ILLINOIS POLLUTION CONTROL BOARD
March 2, 1989

IN THE MATTER OF:	)	
	)	
PROCEDURAL RULES REVISION	)	
35 ILL. ADM. CODE	)	R88-5 (A)
101, 106 (Subpart G), and 107	)	

PROPOSED RULE. SECOND SECOND NOTICE.

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

On September 8, 1988, the Board proposed for first notice revisions of some of its procedural rules. That proposal included proposed new general rules (35 Ill. Adm. Code 101), new rules covering regulatory proceedings (35 Ill. Adm. Code 102), and new rules for adjusted standards proceedings (35 Ill. Adm. Code 106). The Board also proposed repeal of existing Parts 101, 102, and 107. (Part 107 currently contains rules pertaining to sanctions. Rules on sanctions have been proposed as part of the new Part 101 general rules.) An opinion supporting the proposed rules was adopted on September 22, 1988. Merit hearings were held on October 13, 1988 in Springfield, and on October 21, 1988 in Chicago. The first notice comment period closed on Monday, November 7, 1988.

On January 19, 1989 the Board took two actions on this procedural rules revision. First, the docket was split into two dockets. Docket R88-5(A) includes the proposed rules in Part 101 (general provisions), the proposed rules in Subpart G of Part 106 (adjusted standard proceedings), and the proposed repeal of Part 107. Docket R88-5(B) will include the proposed rules for regulatory proceedings (Part 102) and non-substantive revisions to Subparts D, E, and F of Part 106. This split of the docket was done to allow Parts 101, 106 (Subpart G), and 107 to proceed o second notice while the Board further considers the comments on Part 102 received at hearing and during the first notice comment period. The Board anticipates taking further action on Part 102 in the near future.

The second action taken on January 19 was the proposal for second notice of the rules in R88-5(A). The second notice order was withheld from submission to the Joint Committee on Administrative Rules (JCAR) to allow interested persons to comment on the rules., That public comment period ended on Wednesday, February 8, 1989.

The Board received fifteen comments during the first notice comment period. (Public Comments (P.C.) #11-25; please note that P.C. #1-10 pertain to an earlier proposal which was not adopted.) The Board also received eight comments after the close of the comment period. (P.C. #26-33.) These late comments were

filed between one week and five weeks late. The Board will not accept these comments and has not considered them in proposing these rules for second notice. Finally, the Board received six public comments during the "second notice" comment period which ended on February 8, 1989. (P.C. #35 -40.) Except for the eight late comments, the Board has considered all of the comments when revising the proposed rules. The Board again notes that this opinion and order includes only revisions to Part 101 and Subpart G of Part 106, and the repeal of Part 107. To the extent that the public comments address the proposed revisions to Part 102 (regulatory proceedings), those comments will also be considered when the Board takes further action in R88-5(B).

As a preliminary matter, the Board notes that several comments urged that the Board make only those changes statutorily required by SB 1834 (P.A. 85-1048) and HB 4039 (P.A. 85-1331), effective January 1, 1989. That legislation makes four changes to Board procedure: (1) the establishment of filing fees for some types of proceedings; (2) Board authority to determine whether an economic impact study (EcIS) of proposed regulations should be prepared by the Department of Energy and Natural Resources (ENR); (3) authorization of a pre-hearing conference in regulatory proceedings; and (4) expansion of the adjusted standard provision of Section 28.1 of the Environmental Protection Act (Act). (Ill. Rev. Stat. 1987, ch. 111 1/2, par. 1028.1.) These comments suggest that any problems with past Board procedure were cured by the recent legislation, and thus contend that the Board should only revise its procedural rules to reflect the legislative changes. However, as stated in the September 22, 1988 first notice opinion, the Board believes that its existing procedural rules need to be reorganized, tightened, and updated to reflect current Board practice. Thus, the Board will proceed today with revisions to Part 101 (general provisions) and Part 106 (Subpart G- adjusted standard proceedings).

This proposed opinion will touch upon each Subpart in the proposed rules, but will discuss only those rules which were the subject of comments.

PART 101 - GENERAL RULES

Subpart A: General Provisions

The Board received several comments on subsection (b) of Section 101.100 "Applicability". In the first notice proposal, that subsection stated that the Code of Civil Procedure (Code) (Ill. Rev. Stat. 1987, ch. 110, par. 1-101 et seq.) does not apply to Board proceedings unless expressly stated. Several comments suggested that the Code should apply where the procedural rules are silent. The Board agrees that the Code provides guidance where the procedural rules are silent, but will not provide for automatic application of the Code. Instead, the subsection has been rewritten to state that in the absence of a

specific provision in the procedural rules, the parties or participants may argue that a provision of the Code or the Illinois Supreme Court Rules (Ill. Rev. Stat. 1987, ch. 110A, par. 1 et seq.) provide guidance for the Board or hearing officer. This revision codifies current practice, with the goal of achieving consistency throughout all types of Board proceedings. The Board has added a new subsection (c) to Section 101.100, which states that the procedural rules are in addition to the provisions of the Illinois Administrative Procedure Act (Ill. Rev. Stat. 1987, ch. 127, par. 1001 et seq.), unless otherwise provided by the Act. Again, this merely codifies current practice and statutory requirement. The provision was unintentionally omitted from the first notice proposal.

Several definitions in Section 101.101 "Definitions" have been reworded for clarity. Additionally, new definitions of "evidence", "initial filing", "material", "participant", "party", and "procedural rules" have been added to this Section.

The Board received a number of comments on Section 101.102 "Filing of Documents". Two comments objected to the provision of subsection (b) that filings received after 4:30 p.m. will be date-stamped the following day. (P.C. #24, 25.) This objection was premised upon the contention that the rule would create serious problems for those appearing before the Board, is inconsistent with the procedures of most courts and agencies, and may result in a loss of rights, as in the case of permit appeals. The remedy for late filings suggested by the comments is that documents be date-stamped when filed, but that the Clerk's Office not open until 9:00 or 9:30 a.m. the next day to allow for handling of those late documents. These comments were reiterated during the second notice comment period. (P.C. #38, 39.)

The Board is not persuaded. As stated in the first notice opinion, this policy will allow staff to complete the duties associated with filing before the Board's offices close at 5:00 p.m. Other agencies, such as the Illinois Racing Board, also provide that documents filed after 4:30 p.m. will be date-stamped the next business day. Given the fact that Section 40 of the Act allows a permit applicant 35 days to file a permit appeal, the Board finds it difficult to believe that a half hour difference in time for filing will be dispositive of an applicant's ability to timely-file its appeal. Finally, the suggestion that the Clerk's office open later in the morning would create more problems than would closing the office earlier in the afternoon.

The Board also received several suggestions that Section 101.102 specify when a document is considered "filed." The Board agrees, and has added subsections (d) and (e) to address this issue. Subsection (d) provides that the time of filing of any document will be the date on which it is date-stamped by the Clerk, unless date-stamped after any due date. If the document is received after any due date, the time of mailing will be

deemed the time of filing. Proof of the date of mailing will be the certificate of service, made pursuant to Section 101.143. The date of the postmark will not be the relevant date. The Board sees that this provision could be abused, but believes that a certificate of service (which is made by affidavit of a non-attorney and by certificate of an attorney) is the best way to prove mailing. It is true that a person could "misstate" the date of mailing, but he or she would do so under oath. It is equally possible that an envelope could be metered with a date prior to the date it is actually mailed, that action would not be done under oath. This "time of filing" rule of subsection (d) is based upon Supreme Court Rule 373. Please note that even a statutory appeal period is subject to the "mailed is filed unless received before the due date" rule. The Agency argued in its first notice comments that an appeal must be actually received by the Clerk within the statutory appeal time, and that any use of a mailbox rule in that situation would impermissibly extend the appeal time. (P.C. #19.) However, the Supreme Court of Illinois recently held that notices of appeal mailed within the 30-day period and received thereafter are timely filed. Although that case involved the application of Supreme Court Rule 303, the court specifically noted that Rule 373 has a "pro-mailing policy" which should be applied where possible. The court noted that a liberal "pro-mailing policy" is more equitable, since it places law firms which may lack access to messenger services on an equal footing with firms that have such access. Harrisburg-Raleigh Airport Authority v. Department of Revenue, Nos. 66381, 66544 (cons.). The Board agrees with the court's reasoning, and believes that this rule is the most equitable procedure. The Board notes that there may be some disadvantages to this rule, and that several comments urged the use of a "received is filed" rule. However, the use of a "received is filed" rule puts persons not located in the Chicago area at a severe disadvantage, because they do not have the option of using a messenger service or personal delivery to file documents at the Clerk's Chicago office. Subsection (e) has been added to state that the Board or the hearing officer may accelerate a filing schedule upon written notice to the participants or parties. This will allow the Board or hearing officer to specify that a required document must actually arrive in the Clerk's office by a certain date, if application of subsection (d) would result in undue delay.

Subsection (d) also provides that a statutory decision time does not begin to run until the initial filing in a deadline proceeding (such as a permit appeal) is actually received by the Clerk. For example, if a permit appeal must be filed by March 1, and it is mailed on March 1, it will be considered timely filed. However, the 120-day decision time will not begin until the appeal is actually date-stamped by the Clerk.

Citizens for a Better Environment (CBE) (P.C. #20) commented that subsection (b) of Section 101.103 "Form of Documents", which requires the original and nine copies of most documents filed with the Clerk, imposes prohibitive costs on citizens and

nonprofit groups. CBE believes that this requirement is burdensome and excessive, and suggests that the Board request only one copy. The Board is sympathetic to the budget constraints faced by CBE and others, since the Board also faces these problems. However, the Board believes that the requirement of the original and nine copies is necessary. The original is kept by the Clerk and seven copies are distributed to the Board members, leaving only two copies for review by staff and the public and to serve as "extras". The Board believes that Section 101.103(e), which allows for a waiver of the filing requirements upon written motion to the Board, is the proper remedy for situations where a person truly cannot comply with these requirements.

Several comments were received on Section 101.103(g), which requires that all filings include the business address and telephone number of the person appearing before the Board, and that all copies be made from the signed original. These comments questioned why failure to comply with these requirements should be grounds for rejection of a document. The basis for this provision is to allow the person accepting documents for filing (usually the Board's receptionist) to quickly check whether this basic information is included on the document. This ensures that Board staff is able to reach the attorney or other person, if necessary. However, the Board has deleted the requirement that all copies be made from the signed original.

Quite a few comments expressed concern over the new limitations on the length of briefs, set forth in Section 101.104. The commenters feel that reliance upon Rule 28 of the Federal Rules of Appellate Procedure to support the limits is misplaced, since the Board is often the original trier of fact. The commenters also contend that the limitations are too narrow for complex regulatory proceedings. However, the Board continues to believe that page limitations are necessary. The number of proceedings before the Board continues to grow, and the Board wishes to encourage brevity where possible. In a specific situation where the limitations truly do not allow for sufficient discussion of the issues, the remedy is a motion to exceed the limitations. The Board points out that a motion to exceed should be filed with the Board or the hearing officer before the brief is filed, not concurrently. Subsection (c) has been added to articulate the factors considered when ruling upon a motion to exceed. In the event that a brief which exceeds the limitations of Section 101.104 is filed without prior approval of the Board or the hearing officer, the portion which exceeds the limitations will not be considered.

Several comments urged the Board to revise Section 101.105 "Waivers" to allow for types of decision deadline waivers other than open waivers or those to a calendar date certain. For example, several comments suggested that the Board might allow waivers to be contigent upon the outcome of a motion: i.e. a waiver which would become effective upon the grant of a motion to

continue the hearing. After consideration of these comments, the Board continues to believe that requiring waivers to be open or until a date certain will enable the Board to meet its decision deadlines while allowing petitioners to waive those deadlines when they choose. Given the volume of decision deadline cases pending before the Board, and the endless possible variations of contigent waivers, it would be close to impossible to track decision deadlines if the Board accepted contingent waivers, even on a case-by-case basis. The Board has added a sentence allowing it to accept waivers in some other form (such as an emergency oral waiver) in rare cases.

Section 101.105 "Incorporation Of Prior Proceedings" also produced a number of comments. In response to these comments, the rule now specifies that a request for incorporation of any portion of the record of another Board proceeding must be a separate written request (not requested within another document), and that the person seeking incorporation shall file four copies of the material to be incorporated. The required number of copies was reduced from ten to four in response to comments that filing ten copies was unduly burdensome. The four copies now required allows one copy for the Clerk's official files, one copy for each of the downstate offices, and one copy for the file of the Board member assigned to the proceeding. The Board feels that this change will relieve the person seeking incorporation from any undue burden while allowing sufficient copies for necessary Board use.

Notwithstanding the change from ten copies of incorporated material to four copies, one second notice comment still contended that the requirement that the person requesting incorporation provide copies is burdensome. (P.C. #35.) This comment argued that because the Board is already in possession of the records and those records are available to Board members, and because the Board can refuse incorporation of the record if it deems the material irrelevant, Section 101.106 should, at the very least, be qualified to require copies of the record to be incorporated only where the Board does not have the requested documents in its files. However, this comment misinterprets the reason for the requirement. The Board's storage space is severely limited; many of its records are placed on microfiche. The process of having records microfiched is lengthy; records may be out of the Board's office for months. Additionally, parties or participants often request incorporation of portions of records of on-going proceedings. The Board cannot remove documents from the file of a pending proceeding, and it is inefficient and burdensome to Board members and staff to "track down" particular portions of another record when working on a proceeding. By requiring copies of portions of records to be incorporated, the Board will have complete records of each individual proceeding.

The Board has also added a requirement to Section 101.106(a) that the person seeking incorporation give notice of the request

to all identified participants or parties. This addition is in response to suggestions that the requirements for incorporation include notice to all participants, an opportunity to comment, and automatic incorporation of any corresponding cross-questioning. The revised Section 101.106(a) does not establish a comment period or provide for automatic incorporation of cross-questioning. The Board believes that it is not necessary to add such formality and delay to a request for incorporation. Subsection (b), which sets forth the weight the Board will give incorporated material, provides for consideration of the circumstances under which the material was developed, including the past and current opportunity for cross-questioning. If a person feels that the Board may overlook some important cross-questioning, that person is free to request incorporation of that material.

Section 101.107 "Appearances and Withdrawals" has been modified in two ways. First, subsection (a)(2) has been revised to allow corporations to appear without an attorney in all but enforcement cases. The Board continues to believe that corporations should be represented by attorneys when a respondent in enforcement cases where findings of violations of the Act can be made and substantial fines assessed. However, the Board agrees with numerous comments which argued that a corporation should be allowed to appear through any officer, employee, or representative, or through an attorney, in all other types of Board proceedings. Second, subsection (a)(3) of Section 101.107 has been rewritten to specifically state that a unit of local government is considered "any other person." This revision is made in response to questions asked at hearing, and merely clarifies the Board's original intent.

The Board received one second notice comment which questioned why only attorneys must file appearances, whether an attorney may not appear by means of a pleading without filing a separate appearance form, and why an appearance is required in regulatory proceedings. (P.C. #38.) The requirement that an attorney appearing in a representative capacity file a written appearance is intended to allow Board members and staff to easily ascertain exactly who is representing a person so that necessary communications may be addressed to the appropriate person. This reason holds true in regulatory as well as contested case proceedings, and the Board sees no reason to distinguish between the two. Only attorneys are required to file an appearance, because attorneys are usually the only representative whose status may not be clear. (As appearance by an officer of a corporation on behalf of that corporation or a citizen bringing an enforcement action is almost always apparent from filings.) Finally, an attorney may not appear by means of a pleading without filing a separate appearance form.

Subpart B: Filing and Photocopying Fees

The only substantive change made to Subpart B is a revised

Section 101.122 "Forms Of Payment". This Section now specifies that both filing fees and photocopying fees may be paid by money order or check. Cash payments will be accepted, but are strongly discouraged. This revision was made partially in response to comments suggesting that the Board allow payment of fees by corporate check. Subsection (c) has been added to provide for issuance of a sanction order in cases where a check written for a filing fee is not honored by petitioner's bank.

Subpart C: Service

Section 101.141 "Service Of Initial Filings" has been revised to allow service of initial filings in almost all types of Board proceedings to be made by First Class mail, in addition to by personal delivery, messenger service, or by registered or certified mail. This change was made in response to comments by the Illinois Environmental Regulatory Group (IERG). (P.C. #16.) However, initial complaints in enforcement proceedings may not be served by First Class mail, but must be served personally, by messenger service, or by registered or certified mail. This provision continues the current requirements in enforcement cases (see 35 Ill. Adm. Code 103.123), and is analogous to the requirements of the Code of Civil Procedure. The Board believes that it is necessary to have proof of actual receipt of the complaint initiating an enforcement action, not merely proof of the initiation of service. First Class mail cannot provide such proof of receipt, and thus service must be made by one of the four enumerated methods which do provide proof of receipt. Section 101.143 "Proof of Service" has been revised to reflect the changes in Section 101.141.

Subsection (c) of Section 101.144 "Effective Date Of Service" has been rewritten to state that there is a rebuttable presumption that service by First Class mail is complete four days after mailing. This is a change from the prior wording that service by First Class mail is presumed complete four days after mailing. The Board made this change in response to the suggestion of the Environmental Law Committee of the Chicago Bar Association (CBA) that where evidence indicates that actual service was made sooner or later than the presumed four days from mailing, that evidence should be admissible to prove the actual date of service. (P.C. #17.)

Subpart D: Public Information

The Board received several comments on Section 101.161 "Non-Disclosable Information." This Section implements Section 7 of the Act, and is separate from the trade secret provisions of Section 7.1 of the Act. (As Section 101.161 states, procedures governing the identification of trade secrets are found in 35 Ill. Adm. Code 120.) Subsection (c) has been rewritten at the suggestion of the Illinois Environmental Protection Agency (Agency) (P.C. #19) to allow for notice to governmental participants, as required by Section 7(e) of the Act. The

subsection now requires the person requesting non-disclosure to serve notice of the application upon any state or federal agency participating in that proceeding. However, the notice need not include a copy of the application. The Board believes that this provision strikes the balance contemplated by the statute.

Additionally, subsection (d) has been added to Section 101.161. This new subsection makes Subpart C of 35 Ill. Adm. Code 120 applicable to all material found not subject to disclosure. The addition was made in response to a second notice comment which contended that the Section did not adequately ensure protection of material after it is determined to be non-disclosable. Subpart C of Part 120 "Procedures for Protecting Articles Which Represent Trade Secrets" provides for such things as the owners and the agency's (Board, the Agency, and the Department of Energy and Natural Resources) responsibility to mark material, transmission of material between agencies, segregation of material, and prohibitions against unauthorized disclosure or use of protected material. The Board believes that applying Partr 120, Subpart C to non-disclosable material provides sufficient protection of that material both at the Board and when transmitted to other agencies pursuant to Section 7(e) of the Act.

Several comments touched upon the Board's continuing lack of an index of its opinions. The Stepan Company also suggested that a table of Board opinions and orders be published semi-annually or annually in the Environmental Register (P.C. #24). The Board emphatically agrees that an up-to-date index is badly needed, and hopes to explore possibilities for indexing in the near future. The Board also would like to implement Stepan's suggested annual table of opinions for the Environmental Register. Unfortunately, because of the Board's current staffing and funding levels, action on these two items may have to be delayed.

Subpart E: Board Meetings

In response to several comments, subsection (d) of Section 101.180 "Board Meetings" has been revised to state that no oral argument will be heard at any Board meeting, except by leave of the Board. The subsection formerly stated that no oral argument will be heard unless specifically requested by the Board. This change allows a party to request oral argument. The Board notes, however, that it does not intend to change its current policy of almost never allowing oral argument at Board meetings.

The Board also received several comments on Section 101.181 "Agenda For Board Meetings". Initially, the Board wishes to clarify that "4:30 p.m. two days before a scheduled Board meeting", in the context of a Thursday Board meeting, means 4:30 p.m. on Tuesday, not 4:30 p.m. on Monday. One comment stated that if the agenda can be changed two days prior to the meeting, an affected party could miss a critical ruling. The comment suggested that agenda changes be limited to non-regulatory

items. (P.C. #24.) The Board points out that it has long been the Board's practice to issue the final agenda the afternoon before a meeting. Thus, the proposed change to limiting agenda items to those filed two days before the meeting, while not fully adopting this suggestion, does address the concern that an affected person might miss a ruling. (The Board also notes that if that affected party is on the proceeding's notice list, that party will receive the written order soon after the Board meeting.) Another comment contended that this Section will pose more of a burden to the Board than a benefit, and suggested that the Section be rewritten to provide that all filings will be placed on the agenda, but that the Board might hold the filing to the subsequent meeting unless delay or prejudice will result. The Board continues to believe that placing a cut-off on agenda items is necessary, and is fairer than deciding at the meeting to hold a document because it was only recently filed. By setting the cut-off, persons will know when a document must be filed in order for the Board to consider it at the next meeting. The Board believes that it is able to make the "undue delay or material prejudice" determination upon motion by a Board member at the meeting, without hearing or briefing by the parties or participants.

Subpart F: Ex Parte Contacts

In its January 19, 1989 order issuing these rules for "second notice comment", the Board made only one change to Section 101.200 "Ex Parte Contacts." In that order, the Board deleted the requirement in subsection (b) that Board members and staff make ex parte contacts a matter of public record. The Board received two second notice comments asking that the provision be retained. (P.C. #36, 40.) In response, the Board has added subsection (d), which requires that any ex parte contact be made part of the public record. By adding the provision as a new subsection, it now applies to both contested cases proceedings (governed by subsection (a)) and regulatory proceedings (governed by subsection (b)). The Board notes that the deletion was made only because it felt that the requirement to make ex parte contacts a part of the record was unnecessary in light of the Section's prohibition of such contacts.

Subpart G: Hearings

Section 101.220 "Authority of Hearing Officer" was the subject of several comments. The Board has made several revisions to this Section. Subsection (e) has been clarified to state that a hearing officer has the authority to regulate the course of a hearing, including but not limited to, controlling the order of proceedings. Subsection (g) has been reworded to give the hearing officer the authority to compel the answering of interrogatories or other discovery requests. This revision makes clearer that parties should conduct discovery among themselves, with intervention by the hearing officer necessary only if a problem arises. Subsection (k) has been reworded to clarify that

the hearing officer may exclude only late-filed briefs and comments from inclusion in the record. At first notice that subsection spoke of exclusion of late-filed "documents". The Board never intended to give the hearing officer power to exclude anything other than briefs and comments. One comment suggested that subsection (k) should be revised to allow exclusion of late briefs and comments only if the brief or comment is not accompanied by a motion to the Board to file instanter. (P.C. #22.) However, the Board believes that a hearing officer has authority to rule upon motions to file instanter (see proposed Section 101.247), and that his or her authority to exclude late-filed briefs and comments is not dependent upon the filing of a motion to file instanter. The hearing officer may grant or deny a motion to file instanter after considering the circumstances of that proceeding. Subsection (m) has been added to specify that a hearing officer has the authority to rule upon objections and evidentiary questions. Finally, subsection (n) has been added to clarify that a hearing officer may establish a discovery schedule.

The Board also received comments on subsection (a) of Section 101.220 "Authority of Hearing Officer." Those comments suggested that subsection (a) should also specifically provide for modification and supplementation of pre-filed testimony, and that the authority to require pre-filed testimony be limited "to the extent that the substance of the testimony can be reasonably anticipated." (P.C. #13, 22.) The Board declines to make the suggested changes. The Board believes that subsection (a) as proposed does allow the hearing officer to provide for modification and supplementation of testimony. This section, including subsection (a), is intended only to articulate the types of authority a hearing officer may use in fulfilling his or her duty to avoid delay, to maintain order, and to ensure development of a clear, complete, and concise record. The section is not a limit on the powers available to the hearing officer. Thus, the Board will not limit the hearing officer's authority to provide for pre-filing of testimony. It is also not clear whether the suggested language would pass review by JCAR. (The Board did delete the reference to rebuttal testimony from subsection (a), because it believes the reference is redundant and possibly confusing.)

Additionally, several comments suggested changes in subsection (h). The Board believes that it has addressed the CBA's concern over the use of the word "evidence" by adding a definition of evidence to Section 101.101. (P.C. #17.) Two comments suggested that this subsection be deleted, based upon a claim that a broad interpretation of the subsection (such as allowing a hearing officer to order the production of confidential data without protecting it, or ordering the production of data not already in existence) would be beyond the authority of the Board. (P.C. #24, 25.) The Board feels that a hearing officer must have authority to order production of evidence, so that discovery and hearings may run smoothly and

proceed without unnecessary delay. If a party believes that a hearing officer exceeds his or her authority, that order is appealable to the Board. The Board does wish to clarify, however, that it does not believe that it has the authority to order the production of evidence which does not already exist or cannot be compiled without imposition of an undue burden.

The Board received one second notice comment which argued that subsections (g) and (h), which allow the hearing officer to compel the answering of discovery requests and order the production of evidence, constitute a major shift in Board policy (as applied to regulatory hearings) because they delegate Board authority to the hearing officer. The comment notes that a Board member is present at every regulatory hearing, and contends that that Board member should have the obligation and responsibility to determine whether the answering of discovery requests and the production of evidence is proper. Thus, the comment suggests that the subsections be modified to allow only the attending Board member or the Board as a whole to issue such orders in regulatory proceedings. (P.C. #35.) The Board declines to make this modification. The Board first notes that although a hearing officer in a regulatory proceeding does not currently have explicit authority to issue such orders, it is always the hearing officer, not the attending Board member, who makes rulings and issue orders in rulemaking. Thus, the Board does not believe that these provisions constitute any shift in Board policy, and certainly do not show any "impersonalization" of the Board. It is the duty of the hearing officer, not the attending Board member, to develop a clean record and conduct the proceeding in an orderly and efficient manner. Indeed, the Board questions whether a Board member who is not an attorney has authority to issue such orders. The Board believes that the delegation of its authority to a single Board member might well be improper.

The Board received conflicting comments on subsection (a) of Section 101.221 "Hearing Decorum." This subsection governs the recording, either audio or visual, of Board hearings. At first notice, the subsection gave any person the right to record the proceedings subject to reasonable rules prescribed by the hearing officer. The proposal also included language from the Open Meetings Act (Ill. Rev. Stat. 1987, ch. 102, par. 42.05) which requires the hearing officer to prohibit recording of any witness who refuses to testify if that testimony is to be recorded. The Board subsequently received a comment from the Illinois News Broadcasters Association (P.C. #15), which contended that the banning of electronic coverage of Board hearings was not in compliance with the Open Meetings Act, and supported the Board's first notice proposal. On the other hand, two comments specifically opposed the recording of Board hearings on the grounds that it is disruptive and not required by the Open Meetings Act. (P.C. #24, 25.)

After consideration of these comments, and further examination of the Open Meetings Act, the Board has revised

subsection (a). The subsection now gives any person a right to record a hearing, subject to rules prescribed by the hearing officer. However, if the hearing officer determines that recording is disruptive or detrimental to proper development of the record, he or she may limit or prohibit recording. The prohibition against recording any witness who refuses to testify if that testimony is to be recorded remains in the revised subsection, and a requirement that hearing officers make witnesses aware of this provision has been added. The Board finds that its hearings are not subject to the Open Meetings Act. That statute requires all meetings of public bodies to be public meetings, with a corresponding right to record those public meetings. However, a meeting is defined as "any gathering of a majority of a quorum of the members of a public body held for the purpose of discussing public business." (Ill. Rev. Stat. 1987, ch. 102, par. 41.02.) The Board finds that this definition applies to Board meetings, but not to Board hearings, since hearings are only very rarely attended by a "majority of a quorum" of Board members. Additionally, hearings are not held for the purpose of discussing public business, but are held for information gathering purposes. Thus, the Board finds that the Open Meetings Act does not apply to its hearings. However, the subsection governing recording of hearings has been written to give any person the right to record, subject to rules prescribed by the hearing officer. Only if the hearing officer finds that recording is disruptive or detrimental to proper development of the record may he or she limit or prohibit recording. The Board believes that these provisions will allow recording of most Board hearings while also allowing the hearing officer to control the hearing, thus striking a balance between the differing interests expressed in comments.

Subpart H: Motion Practice

This Subpart inspired quite a few comments. Two comments suggested that subsection (a) of Section 101.241 "Filing of Motions And Responses" should specify which motions must be directed to the Board and which motions should generally be directed to the hearing officer. This issue is addressed in Section 101.247(a) "Disposition Of Motion", which allows a hearing officer to rule upon all motions except motions specifically set forth in that subsection. Subsection (a) has been revised to require that three copies of any motion directed to the hearing officer be filed with the Clerk, instead of two copies. This allows for a copy for each of the Board's two downstate offices, as well as a copy for the Clerk's file in Chicago.

Subsection (b) has been revised to clarify that the right to file a response to a motion belongs only to a participant (if a regulatory proceeding) or a party (if a contested case). The phrase "participant or party" is used because this Part applies to all Board proceedings, not to extend any right to respond to a non-party in a contested case. (The Board again points out that

although this Part applies to all Board proceedings, to the extent that any of the more specific Parts of the procedural rules conflict with or supplement Part 101, that more specific Part applies. See proposed Sections 101.100, 101.140, and 101.240.) Additionally, a sentence has been added to subsection (b) to provide that unless material prejudice or undue delay would result, neither the Board nor the hearing officer will grant any motion before the expiration of the 7-day response period. Please note that this provision does not preclude the Board from denying a motion within that period, since ordinarily the denial of a motion will not prejudice the responding party or participant. However, in most cases the Board or the hearing officer will not take any action on a motion until after the 7-day response period has passed. Only in cases where undue delay or material prejudice would result (for example, where a statutory decision deadline is approaching) will the Board or hearing officer act before expiration of the response period.

Section 101.243 "Motions Attacking Jurisdiction Or Sufficiency Of The Pleadings" has been completely rewritten. Subsection (a) requires all motions to strike or dismiss challenging the sufficiency of any pleading to be filed within 21 days after service of the challenged document. In a regulatory proceeding, however, such motions must be filed within 30 days of the Board order formally accepting the regulatory proposal for hearing. (See Application of Procedural Amendments of P.A. 85-1048 to Newly-filed and Pending Regulatory Proceedings, RES 89-1, pp. 5-6 (January 5, 1989).) This distinction is designed to address the problem raised by the Illinois Steel Group: that because a proponent is required to file a regulatory proposal only with the the Board and other state agencies, it often takes longer for a person to even learn that a proposal has been filed. (P.C. #22.) These provisions are entirely new, and are based largely on comments by the Agency. (P.C. #19.)

Section 101.243(b) has also been revised. Instead of requiring all motions challenging the jurisdiction of the Board to be filed within 14 days after service of the initial filing, as was proposed at first notice, the subsection now requires all jurisdictional motions to be filed before the movant files any other document. This provision ensures that jurisdictional objections are raised "up front", while allowing a party who is joined during the pendancy of a proceeding to raise such objections at that party's first opportunity. Finally, a sentence has been added to Section 101.247(a) "Disposition Of Motion" which specifies that if a hearing officer refuses to act upon any motion which he or she has the authority to rule upon, he or she will refer that motion to the Board within five days of the filing of any response.

Subpart I: Discovery

This Subpart produced more comments, both at hearing and in writing, than any other single Subpart. The controversy seemed

to be centered on three issues: 1) does the Board have any discretion, pursuant to Section 5(e) of the Act, to refuse to issue a subpoena; 2) does the Board have authority to use its subpoena and production of information authority to order the production of data or information which does not already exist in the required form; and 3) can the Board's discovery authority be used to order production of information in any forum other than in connection with a hearing on a currently pending Board proceeding.

After a review of Section 5(e) of the Act, the Board concludes that it must issue a subpoena upon the request of any party to a variance, enforcement or permit review proceeding, a proceeding to remove a seal, and any proceeding to review a final determination made pursuant to the Act or Board regulation. On the other hand, the issuance of a subpoena in a regulatory proceeding is discretionary. The Board believes that although it must issue a subpoena in adjudicatory cases it does have the necessary authority to review that subpoena and rule upon any motion to quash the subpoena. The Board or hearing officer may quash or modify a subpoena if it finds that the subpoena is unreasonable, oppressive, or irrelevant.*

In its January 19 order, the Board chose not to reflect the statutory difference between the required issuance of subpoenas in adjudicatory cases and the discretionary issuance in regulatory proceedings in Section 101.260 "Subpoenas". Instead, the proposed Section required the Clerk to issue subpoenas at the request of any party or participant. The Board proposed the rule in that manner in an attempt to provide quick and efficient issuance of subpoenas, with the safeguard of a motion to quash or modify the subpoenas. After consideration of the second notice comments, however, the Board has decided to retain the distinction between automatic issuance of subpoenas in adjudicatory cases and discretionary issuance of subpoenas in rulemakings. Section 101.260 has been revised to reflect this distinction.

As to the remaining two issues, as previously stated, the Board does not believe that it or its hearing officers currently have authority to order the production of evidence which does not

*The Board notes that the statutory standard for subpoenas and orders to produce information "reasonably necessary to the resolution of the matter under consideration" has been stated as "relevant" in these regulations. This change has been made for purposes of JCAR review. Since the Section 101.101 definition of "relevant" includes the requirement that the information or witness be related to the establishment of any fact which is of consequence to the determination of the proceeding, the Board believes that the relevancy standard is equivalent to the statutory standard of Section 5(e) of the Act.

already exist in the required form or cannot be compiled without imposition of an undue burden. Likewise, because of the language of Section 5 of the Act, the Board finds that it does not have the authority to use its discovery powers in any way except in connection with a pending Board proceeding. In other words, the Board's discovery authority cannot be used to gather information to be used in developing a regulatory proposal. The Board is sympathetic to the concerns on this issue raised by the Agency (P.C. #19) and the United States Environmental Agency (USEPA) (P.C. #21). However, without legislative action, the language of Section 5(e) of the Act (that the Board's discovery authority may be used "in connection with any hearing") precludes the use of the Board's discovery powers to gather data for use in developing a regulatory proposal.

Subpart J: Sanctions

Subsection (a) of Section 101.280 "Sanctions For Refusal To Comply With Procedural Rules, Board Orders, or Hearing Officer Orders" has been reworded to clarify that a due date proceeding will be dismissed (as opposed to stayed) only when the non-complying party is the petitioner in such a proceeding. Several comments pointed out that the wording of this subsection at first notice erroneously implied that dismissal of a due date proceeding could be used as a sanction even where the non-complying person was not the petitioner. (P.C. #17, 22.) The Board did not intend such a result, and believes that the revision has removed that implication.

Two comments state that the Board has no authority to order the payment of expenses incurred in obtaining an order for sanctions, as is provided by Section 101.280(g). (P.C. #24, 25.) Those comments do not articulate the basis for that statement, however. The Board believes that it does indeed have the authority to order the payment of expenses. The appellate court has both explicitly and implicitly recognized the Board's authority to impose sanctions. Illinois Environmental Protection v. Celotex Corporation (3d Dist. 1988), 168 Ill. App. 3d 592, 522 N.E. 2d 888, 119 Ill. Dec. 226; Alton Packaging Corporation v. Pollution Control Board (5th Dist. 1986), 146 Ill. App. 3d 1090, 497 N.E. 2d 864; 100 Ill. Dec. 686. The Celotex court explicitly upheld the Board's promulgation of procedural rules on sanctions identical to Supreme Court Rule 219, including dismissal of an action. The Board's current rules on sanctions do not discuss the imposition of costs except as a sanction for failure or refusal to answer a discovery question, although Supreme Court Rule 219 does. See 35 Ill. Adm. Code 107.101. Compared with a sanction like dismissing an action, imposing costs is a relatively light sanction. Since the Board has authority to order an execution (dismissal with prejudice), the authority to order a slap on the wrist (imposition of costs) is clear. The Board has the power to impose sanctions so that it may control proceedings and manage its docket, and finds that it has authority to order the payment of costs.

The Board received several comments objecting to Section 101.281 "Sanctions For Abuse of Discovery Procedures." This Section is taken almost word for word from Supreme Court Rule 219(d). The Board believes that this provision provides an important remedy for possible abuses of discovery procedures, and will not delete it.

At hearing and in its written comments, the Agency stated a concern that the Board needs to apply meaningful sanctions in an even-handed way to all parties and participants. The Agency believes that such sanctions should be adhered to in the vast majority of cases where violations occur, with exceptions only when necessary to avoid injustice. Several other comments articulated a concern that sanctions might be applied only against the regulated community and not against the Agency. The Board stresses that it will apply sanctions as often as necessary, and that all participants and parties are subject to sanctions for violations of procedural rules, Board and hearing officer orders, and discovery procedures.

Subpart K: Relief From and Review Of Final Orders

Section 101.300 "Motions For Reconsideration" has been added to this Subpart for clarity. Subpart H already discusses motions for reconsideration (Section 101.246), and Section 101.300 merely cross-references to that provision. The other section numbers in this Subpart have been moved up to accommodate the addition. Additionally, a new subsection (e) has been added to Section 101.301 "Relief From Final Orders" to state that responses to any such motion shall be filed within 14 days of the filing of the motion.

The Agency has expressed concern with Section 101.301(b), which provides that the Board may relieve a party from a final order under certain circumstances. The Agency apparently fears that this provision may be used to relieve a facility from compliance with a regulation, leaving that facility unregulated. Thus, the Agency contends that the subsection should require that the Board open a new proceeding to regulate the facility in a "timely manner", and states that such action is particularly necessary for a facility located in an area subject to a state implementation plan (SIP).

Section 101.301(b) is intended to apply only to contested cases, not regulatory proceedings. This intent is indicated by the use of the word "party": as is shown in the definitions section, there are no parties in rulemakings, only participants. Thus, the Board believes that the Agency's concerns with this Section are misplaced. Nevertheless, the language of subsection (b) has been revised to clarify that this provision applies only to contested cases.

Appendixes to Part 101

Two comments asked if the various forms contained in the appendixes are mandatory. The comments reflected a concern that persons appearing before the Board, especially those unrepresented by counsel, still be allowed to file variances, permit appeals, public comments, and other filings by other means such as letter. The Board has included these forms merely as guides, not as required forms. Indeed, the forms are especially directed to those not represented by counsel, for help only. Board staff often receives questions on the correct form of various documents, and the forms are intended to be examples. The Board will continue to accept filings in the form of letters. The Board also received a comment on Illustration F of Appendix A, which provides a sample caption for administrative citations. That comment is correct that administrative citation cases were formerly caption "In the Matter of", rather than listing a complainant and a respondent. This has been changed to reflect that administrative citations are a type of enforcement case, not a regulatory proceeding.

Part 106 - ADJUSTED STANDARDS

The Board received numerous questions and comments at hearing concerning the proposed rules for adjusted standards at. In addition, many persons filed written comments subsequent to the Board's Orders of September 22, 1988 and January 19, 1989. The comments that the Board has received are varied in nature and often quite detailed. Except for those public comments which the Board has expressly excluded (see p. 2), the Board has considered all comments received; the Board does not find it necessary to discuss the substance of all comments in this Opinion.

It has been suggested that the Board does not need to adopt procedural rules for adjusted standards but that the current variance procedure need only be amended slightly to accommodate adjusted standards. (P.C. #35.) While Section 28.1 of the Act provides that adjusted standards are adjudicatory proceedings, an adjusted standard is not a variance. A variance acts as a temporary shield against enforcement of a regulatory provision while the variance recipient works toward achieving compliance with that provision. Additionally, an adjusted standard proceeding may result in a Board-adopted standard as an alternative to a particular regulation-based standard, and an adjusted standard could apply to a person for an indefinite period of time.

Public Act 85-1048 amended Section 28.1 to allow adjusted standards from any Board regulation regardless of whether that regulation expressly provides for an adjusted standard proceeding. Prior to P.A.85-1048 adjusted standards could only be obtained from regulations which expressly provided an adjusted standard option. Given this new, sweeping applicability of

adjusted standards, it is necessary to promulgate general procedures which apply to adjusted standard proceedings.

Also, there apparently is some confusion over whether the proposed rules for Subpart G of Part 106 will apply to regulatory proceedings. (P.C #35.) Just as adjusted standards are not variances, they are also not regulatory proceedings. Although standards adopted by the Board through an adjusted standard procedure have similar force and effect as standards adopted via the regulatory process, adjusted standard proceedings are exempt from the "rule-making provisions of the Illinois Administrative Procedure Act and Title VII of [the] Act". Section 28.1(a) of the Act. Consequently, the proposed rules for Part 106, Subpart G, will only apply to those persons seeking an adjusted standard pursuant to Section 28.1.

The following is an analysis of Sections which have been changed from the Board's First Notice Order of September 22, 1988.

Section 106.703 Joint or Single Petition

In response to a request by ENR the Board will require that petitions for adjusted standards which are filed with the Board must be served upon ENR in addition to the Agency.

Section 106.704 Request to Agency to Join as Co-Petitioner

Subsection (b) was changed to clarify that in the context of a request to join as co-petitioner, the Agency may require the person making the request to submit background information in that person's possession.

Subsection (d) was added to expressly provide a mechanism which would allow the Agency to join as a co-petitioner subsequent to the filing of a petition. However, this mechanism does not preclude the Agency from declining to join as a co-petitioner and filing a response, pursuant to Section 106.714, which is favorable to the adjusted standard request.

The Board believes that it is appropriate for the Agency to decline to co-petition in the event that the Agency is faced with a lack of resources with which to investigate and co-petition. Therefore, a simple statement to that effect is the minimum that would be required under this section.

Section 106.705 Petition Contents

Subsection (l) was added in response to comments that the petition content requirements may be too burdensome in some instances. The Agency requests that subsection (l) be deleted. Other commenters support the provision. Subsection (l) does not automatically relieve a petitioner from ever being required to submit certain information to the Board. Subsection (l) states:

> Notwithstanding this provision, the Board may require the petitioner to amend its petition to fully comply with informational requirements set forth by this Section or to provide the Board with additional material which will aid the Board in its resolution of the adjusted standards proceeding.

That is, the Board can still require the petitioner to meet the petition requirements of Section 106.705. In addition, the Board may find the petition deficient and order the petitioner to provide further information to more fully address the petition requirements or to aid the Board in its decision-making process. If the petitioner fails to comply with such a Board Order, the Board may dismiss such a petition pursuant to Section 106.902.

The Agency and the U.S. EPA request that the Board re-write Section 106.705 to provide for detailed, media-specific petition requirements. The Agency has referred the Board to its November 7, 1988 comments for suggested requirements. The Agency appended to those comments proposed requirements for adjusted standard petitions concerning air, water and public water supply. The Agency's proposed language for those particular areas consist of 11 pages of detailed informational requirements. No other Board procedures prescribing petition requirements even come close to the level of detail suggested by the Agency. It is not the intent of the Board to promulgate media-specific procedural rules for adjusted standards. The adjusted standard provision of the Act applies to all regulations governing every environmental regulatory medium, from hazardous waste to noise. The proposed rules are written generally in order to accomodate all types of activities which may be the subject of an adjusted standard provision.

Section 106.808 states that the burden of proof in an adjusted standard is on the petitioner. If a petitioner fails to provide the Board with the necessary information to enable the Board to make a decision on the petition, the petitioner does so at its own risk. As stated in the discussion concerning subsection (1) of Section 106.705, the Board may require the petitioner to provide additional information in its petition. If the petitioner fails to do so, the Board may dismiss the petition pursuant to Section 106.902. The Board has utilized such more-information Orders in dealing with deficient variance petitions. There is no apparent reason why such a mechanism could not be sucessfully applied to an adjusted standard proceeding.

Also, the petition must show that the proposed adjusted standard may be granted consistent with federal law. Both Section 28.1(c)(4) and proposed Section 106.903(a) require the petitioner to prove that the proposed adjusted standard is

consistent with applicable federal law. In addition, the petitioner must identify any procedural requirements, such as a hearing, which are mandated by federal law and necessary for ultimate federal approval of the adjusted standard.

If the Agency is not a co-petitioner, it must file a response. In that response, the Agency must address the petition's assertions which must include the statements concerning federal law. If the Agency believes that the petition is deficient, the Agency shall identify how it is deficient in the response.

The Board is adding Section 106.715 (see following) to expressly allow for amended petitions and amended responses. This makes it clear that the petitioner may amend its petition to address Agency concerns which are identified through informal communications with the Agency or by way of an Agency response filed pursuant to Section 106.714.

In summary, there are methods to correct deficient petitions for adjusted standards. If the petitioner does not ultimately provide the Board with adequate information to support its request for an adjusted standard, such a request will be denied and the regulation of general applicability or a standard equivalent to that regulation will apply to that person.

A number of commenters stated that the language of (g) is redundant. In part, subsection (g) provides:

> The quantitative and qualitative impact of the petitioner's activity on the environment if the petitioner were to comply with the regulation of general applicability as compared to the quantitative and qualitative impact on the environment if the petitioner were to comply only with the proposed adjusted standard... Also, the petitioner shall compare the qualitative and quantitative nature of emissions, discharges or releases which would be expected from compliance with the regulation of general applicability as opposed to that which would be expected from compliance with the proposed adjusted standard. (empahasis added)

The first sentence requires an evaluation of environmental impact, whereas the last sentence requires an evaluation of the emissions, discharges or releases. The environmental impact resulting from emissions is not equivalent to a description of the emissions. The Board fails to see how subsection (g) is redundant in its requirements.

The Board has also received comments that subsection (e) be changed so that the petitioner need only provide costs for the

least costly alternative for compliance with the regulation of general applicability. (P.C. #38,39.) The proposed subsection (e) requires that all compliance alternatives with the corresponding costs for each alternative be discussed. The intent behind this subsection is to ensure that the Board is fully informed as to all options of compliance with the regulation of general applicability. This naturally includes cost information. Obviously, other persons may disagree with the cost conclusions of the petitioner. Subsection (e) requires disclosure of estimates upon which the petitioner is drawing its conclusions. This will enable other persons, and more importantly the Board, to independently evaluate whether the petitioner has presented adequate justification for an adjusted standard.

The Board is not looking for detailed itemized cost data for the compliance alternatives in an initial petition, although such information may be required later by the Board; broad estimates of costs may be acceptable. The Board's requirement ensures that the petitioner itself, at least on a general level has evaluated the costs for each compliance alternative. Furthermore, if the commenters are willing to provide cost information regarding the least costly compliance alternative, it would not be much of a burden to give the Board cost estimates for the other alternatives. In other words, if the petitioner did not have cost estimates for each compliance alternative, then it could not conclude which of those alternatives was the "least costly" alternative. To conclude, the Board is not convinced that this subsection should be altered.

The Board has made some other minor changes to proposed Section 106.705. The Agency requested to add the words "discharges and releases" when describing the effect of the activity at issue in the adjusted standard petition. The Board has modified subsection (c) to require the petitioner to identify all requirements and present information necessary for an adjusted standard as prescribed by the regulation of general applicability. Also, the Agency suggested that subsection (d) be clarified so that the number of employees relate to the facility in question rather than the petitioner. The Board accepts both of those changes. The Board has also added a sentence to subsection (g) to define the term "cross-media" impacts. Finally, it is the Board's intent that subsection (k) require a petitioner to append to its petition relevant portions of cited federal authorities.

Section 106.706 Petition Verification

It was suggested by one commenter that a petition need only be verified by affidavit when the petitioner has waived a hearing and that a waiver of a previously scheduled hearing will only be effective when accompanied by an affidavit verifying the petition. (P.C. #22.) The Board finds that it makes more sense for an affidavit verifying a document to be filed with that

document and not sometime, perhaps even months, after the document is filed. This would in turn also allow the quick waiver and cancellation of a hearing without delay for preparation of an affidavit verifying the petition. The Board cannot see how requiring that an affidavit be filed with each petition would impose an unreasonable burden upon the petitioner. As a result, the Board has not changed this Section.

Section 106.707 Federal Procedural Requirements

This Section has been modified, in response to some comments (P.C. #24, 25.), so as to clarify that a petitioner does not have a duty to ensure that the Board acts in compliance with federal procedural requirements. However, this does not relieve the petitioner from the duty to inform the Board of applicable federal requirements pursuant to Section 106.705(i), or to carry out federal requirements which the petitioner itself is capable of fulfilling.

Section 106.708 Incorporated Material

This Section has been altered to state that the incorporation procedure set forth by 35 Ill. Adm. Code 101.106 is applicable to adjusted standard proceedings.

Section 106.710 Service of Filings

At the request of ENR, the Board has changed this Section to provide that ENR be served with all filings. In addition, the Board or a hearing officer may require that persons other than the petitioner, Agency or ENR be served with filings.

Section 106.711 Petition Notice

The Board received comments that the time allotted for publication of a petition notice is too short. (P.C. #24, 25, 39.) The requirement that the petitioner publish a petition notice within 14 days after the filing of a petition is mandated by Section 28.1(d) of the Act. That relevant provision states:

> (d) The Board shall adopt procedures applicable to such adjusted standards determinations which, at a minimum, shall provide: (1) that the petitioner shall submit to the Board proof that, within 14 days after the filing of the petition, it has published notice of the filing of the petition by advertisement in a newspaper of general circulation in the area likely to be affected.

As a result, the Board is unable to change Section 106.711 as it relates to the timing of the publication of the petition notice.

Also, one commenter requested that members of the public who file a request for hearing serve such a request upon the petitioner. According to the commenter this would provide a needed mechanism to inform the petitioner as to whether a member of the public has requested a hearing. The Board does not believe that such a requirement is necessary. The petitioner will know when its petition notice will be published. Since a member of the public must file a hearing request within 21 days after the date of the publication of the petition notice, the petitioner knows when to contact the Clerk in order to determine whether the Board has received a hearing request.

Current variance procedures provide that a member of the public may trigger a hearing by filing an objection. That procedure does not require that the member of the public serve a copy of the objection on the variance petitioner. The Clerk, though, sends the petitioner a copy of the objection received. To the extent of the Board's knowledge, such a procedure has not caused problems.

In addition, requiring that a member of the public directly send to the petitioner his or her hearing request may have a chilling effect upon the public's participation in a proceeding. A person objecting to the petitioner's request might be reluctant to contact the petitioner directly. Moreover, the Act does not provide for such a procedure.

However the Board will modify Section 106.713 to provide that the Clerk will send copies of timely hearing requests to the petitioner, Agency, and ENR.

Subsection (c) of Section 106.711 has been added to provide that the Board will notice the filing of an adjusted standard petition in the Environmental Register. Such a procedure is an additional notice mechanism and is not intended to supplant the statutorily required newspaper notice of subsections (a) and (b).

The last sentence of subsection (e) which was proposed on January 19, 1989 has been deleted to avoid confusion concerning the necessary timing of hearing requests.

Section 106.712 Proof of Petition Notice

The Board received comments requesting that this Section be changed in order to provide more time for the filing of the certificate of publication. The concern is that the infrequent publication of smaller newspapers may not allow the timely filing of such proof of petition notice. Commenters request that the certificate of publication should be due 21 or 28 days after the date of the publication. As the Section is drafted currently, even if publication is made on the 14th day after a petition is filed, the petitioner still has an additional 16 days to file proof of publication with the Board.

The petitioner controls the filing date of its own petition. Correspondingly, the petitioner can prepare to have the petition notice published soon after that filing date. It does not seem unreasonable to require that proof of the publication be filed 30 days after the petition is filed, particularly when the publication must occur within 14 days after the petition is filed.

Section 106.713 Request for Public Hearing

This Section was modified to make it clear that a request for public hearing must be filed within 21 days after the newspaper publication of the petition notice in accordance with subsection (a) and (b) of Section 106.711. That is, the 21 day period is not triggered by any notice published in the Environmental Register.

Section 106.715 Amended Petition and Amended Response

This Section expressly provides that a petitioner may amend its petition and correspondingly the Agency shall file an amended response. Such amendments may be made prior to the close of a hearing, if a hearing is held in the proceeding. Alternatively, if no hearing is held amendments may occur anytime prior to the Board's decision. However, the Agency is given 30 days to issue its amended response. If the Agency does not wish to change its position after considering the petitioner's amendment, such may be stated in its "Amended Response". Also, the Agency may amend its previously filed response even if the petitioner has not amended its petition. In such an instance, an Agency response may only be amended prior to the close of the hearing if a hearing is held or prior to the Board's decision if a hearing is not held.

As amendments to the petition and response may change facts, positions, or issues previously presented to the Board, such amendments may properly be a basis for the Board to: hold a hearing when one was previously considered unnecessary; grant a continuance of a previously scheduled hearing; postpone a decision on the proceeding; require the re-noticing of a petition in a newspaper; or cause other appropriate actions to be taken.

Section 106.801 Hearing Scheduled

Comments stated that the Board should provide notice to the petitioner when the Board determines, in its discretion, that a hearing should be held. When the Board determines that a hearing should be held, it will assign a hearing officer to the proceeding. That hearing officer may consult with the petitioner on a hearing date, and once the hearing date is set, the petitioner will be notified by the hearing officer of the hearing. The Board believes that this mechanism is adequate to inform the petitioner that a hearing will be held.

Additionally, this Section will require that the hearing officer must make an attempt to consult with the petitioner and the Agency prior to the scheduling of a hearing.

Section 106.803 Pre-hearing Submission of Testimony and Exhibits

Some comments were filed suggesting that pre-hearing submission of testimony may not benefit all proceedings. Other comments filed by the Agency and U.S. EPA, request that the Board require the pre-hearing submission of testimony in all adjusted standard proceedings. The Board will retain the provision which leaves the decision up to the hearing officer to determine whether pre-hearing submissions shall be required. The Board has added language to give some guidance as to when the pre-hearing submissions may be required. Specifically, the hearing officer may require pre-hearing submissions if the "hearing officer determines that such a procedure would provide for a more efficient hearing".

Subsection (a) has also been altered to expressly allow the hearing officer to stagger the pre-hearing submission of testimony and exhibits to reflect that the petitioner has the burden of proof. For example, the petitioner's testimony would be submitted first. Then, sometime later the Agency and other persons may file their testimony in response to that submitted by the petitioner. Also, the hearing officer may allow the petitioner to file its rebuttal testimony, if any, prior to hearing.

The subsection has also been changed to require that service of pre-hearing submissions upon other persons be initiated on or before the date the submissions are filed with the Board. This was done in response to comments that the previous requirement concerning service was too burdensome.

The Board received comments that the pre-hearing submissions should be subject to modification at hearing. Subsection (b) provides a mechanism for making changes to pre-hearing submissions. If such changes are non-substantive or would not materially prejudice another person's participation at hearing, they may be allowed by the hearing officer. For pre-hearing submissions to have any value, they must be reliable. Hence, changes at hearing to pre-hearing submissions must be limited or at least scrutinized. Obviously, if a situation develops where pre-hearing submissions are wholely unreliable the hearing officer may vacate the order which required the pre-hearing filing of testimony and exhibits. Then, a person's hearing presentation would not be bound in any way by any pre-hearing submission.

Section 106.804 Discovery

This Section was revised to make clear that issuance of

subpoenas, as well as the production of information, in adjusted standard proceedings must be accomplished pursuant to Subpart I of 35 Ill. Adm. Code 101.

Section 106.805 Admissible Evidence

Subsection (c) was altered to make it clear that the hearing officer can order any part of a record to be incorporated into an adjusted standard proceeding.

The Board has changed subsection (e) to expressly state that a hearing officer may limit testimony and questioning pursuant to 35 Ill. Adm. Code 101.220.

Section 106.806 Order of Hearing

Language was added to subsection (f), at the request of the Agency, to ensure that the testimony and exhibits presented by the petitioner on rebuttal are limited to the rebutting of evidence presented by the Agency and other persons.

Section 106.807 Post-hearing Comments

The Board will retain the requirement that no new information may be entered into the record by way of post-hearing comments. The post-hearing comments are intended to address, comment upon, or argue from the record which has been built by the hearing process. The post-hearing comment procedure is not an additional mechanism by which to build the evidentiary portion of the record.

Although some commenters do not wish to be bound by such a requirement, the Board must, at some time during a proceeding, draw the line as to when it closes the evidentiary portion of the record. That line is now drawn prior to the submission of post-hearing comments.

The timing of the submission of post-hearing comments may be staggered pursuant to hearing officer order to reflect the petitioner's burden of proof. For example, the hearing officer may require that the petitioner file comments first. Then, other persons would file their comments, and the petitioner's rebuttal comments would be filed last.

Additionally, the Board has received comments that 14 days is too short of a time period in which to file post-hearing comments. This mischaracterizes the requirement of the proposed Section. The 14-day time period only applies if the hearing officer does not set a different comment deadline. This reflects the Board's intent that the proceedings not be prolonged unnecessarily once the evidentiary record has been closed.

Section 106.808 Burden of Proof

Commenters have stated that this Section is unnecessary since the burden of proof issue is addressed by the Act. Other proposed Sections present issues which are addressed by the Act; however, it is the Board's intent that these rules fully explain the adjusted standard process. The Board finds nothing wrong with re-stating provisions of the Act in order to effectuate that intent.

Section 106.903 Board Decision

The Board has added the introductory language of this Section to make it clear that the Act requires that the petitioner justify an adjusted standard consistent with Section 27(a) of the Act.

The Board received some comments that it is not appropriate to include a standard of proof within procedural rules. The Board has deleted the phrase "by a preponderance of the evidence". No other Board procedural rule includes such a standard of proof. Neither does the Act expressly prescribe a standard of proof for Board deliberations.

Section 106.906 Publication of Adjusted Standards

The Board has added subsection (a) to provide that adjusted standards adopted by the Board will be published in the Environmental Register. This will help notify the public concerning adopted adjusted standards.

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SUBTITLE A: GENERAL PROVISIONS
CHAPTER I: POLLUTION CONTROL BOARD

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AUTHORITY: Authorized by Section 26 of the Environmental Protection Act (Ill. Rev. Stat. 1987, ch. 111½ par. 1026); and implementing Sections 5, 7.1, 7.2, 27, 28, 29, 31, 32, 33, 35, 36, 37, 38, 40 and 41 of the Environmental Protection Act (Ill. Rev. Stat. 1985, ch. 111½ pars, 1005, 1007.1, 1007.2, 1027, 1028, 1029, 1031, 1032, 1033, 1035, 1036, 1037, 1038, 1040 and 1041); and Section 4 of "An Act in relation to natural resources, research, data collection and environmental studies," approved and effective July 14, 1978, as amended (Ill. Rev. Stat. 1987, ch. 96½ par. 7404).

SOURCE: Filed with Secretary of State January 1, 1978; codified 6 Ill. Reg. 8357; Part repealed , new Part adopted in R88-5(A) at _____ Ill. Reg. _____ effective _____.

NOTE: Capitalization denotes statutory language.

SUBPART A: GENERAL PROVISIONS

Section 101.100 Applicability

a) This Part governs the practices and procedures of the Pollution Control Board, and contains rules which are applicable to all proceedings conducted by the Board. This Part should be read in conjunction with 35 Ill. Adm. Code 102 through 120, which contain rules applicable to specific proceedings conducted by the Board. The provisions of this Part apply to 35 Ill. Adm. Code 102 through 120; however, in the event of a conflict between the rules of this Part and subsequent Parts, the more specific requirement of the subsequent Part applies.

b) The provisions of the Code of Civil Procedure (Ill. Rev. Stat. 1987, ch. 110, par. 1-101 et seq.) and the Illinois Supreme Court Rules (Ill. Rev. Stat. 1987, ch. 110A, par. 1 et seq.) do not expressly apply to proceedings before the Board. However, in any absence of a specific provision in these procedural rules to govern a particular situation, the parties or participants may argue that a particular provision of the Code of Civil Procedure or the Illinois Supreme Court Rules provides guidance for the Board or hearing officer.

c) The provisions contained in this Part and in 35 Ill. Adm. Code 102 through 120 are in addition to the provisions of the Illinois Administrative Procedure Act (Ill. Rev. Stat. 1987, ch. 127, par. 1001 et seq.), unless otherwise provided by the Act.

Section 101.101 Definitions

The definitions of the Environmental Protection Act (Ill. Rev. Stat. 1987, ch. 111 1/2, par. 1001 et seq.) apply to this Part unless otherwise provided. The following definitions also 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.

"Clean Air Act" means the federal Clean Air Act (42 U.S.C. 7401 et seq. (1988)).

"Clean Water Act" means the federal Clean Water Act (35 U.S.C. 1251 et seq. (1988)).

"Clerk" means the Clerk of the Board.

"Contested case" means an adjudicatory proceeding, including but not limited to enforcement, variance, permit appeal, adjusted standard, and administrative citation, proceedings, but not including regulatory, quasi-legislative, informational, or similar proceedings.

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

"DNS" means the Illinois Department of Nuclear Safety.

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

"Evidence" means a paper, drawing, map, chart, report, study, or other tangible thing produced and submitted at hearing, or testimony received at hearing.

"Initial filing" means the filing which initiates a Board proceeding. For example, the initial filing in an enforcement proceeding is the complaint; in a permit appeal is a petition for review, and in a regulatory proceeding is the proposal. There is only one initial filing in each Board proceeding.

"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, 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.

"Party" means a person authorized by the Act to bring, defend, or intervene in a contested case before the Board.

"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.

"Procedural rules" means the Board's procedural rules, contained in 35 Ill. Adm. Code 101 through 120.

"Registered agent" means a person registered with the Secretary of State for the purpose of accepting service of notices for any entity, or a person otherwise authorized in writing as an agent for the purpose of accepting service of notices for that entity in Board proceedings.

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

"RCRA" means the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 (42 U.S.C. 6901 et seq. (1988)).

"SDWA" means the federal Safe Drinking Water Act (42 U.S.C. 300f et seq. (1988)).

"Site-specific rule" means a proposed or adopted regulation, not of general applicability, which applies only to a specific facility or geographic site.

"USEPA" means the United States Environmental Protection Agency.

Section 101.102 Filing Of Documents

a) Documents and requests permitted or required to be filed with the Board or its Clerk shall be addressed and mailed to or filed with the Clerk at 100 West Randolph Street, State of Illinois Center, Suite 11-500, Chicago, Illinois 60601. Filing, inspection, and copying of documents may be done in the Clerk's office from 8:30 a.m. to 4:30 p.m. Monday through Friday, except for national and state legal holidays. The Board offices are open from 8:30 a.m. to 5:00 p.m. Monday through Friday, except for national and state legal holidays.

b) Filings received after 4:30 p.m. will be date-stamped the following business day.

c) Documents may be filed with the Clerk by certified, registered, or First Class mail, by messenger service, or personally at the Board's Chicago office. Filing by electronic transmission, such as telefax machine or computer modem, will not be accepted, except when specifically requested by the Board.

d) The time of filing of documents will be the date on which they are date-stamped by the Clerk, unless date-stamped after any due date. If received after any due date, the time of mailing shall be deemed the time of filing. Proof of mailing shall be made pursuant to Section 101.143. However, the time for a decision deadline pursuant to Sections 38, 40, 40.1, and 41 of the Act does not begin until the date on which the initial filing in such a proceeding is date-stamped by the Clerk.

e) Notwithstanding subsection (d), the Board or the hearing officer may accelerate a filing schedule to prevent undue delay, upon written notice to the participants or parties. The notice will specify a date by which the document must be received in the Clerk's office.

Section 101.103 Form Of Documents

a) Documents shall clearly show the title of the proceeding in which they are filed. Appendix A of this Part sets forth examples of proper captions. Documents shall bear a heading which clearly describes the nature of the relief sought, such as, but not limited to "Petition for Amendment to Regulation," "Complaint," "Petition for Variance," "Petition for Review," "Motion," or "Public Comment."

b) Except as otherwise provided, the original and nine (9) copies of all documents shall be filed with the Clerk. Only the original and four (4) copies of any discovery motion, deposition, interrogatory, answer to interrogatory, or subpoena need be filed with the Clerk.

c) After the filing of the initial document in a proceeding, all filings, including exhibits, shall include the Board docket number for the proceeding in which the item is to be filed. If the filing is a document, the docket number shall appear on the first page of the filing. For filings which are not documents, the docket number shall appear on a readily visible portion of the filing.

d) Documents, excluding exhibits, shall be typewritten or reproduced from typewritten copy and double-spaced on unglazed white paper of greater than 12 pound weight and measuring 8" x 10 1/2" or 8 1/2" x 11". Reproductions may be made by any process that produces legible black-on-white copies. All documents shall be fastened on the left side or in the upper left hand corner. The left margin of each page shall be at least 1 1/2 inches and the right margin at least one inch.

e) The requirements of subsections (b), (c), and (d) may be waived by the Board upon written request. A request for a filing waiver shall be presented to the Board in the form of a motion accompanied by affidavits necessary to verify any factual assertions contained in the motion. If the Board finds that compliance withthe filing requirements would impose an undue burden, the Board will grant the motion.

f) Exhibits, where possible, shall be reduced to conform to the size requirements of subsection (d). However, one non-conforming copy may be filed with the Clerk's office.

g) The original of each document filed shall be signed by the party or by its authorized representative or attorney. All documents shall bear the business address and telephone number of the attorney filing the document, or of the party who appears on his or her own behalf. The Clerk will refuse to accept for filing any document which does not comply with this subsection.

h) Except as otherwise provided by Sections 1 through 4 of "AN ACT in relation to the reproduction of public records on film and the destruction of records so reproduced" (Ill. Rev. Stat. 1987, ch. 116, pars. 35-38), or by leave of the Board, documents on microfiche are not acceptable for filing.

Section 101.104 Length Of Briefs

a) No brief in support of or in opposition to any motion shall exceed 15 pages without prior approval of the Board or hearing officer. This limit does not include appendices containing relevant material.

b) No post-hearing brief or response brief, brief submitted in response to a Board order, or public comment submitted in lieu of a brief shall exceed 50 pages without prior approval of the Board or hearing officer. No reply brief shall exceed 25 pages. These limits do not include appendices containing relevant material.

c) In considering any motion to exceed these limits, the Board or the hearing officer will take into account factors such as, but not limited to, the complexity of the proceeding, the number of issues involved, and the length of the record.

Section 101.105 Waivers

A waiver of a deadline for final Board action, as specified in Sections 38, 40, 40.1 and 41 of the Act, shall be filed as a separate document. The waiver shall be clearly titled as such, identify the proceeding by name and docket number, and be signed by the party or by his authorized representative or attorney. The waiver shall be an open waiver or a waiver until a calendar date certain. However, the Board reserves the right to accept waivers in other forms where it finds it necessary to prevent undue delay or material prejudice. A contingent waiver is not acceptable.

Section 101.106 Incorporation Of Prior Proceedings

a) Upon the separate written request of any person or on its own initiative, the Board or hearing officer may incorporate materials from the record of another Board docket into any proceeding. The person seeking incorporation shall file with the Board four copies of the material to be incorporated. The person seeking incorporation shall demonstrate to the Board or the hearing officer that the material to be incorporated is relevant to the proceeding. Notice of the request shall be given to all identified participants or parties by the person seeking incorporation.

b) The Board will give the incorporated matter the appropriate weight in light of the following factors: the standard of evidence under which the material was previously presented to the Board; the present purpose for incorporating the material; and the past and current opportunity for cross-examination of the matters asserted within the incorporated material.

Section 101.107 Appearances And Withdrawals

a) Any person entitled to participate in Board proceedings shall appear as follows:

1) A natural person on his or her own behalf or by an attorney at law licensed and registered to practice in the State of Illinois, or both.

2) A corporation, when a respondent in an enforcement case pursuant to 35 Ill. Adm. Code 103, by an attorney at law licensed and registered to practice in the State of Illinois. In all other

proceedings, a corporation may appear through any officer, employee, or representative, or by an attorney at law licensed and registered to practice in the State of Illinois, or both.

3) Any other person, including a unit of local government, through any officer, employee, or representative, or by an attorney licensed and registered to practice in the State of Illinois, or both.

b) Attorneys not licensed and registered to practice in the State of Illinois may request to appear on a particular matter on motion filed with the Board.

c) An attorney appearing in a representative capacity shall file a separate written notice of appearance with the Clerk, together with proof of service and notice of filing on all parties and participants or their representatives. A sample appearance form appears in Appendix B.

d) An attorney who has appeared in a representative capacity and who wishes to withdraw from that representation shall file a notice of withdrawal with the Clerk, together with proof of service and notice of filing on all participants or their representative. A sample notice of withdrawal appears in Appendix C.

Section 101.108 Substitution Of Attorneys

Any attorney who substitutes for an attorney of record shall file a written appearance pursuant to Section 101.107(c). That appearance shall identify the attorney for whom the substitution s made.

Section 101.109 Computation Of Time

Computation of any period of time prescribed by this Chapter or the Act shall begin with the first calendar day following the day on which the act, event or development occurs and shall run until the end of the last day, or the next business day if the last day is a Saturday, Sunday or national or state legal holiday.

SUBPART B: FILING AND PHOTOCOPYING FEES

Section 101.120 Filing Fees

a) A person filing an action for which a filing fee is prescribed by the Act shall pay that fee at the time the petition is presented to the Clerk for filing.

b) The types of petitions for which fees are required and the amount of those fees are as follows:

1) PETITION FOR SITE-SPECIFIC REGULATION, $75;

2) PETITION FOR VARIANCE, $75;

3) PETITION FOR REVIEW OF PERMIT or any petition for review pursuant to Section 40 of the Act, $75;

4) PETITION TO CONTEST LOCAL GOVERNMENT DECISION PURSUANT TO SECTION 40.1 OF THE ACT, $75; and

5) PETITION FOR ADJUSTED STANDARD PURSUANT TO SECTION 28.1 OF THE ACT, $75. (Section 7.2 of the Act.)

c) The Clerk will refuse to accept any petition which is not accompanied by the required fee. The fee must be paid in the form specified in Section 101.122.

Section 101.121 Photocopying Fees

a) All files, records, and data may be copied at Board offices in Chicago UPON PAYMENT OF REASONABLE REPRODUCTION FEES TO BE DETERMINED BY THE BOARD. (Section 7 of the Act.)

b) The Board will contract for any copying that would impose a substantial administrative burden on the Board. The person requesting such copies will be charged the reproduction charges incurred by the Board.

c) Requests for copies will be honored in as timely a manner as possible. Requests for copies by mail will be honored. However, the Board reserves the right to charge the requesting party for the mailing costs incurred by the Board.

Section 101.122 Forms Of Payment

a) Filing fees and photocopying fees may be paid by money order or check. Cash payments will be accepted, but are strongly discouraged.

b) All checks and money orders shall be made payable to the Illinois Pollution Control Board.

c) In the event that a check is not honored by petitioner's bank, the Board will enter a sanction order in that proceeding. Sanctions may include, but are not limited to, dismissal of the action for non-payment, or re-computation of any decision deadline to

exclude the time in which the filing fee remains uncollected.

SUBPART C: SERVICE

Section 101.140 Applicability

This Subpart applies to all Board proceedings generally. However, to the extent that 35 Ill. Adm. Code 102 through 120 conflict with or supplement this Subpart, that more specific Part governs.

Section 101.141 Service Of Initial Filings

A copy of all initial filings in any Board proceeding shall be served upon all persons, required by this Chapter to be served, or their registered agent. 35 Ill. Adm. Code 102 through 120 set forth more specifically who must be served in any given type of Board proceeding. Service of all initial filings shall be made personally, or by registered, certified, or First Class Mail, or by messenger service. However, initial complaints in enforcement proceedings pursuant to 35 Ill. Adm. Code 103 must be served personally, by registered or certified mail, or by messenger service.

Section 101.142 Service Of Subsequent Filings

After initial filings are served pursuant to Section 101.141, all subsequent filings shall be served personally, or by United States mail, or by messenger service.

Section 101.143 Proof Of Service

a) Service of filings is proved by:

1. In case of service by personal delivery, by certificate of the attorney, or affidavit of the person other than an attorney, who made delivery; or

2. In case of service by messenger service, by messenger service receipt; or

3. In case of service by registered or certified mail, by registered or certified mail receipt; or

4. In case of service by First Class mail, by certificate of attorney, or affidavit of person other than attorney, which states the date, time, and place of mailing, the complete address which appeared on the envelope, and the fact that proper postage was prepaid.

b) A sample certificate of service appears in Appendix E of this Part.

Section 101.144 Effective Date Of Service

a) In the case of service by personal delivery, service is complete on the date of that personal delivery.

b) In the case of service by registered or certified mail, or by messenger service, service is complete on the date specified on the registered or certified mail receipt or the messenger service receipt.

c) There is a rebuttable presumption that service by First Class mail is complete four days after mailing.

SUBPART D: PUBLIC INFORMATION

Section 101.160 Public Information

a) The Clerk will maintain files containing all information submitted to or produced by the Board or any of its members relating to matters within the Board's jurisdiction. Without limiting the foregoing, the files will include: pleadings, motions, notices, minutes, transcripts, exhibits, orders and opinions, proposed and adopted regulations, communications to or from the Board or any Board member, the Environmental Register and other Board releases, business records, informal complaints, and internal communications filed at the request of any Board member with consent of the author of that communication.

b) All files maintained by the Clerk will be open to reasonable public inspection and copying, except the following material:

1) Internal communications between and among Board members and staff (except as provided in subsection(a));

2) Material protected from public disclosure under the trade secret provisions of 35 Ill. Adm. Code 120; and

3) Material which is stamped "Not Subject to Disclosure" by Board order, pursuant to Section 101.161.

c) The Clerk shall maintain a list of all files open to public inspection.

Section 101.161 Non-Disclosable Information

a) Only the following materials may be stamped "Not Subject to Disclosure" by the Board:

1) INFORMATION WHICH CONSTITUTES A TRADE SECRET;

2) INFORMATION PRIVILEGED AGAINST INTRODUCTION IN JUDICIAL PROCEEDINGS;

3) INFORMATION CONCERNING SECRET MANUFACTURING PROCESSES OR CONFIDENTIAL DATA SUBMITTED BY ANY PERSON UNDER THE ACT; AND

4) Income and earnings data when not an issue in the proceeding. (Section 7(a) of the Act.)

b) Material will be stamped "Not Subject to Disclosure" only upon request of a Board member or upon written application at the time the material is filed. Procedures governing the identification and protection of trade secrets are found in 35 Ill. Adm. Code 120. An application for non-disclosure other than pertaining to trade secrets shall contain the following:

1) Identification of the precise material, or parts of material, for which non-disclosure is sought;

2) Indication of the particular non-disclosure category into which the material falls; and

3) A concise statement of the reasons for requesting non-disclosure. The application shall be verified and contain such data and information as will inform the Board of the nature of material for which non-disclosure is sought, the reasons why non-disclosure is necessary, and the number and title of all persons familiar with such information, and how long the material has been limited from disclosure.

c) A single copy of the material for non-disclosure shall be filed with the Clerk with the application and shall be available for examination only by Board members, Board assistants, Environmental Scientists of the Board's Scientific/Technical Section, the assigned hearing officer, the Clerk, and the Assistant Clerk. This material may also be made available to officers, employees, or authorized representatives of this State or the United States as provided in Section 7(e) of the Act. If any agency of this State or the United States is a participant in the proceeding in which the application for non-disclosure is made, the applicant shall serve those agency participants with notice of the application for non-disclosure. The Board will rule on the application and inform the applicant of its

decision. Public inspection of the material for non-disclosure shall be barred until the application has been disposed of by the Board and the time for appeal has run. The Board may enter conditional non-disclosure orders allowing withdrawal by the applicant of the material covered by such order, at which time the Board's ruling on the application shall be based on the record excluding the material so withdrawn.

d) All material found not subject to disclosure is governed by the procedures and protections of 35 Ill. Adm. Code 120.Subpart C.

Section 101.162 Publications

a) At least once each month, the Board will publish an Environmental Register containing reports of Board activities and notices of meetings and hearings. One copy will be sent to any person without charge, upon request.

b) Copies of the Act and regulations in effect will be provided without charge, by mail and at the Board's Chicago office.

c) The Board will regularly compile its decisions and orders into volumes, which subscribers may buy and receive by mail at a reasonable cost.

SUBPART E: BOARD MEETINGS

Section 101.180 Board Meetings

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

b) THE BOARD WILL HOLD AT LEAST ONE MEETING EACH MONTH AND WILL ADOPT AT THE BEGINNING OF EACH CALENDAR OR FISCAL YEAR A SCHEDULE OF MEETINGS WHICH SHALL APPEAR AT LEAST ONCE IN ITS MINUTES AND IN THE ENVIRONMENTAL REGISTER. SPECIAL MEETINGS MAY BE CALLED BY THE CHAIRMAN OR BY ANY TWO BOARD MEMBERS UPON DELIVERY OF 24 HOURS WRITTEN NOTICE TO THE OFFICE OF EACH MEMBER. PUBLIC NOTICE OF ALL MEETINGS WILL BE GIVEN AT LEAST 24 HOURS IN ADVANCE OF EACH MEETING BY POSTING AT THE BOARD'S OFFICES. IN EMERGENCIES IN WHICH A MAJORITY OF THE BOARD CERTIFIES THAT EXIGENCIES OF TIME REQUIRE, THE REQUIREMENTS OF PUBLIC NOTICE AND 24 HOUR WRITTEN NOTICE TO MEMBERS MAY BE DISPENSED WITH, AND BOARD

MEMBERS WILL RECEIVE SUCH NOTICE AS IS REASONABLE UNDER THE CIRCUMSTANCES. (Section 5 of the Act.)

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

d) No oral argument will be heard at any Board meeting, except by leave of the Board.

Section 101.181 Agenda For Board Meetings

Unless the Board determines that undue delay or material prejudice will result, no document received by the Clerk after 4:30 p.m. two days before a scheduled Board meeting will be placed on the agenda for that Board meeting. Any such filing will appear on the agenda for the next regularly scheduled Board meeting.

SUBPART F: EX PARTE CONTACTS

Section 101.200 Ex Parte Contacts

a) Contested Case Proceedings. No Board member, hearing officer, or employee of the Board shall communicate ex parte with any person not employed by the Board with respect to the substance of any contested case proceeding pending before the Board. Ex parte contacts with respect to individual pollution sources which may become the subject of such a proceeding are permissible to the extent that information so received is relevant to and received within a rulemaking proceeding, but caution shall be exercised by Board members and employees to avoid prejudging the merits of any potential case.

b) Regulatory Proceedings. Board members and employees should not permit ex parte contacts designed to influence his or her action in any regulatory proceeding after docketing and authorization of hearings. Whenever practicable, communications shall be in writing and addressed to the Board rather than to individual members.

c) Nothing in this Section shall preclude Board members, hearing officers, or employees from receiving informal complaints about individual pollution sources, or forbid such administrative contacts as would be appropriate for judges and other judicial officers.

d) In the event that an ex parte contact does occur, Board members and employees shall make that contact a matter of public record, in order that the information on

which the Board bases its decision can be subject to scrutiny and to rebuttal.

SUBPART G: HEARINGS

Section 101.220 Authority Of Hearing Officer

The hearing officer shall have the duty to conduct a fair hearing, to take all necessary action to avoid delay, to maintain order, and to ensure development of a clear, complete, and concise record. He or she shall 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 prior 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 pursuant to Section 101.261;

i) Initiate, schedule and conduct a pre-hearing conference;

j) Issue subpoenas pursuant to Section 101.260;

k) Exclude late-filed briefs and comments from inclusion in the record for decision;

l) Rule upon motions as specified in Section 101.247;

m) Rule upon objections and evidentiary questions; and

n) Establish a schedule for discovery, including a date by which discovery must be completed.

Section 101.221 Hearing Decorum

a) Hearings should be conducted with fitting dignity and decorum. Any person may record the proceedings by tape, film, or other means. The hearing officer may prescribe rules to govern such recordings. If the hearing officer determines that recording is disruptive or detrimental to proper development of the record, he or she may limit or prohibit recording. If a witness refuses to testify on the grounds that he or she may not be compelled to testify if any portion of the witness' testimony is to be broadcast or televised or if motion pictures are to be taken of the witness while the witness is testifying, the hearing officer will prohibit such recording during the testimony of the witness. The hearing officer shall make witnesses aware of this provision before the hearing begins.

b) Participants in proceedings before the Board shall at all times conduct themselves with the same degree of dignity and respect that they would before a court.

c) Board hearings are not "meetings" within the provisions of the Open Meetings Act. (Ill. Rev. Stat. 1987, ch. 102, par. 41 et seq.)

SUBPART H: MOTION PRACTICE

Section 101.240 Applicability

This Subpart applies to all Board proceedings generally. However, to the extent that 35 Ill. Adm. Code 102 through 120 conflict with or supplement this Subpart, that more specific Part governs.

Section 101.241 Filing Of Motions And Responses

a) All motions shall be in writing, unless made orally on the record during a hearing, and shall state whether directed to the Board or to the hearing officer. If the motion is directed to the Board, ten copies shall be filed with the Clerk. If the motion is directed to the hearing officer, three copies shall be filed with the Clerk and one copy served upon the hearing officer. All other participants shall be served pursuant to Section 101.142.

b) Within 7 days after service of a motion, a participant or party may file a response to the motion. If no response is filed, such participant or party shall be deemed to have waived objection to the granting of the motion, but such waiver of objection does not bind the Board or the hearing officer in the decision of the motion. Unless undue delay or material prejudice would

result, neither the Board nor the hearing officer will grant any motion before expiration of the 7-day response period.

c) The moving person shall not have the right to reply, except as permitted by the Board or the hearing officer to prevent material prejudice.

Section 101.242 Contents Of Motions And Responses

a) All motions shall clearly state the reasons for and grounds upon which the motion is made and shall contain a concise statement of the relief sought. Facts asserted which are not of record in the proceeding shall be supported by affidavit. A brief may be included.

b) All responses shall clearly state the position of the responding person and the reasons for that position. Facts asserted which are not of record in the proceeding shall be supported by affidavit. A brief may be included.

Section 101.243 Motions Attacking Jurisdiction Or Sufficiency Of The Pleadings

a) All motions to strike or dismiss challenging the sufficiency of any pleading filed with the Board shall be filed within 21 days after the service of the challenged document, unless the Board determines that material prejudice would result. In the case of a regulatory proceeding pursuant to 35 Ill. Adm. Code 102, however, motions challenging the sufficiency of a regulatory proposal shall be filed within 30 days of the Board order formally accepting that proposal for hearing.

b) All motions challenging the jurisdiction of the Board shall be filed prior to the filing of any other document by the moving participant or party, unless the Board determines that material prejudice will result. Such participant or party will be allowed to appear specially for the purpose of making such motion.

c) A person may participate in a proceeding without waiving any jurisdictional objection if such objection is timely raised pursuant to subsection (b).

Section 101.244 Motions For Summary Judgment

A motion for summary judgment prior to hearing may be made by any party to an enforcement proceeding pursuant to Title VIII of the Act or a permit appeal pursuant to Title X of the Act. Specific rules for such motions for summary judgment are found in 35 Ill.

Adm. Code 103 (enforcement proceedings) and 35 Ill. Adm. Code 105 (permit appeals).

Section 101.245 Motions Preliminary To Hearing

a) All motions preliminary to hearing shall be presented to the Board or the hearing officer at least 21 days prior to the date of hearing, unless allowed by the Board or the hearing officer to prevent material prejudice. The Board or the hearing officer may direct that the scheduled hearing proceed during the pendancy of the motion. The Board may defer ruling upon any motion, except a motion pursuant to Section 101.243, until its decision on the merits of the case.

b) No motion to continue a hearing in a proceeding with a deadline for Board action, as specified in the Act, will be granted unless the motion to continue is accompanied by a waiver of that decision deadline. The waiver shall conform with the requirements of Section 101.105.

Section 101.246 Motions For Reconsideration

a) Any motion for reconsideration or modification of a final Board order shall be filed within 35 days of the adoption of the order.

b) Any response to a motion for reconsideration or modification shall be filed within 14 days from the filing of the motion.

c) A timely-filed motion for reconsideration or modification stays the effect of the final order until final disposition of the motion. The time for appeal of the Board order runs anew after the Board rules upon the motion unless otherwise provided.

Section 101.247 Disposition Of Motion

a) The hearing officer may rule upon all motions except any motion to dismiss, motion to decide a proceeding on the merits, motion to strike any claim or defense for insufficiency or want of proof, motion claiming lack of jurisdiction, motion for consolidation, motion for summary judgment, or motion for reconsideration. The hearing officer will refer all such motions to the Board. If the hearing officer refuses to act upon any motion, he or she will refer such motion to the Board within 5 days of the filing of any response.

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 written motion. Notwithstanding, 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 and participants. A continuing objection to a hearing officer ruling must be restated at the close of hearing or in post-hearing submissions.

c) Unless otherwise ordered by the Board to prevent material prejudice, neither the filing of a motion, the certification of a question to the Board, nor any appeal to the Board of a hearing officer order shall stay the proceeding or extend the time for the performance of any act. All hearing officer orders shall remain in effect during the pendancy of any appeal to the Board.

SUBPART I: DISCOVERY

Section 101.260 Subpoenas

a) Upon request by any party to a contested case, the Clerk shall issue subpoenas for the attendance of witnesses at a hearing or deposition. Subpoena forms are available at the Board's Chicago office. The person requesting the subpoena is responsible for completing the subpoena and serving it upon the witness.

b) Upon written motion by any participant in a regulatory proceeding pursuant to 35 Ill. Adm. Code 102, the hearing officer or Board may issue subpoenas for the attendance of witnesses at a hearing or deposition. The movant is responsible for serving the subpoena upon the witness if the motion is granted.

c) Service of the subpoena must be completed 7 days before the date of the required appearance. A copy of the subpoena shall be filed with the Clerk after service upon the witness and served upon the hearing officer.

d) Subpoenas may include a command to produce books, papers, documents, or other tangible things designated therein and relevant to the matter under consideration.

e) 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, may quash or modify the subpoena if it is unreasonable, oppressive, or irrelevant. The hearing officer or the Board will rule upon motions to quash or modify material requested in the subpoena pursuant to subsection (d) in

accordance with the standards articulated in Section 101.261.

f) If the witness is a non-resident of the state, the hearing officer or Board may order specific terms and conditions in connection with his or her appearance, including payment of the witness' reasonable expenses by the person requesting the subpoena.

g) Each witness subpoenaed by a party or participant under this Section is entitled to receive witness fees from that party or participant as provided in Section 47 of "AN ACT concerning fees and salaries and to classify the several counties of this state with reference thereto." (Ill. Rev. Stat. 1987, ch. 53, par. 65.)

h) Any witness subpoenaed for a deposition may be required to attend only in the county in which he or she resides or in any other other place ordered by the Board maintains and office address.

i) Failure of any witness to comply with a subpoena shall subject the witness to sanctions under this Part, or to judicial enforcement of the subpoena. The Board may, upon proper motion by the participant or party requesting the subpoena, request the Attorney General to pursue such judicial enforcement of the subpoena on behalf of the Board.

Section 101.261 Production Of Information

The hearing officer may at any time on his or her own motion, or on motion of any participant, or at the direction of the Board, order the production of information which is relevant to the matter under consideration. The hearing officer will deny, limit, condition or regulate the production of information when necessary to prevent undue delay, undue expense, harassment, or oppression or to protect materials from disclosure consistent with the provisions of Sections 7 and 7.1 of the Act and 35 Ill. Adm. Code 101.161 and 120.

SUBPART J: SANCTIONS

Sections 101.280 Sanctions For Refusal To Comply With Procedural Rules, Board Orders, Or Hearing Officer Orders

If a party or any person unreasonably refuses to comply with any provision of 35 Ill. Adm. Code 101 through 120 or fails to comply with any order entered by the Board or the hearing officer, including any subpoena issued by the Board or hearing officer, the Board may order sanctions. In addition to remedies elsewhere specifically provided, the sanctions may include, among others, the following:

a) That further proceedings be stayed until the order or rules are complied with, except where the non-complying party is the petitioner in a petition for variance or permit appeal, such proceeding may be dismissed prior to the date on which decision is due;

b) That the offending person be barred from filing any other pleading relating to any issue to which the refusal or failure relates;

c) That the offending person be barred from maintaining any particular claim, counter claim, third-party complaint, or defense relating to that issue;

d) That a witness be barred from testifying concerning that issue;

e) That, as to claims or defenses asserted in any pleading to which that issue is material, a judgment by default be entered against the offending person or that the proceeding be dismissed with or without prejudice;

f) That any portion of the offending person's pleadings relating to that issue be stricken and, if appropriate, judgment be entered as to that issue;

g) That the offending person pay the amount of reasonable expenstificate of attorney, or affidavit of person other than attorney, which states the date, time, and place of mailing, the complete address which appeared on the envelope, and the fact that proper postage was prepaid.

Section 101.281 Sanctions For Abuse Of Discovery Procedures

The Board or the hearing officer may order that information obtained through abuse of discovery procedures be suppressed. If a person wilfully obtains or attempts to obtain information by an improper discovery method, wilfully obtains or attempts to obtain information to which that person is not entitled, or otherwise abuses discovery rules, the Board may enter any order provided for in this Subpart.

SUBPART K: RELIEF FROM AND REVIEW OF FINAL ORDERS

Section 101.300 Motions for Reconsideration

Motions for reconsideration or modification of a final Board order shall be filed within 35 days of the order, pursuant to Section 101.246. Responses to such motions are also governed by Section 101.246.

Section 101.301 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 anytime on its own initiative or on the motion of any party and after such notice, if any, as the Board orders. Such mistakes may be so corrected by the Board before any appeal is docketed in the appellate court. Thereafter, while the appeal is pending, such mistakes may be corrected with leave of the appellate court. Any corrected order will be mailed to all parties and participants in that proceeding.

b) On written motion, the Board may relieve a party from a final order entered in a contested case, 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

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

3) Void order, such as an order based upon jurisdictional defects.

c) A motion under this Section does not affect the finality of a Board order or suspend the operation of a Board order. The motion must be filed in the same proceeding in which the order was entered but is not a continuation of the proceeding. The motion must be supported by affidavit or other appropriate showing as to matters not of record. All parties or participants in the proceeding shall be notified by the movant as provided by Section 101.141(a).

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

e) Any response to a motion under this Section shall be filed within 14 days of the filing of the motion.

Section 101.302 Judicial Review Of Final Board Orders

a) Judicial review of final Board orders shall be pursuant to Sections 29 and 41 of the Act (Ill. Rev. Stat. 1987, ch. 111 1/2, pars. 1029 and 1041), Rule 335 of the Rules of the Supreme Court of Illinois (Ill. Rev. Stat.

1987, ch. 110A, par. 335) and the Administrative Review Law (Ill. Rev. Stat. 1087, ch. 110, pars. 3-101 et seq.)

b) For purposes of judicial review, Board action becomes final upon adoption of the Board's final order in a proceeding, or upon subsequent Board action if any motion for reconsideration is filed pursuant to Section 101.246.

Section 101.303 Stay Procedures

The procedure for stay of any Board order during appeal shall be as provided in Rule 335 of the Rules of the Supreme Court of Illinois.

Section 101.304 Interlocutory Appeals

a) When the Board, in making an interlocutory order not otherwise appealable, finds pursuant to Rule 308 of the Illinois Supreme Court Rules (Ill. Rev. Stat. 1987, ch. 110A, par. 308) that the order involves a question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, the Board may so state in writing, identifying the question of law involved, on its own motion or on motion of any party.

b) Appeal of such interlocutory order by the Board shall be in accordance with Rule 308 of the Supreme Court of Illinois.

Appendix A Captions

Illustration A General Rulemaking

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	
REVISION OF THE FLUORIDE	)	
DRINKING WATER STANDARD:	)	(Rulemaking)
AMENDMENTS TO 35 ILL. ADM.	)	
CODE XXX.XXX	)	

Illustration B Site-specific Rulemaking

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	
PETITION OF ABC COMPANY FOR	)	R
SITE-SPECIFIC AIR REGULATION:	)	(Site-Specific
35 ILL. ADM. CODE XXX.XXX	)	Rulemaking)

Illustration C Adjusted Standard Petition

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	
PETITION OF ABC COMPANY (AND	)	AS
THE ILLINOIS ENVIRONMENTAL	)	(Adjusted standard)
PROTECTION AGENCY) FOR ADJUSTED	)	
STANDARD FROM 35 ILL. ADM. CODE	)	
XXX.XXX	)	

Illustration D Permit Appeal Or Variance

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

ABC COMPANY,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	PCB
ILLINOIS ENVIRONMENTAL	)	(Permit Appeal or
PROTECTION AGENCY,	)	Variance)
	)	
Respondent.	)	

Illustration E Enforcement Case

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, (or OTHER PERSON'S NAME),	)	
Complainant,	)	
v.	)	PCB (Enforcement)
ABC COMPANY,	)	
Respondent.	)	

Illustration F Administrative Citation

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY (or UNIT OF LOCAL GOVERNMENT),	)	
Complainant,	)	
v.	)	AC-
ABC COMPANY,	)	(Administrative Citation IEPA Number
Respondent.	)	

Appendix B Appearance Form

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

APPLICABLE CAPTION (see Appendix A)	))))))))	docket number

APPEARANCE

I hereby file my appearance in this proceeding, on behalf of ABC Company.

_____
Attorney's Name

Name of Attorney and Firm
Address
Telephone Number

Appendix C Withdrawal Of Appearance Form

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

APPLICABLE CAPTION (see Appendix A)	))))))))	docket number

NOTICE OF WITHDRAWAL OF APPEARANCE

I hereby give notice of withdrawal of my appearance as representative of ABC Company in this proceeding.

_____
Attorney's Name

Name of Attorney and Firm
Address
Telephone Number

Appendix D Notice of Filing

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

APPLICABLE CAPTION (see Appendix A)	)))))))))	docket number

NOTICE OF FILING

TO: (List all persons served.)

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board the [specify what document was filed] of [name of persons filing the document], a copy of which is herewith served upon you.

_____
Name of Attorney or Other Representative

Date

Name
Address
Telephone Number

Appendix E Certificates Of Service

Illustration A Service by Non-Attorney

PROOF OF SERVICE

I, the undersigned, on oath state that I have served the attached [describe document served], by [describe method of service], upon the following persons:

(list persons served)

[signature]

Notary Seal

SUBSCRIBED AND SWORN TO BEFORE ME this ___ day of _____, 19__.

Notary Public

Illustration B Service By Attorney

CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served the attached [describe document served], by [describe method of service), upon the following persons:

(list of persons served)

Date [signature]

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

PART 106
HEARINGS PURSUANT TO SPECIFIC RULES

SUBPART G: ADJUSTED STANDARDS

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106.904	Opinion and Order
106.905	Appeal of Board Decisions
106.906	Publication of Adjusted Standards
106.907	Effect of Filing a Petition

Appendix A Old Rule Numbers Referenced

28.1 and authorized by Section 26 of the Environmental Protection Act (Ill. Rev. Stat. 1987, ch. 111½ pars. 1005, 1014.2(c), 1022.4, 1027, 1028, 1028.1 and 1026).

SOURCE: Filed with Secretary of State January 1, 1978; amended at 4 Ill. Reg. 2, page 186, effective December 27, 1979; codified at 6 Ill. Reg. 8357; amended in R85-22 at 10 Ill. Reg. 992, effective February 2, 1986; amended in R86-46 at 11 Ill. Reg. 13457, effective August 4, 1987; amended in R82-1 at 12 Ill. Reg. 12484, effective July 13, 1988; amended in R88-10 at 12 Ill. Reg. 12817, effective July 21, 1988; amended in R88-5(A) at ____ Ill. Reg._____, effective _____.

NOTE: Capitalization denotes statutory language.

SUBPART G: ADJUSTED STANDARDS

Section 106.701 Applicability

The procedures set forth in this Subpart apply to any person seeking an adjusted standard pursuant to Section 28.1 of the Illinois Environmental Protection Act, (Ill. Rev. Stat. 1987, ch. 111½ par. 1001 et seq.), except as otherwise provided in

Subparts A, B, C, D, E, and F. This Subpart shall be read in conjunction with 35 Ill. Adm. Code 101 which contains procedures generally applicable to Board proceedings. In a proceeding held pursuant to this Subpart, the requirements of this Subpart shall apply in the event of conflict between the requirements of 35 Ill. Adm. Code 101 and those of this Subpart.

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

Section 106.702 Definitions

For the purpose of this Subpart, words and terms shall have the meanings as defined in 35 Ill. Adm. Code 101.101, unless otherwise provided.

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

Section 106.703 Joint or Single Petition

A person begins an adjusted standard proceeding by filing a petition for an Adjusted Standard (petition) either jointly with the Illinois Environmental Protection Agency (Agency) or singly. One original and nine copies of the signed petition shall be filed with the Clerk of the Board. A filing fee shall be paid at the time of the filing of the petition in accordance with the requirements of 35 Ill. Adm. Code 101.120 and 101.122. One copy of the petition shall also be served on the Agency and the Department of Energy and Natural Resources (ENR). Such service on the Agency and ENR shall be initiated on the date the petition is filed with the Board, or any earlier date, and shall be conducted in accordance with 35 Ill. Adm. Code 101.141.

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

Section 106.704 Request to Agency to Join As Co-Petitioner

a) The Agency may act as a co-petitioner in any adjusted standard proceeding.

b) Any person may request Agency assistance in initiating a petition for adjusted standard. In response to a request to act as co-petitioner, the Agency may require the person to submit to the Agency any background information in the person's possession relevant to the adjusted standard which is sought. The Agency shall notify the person in writing of its determination either to join as a co-petitioner, or to decline to join as a co-petitioner. If the Agency declines to join as a co-petitioner, the Agency shall state the basis for this decision.

c) Decisions made by the Agency pursuant to this Section are not appealable to the Board.

d) Subsequent to the filing of the petition and prior to hearing, the Board grant the Agency co-petitioner status upon joint motion of the Agency and the petitioner who originally filed the petition.

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

Section 106.705 Petition Contents

The petition shall be captioned in accordance with 35 Ill. Adm. Code 101. Appendix A. If the Agency is a co-petitioner, the petition shall so state. The petition shall contain headings corresponding to the informational requirements of each subsection of this Section. The following information shall be contained in the petition:

a) A statement describing the standard from which an adjusted standard is sought. This shall include the Administrative Code citation to the regulation of general applicability imposing the standard as well as the effective date of that regulation.

b) A statement which indicates whether the regulation of general applicability was promulgated to implement, in whole or in part, the requirements of the Clean Water Act, Safe Drinking Water Act, Comprehensive Environmental Response, Compensation and Liability Act, Clean Air Act, or the State programs concerning Resource Conservation and Recovery Act (RCRA), Underground Injection Control (UIC), or National Pollutant Discharge Elimination System (NPDES).

c) The level of justification as well as other information or requirements necessary for an adjusted standard as specified by the regulation of general applicability, or a statement that the regulation of general applicability does not specify a level of justification or other requirements;

d) A description of the nature of the petitioner's activity which is the subject of the proposed adjusted standard. The description shall include the location of and area affected by the petitioner's activity. This description shall also include the number of persons employed by the petitioner's facility at issue, age of that facility, relevant pollution control equipment already in use, and the qualitative and quantitative nature of emissions, discharges or releases currently generated by the petitioner's activity;

e) A description of the efforts which would be necessary if the petitioner were to comply with the regulation of general applicability. All compliance alternatives, with the corresponding costs for each alternative, shall be discussed. The discussion of costs shall include the overall capital costs as well as the annualized capital and operating costs.

f) A narrative description of the proposed adjusted standard as well as proposed language for a Board order which would impose the standard. Efforts necessary to achieve this proposed standard and the corresponding costs shall also be presented. Such cost information shall include the overall capital cost as well as the annualized capital and operating costs;

g) The quantitative and qualitative impact of the petitioner's activity on the environment if the petitioner were to comply with the regulation of general applicability as compared to the quantitative and qualitative impact on the environment if the petitioner were to comply only with the proposed adjusted standard. To the extent applicable, cross-media impacts shall be discussed. For the purposes of this Section, cross-media impacts shall mean impacts which concern environmental subject areas other than those addressed by the regulation of general applicability and the proposed adjusted standard. Also, the petitioner shall compare the qualitative and quantitative nature of emissions, discharges or releases which would be expected from compliance with the regulation of general applicability as opposed to that which would be expected from compliance with the proposed adjusted standard;

h) A statement which explains how the petitioner seeks to justify, pursuant to the applicable level of justification, the proposed adjusted standard;

i) A statement with supporting reasons that the Board may grant the proposed adjusted standard consistent with federal law. The petitioner shall also inform the Board of all procedural requirements applicable to the Board's decision on the petition which are imposed by federal law and not required by this Subpart. Relevant regulatory and statutory authorities shall be cited;

j) A statement requesting or waiving a hearing on the petition; and

k) The petition shall cite to supporting documents or legal authorities whenever such are used as a basis for the petitioner's proof. Relevant portions of such documents and legal authorities other than Board

decisions, State regulations, statutes, and reported cases shall be appended to the petition.

l) If any informational requirement prescribed by subsections (a) through (k) is determined by the petitioner to be either not applicable or unduly burdensome, the petitioner need not fulfill that informational requirement in the petition which is initially filed, provided that an explanation detailing the rationale for such a determination and the determination itself is set forth in the appropriate portion of the petition. Notwithstanding this provision, the Board may require the petitioner to amend its petition to fully comply with informational requirements set forth by this Section or to provide the Board with additional material which will aid the Board in its resolution of the adjusted standard proceeding.

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

Section 106.706 Petition Verification

All material facts asserted within the petition shall be verified by affidavits. Such affidavits shall be filed with the petition.

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

Section 106.707 Federal Procedural Requirements

It shall be the duty of the petitioner to ensure compliance with any procedural requirements identified pursuant to Section 106.705(i) to the extent that such requirements do not require Board action.

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

Section 106.708 Incorporated Material

Incorporation of material from the record of another Board docket shall be accomplished in accordance with 35 Ill. Adm. Code 101.106.

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

Section 106.709 Motions

The filing of motions and responses to motions shall be conducted in accordance with 35 Ill. Adm. Code 101.Subpart H.

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

Section 106.710 Service of Filings

All filings in an adjusted standard proceeding shall be served upon the petitioner, the Agency, and the ENR as well as other persons as required by the Board or Hearing Officer. Proof of such service shall accompany each filing and shall be of the form as prescribed by 35 Ill. Adm. Code 101.143.

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

Section 106.711 Petition Notice

a) WITHIN FOURTEEN DAYS AFTER THE FILING OF A PETITION, THE PETITIONER SHALL CAUSE, at its own expense, THE PUBLICATION OF A NOTICE BY ADVERTISEMENT IN A NEWSPAPER OF GENERAL CIRCULATION IN THE AREA LIKELY TO BE AFFECTED by the petitioner's activity which is the subject of the adjusted standard proceeding. (Section 28.1 of the Act, Ill. Rev. Stat. 1987, ch.111½ par. 1028.1). The title of the notice shall be in the form as follows: "Notice of Petition by [petitioner's name] for an Adjusted Standard before the Illinois Pollution Control Board."

b) The notice shall contain the name and address of the petitioner and the statement that the petitioner has filed with the Illinois Pollution Control Board a petition for an adjusted standard. The notice shall also provide the date upon which the petition was filed, the Board docket number, the regulatory standard (with appropriate Administrative Code citation) from which an adjusted standard is sought, the proposed adjusted standard, and a general description of the petitioner's activity which is the subject of the adjusted standard proceeding, and the location of that activity. This information shall be presented so as to be understood in accordance with the context of this Section's requirements. The concluding portion of the notice shall read as follows:

> "Any person may cause a public hearing to be held in the above-described adjusted standard proceeding by filing a hearing request with the Illinois Pollution Control Board within 21 days after the date of the publication of this notice. The hearing request should clearly indicate the docket number

for the adjusted standard proceeding, as found in this notice, and shall be mailed to the Clerk of the Board, Illinois Pollution Control Board, 100 W. Randolph, Suite 11-500, Chicago, Illinois 60601."

c) Subsequent to the filing of a petition, the Board will publish notice in the Environmental Register that it has received a petition for an adjusted standard. The notice will include the petitioner's name, filing date, and a brief narrative description of the proposed adjusted standard as well as the standard imposed by the regulation of general applicability (accompanied by the appropriate Administrative Code Citation) from which the adopted standard is sought.

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

Section 106.712 Proof of Petition Notice

Within 30 days after the filing of the petition, the petitioner shall file a certificate of publication, issued by the publisher of the petition notice certifying the publication of that notice. The certificate shall be issued in accordance with Section 1 of "AN ACT to revise the law in relation to notices" (Ill. Rev. Stat. 1987, ch.100, par. 1).

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

Section 106.713 Request for Public Hearing

Any person may request that a public hearing be held in an adjusted standard proceeding. Such requests shall be filed not later than 21 days after the date of the publication of the petition notice in accordance subsections (a) and (b) of Section 106.711. Requests for hearing should make reference to the Board docket number assigned to the proceeding. A copy of each timely hearing request will be mailed to the petitioner, Agency, and ENR by the Clerk.

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

Section 106.714 Agency Response

a) The Agency shall file a response not later than 30 days after the filing of a petition, if the Agency is not a co-petitioner to the petition. The response shall recommend either a grant or denial of the proposed adjusted standard, and it shall set forth rationale

which supports the Agency's conclusion. In its response, the Agency may present any information which the Agency believes is relevant to the Board's consideration of the proposed adjusted standard. If the Agency recommends a denial of the petition due to informational deficiencies within the petition, the response shall identify the types of information needed to correct the deficiencies.

b) At a minimum, the Agency shall address and respond to the petition with respect to each issue raised by the requirements of subsections (a) through (j) of Section 106.705.

c) The recommendation shall cite to supporting documents or legal authorities whenever such are used as a basis for the Agency's conclusion. Relevant portions of such documents and legal authorities other than Board decisions, State regulations, statutes and reported cases shall be appended to the recommendation if not already in the record of the proceeding.

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

Section 106.715 Amended Petition and Amended Response

The petitioner may amend its petition prior to the close of the hearing if a hearing is held or prior to the Board's decision if a hearing is not held. Such an amendment shall be in writing and filed with the Board unless made orally at hearing. If the petitioner amends the petition, the Agency shall respond to the amendment in writing or orally at hearing. In any event such an amended response shall be filed or given not later than 30 days subsequent to the amending of a petition. The Agency may amend its response even if the petitioner has not amended its petition. In such an instance, a response may only be amended prior to close of the hearing if a hearing is held or prior to the Board's decision if a hearing is not held. Written amendments to the petition or response need not repeat the entire unchanged portion of the original filing provided that a sufficient portion of the original filing is repeated so that the context of the amendment is made clear.

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

Section 106.801 Hearing Scheduled

a) The Board will assign a hearing officer to an adjusted standard proceeding when:

1) The Board receives a hearing request, pursuant to Section 106.713, not later than 21 days after the

date of the publication of the petition notice in accordance with Section 106.711; or

2) The Board IN ITS DISCRETION DETERMINES THAT A HEARING WOULD BE ADVISABLE. (Section 28.1 of the Act). Such a determination need not be evidenced by a Board opinion or order.

b) The hearing officer will set a time and place for the hearing. The hearing officer will make an attempt to consult with the petitioner and the Agency prior to the scheduling of a hearing. Hearings are to be held in the county LIKELY TO BE AFFECTED by the petitioner's activity which is the subject of the proposed adjusted standard. (Section 28.1 of the Act).

c) After the hearing has been scheduled, the hearing officer will notify the Clerk, petitioner, Agency, ENR and any person who has filed a timely hearing request of the time and place of the hearing.

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

Section 106.802 Hearing Notice

After receiving notification from the hearing officer pursuant to Section 106.801(c), the Clerk will cause the publication of a hearing notice BY ADVERTISEMENT IN A NEWSPAPER OF GENERAL CIRCULATION in the county in which the hearing is to be held. SUCH NOTICE SHALL BE PUBLISHED AT LEAST 20 DAYS BEFORE THE DATE OF THE HEARING. (Section 28.1 of the Act).

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

Section 106.803 Pre-hearing Submission of Testimony and Exhibits

a) The hearing officer may require the pre-hearing submission of testimony and exhibits which are to be presented at hearing if the hearing officer determines that such a procedure will provide for a more efficient hearing. Consistent with the petitioner's burden of proof, the hearing officer may provide differing filing deadlines with respect to submissions of different persons. Pursuant to hearing officer order, rebuttal testimony and exhibits may be submitted prior to hearing. When such pre-hearing submission is required, an original and four (4) copies of each testimony and each exhibit shall be filed with the Board. The Agency, petitioner, ENR and any other person as required by the hearing officer shall each be served with one copy of each testimony and exhibit. Such

service shall be initiated on or before the date that copies are filed with the Board. All testimony and exhibits shall be bound and labeled 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.

b) 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.

c) If pre-hearing submission of testimony is required, any testimony which is not filed prior to hearing pursuant to subsection (a) will be allowed only as time permits.

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

Section 106.804 Discovery

The issuance of subpoenas and the production of information will be accomplished pursuant to the procedures set forth by 35 Ill. Adm. Code 101. Subpart I.

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

Section 106.805 Admissible Evidence

a) The hearing officer shall receive evidence which is admissible under the rules of evidence and privilege as applied in the courts of Illinois pertaining to civil actions except as this Section otherwise provides. The hearing officer may admit evidence which is not admissible under such rules if it is relevant and would be relied upon by reasonably prudent persons in the conduct of their affairs.

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 or any portion thereof of any relevant pending or prior proceeding

before the Board or part thereof incorporated into the record of the present proceeding, in accordance with Section 106.708.

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.

e) Any person may testify at hearing provided that the person is sworn and subject to cross-examination. Cross-examination of any person who presents testimony may be conducted by any person. The hearing officer may limit such testimony and cross-examination pursuant to 35 Ill. Adm. Code 101.220.

f) Information received at hearing will only be considered as substantive evidence in the Board's deliberations if it is presented as an exhibit or direct testimony, or if it is elicited from a a person under cross-examination. The Board will not consider, as substantive evidence, information which is presented in the form of a question during cross-examination.

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

Section 106.806 Order of Hearing

The following shall be the order of an adjusted standard hearing subject to modification by the hearing officer for good cause:

a) Presentation, argument, and disposition of motions preliminary to a hearing on the merits of matters raised by the petition and Agency response;

b) Presentation of opening statements by petitioner, Agency, and any interested person;

c) Testimony and exhibits by petitioner;

d) Testimony and exhibits by Agency;

e) Testimony and exhibits by interested persons;

f) Testimony and exhibits by petitioner in rebuttal. This portion of the petitioner's case is limited to the rebutting of evidence presented by the Agency or any interested

person during that part of the hearing described by subsections (d) and (e).

g) Presentation and argument of all motions to be disposed of by the Board;

h) Presentation of closing statements by the petitioner, Agency, and any interested person; and

i) A schedule for the submission of post-hearing comments to the Board.

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

Section 106.807 Post-hearing Comments

The petitioner, Agency, ENR and any interested person may file post-hearing comments. The hearing officer may order any person to file such comments. Post-hearing comments shall be filed within fourteen (14) days after the close of the last hearing unless the hearing officer specifies a different date for submission of post-hearing comments. Consistent with the petitioner's burden of proof, the hearing officer may provide for differing filing deadlines with respect to post-hearing comments by different persons. Pursuant to hearing officer order, rebuttal post-hearing comments may be submitted. All post-hearing comments shall present arguments or comments based only on information contained in the record. Such comments may also present legal argument citing legal authorities. The Board will not consider any new information presented by post-hearing comments.

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

Section 106.808 Burden of Proof

The burden of proof in an adjusted standard proceeding is on the petitioner.

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

Section 106.901 Board Deliberations

In making its decision on an adjusted standard petition, the Board shall consider only the record of the adjusted standard proceeding.

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

Section 106.902 Dismissal of Petition

The Board may at any time dismiss a petition for any of the following reasons:

a) The Board DETERMINES THAT THE PETITION IS FRIVOLOUS, DUPLICATIVE, or deficient with respect to the requirements of Section 106.705, 106.706, 106.710, and 106.712 (Section 28.1 of the Act); or

b) The Board DETERMINES THAT THE PETITIONER IS NOT PURSUING DISPOSITION OF THE PETITION IN A TIMELY MANNER. (Section 28.1 of the Act).

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

Section 106.903 Board Decision

A PETITIONER MUST JUSTIFY AN ADJUSTED STANDARD CONSISTENT WITH SUBSECTION (A) OF SECTION 27 OF THE ACT. (Section 28.1 of the Act.)

a) IF THE REGULATION OF GENERAL APPLICABILITY DOES NOT SPECIFY A LEVEL OF JUSTIFICATION FOR AN ADJUSTED STANDARD, THE BOARD MAY ADOPT THE PROPOSED ADJUSTED STANDARD IF THE PETITIONER PROVES (Section 28.1 of the Act) that:

1) FACTORS RELATING TO THAT PETITIONER ARE SUBSTANTIALLY AND SIGNIFICANTLY DIFFERENT FROM THE FACTORS RELIED UPON BY THE BOARD IN ADOPTING THE GENERAL REGULATION APPLICABLE TO THAT PETITIONER (Section 28.1 of the Act);

2) THE EXISTENCE OF THOSE FACTORS JUSTIFIES AN ADJUSTED STANDARD (Section 28.1 of the Act);

3) THE REQUESTED STANDARD WILL NOT RESULT IN ENVIRONMENTAL OR HEALTH EFFECTS SUBSTANTIALLY AND SIGNIFICANTLY MORE ADVERSE THAN THE EFFECTS CONSIDERED BY THE BOARD IN ADOPTING THE RULE OF GENERAL APPLICABILITY (Section 28.1 of the Act); AND

4) THE ADJUSTED STANDARD IS CONSISTENT WITH ANY APPLICABLE FEDERAL LAW (Section 28.1 of the Act).

b) If the regulation of general applicability specifies a level of justification for an adjusted standard, the Board may adopt the proposed adjusted standard, if the petitioner proves the level of justification specified by the regulation of general applicability.

c) IF THE REGULATION OF GENERAL APPLICABILITY IMPLEMENTS IN WHOLE OR IN PART THE REQUIREMENTS OF THE CLEAN AIR ACT, THE BOARD WILL ADOPT EITHER (Section 28.1 of the Act):

1) The proposed adjusted standard if the petitioner proves the applicable level of justification; or

2) A STANDARD THE SAME AS THAT IMPOSED BY THE REGULATION OF GENERAL APPLICABILITY, if the petitioner fails to prove the applicable level of justification. (Section 28.1 of the Act).

d) In adopting adjusted standards THE BOARD MAY IMPOSE SUCH CONDITIONS AS MAY BE NECESSARY TO ACCOMPLISH THE PURPOSES OF THE ACT (Section 28.1 of the Act).

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

Section 106.904 Opinion and Order

The Board shall issue a written opinion and order which sets forth the Board's decision and supporting rationale. Such opinions and orders SHALL BE MAINTAINED FOR PUBLIC INSPECTION BY THE CLERK OF THE BOARD. (Section 28.1 of the Act.)

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

Section 106.905 Appeal of Board Decisions

ANY FINAL ORDER OR DETERMINATION OF THE BOARD IN AN ADJUSTED STANDARD PROCEEDING MAY BE APPEALED TO THE APPELLATE COURT PURSUANT TO SECTION 41 OF THE ACT. (Section 28.1 of the Act).

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

Section 106.906 Publication of Adjusted Standards

a) Subsequent to the Board's adoption of an adjusted standard, the Board will publish, in the Environmental Register, the name of the petitioner, date of the Order which adopted the adjusted standard, and a brief narrative description of the adopted adjusted standard.

b) THE BOARD SHALL CAUSE THE PUBLICATION OF A LISTING OF ALL DETERMINATIONS MADE PURSUANT TO SECTION 28.1 OF THE ACT IN THE ILLINOIS REGISTER AND THE ENVIRONMENTAL REGISTER AT THE END OF EACH FISCAL YEAR. (Section 28.1 of the Act).

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

Section 106.907 Effect of Filing a Petition

a) IF ANY PERSON FILES A PETITION FOR AN INDIVIDUAL ADJUSTED STANDARD IN LIEU OF COMPLYING WITH THE APPLICABLE REGULATION WITHIN 20 DAYS AFTER THE EFFECTIVE DATE OF THE REGULATION, THE OPERATION OF THE REGULATION SHALL BE STAYED AS TO SUCH PERSON PENDING THE DISPOSITION OF THE PETITION; PROVIDED, HOWEVER, THAT THE OPERATION OF ANY REGULATION SHALL NOT BE STAYED IF THAT REGULATION WAS ADOPTED BY THE BOARD TO IMPLEMENT, IN WHOLE OR IN PART, THE REQUIREMENTS OF THE FEDERAL CLEAN AIR ACT, SAFE DRINKING WATER ACT OR COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT, OR THE STATE RCRA, UIC OR NPDES PROGRAMS. (Section 28.1 of the Act).

b) WITHIN 20 DAYS AFTER THE EFFECTIVE DATE OF ANY REGULATION THAT IMPLEMENTS IN WHOLE OR IN PART THE REQUIREMENTS OF THE CLEAN AIR ACT, IF ANY PERSON FILES A PETITION FOR AN INDIVIDUAL ADJUSTED STANDARD IN LIEU OF COMPLYING WITH THE REGULATION, SUCH SOURCE WILL BE EXEMPT FROM THE REGULATION UNTIL THE BOARD MAKES A FINAL DETERMINATION ON THE PETITION. IF THE REGULATION ADOPTED BY THE BOARD FROM WHICH THE INDIVIDUAL ADJUSTED STANDARD IS SOUGHT REPLACES A PREVIOUSLY ADOPTED BOARD REGULATION, THE SOURCE SHALL BE SUBJECT TO THE PREVIOUSLY ADOPTED BOARD REGULATION UNTIL FINAL ACTION IS TAKEN BY THE BOARD ON THE PETITION. (Section 28.1 of the Act).

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

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Proposed Opinion and Order was adopted on the 2nd day of March, 1989, by a vote of 6-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board