

BOARD PROPOSAL FOR PUBLIC COMMENT OCTOBER 3, 1996

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

PART 103
ENFORCEMENT

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AUTHORITY: Implementing Sections 5, 7.2, 13(c), 13.3, 17.5, 22.4(a), 22.4(d), 22.7(d), 27, 28, 28.2, 29, 30, 31, and 41 of the Environmental Protection Act (Act) [415 ILCS 5/5, 7.2, 13(c), 13.3, 17.5, 22.4(a), 22.4(d), 22.7(d), 27, 28, 28.2, 29, 30, 31, and 41] and authorized by Section 26 and 27 of the Act [415 ILCS 5/26 and 27].

SOURCE: Procedural rules adopted at 3 Ill. Reg. 23, p. 96, effective May 29, 1983; repealed by operation of law effective October 1, 1984; new rules adopted at 9 Ill. Reg. 107, effective December 21, 1984; Part repealed, new Part adopted in R97-8 at __Ill. Reg. __, effective_____.

SUBPART A: GENERAL PROVISIONS

Section 103.100 Applicability

- a) This Part applies to proceedings before the Illinois Pollution Control Board (Board) concerning complaints alleging violations of the Environmental Protection Act (Act), regulations, and orders of the Board pursuant to Section 31 of the Act. [415 ILCS 5/31.]
- b) This Part shall be read in conjunction with 35 Ill. Adm. Code 101, which contains procedures generally applicable to all adjudicatory Board proceedings. In the event of a conflict between the requirements of 35 Ill. Adm. Code 101 and those of this Part, the provisions of this Part apply.

Section 103.102 Severability

If any provision of this Part or its application to any person or under any circumstances is adjudged invalid, such adjudication does not affect the validity of this Part as a whole or of an portion not adjudged invalid.

Section 103.104 Definitions

For the purpose of this Part, words and terms shall have the meaning as defined in 35 Ill. Adm. Code 101.Subpart B, unless otherwise provided.

Section 103.106 General

Enforcement actions may be initiated by the Attorney General of the State of Illinois or *any person may file with the Board a complaint...against any person allegedly violating this Act or any rule or regulation thereunder or any permit or term or condition thereof.* [415 ILCS 5/31(b).] Complaints filed by persons other than the Attorney General or a State's Attorney will be known as citizen's complaints.

SUBPART B: COMPLAINT, REQUEST FOR INFORMAL AGENCY INVESTIGATION, SERVICE AND AUTHORIZATION OF HEARING

Section 103.200 Who May File

An enforcement proceeding may be commenced by any person. [415 ILCS 5/31.]

Section 103.202 Parties

- a) The person initiating an enforcement proceeding shall be named the complainant. Any adverse party shall be named the respondent. If the Agency is requested by the Board to conduct an investigation pursuant to Section 30 of the Act the Board will named the Agency as a "party in interest" pursuant to 35 Ill. Adm. Code 101.404. [415 ILCS 5/30.]

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- b) With leave of the Board and in accordance with Section 103.206 of this Part, cross-complainants and counter-complainants may appear as parties.
- c) Misnomer of a party is not a ground for dismissal; the name of any party may be corrected at any time.

Section 103.204 Notice, Formal Complaint, and Answer

- a) An enforcement action shall be commenced by the service of a notice and formal complaint by certified mail or personal service upon all respondents and the filing of eleven (11) copies of the notice and formal complaint with the Clerk.
- b) The notice shall be directed to the respondents notifying them of the filing of the accompanying complaint and that they may be required to attend a hearing at a date set by the Board.
- c) The formal complaint filed by the Attorney General on behalf of the People of the State of Illinois shall be captioned in accordance with 35 Ill. Adm. Code 101. Appendix A, Illustration A and contain:
 - 1) A reference to the provision of the Act and regulations which the respondents are alleged to be violating;
 - 2) The dates, location, events, nature, extent, duration, and strength of discharges or emissions and consequences alleged to constitute violations of the Act and regulations. The complaint shall advise respondents of the extent and nature of the alleged violations to reasonably allow preparation of a defense; and
 - 3) A concise statement of the relief which the complainant seeks.
- d) A citizen's complaint may be filed in conformance with subsection c above, or on Board Form # - or reasonably similar format which contains all information required on the relevant form. Board Form # -- is electronically available on the Board's Home Page or may be obtained at the Board's Chicago or Springfield offices. Additionally a copy of Board Form# -- appears in 35 Ill. Adm. Code 101. Appendix G, ILLUSTRATION A.
- e) Respondent shall file an answer within 30 days of receipt of the complaint. All material allegations of the complaint shall be taken as admitted if not specifically denied by the answer or if no answer is filed. Any facts constituting an affirmative defense which would be likely to take the complainant by surprise must be plainly set forth prior to hearing in the answer or in a supplemental answer.
- f) Any party serving a complaint upon a *pro se* party shall include the following language in the first paragraph of the request: "Failure to file an answer to this complaint within thirty (30) days may have severe consequences. Failure to answer will mean that all allegations in the complaint will be taken as if admitted for purposes of this case. If you have any questions about this procedure, you should contact the hearing officer assigned to this case or an attorney."

Section 103.206 Adding Parties

- a) If a complete determination of the controversy cannot be had without the presence of other parties the Board or the hearing officer upon their own motion or upon a motion from any party shall order the new party to be brought in pursuant to Section 103.204 of this Part.

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- b) If a complainant wishes to add a new respondent to the case, complainant shall move the Board to amend the complaint. The complainant shall also serve the amended complaint, all Board orders, all hearing officer orders and motion to add a respondent upon the party sought to be added in accordance with Section 103.204 of this Part.
- c) If a respondent wishes to add an additional respondent to the case respondent shall move the Board to add the party. The respondent shall also serve the party sought to be added with a copy of the complaint, all Board orders, all hearing officer orders, and a copy of the motion to join.
- d) If the respondent wishes to cross-complain against an existing respondent or complainant, the respondent shall file a formal complaint in accordance with Section 103.204 of this Part.
- e) The party who is sought to be joined may file a response to the motion to join within 14 days of the service of the above documents.

Section 103.208 Request for Informal Agency Investigation

- a) To request an informal Agency investigation, a citizen may complete an informal investigation form or reasonably similar format which contains all information required on the relevant form. Board Form # -- is electronically available on the Board's Home Page or may be obtained at the Board's Chicago or Springfield offices. Additionally a copy of Board Form# -- appears in 35 Ill. Adm. Code 101.Appendix G, ILLUSTRATION B.
- b) The Board will forward the informal request to the Agency. The Agency shall inform the citizen and the Board of the results of the investigation or its decision not to investigate.
- c) The Board will take no further action upon the request for informal investigation beyond the action in subsection (b) above.

Section 103.210 Notice of Complaint

- a) In addition to the notice of hearing requirements set forth in 35 Ill. Adm. Code 101. The Agency, when complainant, shall give notice of each complaint and hearing at least 21 days before the hearing to:
 - 1) *Any person that has complained to the Agency respecting the respondent within the six months preceding the date of the complaint; and*
 - 2) *To any person in the county in which the offending activity occurred that has requested notice of enforcement proceedings. [415 ILCS 5/31(a)(1).]*
- b) Failure to comply with the provisions of this Section may not be used as a defense to an enforcement action, but any person adversely affected by such failure of compliance may upon motion to the hearing officer have the hearing postponed if prejudice is shown.

Section 103.212 Hearings on Complaint

- a) *Any person may file with the Board a complaint... against any person allegedly violating this Act or any rule or regulation thereunder or any permit or term or condition thereof. When such a complaint is received by the Board, unless the Board determines that such complaint is duplicitous or frivolous, it shall schedule a hearing. [415 ILCS 5/31(b).]* The definition for duplicitous and frivolous can be found at 35 Ill. Adm. Code 101.Subpart B.

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- b) Motions made by respondents alleging that the complaint is duplicitous or frivolous shall be filed no later than 30 days following the date of service of the complaint upon the respondent.
- c) The Board will automatically set for hearing all complaints filed by the Attorney General or a State's Attorney on behalf of the People of the State of Illinois.
- d) The Board in its discretion may hold a hearing on the violation and a separate hearing on the remedy. Additionally, the Board may order parties to a case to return to hearing on a compliance issue.

SUBPART C: SETTLEMENT PROCEDURE

Section 103.300 Request for Relief from Hearing Requirement in State Enforcement Action

- a) When a complaint has been filed on behalf of the Agency or by the People of the State of Illinois, the parties may file with the Board a proposed stipulation and settlement agreement accompanied by a request for relief from the requirement of hearing pursuant to Section 31(a)(1) of the Act. [415 ILCS 5/31(a)(1).] The proposed stipulation and settlement agreement shall conform to the statement required for settlement submissions at hearing in Section 103.302 of this Part.
- b) Unless the Board, in its discretion, concludes that a hearing will be held, the Board shall cause notice of the proposed stipulation and settlement, and request for relief to be published and sent in the same manner as is required for hearing, by the Clerk's office. The notice shall include a statement that any person may file with the Clerk of the Board a written demand for a hearing within 21 days after publication of the notice. Such written demand for hearing shall clearly state that a public hearing is requested and should indicate the assigned Board Docket number and respondent's name in the matter.
- c) If any person files a timely written demand for a hearing, the Board will deny the request for relief from a hearing and will hold a hearing in accordance with the notice provisions of Section 31(a)(1) of the Act. [415 ILCS 5/31(a)(1).]
- d) If a hearing is scheduled pursuant to subsection (c) above, the complainant(s) do not have to present a prima facie case before the hearing officer. A copy of the proposed stipulation and settlement will be entered into and presented for the record.
 - 1) *All such hearings shall be open to the public, and any person may submit written statements to the Board in connection with the subject thereof. In addition, the Board may permit any person to offer oral testimony. [415 ILCS 5/32.]*
 - 2) In addition to their statutory participation rights, members of the public present at the hearing may participate as provided in 35 Ill. Adm. Code 101.110.

Section 103.302 Contents of Proposed Stipulation and Settlement Agreement

- a) No case pending before the Board will be disposed of or modified without an order of the Board. A proposed stipulation and settlement agreement shall contain, a written statement, signed by the parties or their authorized representatives, outlining the nature of, the reasons for, and the purpose to be accomplished by the settlement. Such written statement shall include:

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- 1) A full stipulation of all material facts pertaining to the nature, extent and causes of the alleged violations;
- 2) The nature of the relevant parties' operations and control equipment;
- 3) Any explanation for past failures to comply and an assessment of the impact on the public resulting from such noncompliance;
- 4) Details as to future plans for compliance, including a description of additional control measures and the dates for their implementation; and
- 5) The proposed penalty.

Section 103.304 Hearing on the Proposed Stipulation and Settlement Agreement

When the parties submit a proposed stipulation and settlement agreement to the hearing officer at hearing, or when the Board orders that a hearing be held in accordance with Section 103.300(c) of this Part, the hearing officer shall conduct a hearing in which interested persons may testify with respect to the nature of the alleged violation and its impact on the environment, together with their views on the proposed stipulation and settlement agreement. Such testimony shall be in accordance with 35 Ill. Adm. Code 101.110.

Section 103.306 Board Order on Proposed Stipulation and Settlement Agreement

- a) The Board will consider such proposed settlement and stipulation agreement and the hearing record. The Board may accept, suggest revisions in, reject the proposed settlement and stipulation agreement, or direct further hearings as it appears appropriate. Where an National Pollutant Discharge Elimination System (NPDES) permit is involved in the settlement, notice of settlement shall be published in the Environmental Register at least 30 days prior to such settlement.
- b) If the Board determines that a settlement involves or may involve the issuance or modification of a Resource Conservation Recovery Act (RCRA) permit it will enter an interim order pursuant to Section 103.402 of this Part.

SUBPART D: DECISION IN CASES INVOLVING RCRA PERMITS

Section 103.400 Purpose, Scope, and Applicability

- a) This subpart applies when the Board finds in an interim order that an enforcement action involves issuance or modification of a RCRA permit;
- b) Enforcement actions which involve issuance or modification of a RCRA permit include those in which, to grant complete relief, it appears that the Board will have to:
 - 1) Revoke a RCRA permit;
 - 2) Order a RCRA permit issued or modified;
 - 3) Enter an order which could require actions which would be different from the conditions of a RCRA permit or 35 Ill. Adm. Code 724 or 725; or
 - 4) Enter an order directing facility closure or modification after a finding that a facility was operating without a RCRA permit and that one was required.

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- c) These procedures provide methods by which the Board will formulate compliance plan, and, if necessary, direct the issuance or modification of a RCRA permit.

Section 103.402 Interim Order

- a) The Board will enter an interim order invoking the procedures of this subpart on its own motion or on the motion of any party. Before the Board enters an interim order the parties must develop, through hearings or admissions pursuant to 35 Ill. Adm. Code 101.Subpart F, a sufficient record to support the findings which the Board must make in subsection (b) below.
- b) An interim order invoking the procedures of this subpart will include:
 - 1) A finding or proposed finding of violation and any penalty or proposed monetary penalty;
 - 2) A finding that the case is an enforcement action which involves or may involve the issuance or modification of a RCRA permit;
 - 3) Joinder of the Agency if it is not already a party; and
 - 4) A time schedule for filing by the Agency of a partial draft permit.
- c) The interim order is not a final order and may be appealed only with leave of the Board.

Section 103.404 Joinder of the Agency

If the Board directs that the Agency be joined, the Clerk will send, by messenger or by certified mail addressed to the Agency, a copy of the Board Order requiring joinder. Such mailing shall constitute service of process upon the Agency.

Section 103.406 Draft Permit or Statement

- a) Within 60 days after entry of an interim order, the Agency shall file and serve on all parties either a partial draft permit or a statement that no RCRA permit needs to be issued or modified.
- b) The partial draft permit shall be in compliance with the requirements of 35 Ill. Adm. Code 705.141 and shall include such conditions as the Agency finds are necessary to correct the violations found in the interim order.
- c) The Agency may confer with other parties and enter into agreements as to the substance of the partial draft permit which it will recommend to the Board. The Agency shall disclose any such conferences or agreements in the proposed draft permit. Such agreements do not bind the Board.
- d) If the Agency issues a statement that no RCRA permit needs to be issued or modified, the remaining procedures of this subpart will not be followed, unless the Board determines otherwise.

Section 103.408 Stipulated Draft Remedy

- a) The parties may agree to a stipulated draft remedy.
- b) A stipulated draft remedy shall include the following:

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- 1) Proposed mandatory orders which the parties agree should be included in the Board's final order, which may include one or more of the following:
 - A) An order to cease and desist conducting regulated activities;
 - B) An order to close a facility or unit;
 - C) An order to execute a post-closure care plan;
 - D) A compliance plan, including a time schedule to assure compliance with regulations in the shortest possible time;
 - E) An order to provide a performance bond or other financial assurance;
 - F) An order to apply for a permit or permit modification; and
 - G) An order revoking a permit.
 - 2) A partial draft permit or statement as provided by Section 103.406 of this Part.
 - 3) A statement as to whether or not the stipulation is divisible for purposes of Board determinations.
- c) All parties, including the Agency, must sign the stipulated draft remedy before notice is given pursuant to Section 103.410 of this Part.

Section 103.410 Contents of Public Notice

- a) In addition to all parties, the Agency shall serve a copy of any partial draft permit on the United States Environmental Protection Agency (USEPA) at the address listed in 35 Ill. Adm. Code 101.Subpart C.
- b) In addition to the requirements of the Act and Section 103.208 of this Part, the Agency shall, at a minimum, give notice of the filing of a partial draft permit to the following persons:
 - 1) Federal agencies as designated by the USEPA;
 - 2) Illinois Department of Transportation;
 - 3) Illinois Department of Natural Resources;
 - 4) Illinois Department of Public Health;
 - 5) The Governor of any other state adjacent to the county in which the facility is located; and
 - 6) Elected officials of any counties, in other states, adjacent to the county in which the facility is located, and elected officials in any municipality, in another state, if it is the closest population center to the facility.
- c) In addition to the methods of notice by publication of Section 103.208 of this Part, the Agency shall give notice by broadcast over at least one radio station in the area of the facility containing the information required by subsections (d)(2), (d)(4) and (d)(6) through (d)(8).

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- d) A notice of a partial draft permit shall include the following information:
- 1) The address of the Board office;
 - 2) Name and address of the respondent and, if different, of the facility subject to the enforcement action;
 - 3) A brief description of the business conducted at the facility and the activity which is the subject of the enforcement action;
 - 4) A statement of the violations the Board has found or has proposed to find;
 - 5) A statement that the Agency has filed a partial draft permit;
 - 6) Name, address and telephone number of the Clerk of the Board, from whom interested persons may obtain further information, including copies of the partial draft permit and/or stipulated remedy;
 - 7) A notice of a hearing, the address of the Board, a statement that a hearing will be held and that the record will remain open for 45 days after the filing of the partial draft and/or stipulated remedy for written comments;
 - 8) A statement that the record in the action is available at the Board office for inspection, except those portions which are claimed or determined to be trade secrets, and that procedures are available whereby disclosure may be sought by the public in accordance with 35 Ill. Adm. Code 130;
 - 9) A statement that enforcement actions are considered pursuant to 415 ILCS 5/30 *et seq.*; and
 - 10) Any additional information considered necessary or proper.

Section 103.412 Public Comment

Any person, including the USEPA, may comment on the partial draft permit or stipulated draft remedy within 45 days after it has been filed with the Board and notice given pursuant to Section 103.410 of this Part.

Section 103.414 Hearing

- a) The hearing officer, after appropriate consultation with the parties, shall set a time and place for the hearing to be held not less than 30 days after the filing of the partial draft permit and/or stipulated remedy.
- b) The hearing shall be held in the county in which the facility is located, in the population center in such county closest to the facility.
- c) The Clerk in consultation with the hearing officer shall give notice of the hearing to the persons entitled to notice in Sections 103.208 and 103.410 of this Part, and to any other persons who have commented, requested to comment or requested notice, and to any persons on a mailing list provided by the Agency.
- d) Notice shall be mailed not less than 30 days before the hearing.

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- e) Failure to comply with the provisions of this section may not be used as a defense to an enforcement action, but any person adversely affected by such failure of compliance may upon motion to the hearing officer or Board have the hearing postponed if prejudice is shown.
- f) Whenever a proceeding before the Board may affect the right of the public individually or collectively to the use of community sewer or water facilities provided by a municipality owned or publicly regulated, the Board shall at least 30 days prior to the scheduled date for the first hearing in such proceeding, give notice of the date, time, place, and purpose of such hearing by public advertisement in a newspaper of general circulation in the area of the state concerned.

Section 103.416 Contents of Board Order

- a) The Board will not enter an order which would require the issuance or modification of a RCRA permit unless the public notice, public comment and hearing procedures of this subpart have been followed.
- b) If the Board determines that, to grant complete relief, it must order the issuance or modification of a RCRA permit, its final order will include an order directing the Agency to issue or modify the RCRA permit, which may take one of the following forms:
 - 1) An order to issue or modify a permit in conformance with a draft permit;
 - 2) An order to issue or modify a permit in conformance with a draft permit as modified by the Board order; or
 - 3) Guidelines for issuance or modification of a permit in conformance with the order and other applicable regulations.
- c) If the order specifies a schedule leading to compliance with the Act and Board rules;
 - 1) Such schedule shall require compliance as soon as possible; and
 - 2) The order may require the posting of sufficient performance bond or other security to assure correction of such violation within the time prescribed.

SUBPART E: IMPOSITION OF PENALTIES, FEES AND COSTS

Section 103.500 Default

The procedures for default can be found at 35 Ill. Adm. Code 101.608.

Section 103.502 Civil Penalties Method of Payment

- a) Payment of the penalty shall be made by certified or cashier's check, money order, or in installments by the foregoing means after execution of a promissory note containing an agreement for judgment;
- b) All remittances shall be made payable to the Environmental Protection Trust Fund or such other fund as specified by the Board.
- c) Any such penalty not paid within the time prescribed in the Board order will incur interest at the rate set forth in subsection (a) of Section 1003 of the Illinois Income Tax Act [35 ILCS 5/1003(a)].