

ILLINOIS POLLUTION CONTROL BOARD
February 8, 1990

IN THE MATTER OF:)
)
AMENDMENTS TO 35 ILL. ADM. CODE)
105.102; REPEAL OF DE NOVO)
HEARINGS FOR APPEALS OF NPDES) R90-8
PERMITS.) (Rulemaking)

PROPOSED RULE FIRST NOTICE

OPINION AND ORDER OF THE BOARD (by B. Forcade):

This matter arises on the Board's own motion. Recently, the appellate court interpretations of a Board regulation have been different than the Board's interpretation of that regulation. To ensure the Board's objective is secured, the Board today proposes to amend that regulatory language to more clearly reflect the Board's present intentions.

The regulation at issue, 35 Ill. Adm. Code 105.102(b)(8) provides for de novo hearings on disputed issues of fact in NPDES permit appeals. The Second District, in Dean Foods Company v. PCB, 143 Ill. App. 3d 322, 492 N.E. 2d 1344 (Second District, 1986), held the "de novo" required the Board to entertain facts not before the Agency in its permit review. In City of East Moline v. Illinois Environmental Protection Agency, PCB 86-218 (September 8, 1988), the Board reevaluated the regulation and held that "de novo" meant a "new and fresh" look at the facts before the Agency and a decision that did not grant deference to the prior Agency decision. The Board felt that allowing new information to be introduced, information that was not before the Agency, would make this Board the permit issuing entity in Illinois in contravention of Section 39(a) of the Environmental Protection Act (hereinafter "the Act"), and Village of Hillside v. John Sexton Sand & Gravel Company, 105 Ill. App. 3d 533, 434 N. E. 2d 382 (First District, 1982).

The Board's interpretation appears to be at least partially at odds with two cases very recently decided by the appellate courts, City of East Moline v. PCB, 188 Ill. App. 3d 349, 544 N.E. 2d 82 (Third District, 1989), and Citizens Utilities v. PCB, ___ Ill. App. 3d ___, ___ N.E.2d ___ (Third District, Slip Opinion January 5, 1990).

The Board intends to correct this discrepancy in interpretation by proposing to amend the regulatory language to more clearly reflect the Board's intentions.

Today's proposal flows from the authorization of Section 26 of the Act, allowing the Board to adopt procedural rules pursuant

to the Administrative Procedures Act (hereinafter "APA"). The Board intends to follow the procedures of Section 5.01 of the APA by allowing comment for at least 45 days after first notice publication in the Illinois Register. Because of the limited scope of the proposed amendments, the Board does not intend to initiate hearings in this matter. Interested persons are requested to provide all comments in written format to the Clerk of the Board.

The Board's intention in this proceeding is to make the NPDES permit appeal process function in the same manner as the appeal of all other Agency issued permits. In those other circumstances, the Board gives no deference to the Agency's decision, but neither does the Board allow a hearing based on totally new factual material not previously before the Agency. The Board believes implementation of this concept can be accomplished in NPDES permit appeals by including the language, "The decision of the Board shall be based exclusively on the record before the Agency including the record of hearing, if any." This language, as well as the burden of proof language, is found with minor semantic differences in Section 40(b), (c), and (d) of the Act governing permit appeals. Today's proceeding is not intended to make any changes in the manner in which other non-NPDES permit appeal proceedings are conducted.

The Board specifically encourages all interested persons to comment on what unique aspects of the NPDES permitting process would require divergence from the traditional Board permit review procedures which are limited to the record before the Agency, and whether such divergence could be accomplished without making the Board the permitting agency.

ORDER

The Board hereby proposes for First Notice the following amendments to 35 Ill. Adm. Code 105, Subtitle A: General Provisions, Chapter I, Pollution Control Board, Section 105.102, Permit Appeals. The Clerk of the Board is directed to file these proposed amendments with the Secretary of State.

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

PART 105
PERMITS

Section
105.101 Setting Standards
105.102 Permit Appeals
105.103 Permit Review
105.104 Cost of Review

APPENDIX A Old Rule Numbers Referenced

AUTHORITY: Authorized by Section 26 of the Environmental Protection Act (Ill. Rev. Stat. 1979, ch. 111½, par. 1026) and implementing Sections 5, 39, 40 and 40.1 of the Illinois Environmental Protection Act (Ill. Rev. Stat. 1979, ch. 111½, pars. 1005, 1039, 1040 and 1040.1, as amended by P.A. 82-682).

SOURCE: Filed with Secretary of State January 1, 1978; amended 4 Ill. Reg. 52, page 41, effective December 11, 1980; codified 6 Ill. Reg. 8357; amended in R90-8 at 14 Ill. Reg. _____, effective _____.

Section 105.102 Permit Appeals

- a) Permit Appeals Other than NPDES (National Pollutant Discharge Elimination System) Permit Appeals:
 - 1) If the Agency denies the permit, it shall advise the permit applicant in writing in accordance with the requirements of Section 39(a) of the Environmental Protection Act (Act).
 - 2) In the case of a denial of a permit or issuance by the Agency of a permit with one or more conditions or limitations to which an applicant objects, an applicant who seeks to appeal the Agency decision shall file a petition for a hearing before the Board within 35 days of the date of mailing of the Agency's final decision. The petition shall include:
 - A) Citation of the particular standards under which a permit is sought;
 - B) A complete and precise description of the facility, equipment, vehicle, vessel, or aircraft for which a permit is sought, including its location;
 - C) A complete description of contaminant emissions and of proposed methods for their control; and
 - D) Such other materials as may be necessary to demonstrate that the activity for which the permit is sought will not cause a violation of the Act or the regulations.
 - 3) The method of filing service shall be in accordance with Sections 103.122 and 103.123.
 - 4) The Agency shall appear as respondent in the hearing and shall, within 14 days, upon notice of

the petition, file with the Board the entire Agency record of the permit application, including:

- A) The application;
- B) Correspondence with the applicant; and
- C) The denial.

- 5) The Clerk shall give notice of the petition and hearing in accordance with Part 103.
- 6) The proceedings shall be in accordance with the rules set forth in Part 103.

b) NPDES Permit Appeals:

- 1) If the Agency denies an NPDES Permit, it shall advise the permit applicant in writing in accordance with the requirements of Section 39(a) of the Act.
- 2) In the case of the denial of an NPDES Permit or the issuance by the Agency of an NPDES Permit with one or more conditions or limitations to which the applicant objects, the applicant may contest the decision of the Agency by filing with the Clerk of the Board a petition for review of the Agency's action in accordance with this Section.
- 3) Any person other than the applicant who has been a party to or participant at an Agency hearing with respect to the issuance or denial of an NPDES Permit by the Agency, or any person who requested such a hearing in accordance with applicable rules, may contest the final decision of the Agency by filing with the Clerk a petition for review of the Agency's action.
- 4) The petition shall be filed and notice issued within 30 days from the date the Agency's final decision has been mailed to the applicant and all other persons who have right of appeal. The method of filing and service shall be in accordance with Sections 103.122 and 103.123.
- 5) The Agency shall appear as respondent and shall file an answer consisting of the hearing file of any hearing which may have been held before the Agency, including any exhibits, and the following documents: NPDES Permit application, NPDES Permit denial or issuance letter, and all correspondence with the applicant concerning the application.

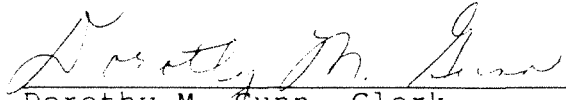
- 6) All parties other than the petitioner who were parties to or participants at any Agency hearing shall be made respondents.
- 7) The petition shall contain a statement of the decision or part thereof to be reviewed. The Board upon motion of any respondent shall, or upon its own motion may, require of the petitioner a specification of the errors upon which the petitioner relies in his petition.
- 8) The hearings before the Board shall extend to all questions of law and fact presented by the entire record. The Agency's findings and conclusions on questions of fact shall be prima facie true and correct. If the Agency's conclusions of fact are disputed by the party or if issues of fact are raised in the review proceeding, the Board may make its own determination of fact based on the record. If any party desires to introduce evidence before the board with respect to any disputed issue of fact, the Board shall conduct a de novo hearing and receive evidence with respect to such issue of fact. In a permit appeal proceeding, the burden of proof shall be on the petitioner. It shall be the duty of the petitioner, at hearing, to prove for each and every material fact that its permit application, as submitted to the Agency, establishes that the facility will not cause a violation of the Act or Board regulations. If conditions are challenged, the petitioner must prove that they are not necessary to accomplish the purposes of the Act and therefore, were imposed unreasonably. The decision of the Board shall be based exclusively on the record before the Agency including the record of the Agency hearing, if any.
- 9) This proceeding shall be in accordance with Part 103.
- 10) The order of the Board entered pursuant to hearing may affirm or reverse the decision of the Agency, in whole or in part, may remand the proceeding to the Agency for the taking of further evidence, or may direct the issuance of the permit in such form as it deems just, based upon the law and the evidence.

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

IT IS SO ORDERED

Board Member J. Anderson dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Proposed Rule, First Notice Opinion and Order was adopted on the 4th day of February, 1990, by a vote of 6-1.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board