

ILLINOIS POLLUTION CONTROL BOARD
September 15, 1994

IN THE MATTER OF:)
)
PROCEDURAL RULES REVISION:) R94-11
APPEALS FROM OFFICE OF) (Rulemaking)
THE STATE FIRE MARSHAL)
DETERMINATIONS)
(35 ILL. ADM. CODE 107))
)

Proposed Rule. Second Notice.

OPINION AND ORDER OF THE BOARD (by C. A. Manning, M. McFawn, and J. Theodore Meyer):

This matter is before the Board on its own motion. On September 13, 1993, the Governor signed into law P.A. 88-496, "Petroleum Leaking Underground Storage Tanks".¹ While this new underground storage tank (UST) law did not create a new program, it substantially amended the administration of the old UST program and the method by which petroleum leaks are remediated in Illinois. One of the significant changes is the division of program administration between the Illinois Environmental Protection Agency (Agency) and the Office of the State Fire Marshal (OSFM). The OSFM had always been responsible for the "early action" activities at a UST site, *i.e.*, supervising tank pulls and verifying petroleum leaks. Under the new statutory provisions, the OSFM is now charged with the additional responsibilities of determining whether an owner or operator is eligible to seek reimbursement for corrective action from Illinois' UST Fund, and, if so, determining the appropriate deductible. (415 ILCS 5/57.9(c).) Under the old program, these functions were performed by the Agency, and owners and operators were authorized to file appeals with the Board of those eligibility and deductibility final determinations. This new legislation marks the first time that the OSFM's final decisions are appealable to the Board rather than to circuit court.²

¹ P.A. 88-496, also known as H.B. 300, added new Sections 57 through 59 to the Environmental Protection Act (415 ILCS 5/57-5/59) (Act) and repealed Sections 22.13, 22.18, 22.18b, and 22.18c.

² P.A. 88-496 allows for appeals to the Board from determinations made by both the Agency and the OSFM. The statutory sections providing for appeals from Agency determinations specifically state that those appeals shall be pursuant to Section 40 of the Act. However, Section 57.9(c)(2), which provides for appeals from OSFM determinations, does not

In response, the Board has drafted procedural rules implementing this new appeal process in the UST law. On June 30, 1994, we adopted an opinion and order proposing the rules for first notice. The proposed rules were published in the Illinois Register on July 22, 1994, at 18 Ill.Reg. 11427. The Board held a public hearing in Springfield, Illinois on August 23, 1994. After considering the testimony and public comments in this proceeding, the Board today sends these proposed rules to second notice.

PROPOSAL

The Board believes that P.A. 88-496 envisions prompt action by the administrative agencies so that an owner or operator may proceed to the remediation requirements and rapidly address any contamination which may be a threat to human health, safety and the environment. Therefore, the proposed rules establish a flexible hearing and decision process. For a description of the proposal, see the Board's first notice opinion in this rulemaking, dated June 30, 1994.

PUBLIC COMMENTS

The Board received 4 public comments during the comment period in this proceeding. Comments were submitted by:

PC#1	Office of the Illinois State Fire Marshal
PC#2	Department of Commerce and Community Affairs
PC#3	Secretary of State, Administrative Code Division
PC#4	Office of the Illinois Attorney General

The Board has considered all of these comments in making its decisions on this proposal.

The OSFM raised two issues, both in its public comment and at hearing. First, the OSFM states that its definition of "underground storage tank" or "UST" is more comprehensive than the definition included at Section 107.103 of the proposed rules. Thus, the OSFM suggests adding a phrase to the definition indicating that the definition used by OSFM shall take precedence in the event of a conflict between the two definitions.

The definition of "underground storage tank" or "UST" proposed at Section 107.103 is identical to the definition adopted today in Regulation of Petroleum Leaking Underground Storage Tanks: 35 Ill. Adm. Code 732 (Pursuant to P.A. 88-496),

refer to Section 40. These proposed rules do not presume the applicability of Section 40 to OSFM appeals.

R94-2(A).³ That rulemaking contains the substantive regulations implementing the UST program established by P.A. 88-496, so that the definition of "UST" used in this rulemaking, as well as in R94-2(A), is derived directly from the statutory provisions of P.A. 88-496. (415 ILCS 5/57.2 (as added by P.A. 88-496, effective September 13, 1993).) The rules proposed in this docket are procedural rules, implementing the appeal provisions of P.A. 88-496, and are not intended to address substantive eligibility issues. We find that the definitions of "underground storage tank" or "UST" contained in these procedural rules must be identical to the definition adopted in the technical rules (R94-2(A)), and consistent with the provisions of P.A. 88-496. Therefore, we decline to accept the OSFM's suggestion that in the event of a conflict, the OSFM definition should take precedence. We further believe that eligibility and deductibility determinations made by the OSFM pursuant to Section 57.9 of the Act should be made by referring to the definitions in the Act and in the regulations adopted in R94-2(A). This position is supported by the Illinois Environmental Regulatory Group (IERG), which further stated that it supports the adoption of the rules as proposed at first notice. (Tr. at 8-9.)

The OSFM raised a second concern, relating to the provisions of proposed Section 107.122 "Contents of Petition". The OSFM suggests that language be added to subsection (b) to clarify that the petition shall describe the substance stored in each UST on the site. The Board agrees with the OSFM that added language would clarify the rule and provide additional information with each petition. Therefore, that subsection will now read:

A complete and precise description of the underground storage tank site, including but not limited to the location of the site, including the county, the number of underground storage tanks on-site, the substance(s) stored in each tank, the date of the tank(s) registration; and the date of IEMA notification.

The Attorney General raised a number of issues in its comments. First, the Attorney General recommends several non-substantive corrections to proposed Sections 107.103, 107.201, and 107.247. The Board will make those corrections. Second, the Attorney General recommends changes to proposed Section 107.225 "Motions to Cancel Hearing". That section provides that requests for cancellation of hearing must be filed no less than 14 days before the scheduled hearing date, and that any such request

³ The rules adopted in R94-2(A) are colloquially known as the UST technical rules. Those rules set forth the regulatory requirements of the Illinois UST program, as established by P.A. 88-496.

filed less than 14 days prior to hearing will be granted only upon a showing of material prejudice. The Attorney General contends that these requirements should be deleted, because those provisions do not allow for situations in which a settlement is reached within a few days of hearing.

After considering the issue, the Board declines to make the suggested changes. We believe that these rules must provide guidelines for a smooth, yet flexible, process. When a hearing is canceled close to the scheduled hearing date the Board incurs costs for a hearing which is not held, and the public notice of that hearing is negated. The Board will consider, in the future, whether we should impose hearing costs upon parties who wish to cancel hearing less than the required number of days prior to hearing. Thus, we believe that it is important that the rules specify a time for the filing of motions to cancel hearing.

We have, however, shortened the time period from 14 days to 10 days, and added a provision that a motion to cancel hearing may be filed up to 5 days prior to hearing if all parties agree to the request. The provision that a motion to cancel filed less than the required number of days prior to hearing may be granted in the case of material prejudice will allow for additional flexibility in implementing this rule. Where a settlement is reached, proposed Section 107.280 "Settlement" (as modified today--see below) allows for cancellation of hearing where a settlement agreement is reached within 3 business days of the hearing date. We believe that these rules, taken together, protect the interests of the public, the Board, and the parties.

Third, the Attorney General asks that the Board add a provision to proposed Section 107.227 "Motions for Summary Judgment" to either require that the Board rule on a motion for summary judgment prior to the hearing date, or to provide that hearing be continued until after the Board reaches decision on the motion. The Board will not make those changes. Because a motion for summary judgment may be filed up to 21 days before hearing, and because the non-moving party has 14 days in which to respond, it is impossible for the Board to always reach a decision prior to a hearing date. Likewise, there may be situations (for example, motions for partial summary judgment) in which cancellation of hearing is not warranted. However, the Board will add a new subsection (e) specifically noting that a party who wishes to cancel hearing pending decision on a motion for summary judgment shall file a motion pursuant to Section 107.225.

Fourth, the Attorney General notes that subsection (c) of Section 107.228 "Motions for Reconsideration" is vague on the issue of when the time for appeal of a final Board order begins to run after a motion for reconsideration. The Board agrees that the language proposed at first notice was vague, and we have

rewritten that subsection to read:

- c) A timely-filed motion for reconsideration or modification stays the effect of the final order, including the time for appeal of that 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.

Fifth, the Attorney General suggests changes to proposed Section 107.280 "Settlement". The Attorney General states that subsection (a), as currently drafted, would technically require the parties to file all settlement proposals made during the course of negotiations, and that such a requirement is overly burdensome. The Board agrees, and will redraft subsection (a) to require the filing of settlement proposals only after agreement is reached by the parties. Additionally, the Board has revised the period in which the parties can file a settlement agreement and avoid a hearing. Subsection (a) will read:

- a) All parties to any case in which settlement is ~~proposed~~reached shall file, for the Board's approval, a proposed stipulation and settlement signed by all the parties or their authorized representatives, outlining the nature of, the reasons for, and the purpose to be accomplished by a settlement. ~~The stipulation and settlement agreement must be accompanied by a motion to cancel hearing in accordance with Section 107.225.~~
- 1) Parties wishing to settle without a hearing in the case, must file the information required in subsection (a) above with the Board, and serve upon the hearing officer, before the close of business at least 143 business days before the scheduled hearing date. Any motion to cancel hearing filed less than 3 business days before the hearing date may be granted only upon a showing that material prejudice would result from a failure to cancel hearing.
 - 2) Stipulations and settlement agreements not filed at least 143 business days before the hearing shall be filed with the hearing officer at the time of the scheduled hearing, unless the hearing is cancelled pursuant to subsection (a)(1) above.

Finally, the Attorney General suggests that language be added to proposed Section 107.300 "Transcripts" to specify when

the transcript will be filed with the Board. The Board will not make this change, because the deadline for the filing of the transcript by the court reporter sometimes changes from year to year, depending upon the terms of the Board's court reporting contract. The current deadline for filing of the transcript can be ascertained by contacting the hearing officer or the Clerk of the Board.

The Board has made several other changes to the proposed rules. We added a Board note to the definition of "operator" in Section 107.103. This addition will make the definition of "operator" in these rules consistent with the definition contained in the UST technical rules, adopted today in docket R94-2(A). Additionally, the Board has made a number of non-substantive corrections and changes to the proposed rules. All changes are shown by strike-throughs and underlines.

CONCLUSION

The goal of these proposed rules is to create a streamlined process where parties can quickly and easily obtain a Board decision in an appeal of an OSFM eligibility and deductibility determination. This will allow owners and operators of USTs to move quickly through the entire UST corrective action and reimbursement process.

ORDER

The Clerk of the Board is directed to submit these proposed rules to the Joint Committee on Administrative Rules (JCAR) for second notice:

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

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OFFICE OF THE STATE FIRE MARSHAL APPEALS

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AND RELIEF FROM FINAL BOARD ORDERS

- Section
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- 107.361 Relief from Final Orders
- 107.362 Judicial Review of Final Board Orders

AUTHORITY: Authorized by Section 26 of the Illinois Environmental Protection Act [415 ILCS 5/26 (1992)] and implementing Section 57.9(c) of the Environmental Protection Act [415 ILCS 5/57.9(c), as added by P.A. 88-496, effective September 13, 1993].

SOURCE: Adopted in R94-11 at 18 Ill. Reg. _____, effective _____.

NOTE: Capitalization denotes statutory language.

SUBPART A: GENERAL PROVISIONS

Section 107.100 Applicability

This Part applies to proceedings before the Illinois Pollution Control Board (Board) concerning appeals from Office of State Fire Marshal (OSFM) final determinations made pursuant to Section 57.9(c) of the Environmental Protection Act. [415 ILCS 5/57.9(c)(1992).] This Part shall be read in conjunction with 35 Ill. Adm. Code 101 which contains procedures generally applicable to 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 shall apply.

Section 107.101 Severability

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

Section 107.102 General Overview

These procedural rules promote administrative efficiency in the Board's consideration of appeals of OSFM Eligibility and Deductibility Final Determinations. The process before the Board includes, but is not limited to, the following steps. Upon receipt of a petition for review, unless the Board or its designee makes a preliminary determination that the petition is insufficient, a hearing date and location will be assigned. Though hearings will be publicly-noticed in the county where the underground storage tank site is located, in most cases the hearings will take place in either Chicago or Springfield. The Board envisions that if the parties enter into settlement prior to or during the hearing process, the parties may request that the Board accept and enter a final order adopting a proposed settlement agreement; such an order may be requested with or without a hearing.

Section 107.103 Definitions

Except as otherwise defined in this section, definitions of terms used in this Part shall be those used in the Environmental Protection Act [415 ILCS 5/1 et seq.]

"Act" means the Environmental Protection Act [415 ILCS 5/1 et seq (1992)].

"Board" means the Illinois Pollution Control Board or its designee.

"Eligibility and Deductibility Determination Form"

means a form provided by the Office of State Fire Marshal to the owner or operator either on site or within 15 days of receipt of notice indicating a confirmed release. (Derived from Section 57.9(c) of the Act).

"Eligibility and Deductibility Final Determination" means the letter issued by the Office of State Fire Marshal enunciating the final eligibility and deductibility determination of an owner or operator who has reported a confirmed release of a regulated substance to access the Underground Storage Tank Fund. (Derived from Section 57.9(c) of the Act).

"FUND" MEANS THE UNDERGROUND STORAGE TANK FUND. (Section 57.2 of the Act.)

"IEMA" means the Illinois Emergency Management Agency.

"OSFM" means the Office of State Fire Marshal.

"Operator" means any person in control of, or having responsibility for, the daily operation of the underground storage tank. (42 U.S.C. § ~~6881~~6991).

BOARD NOTE: A person who voluntarily undertakes action to remove an underground storage tank system from the ground shall not be deemed an "operator" merely by the undertaking of such action.

"Owner" means:

In the case of an underground storage tank in use on November 8, 1984, or brought into use after that date, any person who owns an underground storage tank used for the storage, use or dispensing of regulated substances;

In the case of any underground storage tank in use before November 8, 1984, but no longer in use on that date, any person who owned such underground storage tank immediately before the discontinuation of its use. (42 U.S.C. § 6991).

"Registration" means registration of an underground storage tank with the OSFM in accordance with Section 4 of the Gasoline Storage Act (430 ILCS 15/4).

"SITE" MEANS ANY SINGLE LOCATION, PLACE, TRACT OF LAND OR PARCEL OF PROPERTY INCLUDING CONTIGUOUS PROPERTY NOT SEPARATED BY A PUBLIC RIGHT-OF-WAY. (Section 57.2 of the Act).

"Underground Storage Tank" or "UST" means any one or combination of tanks (including underground pipes connected thereto) which is used to contain an accumulation of regulated substances, and the volume of which (including the volume of underground pipes connected thereto) is 10 per centum or more beneath the surface of the ground. Such term does not include any of the following or any pipes connected thereto:

Farm or residential tank of 1,100 gallons or less capacity used for storing motor fuel for noncommercial purposes;

Septic tank;

Pipeline facility (including gathering lines) regulated under the Natural Gas Pipeline Safety Act of 1968 (49 U.S.C. App. 1671 et seq.), or the Hazardous Liquid Pipeline Safety Act of 1979 (49 U.S.C. App. 2001 et seq.), or which is an intrastate pipeline facility regulated under State laws as provided in either of these provisions of law, and which is determined by the Secretary to be connected to a pipeline or to be operated or intended to be capable of operating at pipeline pressure or as an integral part of a pipeline;

Surface impoundment, pit, pond, or lagoon;

Storm water or waste water collection system;

Flow-through process tank;

Liquid trap or associated gathering lines directly related to oil or gas production and gathering operations; or

Storage tank situated in an underground area (such as a basement, cellar, mineworking, drift, shaft, or tunnel) if the storage tank is situated upon or above the surface of the floor. (Derived from 42 U.S.C. § 6991).

THE TERM "UNDERGROUND STORAGE TANK" SHALL ALSO MEAN AN UNDERGROUND STORAGE TANK USED EXCLUSIVELY TO STORE HEATING OIL FOR CONSUMPTIVE USE ON THE PREMISES WHERE STORED AND WHICH SERVES OTHER THAN A FARM OR RESIDENTIAL UNIT. (Section 57.2 of the Act).

SUBPART B: PLEADINGS AND PROCESS

Section 107.120 Who May File; Parties

Any owner or operator of an underground storage tank who has been issued an "Eligibility and Deductibility Final Determination" letter may file a petition with the Board seeking review of that final decision. The owner/operator shall be named as the petitioner, and the OSFM shall be named as the respondent. Filing requirements are set forth at 35 Ill. Adm. Code 101.Subpart A.

Section 107.121 Timely Petition

The petition for review must be filed with the Board within 35 days of the date of the OSFM's "Eligibility and Deductibility Final Determination" letter. There shall be a rebuttable presumption that petitioner received the OSFM's "Eligibility and Deductibility Final Determination" letter four days from the date indicated on the letter.

Section 107.122 Contents of the Petition

A petition for review must include:

- a) A copy of the OSFM's "Eligibility and Deductibility Final Determination" letter;
- b) A complete and precise description of the underground storage tank site, including but not limited to the location of the site, including the county, the number of underground storage tanks on-site, the substance(s) stored in each tank, the date of the tank(s) registration; and the date of IEMA notification;
- c) A concise statement of the relief being sought before the Board;
- d) A concise statement of the issues on review before the Board;
- e) If the owner or operator is represented by counsel, an appearance shall be filed in conjunction with the petition;
- f) Documentation to demonstrate the petition's timely filing; and
- g) A request to hold the hearing in either Springfield or Chicago, or a request to conduct hearing at a specified location other than Springfield or Chicago, specifying the reasons for that request. A hearing will be held in an alternate location only to prevent material prejudice or undue delay.

Section 107.123 Service

- a) The petitioner shall serve all filings upon the OSFM. All filings shall be accompanied by a notice of filing.
- b) Methods and proof of service, as well as the effective date of service, are governed by 35 Ill. Adm. Code 101.Subpart C.

Section 107.124 OSFM Appearance and Record

- a) The OSFM shall appear as a respondent.
- b) Within 14 days of receipt of the notice of filing of the petition for review, the OSFM shall file an appearance and the record before the Board. The record shall include all information which served as a basis for the OSFM's "Eligibility and Deductibility Final Determination" letter, including but not limited to:
 - 1) A copy of the "Eligibility and Deductibility Final Determination" letter;
 - 2) A completed copy of the "Eligibility and Deductibility Determination Form" upon which the OSFM made its final determination;
 - 3) Any and all correspondence with the applicant;
 - 4) Any and all forms completed by the owner or operator which served as a basis for the OSFM final decision; and
 - 5) Any memoranda or correspondence which served as a basis for the OSFM final decision.

SUBPART C: INITIAL BOARD ACTION

Section 107.140 Preliminary Board Determination: Accept for Hearing

- a) Upon receipt of the petition for review, unless the Board makes a preliminary determination that the petition is insufficient pursuant to Section 107.122, a hearing date and location will be assigned.
- b) If the petition does not satisfy Section 107.122, the case shall be referred to the Board for consideration pursuant to Section 107.141.

Section 107.141 Preliminary Board Determinations:
 Insufficient Petition

On its own motion, the Board may determine that a petition for review is untimely, insufficient, or otherwise improperly filed. If such a determination is made, the Board may either dismiss the petition or direct that an amended petition be filed. Upon the filing of a sufficient amended petition, the case may be set for hearing pursuant to Section 107.160.

SUBPART D: NOTICE OF HEARING

Section 107.160 Authorization of Hearing

- a) The Board will set a case for hearing. The hearing will be held within 60 days after the filing of the petition for review unless the Board orders otherwise to prevent material prejudice.
- b) The hearing will be held in either Springfield or Chicago or in such other place as the hearing officer or the Board may designate to prevent material prejudice or undue delay.
- c) Upon the case being set for hearing, the Clerk will cause notice of the hearing to be published. Public notice will be published at least 21 days before the hearing by public advertisement in a newspaper of general circulation in the county in which the UST site in question is located.

SUBPART E: AUTHORITY AND DUTIES OF HEARING OFFICERS

Section 107.180 Authority of Hearing Officers

The hearing officer shall have all powers necessary to schedule and conduct a fair hearing, including but not limited to the following:

- a) Issue discovery orders whenever the parties cannot agree upon the legitimate scope of discovery, including the setting of a schedule for the orderly submission of discovery;
- b) Issue protective orders pursuant to Section 107.201(e) below;
- c) Rule on objections to discovery pursuant to Section 107.201(f) below;
- d) Hold pre-hearing conferences for settlement, simplification of issues or any other purpose;
- e) At hearing, rule on objections and offers of proof, and receive evidence in accordance with Section 107.244

below;

- f) Administer oaths and affirmations;
- g) Regulate the course of the hearings, and the conduct of the parties and counsel;
- h) Consider and rule on any non-dispositive motions;
- i) Examine the witnesses to insure a clear and complete record;
- j) Determine that a witness is adverse or unwilling pursuant to Section 107.245 below; and
- k) Compel the appearance at hearing of an officer, director or employee of a party pursuant to Section 107.245 below.

Section 107.181 Duties of Hearing Officers

The hearing officer has the duty to take all necessary action to avoid delay, to maintain order, and to ensure development of a clear and complete record. Additionally, it is the hearing officer's duty to accomplish the following:

- a) Establish a schedule for submission of briefs to the Board. All schedules and any modifications to schedules shall be in writing, and shall be submitted to the Board by the hearing officer no later than 5 days after hearing;
- b) At the conclusion of the hearing, the hearing officer shall make a statement both on the record and in writing as to the credibility of witnesses. This statement shall be based on his legal judgment and experience and shall indicate whether he finds credibility to be an issue and if so, the reasons why. This statement shall become part of the official record;
- c) The hearing officer shall transmit to the Clerk any exhibits, offers of proof not included in the hearing transcript, any proposed stipulation and settlement, and any written statements submitted pursuant to Section 107.280(b); and
- d) The hearing officer shall file a copy of all correspondence, schedules and hearing officer orders with the Clerk, and serve all parties pursuant to 35 Ill. Adm. Code 101.142.

SUBPART F: PRE-HEARING MATTERS, DISCOVERY,
ADMISSIONS AND SUBPOENAS

Section 107.200 Pre-Hearing Conference

- a) On the hearing officer's own motion, or on motion by a party, the hearing officer may direct the parties or their attorneys to appear at a specified time and place for a conference for, among other reasons, the following purposes:
 - 1) Simplifying the issues;
 - 2) Amending the pleadings for clarification, amplification, or limitation;
 - 3) Making admissions of fact or stipulating to the admissibility of any matter;
 - 4) Limiting the number of witnesses;
 - 5) Exchanging prepared testimony and exhibits; and
 - 6) Aiding in the simplification of the evidence and disposition of the proceeding.
- b) A pre-hearing conference may also be held by telephone.
- c) Substantive action taken at the pre-hearing conference shall be noted by the hearing officer, either on the record at hearing or in writing.

Section 107.201 Discovery in General

- a) Scope of Discovery: All relevant information and information calculated to lead to relevant information is discoverable, unless privileged.
- b) Disagreements on Discovery: If the parties cannot agree on the scope of discovery or the time or location of any deposition, the hearing officer shall have the authority to order discovery or to deny requests for discovery.
- c) Time for Discovery: All discovery must be completed prior to the scheduled hearing in the case. Disputes over the timing of discovery shall be directed to the hearing officer.
- d) Purpose of Discovery: All depositions and interrogatories shall be for purposes of discovery only, except for the following purposes:

- 1) Impeachment of the testimony of the deponent or interrogated person;
 - 2) As an admission of the deponent or interrogated person; and/or
 - 3) As evidence, upon motion to the hearing officer, upon a showing that at the time of hearing the person deposed or interrogated will not be available to participate in the hearing because of exceptional circumstances, including, but not limited to, death, age, sickness, infirmity, or absence from the country.
- e) Protective Orders: The hearing officer may, upon his own initiative, or on the motion of any party or witness, issue protective orders denying, limiting, conditioning or regulating discovery to prevent unreasonable expense, harassment, or oppression, and to expedite resolution of the proceeding.
 - f) Objections to Discovery: Unless a claim of privilege is asserted, it is not a ground for objection that the testimony of a deponent or person interrogated will be inadmissible at hearing, if the information sought is reasonably calculated to lead to relevant information. All objections to rulings of the hearing officer shall be made on the record at hearing, or in writing prior to hearing.
 - g) Failure to Comply: Failure to comply with any order regarding discovery shall subject the offending persons to sanctions pursuant to Subpart K below.
 - h) If any person in bad faith files any request for discovery or answers to discovery, or knowingly gives a false answer to discovery questions, the Board, upon motion or on its own initiative, may impose sanctions pursuant to Subpart K below.

Section 107.202 Subpoenas

Subpoenas are governed by the provisions of 35 Ill. Adm. Code 101.260.

SUBPART G: MOTION PRACTICE

Section 107.220 Filing and Contents of Motions and Responses

Filing and contents of motions are governed by 35 Ill. Adm. Code 101.241 and 101.242.

Section 107.221 Motions Attacking Jurisdiction or Sufficiency of the Pleadings

Motions attacking jurisdiction or the sufficiency of pleadings shall be filed pursuant to 35 Ill. Adm. Code 101.243.

Section 107.222 Motions Preliminary to Hearing

Motions preliminary to hearing (except motions to cancel hearing, governed by Section 107.225) shall be filed pursuant to 35 Ill. Adm. Code 101.245.

Section 107.223 Effect of Filing and Disposition of Motions

Provisions regarding the effect of filing a motion, and the disposition of motions, are set forth at 35 Ill. Adm. Code 101.247. Appeals of hearing officer rulings to the Board are governed by 35 Ill. Adm. Code 101.247(b).

Section 107.224 Voluntary Dismissal

A motion by petitioner to voluntarily dismiss an appeal shall be directed to the Board. Such motion may be made orally at hearing, or filed in writing prior to entry of the Board's decision. If made orally, that motion will be recorded by the hearing officer in writing and transmitted to the Board within 5 days of the close of that hearing.

Section 107.225 Motions to Cancel Hearing

- a) Time for Filing: Unless otherwise provided by Board or hearing officer order, requests for cancellation of hearing may be granted upon motion to the hearing officer, filed no less than 1410 days, or 5 days if the motion is agreed to by all parties, before the scheduled hearing date. Any motion for cancellation filed less than 1410 days, or 5 days if the motion is agreed to by all parties, before the hearing date may be granted only upon a showing by the movant that movant would suffer material prejudice if the hearing was not cancelled. Motions to cancel hearing based upon a settlement agreement are exempt from this Section, and are covered by Section 107.280 of this Part.
- b) Contents: All motions for cancellation shall be supported by an affidavit of the person or persons having knowledge of the facts supporting the request for cancellation. The affidavit shall include the factual bases for the cancellation, a complete status report detailing the progress of the proceeding, the number of cancellations previously granted, and a

proposed date for rescheduling the hearing. The hearing officer shall grant the motion only upon a showing that the request for cancellation is not the result of lack of due diligence by the movant.

Section 107.226 Motions to Stay

- a) Motions to stay a proceeding shall be directed to the Board. All motions to stay shall include a complete status report detailing the progress of the proceeding and a proposed date for further action in the proceeding.
- b) The Board will act upon all motions to stay. If the motion to stay is granted, the Board may direct the hearing officer to require status reports during the pendency of the stay.
- c) At the conclusion of the stay, the hearing officer will contact the parties and establish a new hearing schedule, unless the case is otherwise resolved.

Section 107.227 Motions for Summary Judgment

- a) Motion: Any time after the opposing party has appeared (or after the expiration of time within which any party is required to appear), but no less than 21 days prior to the scheduled hearing, a party may move the Board for summary judgment for all or any part of the relief sought.
- b) Response: Any response to a motion for summary judgment shall be filed within 14 days from service of that motion.
- c) Reply: The moving party shall not have the right to reply to a response, unless allowed by the Board or the hearing officer to prevent material prejudice.
- d) Board Determination: The Board will enter summary judgment if the pleadings, depositions and admissions on file, together with any affidavits, show that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law.
- e) Any party wishing to cancel hearing pending decision on a motion for summary judgment shall file a motion to cancel hearing pursuant to Section 107.225 of this Part.

Section 107.228 Motions for Reconsideration

- a) Any motion for reconsideration or modification of a 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 service of the motion.
- c) A timely-filed motion for reconsideration or modification stays the effect of the final order, including the time for appeal of that 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.~~
- d) In ruling upon a motion under this Section, the Board will consider factors including, but not limited to, error in the decision and facts in the record which were overlooked.

SUBPART H: HEARINGS

Section 107.240 Hearings Open to the Public

All hearings conducted under this Part shall be open to the public.

Section 107.241 Order of Cases

In the event that more than one eligibility/deductibility determination appeal is scheduled for hearing on the same day, cases will be heard in numerical order, by docket number, with the exception that any case with a completed stipulation and settlement pursuant to Section 107.300 shall be heard first. The order of hearing of cases shall be subject to modification by the hearing officer in order to avoid material prejudice or undue delay.

Section 107.242 Order of Proceedings

- a) The following shall be the order of proceedings for all hearings:
 - 1) Opening of the record of hearing and introduction of the parties by the hearing officer;
 - 2) Presentation, argument, and disposition of motions preliminary to hearing;
 - 3) Presentation of opening statements, with petitioner proceeding first and respondent proceeding second;

- 4) Petitioner's case in chief;
 - 5) Respondent's case in chief;
 - 6) Oral and/or written statements from interested persons, as authorized by the hearing officer pursuant to Section 107.260 below;
 - 7) Respondent's case in rebuttal, limited to the rebutting of statements and assertions contained in the oral and written statements allowed pursuant to subsection (a)(6) above;
 - 8) Petitioner's case in rebuttal;
 - 9) Respondent's closing arguments, including legal arguments;
 - 10) Petitioner's closing arguments, including legal arguments; and
 - 11) Scheduling submission of written briefs, if any.
- b) The order of hearing specified in subsection (a) above shall be subject to modification by the hearing officer in order to avoid material prejudice or undue delay.

Section 107.243 Testimony at Hearing

All witnesses shall be sworn and shall testify under oath. All testimony at hearing shall be subject to cross-examination by any party.

Section 107.244 Admissibility of Evidence

- a) Admissibility: The hearing officer shall admit evidence which is admissible under the rules of evidence as applied in the civil courts of Illinois, except as otherwise provided in this Part.
- b) Hearsay: The hearing officer may admit hearsay evidence which is material, relevant, and would be relied upon by prudent persons in the conduct of serious affairs, unless such evidence is privileged.
- c) When the admissibility of evidence depends upon an arguable interpretation of substantive law, the hearing officer shall admit such evidence.
- d) Scientific Articles and Treatises: Relevant scientific or technical articles, treatises, or materials may be introduced into evidence by a party, subject to

refutation or disputation through introduction of documentary evidence or expert testimony.

- e) **Written testimony:** Written testimony may be introduced by a party only if the persons whose written testimony is introduced are available for cross-examination at hearing.
- f) **Admission of business records:** A writing or record, whether in the form of any entry in a book or otherwise made as a memorandum or record of any act, transaction, occurrence, or event, may be admissible as evidence of the act, transaction, occurrence, or event. To be admissible, the writing or record shall have been made in the regular course of business, provided it was the regular course of business to make such a memorandum or record at the time of such act, transaction, occurrence, or event, or within a reasonable time thereafter. All other circumstances of the making of the writing or record, including lack of personal knowledge by the entrant or maker, may be admitted to affect the weight of the evidence, but shall not affect admissibility. The term "business", as used in this subsection (f), includes business, profession, occupation, and calling of every kind.
- g) **Prior Inconsistent Statements:** Prior statements made under oath may be admitted to impeach a witness if the statement is inconsistent with the witness' testimony at hearing.

Section 107.245 Examination of Adverse and Hostile Witnesses

- a) **Adverse Witnesses:** At hearing, upon motion to the hearing officer, any party, or any person for whose immediate benefit the action is prosecuted or defended, or the officers, directors, managing agents, or foremen of any party may be called as an adverse witness. Adverse witnesses may be examined as if under cross-examination. The party calling for the adverse witness may rebut the testimony and may impeach the witness.
- b) **Hostile Witnesses:** If the hearing officer determines that any witness is hostile or unwilling, the witness may be examined by the party calling the witness as if under cross-examination.

Section 107.246 Amendment of Pleadings

Proof may depart from pleadings, and pleadings may be amended to conform with the proof, so long as no unfair surprise results that cannot be remedied by a continuance which could be granted

consistent with the minimum timelines prescribed by this Part.

Section 107.247 Default

Failure of a party to appear ~~on~~ at the hearing, or failure to proceed as ordered by the Board or hearing officer, shall constitute default.

SUBPART I: PUBLIC PARTICIPATION

Section 107.260 Statements from Interested ~~Parties~~Persons

- a) Oral statements: The hearing officer may permit any person not a party and not otherwise a witness for a party, to make oral statements on the record when time, facilities and concerns for a clear and concise hearing record allow so. Such oral statements shall be made under oath and are subject to cross examination.
- b) Written statements: Any person not a party and not otherwise a witness for a party may submit written statements relevant to the subject matter at any time prior to hearing or at hearing. Any persons submitting such a statement shall be subject to cross examination by any party. Written statements submitted without the availability of cross-examination will be treated as public comment and shall be afforded lesser weight than evidence subject to cross examination.

SUBPART J: SETTLEMENT

Section 107.280 Settlement

- a) All parties to any case in which settlement is ~~proposed~~reached shall file, for the Board's approval, a proposed stipulation and settlement signed by all the parties or their authorized representatives, outlining the nature of, the reasons for, and the purpose to be accomplished by a settlement. ~~The stipulation and settlement agreement must be accompanied by a motion to cancel hearing in accordance with Section 107.225.~~
 - 1) Parties wishing to settle without a hearing in the case, must file the information required in subsection (a) above with the Board, and serve upon the hearing officer, before the close of business at least 143 business days before the scheduled hearing date. Any motion to cancel hearing filed less than 3 business days before the hearing date may be granted only upon a showing that material prejudice would result from a

failure to cancel hearing.

- 2) Stipulations and settlement agreements not filed at least 143 business days before the hearing shall be filed with the hearing officer at the time of the scheduled hearing, unless the hearing is cancelled pursuant to subsection (a)(1) above.
- b) The stipulation shall contain a full statement of all material facts pertaining to the nature of the OSFM's determination of deductibility or eligibility.
- c) If the provisions of subsection (a)(1) above are fulfilled, the Board may accept a stipulation and settlement without a public hearing.

SUBPART K: POST-HEARING MATTERS

Section 107.300 Hearing Transcripts

The Board will provide for a court reporter who shall transcribe the entire hearing. The original transcription shall be filed with the Board. Any party or witness may move to correct the transcript within 7 days of the filing of the transcript with the Board.

Section 107.301 Written Briefs

- a) Except as otherwise directed by the Board, all briefs shall be filed in accordance with the briefing schedule established by the hearing officer pursuant to Section 107.181 above of this Part. Any party may move the Board for an extension of time to file briefs in accordance with Subpart G above of this Part.
- b) The briefs shall set forth the party's legal arguments including citation to authorities and to the pages of the record relied upon. All briefs shall comply with the provisions of 35 Ill. Adm. Code 101.104.
- c) The parties may waive their right to file a brief either orally on the record at hearing or by written motion.

Section 107.302 Record of Proceeding

All pleadings, motions, orders, briefs, the transcript of hearing, offers of proof, exhibits, and any written statements from the public, and stipulation and settlement agreements shall constitute the record.

SUBPART L: SANCTIONS

Section 107.320 Sanctions

The imposition of sanctions for refusal to comply with procedural rules, Board orders, or hearing officer orders, or for abuse of discovery procedures, are governed by 35 Ill. Adm. Code 101.Subpart J.

SUBPART M: FINAL BOARD ACTION

Section 107.340 Standard of Review

The standard of review of an OSFM final determination is whether the application, as submitted to OSFM, demonstrates compliance with the Act and Board regulations.

Section 107.341 Contents of Board Opinions

- a) The Board will issue a written opinion and order stating the facts and reasons leading to its decision.
- b) The Board's opinions and orders will include, but are not limited to, findings of fact and conclusions of law.

Section 107.342 Duties of the Clerk

The Clerk shall certify and maintain copies of the opinions and orders of the Board, with the vote of each Board member recorded. The Clerk shall serve all parties with a copy of such opinions and orders by certified mail, return receipt requested.

SUBPART N: MOTIONS FOR RECONSIDERATION
AND RELIEF FROM FINAL BOARD ORDERS

Section 107.360 Motions for Reconsideration

Motions for reconsideration of a final Board order shall be filed and acted upon pursuant to Section 107.228 above.

Section 107.361 Relief from Final Orders

- a) Clerical mistakes in orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the Board at any time on its own initiative or on the motion of any party and after such notice, if any, as the Board orders. 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 only with leave of the appellate court. Any

corrected order will be mailed to all parties and participants in that proceeding.

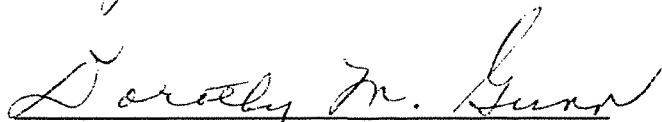
- b) On written motion, the Board may relieve a party from a final order entered in a contested case, for the following:
 - 1) Newly discovered evidence which existed at the time of hearing and which by due diligence could not have been timely discovered; or
 - 2) Fraud (whether intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; or
 - 3) Void order, such as an order based upon defective subject-matter jurisdiction.
- 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, and must be served on all parties to the proceeding.
- d) A motion under subsection (b) above shall be filed with the Board within one year 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 107.362 Judicial Review of Final Board Orders

Judicial review of final Board orders shall be pursuant to Section 41 of the Act. Appeal is directly to the appellate court.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 15th day of September, 1994, by a vote of 6-0.


Dorothy M. Gunn, Clerk
Illinois Pollution Control Board