the proponent to satisfy the content requirements for proposals under this Subpart or failure to respond to Board requests for additional information will render a proposal subject to dismissal for inadequacy.
- b) Failure of the proponent to pursue disposition of the proposal in a timely manner will render a proposal subject to dismissal.
- c) Any person may file a motion challenging the sufficiency of the proposal pursuant to 35 Ill. Adm. Code 101.243.

SUBPART D: AUTHORIZATION, SCHEDULING, AND
NOTICE OF HEARINGS

Section 102.160 Authorization Of Hearing

- a) The Clerk shall assign a docket number to any proposal. All regulatory proposals will be placed on the Board agenda for determination of adequacy under the Act and Sections 102.121 and 102.141. IF THE BOARD FINDS THAT ANY SUCH PROPOSAL IS NOT PLAINLY DEVOID OF MERIT, DOES NOT DEAL WITH A SUBJECT ON WHICH A HEARING HAS BEEN HELD WITHIN THE PRECEDING 6 MONTHS, IS ACCOMPANIED BY AN ADEQUATE STATEMENT OF SUPPORTING REASONS AND A PETITION SIGNED BY AT LEAST 200 PERSONS, and meets the requirements of this Part, THE BOARD WILL SCHEDULE A PUBLIC HEARING FOR CONSIDERATION OF THE PROPOSAL. IF A PROPOSAL IS MADE BY THE AGENCY, ENR, OR DNS, THE BOARD SHALL SCHEDULE A PUBLIC HEARING WITHOUT REGARD TO THE ABOVE CONDITIONS. Pursuant to Section 28 of the Act, THE

BOARD MAY ALSO IN ITS DISCRETION SCHEDULE A PUBLIC HEARING UPON ANY PROPOSAL WITHOUT REGARD TO THE ABOVE CONDITIONS. (Section 28 of the Act.) The proponent must cure any inadequacy identified by Board order before the proposal will proceed to hearing.

- b) If the Board determines that a proposal meets the requirements of subsection (a), and if any filing fee required by the Act and 35 Ill. Adm. Code 101.120 has been paid, the Board will issue an order accepting the proposal for hearing. Such an order will be construed as starting the timeclock for purposes of any applicable economic impact study and first notice publication deadlines pursuant to Sections 27 and 28.2 of the Act.
- c) When the Board authorizes a hearing, the Chairman will designate an attending Board member. A member of the Board may serve as hearing officer if otherwise qualified, and such hearing need not be attended by another Board member.
- d) In the case of a proposed regulatory change under the provisions of 35 Ill. Adm. Code 302.211(j) or 304.141(c), the requirement of subsection (a) relating to a requirement of 200 signatures shall not apply. In such case only a single hearing shall be required, to be held in the affected county.
- e) The Board may consolidate proposals for hearing or decision.

Section 102.161 Scheduling Of Hearings

- a) Except as otherwise provided by the Act, no substantive regulation shall be adopted, amended or repealed by the Board until after at least one public hearing. In the case of site-specific rules, a public hearing shall be held in the affected county. In the case of state-wide regulations, public hearings shall be held in at least two counties of the state.
- b) The Board need not hold a hearing on a procedural regulation, except as provided by Section 5.01 of the APA.
- c) After consideration of the number and complexity of issues involved in a regulatory proposal, the hearing officer will issue an order preliminarily specifying the number of hearings to be held on that proposal.
- d) If the proponent or any participant wishes to request a

hearing beyond the number of hearings specified by the hearing officer pursuant to subsection (c), that person must demonstrate, in a motion to the Board, that failing to hold an additional hearing would result in material prejudice to the movant. The motion may be oral, if made at hearing, or written. The movant must show that he or she exercised due diligence in its participation in the proceeding, and why an additional hearing, as opposed to the opportunity to submit written comments pursuant to Section 102.320, is necessary.

- e) Notwithstanding subsection (d), the Board or the hearing officer will schedule an additional hearing or hearings on its own motion, if it finds that additional hearing would aid the Board in its decision on the proposal.

Section 102.162 Notice Of Hearing

- a) The hearing officer will set a time and place for hearing. The Clerk shall give notice of the date of the hearing as follows:
 - 1) By notice in the Board's Environmental Register; and
 - 2) At least 20 days prior to the hearing date, by public advertisement in a newspaper of general circulation in the county in which the hearing is to be held. Where required by federal law, including but not limited to air pollution and RCRA proposals, newspaper notice shall be published at least 30 days prior to the hearing date.
- b) The hearing officer will give notice by mail to the proponent and to all persons who have submitted their names and addresses to the Clerk concerning the proposal.
- c) Hearings which are continued on the hearing record for a period of 45 days or less do not require notice that complies with subsections (a) and (b).

Section 102.163 Notice Of Site-Specific RCRA Proposals

- a) Public notice of hearings on site-specific RCRA proposals shall be given at least 30 days before the date of the hearing.
- b) In addition to the requirements of Section 28 of the Act and Section 102.211, the Board, at a minimum, will give notice of hearings on a site-specific RCRA proposal to the following persons:
 - 1) Federal agencies as designated by USEPA;

- 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; and
 - 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 28 of the Act and Section 102.241, the Board will give notice by radio broadcast in the area of the facility. That notice will include the information required by subsections (d)(2) and (d)(4) through (d)(8) below.
- d) A hearing notice on a site-specific RCRA proposal will include the following information:
- 1) The address of the Board office;
 - 2) Name and address of the proponent and, if different, of the facility for which the site-specific rule is sought;
 - 3) A brief description of the business conducted at the facility and the activity described in the petition;
 - 4) A description of the relief requested in the petition and the Board's docket number of the proceeding;
 - 5) Name, address and telephone number of the Clerk of the Board, from whom interested persons may obtain further information, including copies of the proposal;
 - 6) The name, address and telephone number of the Agency's representative in the rulemaking;
 - 7) A description of any written comment period or a statement that a comment period will be established in the future;

- 8) A statement that the record in the rulemaking is available at the Board office for inspection, except those portions which are claimed or determined to be trade secrets, and that procedures are available whereby disclosure may be sought by the public pursuant to 35 Ill. Adm. Code 120.
- 9) A statement that site-specific rules may be adopted pursuant to Title VII of the Act and 35 Ill. Adm. Code 102, and a reference to the Board regulations sought to be modified; and
- 10) Any additional information considered necessary or proper.

SUBPART E: ECONOMIC IMPACT STUDY DETERMINATIONS

Section 102.180 Board Determinations

- a) Within 60 days of the date that the Board accepts a proposal for hearing pursuant to Section 28 of the Act and Section 102.160, the Board shall determine whether an economic impact study should be prepared.
- b) Notwithstanding subsection (a), AT ANY TIME PRIOR TO THE CLOSE OF THE RECORD DURING THE RULEMAKING PROCEEDING, THE BOARD MAY DETERMINE THAT AN ECONOMIC IMPACT STUDY SHOULD BE PREPARED, IF THE PROPOSAL HAS BEEN SUBSTANTIALLY MODIFIED OR IF INFORMATION IN THE RECORD INDICATES THAT AN ECONOMIC IMPACT STUDY WOULD BE ADVISABLE. (Section 27 of the Act.) However, this subsection is not applicable to proceedings involving required rules pursuant to Section 28.2 of the Act.
- c) IF THE BOARD DETERMINES THAT AN ECONOMIC IMPACT STUDY SHOULD BE CONDUCTED, ENR SHALL CONDUCT SUCH A STUDY IN ACCORDANCE WITH "AN ACT IN RELATION TO NATURAL RESOURCES, RESEARCH, DATA COLLECTION AND ENVIRONMENTAL STUDIES" (Ill. Rev. Stat. 1987, ch. 96 1/2, par. 7401 et seq.). THE BOARD MAY IDENTIFY SPECIFIC ISSUES TO BE ADDRESSED IN THE STUDY. (Section 27 of the Act.)

Section 102.181 Request For Determination

- a) WITHIN 21 DAYS OF THE DATE THAT THE BOARD ACCEPTS A PROPOSAL FOR HEARING PURSUANT TO SECTION 28 OF THE ACT AND SECTION 102.160, ANY PERSON MAY REQUEST THAT THE BOARD DETERMINE THAT AN ECONOMIC IMPACT STUDY SHOULD OR SHOULD NOT BE PREPARED. (Section 27 of the Act.)
- b) Such request shall be made in writing, and shall detail

the reasons for the request. The request SHALL DESCRIBE, TO THE EXTENT REASONABLY PRACTICABLE, THE ECONOMIC IMPACT OF THE PROPOSED RULE. (Section 27 of the Act.) All material facts asserted in the request shall be verified by affidavit.

- c) The person filing the request shall file the original and nine (9) copies with the Clerk, and one copy each with the Agency, ENR, the Attorney General, and the proponent.
- d) No hearing will be held on any request filed pursuant to this Section.

Section 102.182 Basis For Board Determination

In determining whether an economic impact study should be performed, the Board will consider:

- a) Information in the record furnished by the proponent pursuant to Sections 102.121 and 102.141 and by any person filing a request for determination pursuant to Section 102.231;
- b) ITS ASSESSMENT OF THE POTENTIAL ECONOMIC IMPACT OF THE RULE;
- c) THE POTENTIAL FOR CONSIDERATION OF THE ECONOMIC IMPACT ABSENT SUCH A STUDY;
- d) THE EXTENT, IF ANY, TO WHICH THE BOARD IS FREE UNDER THE STATUTE AUTHORIZING THE RULE TO MODIFY THE SUBSTANCE OF THE RULE BASED UPON THE CONCLUSIONS OF AN ECONOMIC IMPACT STUDY; and
- e) ANY OTHER CONSIDERATIONS THE BOARD DEEMS APPROPRIATE. (Sections 27 and 28.2 of the Act.)

Section 102.183 Notice Of Board Determination

The Board will issue a written interlocutory order giving the reasons for its determination. The proponent, the Agency, ENR, the Attorney General and any person who has asked to be placed on the notice list for the proposal will be given notice of the Board's determination. Orders entered pursuant to this Section may be appealed only pursuant to 35 Ill. Adm. Code 101.304.

SUBPART F: CERTIFICATION OF REQUIRED RULES

Section 102.200 Agency Certification

WHEN THE AGENCY PROPOSES A RULE WHICH IT BELIEVES TO BE A REQUIRED

RULE as defined by Section 28.2(a) of the Act and Section 102.101, THE AGENCY SHALL SO CERTIFY IN ITS PROPOSAL, IDENTIFYING THE FEDERAL LAW TO WHICH THE PROPOSED RULE WILL RESPOND. (Section 28.2(e) of the Act.) Such certification shall include citation to the specific section of the specific federal law to which the proposed rule will respond.

Section 102.201 Challenge To Agency Certification

- a) If any person wishes to challenge the Agency's certification that a proposed rule is a required rule, that person shall file an objection to that certification within 21 days of the date of the Board's order accepting a proposal for hearing. Such objection shall state the reasons that the objector believes that the proposed rule is not a required rule, and shall include all arguments which the objector wishes the Board to consider. A copy of the objection shall be served upon the Agency and ENR.
- b) The Agency may file a response to any objection within 10 days of the service of that objection. No reply by the objector will be allowed, unless the Board orders otherwise to avoid material prejudice.
- c) No hearing will be held on any objection filed pursuant to this Section.

Section 102.202 Board Determination

- a) The Board will rule upon any objection filed pursuant to this Subpart within 60 days of the date that the Board accepts a proposal for hearing. The Board's ruling will be made in its order determining whether an economic impact study will be prepared, issued pursuant to Section 102.180.
- b) In ruling upon an objection to an Agency certification, the Board will consider all information in the record of that proceeding, including but not limited to the proposal, the objection, and the Agency response to the objection. The burden of proof is on the objector.
- c) The Board will give notice of its determination to the objector, the Agency, ENR, and any person who has asked to be placed on the notice list for that proposal.
- d) Orders entered pursuant to this Section are interlocutory in nature and may be appealed only pursuant to 35 Ill. Adm. 101.304.

SUBPART G: AUTHORITY OF HEARING OFFICER

Section 102.220 Authority Of Hearing Officer

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, complete, and concise record. He or she will have all powers necessary to these ends, including (but not limited to) the authority to:

- a) Require and establish a schedule for, and notice and distribution of, any pre-hearing submission of testimony and written exhibits;
- b) Require all participants to state their position with respect to the proposal;
- c) Administer oaths and affirmations;
- d) Examine witnesses and direct witnesses to testify;
- e) Regulate the course of the hearing, including but not limited to controlling the order of proceedings;
- f) Establish reasonable limits on the duration of the testimony and questioning of any witness and limit repetitious or cumulative testimony and questioning;
- g) Issue, in the name of the Board, an order compelling the answering of interrogatories or other discovery requests;
- h) Order the production of evidence as specified in Section 102.261 and 35 Ill. Adm. Code 101.261;
- i) Initiate, schedule and conduct a pre-hearing conference as specified in Subpart H;
- j) Issue subpoenas pursuant to Section 102.262 and 35 Ill. Adm. Code 101.260;
- k) Exclude late-filed briefs and comments from inclusion in the record for decision;
- l) Rule upon motions as specified in 35 Ill. Adm. Code 101.247 and this Part;
- m) Rule upon objections and evidentiary questions;
- n) Establish a schedule for discovery, including a date by which discovery must be completed; and
- o) Where pre-hearing submission of hearing testimony or exhibits has been required, allow the admission of testimony or exhibits which were not pre-submitted, if

necessary to prevent undue delay or material prejudice.

Section 102.221 Notice And Service Lists

- a) The hearing officer shall maintain a notice list for each regulatory proceeding. The notice list will consist of those persons who have furnished their names and addresses for inclusion on the notice list for a specific proceeding. Notice of all Board action and hearing officer orders will be given to all persons included on the notice list.
- b) The hearing officer may establish a service list for any regulatory proceeding, in addition to the notice list. The hearing officer may direct participants to serve copies of all documents upon the persons listed on the service list. In deciding whether to establish a service list, the hearing officer will consider factors including but not limited to, the complexity of the proceeding and the number of participants.

Section 102.222 Effect Of Hearing Officer Ruling

All decisions, orders, and rulings made by the hearing officer remain in effect during the pendency of any appeal to the Board of that decision, order, or ruling.

SUBPART H: PRE-HEARING CONFERENCES

Section 102.240 Initiation And Scheduling

- a) TO THE EXTENT CONSISTENT WITH ANY DEADLINE FOR ADOPTION OF ANY REGULATIONS MANDATED BY STATE OR FEDERAL LAW, PRIOR TO INITIATING ANY HEARING ON A REGULATORY PROPOSAL, THE BOARD MAY ASSIGN A QUALIFIED HEARING OFFICER WHO MAY SCHEDULE A PRE-HEARING CONFERENCE BETWEEN THE PROPONENT AND ANY OR ALL OF THE POTENTIALLY AFFECTED PERSONS. (Section 27(e) of the Act.) The hearing officer may schedule a pre-hearing conference on his or her own motion, or on the motion of the proponent or any potentially affected person. A motion to schedule a pre-hearing conference shall be directed to the hearing officer.
- b) THE NOTICE REQUIREMENTS OF SECTION 28 of the Act and Section 102.161 SHALL NOT APPLY TO SUCH PRE-HEARING CONFERENCES. (Section 27(e) of the Act). However, the hearing officer will give notice to any person who has requested inclusion on the notice list of that proposal.

Section 102.241 Purpose

The purpose of a pre-hearing conference shall be:

- a) TO MAXIMIZE UNDERSTANDING OF THE INTENT AND APPLICATION OF THE PROPOSAL;
- b) TO REACH AGREEMENT ON ASPECTS OF THE PROPOSAL, IF POSSIBLE; AND
- c) TO ATTEMPT TO IDENTIFY AND LIMIT THE ISSUES OF DISAGREEMENT AMONG THE PARTICIPANTS TO PROMOTE EFFICIENT USE OF THE TIME AT HEARING. (Section 27(e) of the Act.)

Section 102.242 Pre-hearing Order

- a) NO RECORD OF THE PRE-HEARING CONFERENCE NEED BE KEPT, NOR SHALL ANY PARTICIPANT OR THE BOARD BE BOUND BY ANY DISCUSSIONS CONDUCTED AT THE PRE-HEARING CONFERENCE.
- b) Notwithstanding subsection (a), WITH THE CONSENT OF ALL PARTICIPANTS IN THE PRE-HEARING CONFERENCE, THE HEARING OFFICER MAY ENTER A PRE-HEARING ORDER DELINEATING ISSUES TO BE HEARD, AGREED FACTS, AND OTHER MATTERS.
- c) If the participants in the pre-hearing conference agree to having a pre-hearing order entered pursuant to subsection(b), the hearing officer may require that those participants furnish the text of a proposed order setting forth the substance of the agreements reached at the pre-hearing conference. The hearing officer will enter that order if he or she agrees that it sets forth the substance of the agreement. The order shall identify which participants have agreed to the substance of the order.
- d) A PRE-HEARING ORDER SHALL NOT BE BINDING ON NONPARTICIPANTS IN THE PRE-HEARING CONFERENCE. (Section 27(e) of the Act.)

SUBPART I: MOTIONS AND DISCOVERY

Section 102.260 Motion Practice

Motion practice in regulatory proceedings is governed by 35 Ill. Adm. Code 101.Subpart H. All motions and responses shall be served upon the proponent, the Agency, ENR, the Attorney General, and all persons on any service list established pursuant to Section 102.221(b).

Section 102.261 Production Of Information

The production of information in regulatory proceedings is governed by 35 Ill. Adm. Code 101.261.

Section 102.262 Subpoenas

The issuance and enforcement of subpoenas in regulatory proceedings is governed by 35 Ill. Adm. Code 101.260(b) through (i).

SUBPART J: REGULATORY HEARINGS

Section 102.280 Pre-hearing Submission Of Testimony And Exhibits

- a) The proponent shall submit all written testimony and any related exhibits 21 days prior to the hearing at which the witness testifies, unless the hearing officer directs otherwise to prevent material prejudice or undue delay.
- b) The hearing officer may require the pre-hearing submission of testimony and any related exhibits by participants other than the proponent if the hearing officer determines that such a procedure will provide for a more efficient hearing.
- c) The original and four (4) copies of pre-submitted testimony and exhibits shall be filed with the Clerk. The Agency, ENR, and, if a participant, the Attorney General shall each be served with one copy of each testimony and exhibit. One copy shall also be served upon the proponent and each participant on any service list, unless otherwise specified or limited by the hearing officer. Such service shall be initiated on or before the date that copies are filed with the Clerk.
- d) All testimony and exhibits shall be submitted in the form required by 35 Ill. Adm. Code 101.103 and labelled with the docket number of the proceeding, the name of the witness submitting the material or exhibit, and the title of the material or exhibit.
- e) The proponent and each participant who has pre-submitted testimony shall bring copies of that testimony and any exhibits to the hearing.
- f) Testimony submitted prior to hearing will be entered into the record as if read, unless the hearing officer determines that it will aid public understanding to have the testimony read. All persons testifying will be sworn and will be subject to examination. Modifications to previously submitted testimony and exhibits may be allowed by the hearing officer at hearing provided that such modifications are either non-substantive in nature or would not materially prejudice another person's participation at hearing. Objections to such

modifications are waived unless raised at hearing.

- g) Where pre-hearing submission of testimony is required pursuant to subsection (a) and (b), any testimony which is not pre-submitted in a timely manner will be allowed only as time permits, pursuant to Section 102.220(o).

Section 102.281 Transcript

All testimony shall be recorded stenographically. When the transcript is filed with the Clerk, the hearing officer will receive and rule on typographical corrections and reporting errors from any person who may examine the transcript for accuracy. Failure of any witness to correct the transcript within 14 days after its receipt in Board offices constitutes a waiver of any right to correct.

Section 102.282 Admissible Information

All information which is relevant and not repetitious or privileged shall be admitted by the hearing officer. The hearing officer will rule on objections.

Section 102.283 Presentation Of Testimony

- a) All witnesses at hearings shall be sworn.
b) Testimony shall be in narrative form.

Section 102.284 Questioning Of Witnesses

All witnesses shall be subject to questioning by any person. Repetitious, irrelevant, harassing, or cumulative questioning will be prohibited by the hearing officer. The Board will not consider as substantive evidence any unsworn information which is presented in the form of a question during questioning of any witness.

Section 102.285 Record For Decision

The record includes the transcript, all written testimony, all exhibits admitted at hearing, and all public comments, briefs and other information timely filed with the Clerk.

SUBPART K: ECONOMIC IMPACT HEARINGS

Section 102.300 Hearings On The Economic Impact Study Of New Proposals

- a) Before the final adoption of any proposal, the Board shall conduct at least one hearing on any economic impact study submitted by ENR on any proposed regulation, or proposed amendment to existing regulation, unless

otherwise provided by the Act.

- b) IN THE CASE OF A REQUIRED RULE, IF THE ECONOMIC IMPACT STUDY IS NOT SUBMITTED TO THE BOARD WITHIN SIX (6) MONTHS OF THE BOARD'S DECISION THAT AN ECONOMIC IMPACT STUDY SHOULD BE CONDUCTED, THE BOARD MAY PROCEED TO ADOPT A REQUIRED RULE WITHOUT AN ECONOMIC IMPACT STUDY. However, TO THE EXTENT POSSIBLE CONSISTENT WITH SECTION 28.2(b) OF THE ACT, THE BOARD SHALL CONDUCT A HEARING ON THE ECONOMIC IMPACT OF THE PROPOSED REQUIRED RULE. (Section 28.2 of the Act.) Pursuant to Section 28 of the Act, this requirement may be fulfilled by considering economic impact at any merit hearing on the proposed required rule.
- c) Hearings held pursuant to this Section may be consolidated with any other hearings held pursuant to this Part.

Section 102.301 Hearings On The Economic Impact Study Of Existing Regulations

- a) WITHIN A REASONABLE TIME, BUT NOT MORE THAN 120 DAYS, AFTER EACH ECONOMIC IMPACT STUDY ON EXISTING REGULATIONS HAS BEEN FILED BY ENR, THE BOARD SHALL CONDUCT PUBLIC HEARINGS ON SUCH STUDY.
- b) AFTER CONCLUSION OF THE HEARINGS, THE BOARD SHALL PUBLISH ITS FINDINGS AND CONCLUSIONS ON THE AREAS COVERED BY THE STUDY AND THE TESTIMONY RECEIVED BY THE BOARD. The Board will satisfy this requirement by entering a written order.
- c) THE BOARD SHALL ALSO SPECIFICALLY DETERMINE WHETHER, AS A RESULT OF ITS FINDINGS AND CONCLUSIONS, ANY REGULATIONS OF THE BOARD SHALL BE MODIFIED OR REPEALED.
- d) IF THE BOARD CONCLUDES THAT MODIFICATION OR REPEAL MAY BE NECESSARY, IT SHALL PROPOSE SUCH MODIFICATION AS REGULATIONS AND CONDUCT FURTHER HEARINGS ON SAID MODIFICATION.
- e) ANY SUCH PROPOSED MODIFICATIONS SHALL NOT REQUIRE ANY ADDITIONAL ECONOMIC IMPACT STUDY. (Section 4(b) of "AN ACT in relation to natural resources, research, data collection and environmental studies.)

SUBPART L: PUBLIC COMMENTS

Section 102.320 Public Comments

Any person may submit written comments on any proposal within 14 days after the receipt of the transcript in Board offices or within 14 days after regulation revision under Section 102.340, unless otherwise specified by the hearing officer or the Board to prevent material prejudice or undue delay. Comments shall be filed with the Clerk and served upon the Agency, ENR, the Attorney General (if a participant), the proponent, and the participants on any service list established by the hearing officer pursuant to Section 102.221. Comments which are not timely filed will not be considered, except as allowed by the hearing officer or the Board to prevent material prejudice.

SUBPART M: BOARD ACTION

Section 102.340 Revision Of Proposed Regulations

- a) The Board may revise the proposed regulations before adoption upon its own motion, or in response to suggestions made at hearing and in written comments made prior to second notice. No additional hearing on the revisions need be held.
- b) THE BOARD MAY MODIFY AND SUBSEQUENTLY ADOPT ANY PROPOSED REGULATIONS, OR AMENDMENTS TO EXISTING REGULATIONS WITHOUT ANY ADDITIONAL ECONOMIC IMPACT STUDY; PROVIDED THAT SUCH MODIFICATION BY THE BOARD DOES NOT SIGNIFICANTLY ALTER THE INTENT AND PURPOSE OF THE PROPOSED REGULATION WHICH WAS THE SUBJECT OF ENR'S ECONOMIC IMPACT STUDY. (Section 27(b) of the Act.)
- c) Unless otherwise provided in the Act, THE BOARD MAY REVISE PROPOSED REGULATIONS AFTER HEARING IN RESPONSE TO OBJECTIONS OR SUGGESTIONS MADE BY JCAR PURSUANT TO SECTIONS 5.01(b) AND 7.06(a) OF THE APA. THE BOARD MAY MAKE SUCH A REVISION WHERE IT FINDS:
 - 1) THAT SUCH OBJECTIONS OR SUGGESTIONS RELATE TO THE STATUTORY AUTHORITY UPON WHICH THE REGULATION IS BASED, WHETHER THE REGULATION IS IN PROPER FORM, OR WHETHER ADEQUATE NOTICE WAS GIVEN; and
 - 2) THAT THE RECORD BEFORE THE BOARD IS SUFFICIENT TO SUPPORT SUCH A CHANGE WITHOUT FURTHER HEARING. (Section 28 of the Act.)

Section 102.341 Adoption Of Regulations

- a) IN ADOPTING ANY NEW REGULATION, EXCEPT A REQUIRED RULE OR AN IDENTICAL IN SUBSTANCE REGULATION, THE BOARD SHALL CONSIDER THOSE ELEMENTS DETAILED IN ANY ECONOMIC IMPACT STUDY PERFORMED BY ENR ON THAT REGULATION. THE BOARD SHALL, IN ITS WRITTEN OPINION, MAKE A DETERMINATION,

BASED UPON THE ECONOMIC IMPACT STUDY AND OTHER EVIDENCE IN THE RECORD, AS TO WHETHER THE PROPOSED REGULATION HAS ANY ADVERSE ECONOMIC IMPACT ON THE PEOPLE OF THE STATE OF ILLINOIS. (Section 27(b) of the Act.)

- b) In the case of a required rule, the Board will follow the procedures of subsection (a), except as provided in Section 102.300(b).
- c) As provided by Sections 13(c), 13.3, 17.5, 22.4(a), 22.4(d), and 22.7(d) of the Act, the provisions of Title VII of the Act and Section 5 of the APA shall not apply to identical in substance rulemakings.

Section 102.342 First Notice Of Proposed Regulations

Except when otherwise directed by the Act, the Board shall give first notice of its proposed adoption, amendment, or repeal of regulations pursuant to Section 5.01 of the APA. The first notice period shall be at least 45 days, and shall begin on the day that first notice is published in the Illinois Register. The Board will accept written comments from any person concerning the proposed regulations during the first notice period.

Section 102.343 Second Notice Of Proposed Regulations

- a) Except when otherwise directed by the Act, the Board shall give second notice of its proposed adoption, amendment, or repeal of regulations to JCAR. The second notice period shall begin on the date written notice is received by JCAR, and shall expire 45 days after that date, except as provided by Section 5.01 of the APA. The Board will accept comments only from JCAR during the second notice period.
- b) After the beginning of the second notice period, no substantive changes will be made to the proposed regulation, except in response to objections or suggestions from JCAR. Such changes will be made pursuant to Section 102.340(c).

Section 102.344 Notice Of Board Final Action

The Board will give notice of its final action on a proposal to the proponent, the Agency, ENR, the Attorney General, and all persons on the notice list. The Board will publish notice of its final action in the Environmental Register, and will enter a written opinion stating the reasons in support of its final action.

Section 102.345 Adoption Of Identical In Substance Regulation

- a) Prior to adopting identical in substance regulations, the

Board will:

- 1) Make available to the public a proposed Opinion and Order containing the text of the rules;
 - 2) Publish the proposed regulations in the Illinois Register;
 - 3) Serve a copy of the proposed Opinion and Order on the USEPA; and
 - 4) Receive written comments from the USEPA and other persons for at least 45 days after the date of publication in the Illinois Register.
- b) AFTER CONSIDERATION OF COMMENTS FROM THE USEPA, THE AGENCY, THE ATTORNEY GENERAL AND THE PUBLIC, THE BOARD SHALL ADOPT THE VERBATIM TEXT OF SUCH USEPA REGULATIONS AS ARE NECESSARY AND APPROPRIATE FOR AUTHORIZATION OF THE PROGRAM. EXCEPT AS PROVIDED IN SECTION 7.2 OF THE ACT, THE ONLY CHANGES THAT MAY BE MADE BY THE BOARD TO THE FEDERAL REGULATIONS ARE THOSE CHANGES THAT ARE NECESSARY FOR COMPLIANCE WITH THE ILLINOIS ADMINISTRATIVE CODE, AND TECHNICAL CHANGES THAT IN NO WAY CHANGE THE SCOPE OR MEANING OF ANY PORTION OF THE REGULATIONS. (Section 7.2(a) of the Act.)

Section 102.346 Adoption Of Emergency Regulations

- a) WHEN THE BOARD FINDS THAT A SITUATION EXISTS WHICH REASONABLY CONSTITUTES A THREAT TO THE PUBLIC INTEREST, SAFETY, OR WELFARE, THE BOARD MAY ADOPT REGULATIONS IN ACCORDANCE WITH SECTION 5.02 OF THE APA. (Section 27(c) of the Act.)
- b) WHEN THE BOARD FINDS THAT A SEVERE PUBLIC HEALTH EMERGENCY EXISTS, THE BOARD MAY, IN RELATION TO ANY PROPOSED REGULATION, ORDER THAT SUCH REGULATION TAKE EFFECT WITHOUT DELAY. THE BOARD SHALL PROCEED WITH ANY REQUIRED HEARINGS WHILE THE REGULATION CONTINUES IN EFFECT. (Section 27(c) of the Act.)

Section 102.347 Adoption Of Peremptory Regulations

- a) WHEN THE BOARD FINDS THAT A PEREMPTORY RULEMAKING IS NECESSARY AND STATES IN WRITING ITS REASONS FOR THAT FINDING, THE BOARD WILL ADOPT PEREMPTORY RULEMAKING UPON FILING A NOTICE OF RULEMAKING WITH THE SECRETARY OF STATE PURSUANT TO SECTION 6.01 OF THE APA.
- b) NOTICE OF SUCH PEREMPTORY RULEMAKING WILL BE PUBLISHED IN THE ILLINOIS REGISTER. (Section 5.03 of the APA.)

Section 102.348 Adoption Of Temporary Regulations

- a) THE BOARD MAY ADOPT A PROPOSED REGULATION PRIOR TO ITS CONSIDERATION OF AN ECONOMIC IMPACT STUDY WHEN SUCH STUDY IS FILED WITH THE BOARD LESS THAN 120 DAYS IN ADVANCE OF A DATE ON WHICH A TEMPORARY NON-EMERGENCY REGULATION OR PROVISION THEREOF WOULD LAPSE PRIOR TO ADOPTION OF A PERMANENT REGULATION OR PROVISION THEREOF ON THE SAME SUBJECT, OR LESS THAN 120 DAYS IN ADVANCE OF A DEADLINE FOR ADOPTION OF THE REGULATION WHICH IS ESTABLISHED IN A STATE STATUTE. (Section 27 of the Act.)
- b) SUCH ADOPTED REGULATION SHALL BE EFFECTIVE UNTIL 180 DAYS AFTER THE ECONOMIC IMPACT STUDY REQUIRED PURSUANT TO THIS SECTION IS FILED WITH THE BOARD, AND IN NO EVENT SHALL A REGULATION ADOPTED PURSUANT TO THIS PROCEDURE STAY IN EFFECT FOR MORE THAN ONE YEAR. (Section 27 of the Act.)

SUBPART N: MOTIONS FOR RECONSIDERATION
AND APPEAL

Section 102.360 Filing Of Motion For Reconsideration

Motion for reconsideration or modification of any Board order taking substantive action on a regulatory proposal shall be filed in accordance with 35 Ill. Adm. Code 101.246. The contents of such motions are governed by 35 Ill. Adm. Code 101.242.

Section 102.361 Disposition Of Motions For Reconsideration

- a) AFTER COMMENCEMENT OF THE SECOND NOTICE PERIOD, NO SUBSTANTIVE CHANGES MAY BE MADE TO A PROPOSED RULEMAKING UNLESS IT IS MADE IN RESPONSE TO AN OBJECTION OR SUGGESTION OF JCAR. (Section 5.01(b) of the APA.) Therefore, submission of second notice of a proposal to JCAR will preclude the Board from revising that proposal in response to a motion for reconsideration. However, the Board may resubmit a rule for first notice if necessary to prevent material prejudice.
- b) An adopted rule becomes effective upon the filing of that rule with the Secretary of State. Therefore, the Board is precluded from allowing a motion for reconsideration of a final order adopting a rule, if that rule has been filed with the Secretary of State.

Section 102.362 Correction Of Publication Errors

The Board may make technical corrections to proposed or adopted rules, published in the Illinois Register or filed with the

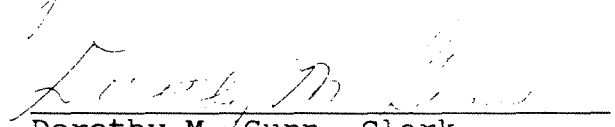
Secretary of State, only in accordance with 1 Ill. Adm. Code 100.240. No hearing need be held on such corrections.

Section 102.363 Appeal

Any final Board order may be appealed to the appellate court within 35 days of the entry of that order, pursuant to Sections 29 and 41 of the Act.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 5th day of February, 1990, by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board