

ILLINOIS POLLUTION CONTROL BOARD  
March 16, 2000

IN THE MATTER OF: )  
)  
REVISION OF THE BOARD'S ) R00-20  
PROCEDURAL RULES: 35 ILL. ADM. ) (Rulemaking - Procedural)  
CODE 101-130 )

Proposed Rule. First Notice.

OPINION OF THE BOARD (by C.A. Manning, G.T. Girard, and E.Z. Kezelis)

The Board today proposes new procedural rules for first notice publication in the *Illinois Register*. The proposed rules govern how persons initiate and participate in all proceedings before the Board under the Environmental Protection Act (Act), 415 ILCS 5/1 *et seq.* (1998), and other legislation directing Board action.

The Board crafted the proposed rules to more efficiently and effectively implement the Act and other laws in Board proceedings. Upon final adoption, the proposed rules will replace all of the Board's existing procedural rules and all Board resolutions that relate to procedural matters. To avoid confusing participants in the Board's process and to distinguish this proposal from prior ones, the Board today opens this new docket.

This proposal builds upon the strengths of the proposal for public comment that the Board issued in predecessor docket Revision of the Board's Procedural Rules: 35 Ill. Adm. Code 101-130 (October 3, 1996), R97-8 (referred to as "predecessor docket"), which the Board closes today in a separate order. This proposal has benefited from the significant amount of public comment that the Board received in the predecessor docket. These comments prompted many of the changes that the Board discusses in this opinion.

The Board sets the following schedule for public hearings and public comments on this proposal:

PUBLIC HEARINGS

First Hearing: Tuesday, April 11, 2000

1:30 p.m.

Illinois Pollution Control Board  
600 South Second Street, Suite 402  
Springfield, Illinois 62704

Second Hearing: Thursday, May 4, 2000

1:30 p.m.  
James R. Thompson Center  
100 West Randolph Street, Room 9-040  
Chicago, Illinois 60601

WRITTEN PUBLIC COMMENTS

Filing Deadline: June 1, 2000

Where to File:

Office of the Clerk  
Illinois Pollution Control Board  
James R. Thompson Center  
100 West Randolph, Suite 11-500  
Chicago, Illinois 60601

The Board intends that the hearings be as effortless as possible for the participants. No prefiling will be necessary. The purpose of the hearings is simply to accept into the record any oral comments that anyone may have and to further explain the rules in response to any requests to do so. The Board will make the transcript of each hearing available on the Board's Web site ([www.ipcb.state.il.us](http://www.ipcb.state.il.us)).

The Board also will establish a "Public Comment Page" on the Web site and post all public comments received, as well as the opinion and order in the predecessor docket. While this page will be for this proceeding only, it will serve as a pilot program for future Board regulatory proceedings. Public comments may be submitted to the Clerk's Office electronically at [clerk@ipcb.state.il.us](mailto:clerk@ipcb.state.il.us), but persons wishing to comment should refer to the hearing officer's order, also to be issued today, for specific requirements. The Board's opinion and order in this matter, as well as the hearing officer order, also will be posted on the Web site.

PUBLIC COMMENTS FILED IN PREDECESSOR DOCKET

The Board received a significant amount of public comment in the predecessor docket. The Board thanks each of the 13 commenters and lists them below, along with the shortened names that the Board uses in this opinion to discuss their comments:

<u>PUBLIC COMMENT #</u>	<u>PERSON OR ENTITY</u>	<u>SHORTENED NAME</u>
1	Joint Committee on Administrative Rules	JCAR
2 and 3	Chicago Bar Association	CBA

4	Webber & Thies, P.C.	Webber
5	Office of the Attorney General James E. Ryan	AGO
6	Gardner, Carton & Douglas	Gardner
7	Monsanto Company	Monsanto
8	Sidley & Austin	Sidley
9	Mayer, Brown & Platt	Mayer
10	Lyman C. Welch	Welch
11	Illinois Environmental Protection Agency	Agency
12	Illinois Environmental Regulatory Group	IERG
13	Illinois State Bar Association's Environmental Law Section Council	ISBA

## OVERVIEW OF FIRST NOTICE PROPOSAL

### Facilitating Public Participation

The Board continues to base its procedural rules on federal and State codes of civil procedure, rules of the Illinois Supreme Court, and procedural requirements of various environmental laws. The proposed rules, however, also seek to facilitate public participation in Board proceedings.

First, to make the rules easier to use, the Board has simplified and defined many terms potentially unfamiliar to the public. Second, the Board has made organizational changes in response to public comments. Third, the Board has described more clearly the many opportunities for the public to participate in Board proceedings. Fourth, the Board has eliminated from the rules many of the internal directives to the Clerk and Board staff. Finally, the proposed rules are the comprehensive source of all of the Board's procedural requirements—it no longer will be necessary to refer to Board resolutions that relate to procedural matters.

In addition, this proposal establishes procedural rules for particular proceedings and circumstances for which no specific procedural rules exist. This includes appeals of Agency leaking underground storage tank decisions, appeals of administrative citations, and appeals of

local government decisions on siting new pollution control facilities. It also includes procedural rules for the Board to certify “pollution control facilities” for tax purposes under the Property Tax Code, 35 ILCS 200/11-5 *et seq.* (1998). In addition, the proposed rules specifically address aspects of the more complex litigation that the Board has begun to see in the last few years, including counter-complaints, cross-complaints, and third-party complaints, and how persons who are not parties to an enforcement proceeding may be added as respondents.

### Roadmap to the Various Parts of the Proposed Procedural Rules

The proposed procedural rules consist of ten parts within Title 35 of the Illinois Administrative Code. Part 101 sets forth the general procedural provisions that apply to all Board proceedings, including adjudicatory and rulemaking proceedings. These general rules apply unless more specific rules for particular proceedings supersede them.

The balance of the proposed rules govern specific types of Board proceedings. As in the existing rules, Part 102 addresses regulatory and informational proceedings; this material was presented as Part 125 in the predecessor docket. Part 103 continues to apply to enforcement proceedings.

In response to comment, the Board dedicated Part 104 to addressing the three core adjudicatory proceedings for obtaining relief from generally applicable regulations: variances, provisional variances, and adjusted standards. Part 105 covers Board review of other State agency final actions, including final decisions of the Agency under various programs and final decisions of the Office of the State Fire Marshal (OSFM) with respect to the Underground Storage Tank (UST) Fund.

Part 106 establishes procedures for proceedings pursuant to specific rules or statutory provisions, such as heated effluent and artificial cooling lake demonstrations and involuntary terminations of Environmental Management System Agreements (EMSAs). Many of the provisions in this Part were in Part 104 in the predecessor docket.

Part 107 addresses appeals of decisions of local governments on siting new pollution control facilities (Part 106 in the predecessor docket), and Part 108 establishes procedures for appeals of administrative citations. Part 125 addresses petitions for the Board to certify “pollution control facilities” and “low sulfur dioxide emission coal fueled devices” for tax purposes under the Property Tax Code. Finally, Part 130 sets forth procedures to identify and protect trade secrets and other non-disclosable information.

## DISCUSSION OF PROPOSED RULES AND PUBLIC COMMENTS

### Part 101: General Rules

#### Section 101.110 Public Participation

In response to Mayer's comment, the Board modifies the last sentence of subsection (a) to clarify that a hearing officer may allow the public to participate only to the extent permitted by applicable law and these procedural rules. Mayer also suggested that parties should have a chance to respond to *amicus curiae* briefs. The Board amends subsection (c) to allow response briefs with the Board's permission.

#### Section 101.112 Bias and Conflict of Interest

In this Section, the Board addresses a subject that the current procedural rules do not—the ability of current or former Board Members or Board employees to represent others in Board proceedings. Without exception, the Board prohibits current Board Members and Board employees from representing others in any Board proceeding. Representation includes consulting on legal or technical matters.

In the predecessor docket, this Section banned, without exception, former Board Members and Board employees from appearing before the Board for six months after leaving the Board. The Board deletes this language from the proposal, preferring to address such matters internally and in accordance with the Code of Professional Ethics for attorneys (see Illinois Supreme Court Rules, Article VIII). Former Board Members and Board employees cannot at any time, however, represent others in any Board proceeding in which he or she participated personally and substantially while with the Board, unless the Board and all parties or proponents consent in writing after disclosure.

#### Section 101.114 *Ex Parte* Communications

The Board clarifies this Section to prevent the public from unwittingly attempting to improperly contact a Board Member or Board employee.

The current procedural rules do not define “*ex parte* communication.” The Board defines the term in Section 101.202 of the proposed rules as a communication between an outside person and a Board Member or Board employee that reflects on the substance of a pending Board proceeding and that takes place outside the record of that proceeding. The definition applies to both adjudicatory and regulatory proceedings. In accordance with Section 10-60(d) of the Illinois Administrative Procedure Act (IAPA), 5 ILCS 100/10-60(d) (1998), the definition expressly excludes communications regarding matters of procedure and practice, such as the format of pleadings, number of copies required, manner of service, and status of proceedings. For purposes of this definition, “Board employee” means a person the Board employs on a full-time, part-time, contract or intern basis.

*Ex parte* communications with respect to pending adjudicatory proceedings are prohibited. Information about a pollution source included in the record of a regulatory proceeding is not considered an *ex parte* communication with respect to any adjudicatory proceeding concerning the source. Finally, Board Members and Board employees should not engage in an *ex parte* communication designed to influence his or her action with respect to a pending regulatory proceeding.

### Section 101.202 Definitions for Board's Procedural Rules

Commenters generally supported the Board's attempt to make its processes more understandable to the public by defining many previously undefined terms. Commenters suggested, however, that the Board proposed too many definitions. While this Section retains many terms from the predecessor docket that are not defined in the Board's current procedural rules, the Board eliminates many of the definitions that may be confusing in the context of administrative rules. The Board believes, however, that additional definitions in the form of a glossary or other explanatory material may be helpful to persons new to the Board, and the Board is exploring means to provide this information.

Below, the Board discusses the major concerns raised in public comments and the significant revisions to current or previously proposed definitions.

Adjusted standard. The Board can grant permanent relief under adjusted standards, but it also may limit the duration of the relief. The Board therefore deletes the word "permanent," consistent with Board precedent.

Certificate of acceptance. The Agency commented that the definition should reflect that the petitioner must file the certificate with the Board and serve it on the Agency for the variance to be effective. The Board does not believe that it is appropriate to place this language in a definition. The Board instead sets it forth in the variance rules at Section 104.240.

Delegated unit. Mayer questioned the phrase "other function" in this definition. The Board notes that Section 4(r) of the Act, to which the definition refers, allows the Agency to delegate to a unit of local government "all or portions of its inspecting, investigating and enforcement functions." The phrase "other function" in the definition accommodates this statutory language, which is not expressly limited to the administrative citation function.

Discovery. In the predecessor docket, the Board's definition referred to "facts and information about the case from the other party . . . ." Here, the Board deletes the phrase "from the other party" in response to Mayer's comment. In addition, the Board clarifies that the definition applies only to adjudicatory cases.

Document. In response to Mayer's comment that the definition is unnecessary and confusing, the Board deletes the definition.

Duplicitous or duplicative, and Frivolous. Some commenters took issue with these definitions as proposed in the predecessor docket. Section 31(d) of the Act requires the Board

to set citizen's enforcement actions for hearing unless the Board determines that the complaint is "duplicitous or frivolous." 415 ILCS 5/31(d) (1998). The current procedural rules do not define "duplicitous" or "frivolous." In the predecessor docket, the Board defined "duplicitous or duplicative" to mean that "the matter is identical or substantially similar to one brought in another forum" and "frivolous" to mean "a request for relief that the Board does not have the authority to grant."

The Board and the courts consistently have interpreted "duplicitous" to mean duplicative. See Winnetkans Interested in Protecting the Environment (WIPE) v. Illinois Pollution Control Board, 55 Ill. App. 3d 475, 478-479, 270 N.E.2d 1176, 1178-1179 (1st Dist. 1977); People v. State Oil Company (August 19, 1999), PCB 97-103, slip op. at 2-3. CBA, citing WIPE, argued that a complaint is "duplicitous" only if it is identical or substantially similar to one brought "before the Board." CBA asserts that the Board, by referring to "another forum," has improperly broadened the meaning of "duplicitous."

The Board disagrees. In WIPE, the issue was whether the complaint before the Board was rendered duplicitous by an earlier complaint before the Board. The facts of the case did not present the court with the question of whether the complaint before the Board may be rendered duplicitous by a matter in a forum other than the Board. The decision in WIPE in no way precludes the reference to other forums in the Board's definition of "duplicitous" as CBA suggests.

The Board amends the definition to refer to identical or substantially similar matters "before the Board" as well as such matters "in another forum." This revised definition is consistent with how the Board currently decides whether a citizen complaint is duplicitous. See Walsh v. Kolpas (September 23, 1999), PCB 00-35, slip op. at 2 ("An action before the Board is duplicitous if the matter is identical or substantially similar to one brought in this or any other forum."). Although the Board has exclusive jurisdiction over citizen complaints under the Act (People v. State Oil, PCB 97-103, slip op. at 7-10), it nevertheless is necessary to refer to "another forum" in the proposed definition of "duplicitous or duplicative" because the State may initiate an enforcement proceeding under the Act in circuit court against a citizen, and the citizen may file a third-party claim in the circuit court. See People v. Fiorini, 143 Ill. 2d 318, 337-338, 574 N.E.2d 612, 619 (1991); People v. NL Industries, 152 Ill. 2d 82, 93, 604 N.E.2d 349, 353 (1992).

In its comment, Sidley sought a broader definition of "frivolous." Specifically, Sidley suggested that the definition include claims that are "essentially devoid of merit or trivial in nature." While the Board declines this suggestion, the Board expands the definition in accordance with Board precedent by adding the language "fails to state a cause of action upon which the Board can grant relief." See State Oil, PCB 97-103, slip op. at 3.

Interlocutory appeal. CBA and Sidley requested that the Board correct this definition to mean an appeal of a Board decision "to the appellate court which is not dispositive of all the contested issues in the case." The Board does so.

Joinder. The Board clarifies this definition to respond to Sidley's comment.

Material. Mayer commented that definitions for “material” and “relevant” seem gratuitous and unwise, and Gardner suggested that changes were necessary. The Board deletes these definitions.

Motion. In response to numerous comments that the Board’s proposed definitions of various types of motions provided more confusion than clarity, the Board deletes them.

New pollution control facility. In response to Gardner’s comment about changes to Section 3.32(b) of the Act that took place after the Board’s proposal for public comment in the predecessor docket, the Board incorporates the suggested language.

Non-disclosable information. In the predecessor docket, the Board quoted Section 7(a) of the Act, 415 ILCS 5/7(a) (1998), to define “non-disclosable information”: “*information which constitutes a trade secret, information privileged against introduction in judicial proceedings, internal communications of the several agencies, information concerning secret manufacturing processes or confidential data submitted by any person under this Act.*” CBA suggested that this information be more appropriately termed “confidential information.” The Board declines this suggestion, believing that the term “non-disclosable information” encompasses a broader subject matter.

Participant. The Board expands the definition to include the concept from the predecessor docket of “non-party participant,” a term the Board eliminates here.

Participant in a CAAPP Comment Process. The Agency suggested including not only persons who participated in the hearing before the Agency, but also persons who commented on the draft Clean Air Act Permit Program (CAAPP) permit. The Board does so.

Pollution control facility. To respond to Gardner’s comment, the Board deletes the following language to reflect legislative changes that occurred after the Board’s proposal for public comment in the predecessor docket: “that accepts waste from or that serves an area that exceeds or extends over the boundaries of any local general purpose unit of government.”

Provisional variance. In response to Sidley’s comment, the Board deletes any reference to time in this definition.

Public comment. In the predecessor docket, the Board used the word “testimony” in defining “public comment.” Mayer correctly pointed out that unsworn statements not subject to cross-examination (*i.e.*, public comments) are usually not considered “testimony.” The Board modifies this definition to read “information submitted to the Board during a pending proceeding either by oral statement made at hearing or written statement filed with the Board.”

Recycled paper. The Board removes a past effective date.

Regulatory relief mechanism. In response to comments from CBA and the Agency, the Board simplifies the definition so that it refers only to the three core adjudicatory proceedings for obtaining relief from rules of general applicability: “variances, provisional variances and adjusted standards.”



Relevant. The Board removes this definition because the term is more appropriately applied on a case-by-case basis.

Service list. Welch commented that requiring participants to serve their comments in regulatory proceedings is burdensome. The purpose of the service list is to ensure that all persons interested in a given proceeding are well-informed. The Board notes, however, that under this proposal, hearing officers have the discretion to relieve persons of service requirements in a given rulemaking as may be appropriate (see 102.108(c)). Since the Board's action in the predecessor docket, the Board has made major improvements to its Web site. The Board's hope in the near future is to facilitate a less burdensome exchange of public comments among rulemaking participants by using the Board's Web site to publish public comments. Towards that end, a trial electronic exchange of public comments on the Board's Web site is part of this rulemaking. Depending upon its success and other technological advances, the Board may revise its service requirements. Nonetheless, at this point in time, the Board moves forward with the definition.

Substantive amendment to an initial filing. The Board deletes this definition.

Third party. Mayer and Welch were confused by the reference to "principal" parties. The Board deletes "principal."

Uncontrollable circumstances. The Board declines CBA's request to define this term.

Undue delay. CBA and the Agency expressed concerns over this definition. The Board deletes it.

#### Section 101.300 Computation of Time

To eliminate any confusion, the Board specifies the dates of Board decisions for purposes of the Board's statutory decision deadlines and appeals of Board decisions.

#### Section 101.302 Filing of Documents

Regarding subsections (d) and (h), Welch encouraged routine electronic filing without any requirement to thereafter file paper copies. While electronic filing has advantages, the Board is not quite ready to move from a paper to an electronic filing system. The Board does amend subsection (d) so that electronic filing is not necessarily limited to "special or emergency circumstances," but retains the requirement that such filings receive the prior approval of the Clerk or the hearing officer. The Board also eliminates the requirement that persons use various written Board forms.

In addition, the Board currently is considering the use of an electronic filing and docketing system. The Board may move in this direction in the near future and, accordingly, invites public comment on any specific features such a system might include.

With respect to subsection (h) (formerly (i)), the Board reduces the number of copies generally required for filings with the Clerk. Specifically, the proposal for public comment in

the predecessor docket required a signed original plus 11 copies, for a total of 12. The Board amends the subsection to require a signed original plus nine copies, for a total of ten. This is consistent with the Board's current procedural rules (see 35 Ill. Adm. Code 101.103(b)). In addition, the Agency suggested that the Board require only four copies of voluminous regulatory filings and permit appeal records upon the Clerk's prior approval. The Board declines this suggestion but notes that a person may request that the Board allow the submittal of fewer copies of a given filing than would otherwise be required.

Regarding the page limit on briefs in subsection (j) (formerly (k)), Mayer commented that it was unfair to allow the movant 50 pages, and limit the respondent to 25 pages. In response, the Board changes both page limits to 30, excluding appendices. The Board also adds a 20 page limit on *amicus curiae* briefs, as well as a provision that briefs may exceed these limits with prior approval of the Board or hearing officer.

#### Section 101.308 Statutory Decision Deadlines and Waiver of Deadlines

Gardner requested specification whether a waiver should be a letter or a pleading. The Board does not amend the rule because the Board will accept either document if the petitioner clearly states its intent to waive the deadline.

With respect to subsection (a), the AGO commented that UST Fund determinations fall under Section 57.9 of the Act, not Section 40; thus they are probably not subject to the decision deadline set forth in Section 40. The Board agrees that certain UST Fund determinations are appealable to the Board pursuant to Section 57.9 rather than Section 40. The AGO's comment focuses on the OSFM's eligibility and deductibility determinations, the appeals of which do not have a decision deadline. Under Section 57.8(i) of the Act, however, Agency UST Fund determinations are appealable pursuant to Section 40, and Section 40 appeals have decision deadlines. The Board amends subsection (a) to clarify that the reference to Section 40 does not apply to OSFM decisions.

Regarding subsection (c), the AGO is concerned that a permit appeal may last indefinitely under an "open waiver," to the potential detriment of the state-wide program to protect the environment. The AGO argued that a petitioner may be able to delay compliance unless the rules impose reasonable restrictions.

IERG supported the negotiation waiver as proposed. However, Webber commented that subsection (c) lacks a provision by which the Board can reassert control over a docket that has shown no activity under an "open" or "negotiation" waiver. The Board appreciates the commenters' concerns about cases pending indefinitely. The Board's administrative process, however, is designed to guard against just such an eventuality. Specifically, the Board's hearing officers continually monitor the status of cases to ensure that they are proceeding to timely dispositions.

Moreover, regardless of any waivers, a party may at any time request that the Board set a matter for hearing. The Board can and will, on its own motion or a party's motion, direct

that a case proceed to hearing unless the petitioner can show good cause for continued negotiations. The Board always is willing to entertain motions to expedite hearings.

Mayer commented that the negotiation waiver may be more widely used if the end of the waiver does not trigger the full 120-day decision period, but instead only the time necessary for the Board to complete the matter, *e.g.*, when such a waiver is filed after hearing. The Board notes that even after a petitioner files a negotiation waiver, when the petitioner will file the notice to reinstate is unspecified. The decision period is simply reinstated whenever the petitioner files a notice to reinstate. Accordingly, it would be impractical for the Board to allow a petitioner to establish a truncated decision period, in effect, without warning. In addition, even with a reinstated 120-day decision period, the Board is not required to use the full decision period to reach its decision.

After considering the comments, the Board does not significantly change subsection (c). The Board does modify the rule, however, to provide that if a petitioner files a time certain waiver before hearing, the waiver must be for at least 120 days. This minimum waiver period is designed to prevent problems that could result if a waiver does not allow sufficient time for hearing notices and preparation. The Board also clarifies that a waiver does not preclude the Board from reaching a decision before the deadline.

#### Section 101.310 Notice of Withdrawal of Cases

In the predecessor docket, the Board proposed allowing petitioners and complainants to withdraw cases simply by filing a notice, without any Board action. CBA commented that the Board might want to retain control over case withdrawals in the event that there are cross-claims or counter-claims and to impose sanctions when a party has filed and withdrawn a case in bad faith to harass another party. The Board deletes this Section. No case will be removed from the Board's docket absent a Board order.

#### Section 101.400 Appearances, Withdrawals and Substitutions of Attorneys in Adjudicatory Proceedings

Attorney Representation. Section 101.400(a)(2) clarifies that a person must be a licensed attorney to appear before the Board on behalf of others in an adjudicatory proceeding. In the predecessor docket, the Board based this provision on its interpretation of the Attorney Act, 705 ILCS 205/1 *et seq.* (1998), the Corporation Practice of Law Prohibition Act, 705 ILCS 220/1 *et seq.* (1998), and Illinois case law. No commenter disagreed with this interpretation, and the AGO agreed with the Board's approach. In addition, the provision is consistent with the recent line of Board decisions that found various activities in adjudicatory proceedings before the Board to constitute the practice of law. See, *e.g.*, *In re Petition of Recycle Technologies, Inc. for an Adjusted Standard Under 35 Ill. Adm. Code 721.131(c)* (July 10, 1997), AS 97-9.

Generally, under the Attorney Act, a person may appear on his own behalf, but cannot appear on behalf of others unless admitted to practice law. See 705 ILCS 205/1, 11 (1998). While non-attorneys may represent others before certain excluded State boards and commissions

without violating this prohibition, the Board currently is not among the list of exclusions. See 705 ILCS 205/1 (1998). The purpose of the statutory prohibition is “the protection of the litigants against the mistakes of the ignorant and the schemes of the unscrupulous and the protection of the court itself in the administration of its proceedings from those lacking the requisite skills.” City of Chicago v. Witvoet, 12 Ill. App. 3d 654, 655-56, 299 N.E.2d 128 (1st Dist. 1973).

The Board emphasizes that individuals may represent themselves in adjudicatory proceedings before the Board. The Board also draws an important distinction between its quasi-judicial adjudicatory function and its quasi-legislative regulatory function. Because participating in regulatory proceedings does not constitute the “practice of law,” one may represent others in a regulatory proceeding without being an attorney. The Board invites suggestions at hearing and in public comment for distinctions that may appropriately be drawn between what does and does not constitute the “practice of law” in the various aspects of the Board’s adjudicatory proceedings.

Attorney Appearances and Withdrawals. Webber commented that withdrawal of legal counsel can place parties at risk of losing rights, may lessen the Board’s control over its docket, and may be a procedure that desperate parties will abuse. CBA commented that legal counsel should be required to file a motion to withdraw if a hearing date or statutory decision deadline is near.

The Board does not amend the proposal in response to these comments. If a party feels that attorney withdrawal would have a prejudicial impact, the party may file a motion for relief.

#### Section 101.402 Intervention of Parties; Section 101.403 Joinder of Parties

CBA and Gardner commented that the rule should not limit intervention and joinder to enforcement cases. CBA also commented that the Section appeared to use the concepts of intervention and joinder interchangeably. The Board no longer limits these concepts to enforcement proceedings. In addition, for clarity, the Board separates the two distinct concepts into two separate sections and provides procedures to intervene and to join parties.

### Section 101.502 Motions Directed to the Hearing Officer

Based on CBA's comment, the Board modifies subsection (b). Now an objection to a hearing officer's ruling rendered at hearing will be deemed waived if not filed within seven days after the Board receives the hearing transcript.

### Section 101.508 Motions to Board Preliminary to Hearing

The AGO commented that it seems unlikely that all motions filed with the Board will "require 21 days of consideration." The AGO stated that while it may take 21 days to evaluate a motion for summary judgment, a motion for extension of time would not require that much time. The AGO recommended that the Board include a separate timing requirement for each type of motion.

The Board does not modify the rule as requested. The 21-day period encompasses time for the movant to complete service on the responding party; time for the responding party to prepare, file, and serve a response; and time for the Board to deliberate and prepare a written order. It also takes into account that the Board regularly meets only twice per month.

### Section 101.510 Motions to Cancel Hearing

Generally, the hearing officer may grant motions to cancel a hearing that are filed no fewer than ten days or, if all parties agree to the motion, five days before the scheduled hearing date. The hearing officer may grant a motion filed after the prescribed time only if the movant demonstrates that it will suffer material prejudice if the hearing is not canceled. All motions must be supported by affidavit and must include the reasons for the request to cancel, a proposed date to reschedule the hearing, and a status report that describes the progress of the proceeding and the number of prior hearing cancellations granted at the movant's request. The movant must demonstrate that the request to cancel is not the result of its lack of diligence.

If the hearing officer grants a motion to cancel a hearing, the hearing officer will revise the schedule to complete the record. The hearing officer also will file the revised schedule with the Clerk and serve a copy of the revised schedule on all parties.

Section 101.510 also contains provisions to help the Board control the escalating costs of canceling and re-noticing hearings. The Board's intent is to shift to the party seeking to cancel the hearing some of the financial burden that results from cancellation. Specifically, under this Section, the Board may assess the actual cost of newspaper notice of the rescheduled hearing. In addition, if the motion to cancel is filed less than two business days before the scheduled hearing, the Board may assess the cancellation fee of the court reporter on the movant.

CBA commented that the Board did not require that a decision deadline waiver accompany a motion to cancel a hearing. CBA explained that the deadlines rarely allow sufficient time for one satisfactory hearing, let alone time to cancel and reschedule a hearing.

The Board notes that the language in the predecessor docket did not require a waiver to accompany a motion if a waiver had preceded the motion. Nevertheless, the Board modifies subsection (c) to clarify that the hearing officer will deny a motion to cancel a hearing if the decision deadline does not allow enough time for the Board to reschedule the hearing, provide newspaper notice, hold the hearing, receive the transcript, and deliberate and decide the case.

The Agency expressed concerns over subsection (c)(1) in the predecessor docket. To clarify, subsection (c)(1) did not require that all motions to cancel be accompanied by decision deadline waivers. However, the hearing officer will grant the motion only so long as the pending decision deadline (waived or not) would allow the Board sufficient time to reschedule, re-notice if applicable, deliberate and decide the matter.

Sidley commented that subsection (c)(3) in the predecessor docket is unclear as to who is responsible to prepare and file the revised schedule to complete the record. The Board amends this language (new subsection (d)) to clarify that the hearing officer will revise the schedule, and file and serve the revised schedule.

#### Section 101.514 Motions to Stay Proceedings

In response to CBA's comment, the Board specifies that in decision deadline cases, a motion to stay a proceeding must be accompanied by a waiver of the decision deadline.

#### Section 101.516 Motions for Summary Judgment

This Section increases the response time from 7 to 14 days. It also provides that any issue raised in a motion for summary judgment that the Board does not rule on before the hearing starts is deemed denied.

The AGO commented that it is pleased that the Board is encouraging parties to use motions for summary judgment. However, it suggested that subsection (d) be removed because the Board is well equipped to make determinations regarding any issues that summary judgment motions address.

The Board declines this suggestion. Given the Board's meeting schedule, the scheduled hearing date, and decision deadlines, the Board may not be able to rule on a motion for summary judgment before the hearing starts. Subsection (d) will allow the parties to proceed to hearing on the merits of the case.

#### Section 101.520 Motions for Reconsideration

The Board no longer will entertain motions to reconsider discovery and other interim orders. Persons should be aware that filing a motion to reconsider is not a prerequisite to appealing the Board's final decision to the appellate court.

### Section 101.606 Informal Recordings of the Proceedings

This Section specifically authorizes the hearing officer to regulate use of audio or video recording equipment at hearing to avoid disruption of hearings. This Section does not preclude persons from retaining their own court reporters, provided that they do not disrupt the proceeding.

### Section 101.608 Default

This Section clarifies that the party with the ultimate burden of proof must present a *prima facie* case on the merits, even if the opposing party fails to appear at hearing.

### Section 101.610 Duties and Authority of the Hearing Officer

In the predecessor docket, the Board proposed a new provision that would allow hearing officers to “[a]ssist the Board in its deliberations.” Commenters expressed concerns about the impact of this change on the Board’s decisionmaking process. The Board deletes the provision.

In response to an Agency comment, the Board adds a new subsection (p) to authorize the hearing officer in a rulemaking to require all participants to state their position with respect to the proposal. The Board inadvertently omitted this provision, which is in the Board’s current procedural rules.

The Board also accepts the substance of the Agency’s suggestion regarding the words “hostile,” “unwilling,” or “adverse” as they refer to characterization of witnesses. The Board adds the word “hostile” to Sections 101.610(f) and 101.624.

### Section 101.614 Production of Information

ISBA recommended that the Board revise this Section to specifically refer to the hearing officer’s authority to condition the production of confidential information through a protective order. Although the Board is sensitive to issues surrounding the protection of confidential information, the Board declines to make this revision because it is unnecessary. This Section already refers to the hearing officer’s authority to “deny, limit or condition the production of information when necessary . . . to protect materials from disclosure consistent with Sections 7 and 7.1 of the Act and 35 Ill. Adm. Code 101 through 130.” Consistent with Sections 7 and 7.1 of the Act, Part 130 of the proposed rules addresses the identification and protection of trade secrets and other “non-disclosable information.” “Non-disclosable information” includes confidential data (see Section 101.202).

### Section 101.616 Discovery

With respect to subsection (a), CBA suggested that the Board limit discoverable information to relevant information that is not confidential. The Board amends subsection (d), which addresses protective orders, to specifically refer to protecting materials from disclosure consistent with Sections 7 and 7.1 of the Act and Part 130. Similarly, the Board modifies

subsection (a), which addresses the scope of discovery, to exclude from discovery those materials that would be protected from disclosure under Part 130. Accordingly, non-discoverable information includes not only privileged information and trade secrets, but also other categories of information within the definition of “non-disclosable information,” such as confidential data.

The Agency noted, regarding subsection (f), that failure to comply with a Board or hearing officer discovery order may lead to sanctions pursuant to Subpart H, which includes removing an attorney from a case. The Agency questioned the Board’s statutory authority to do so. Taking a conservative approach, the Board deletes any specific reference to attorney removal in the non-exhaustive list of possible sanctions enumerated in Section 101.800(b).

With respect to Section 101.616(g), the Agency questioned whether it would be too subjective for the Board to subject persons to sanctions for seeking or responding to discovery in “bad faith.” The Agency suggested that the Board instead follow the Illinois Supreme Court Rule 137. Rule 137 refers to “any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.” The Board modifies subsection (g) to follow the language of Rule 137.

#### Section 101.618 Admissions

The Board intends subsection (c) to aid *pro se* parties. It requires that the party serving the request include specified language that explains the consequences of failing to respond, and states that questions should be referred to the hearing officer or an attorney.

The Agency asked the Board to specify how many copies of requests to admit are required. The Agency made a similar request with respect to the number of interrogatories required under Section 101.620. The Board specifies the number of required copies in Section 101.302(h).

Mayer commented that the distinction between conclusions of law and fact in subsection (f) is valid in theory, but generally impossible in practice. CBA also was confused by this provision. The Board deletes this subsection. In so doing, however, the Board does not retreat from its position that it will not consider admissions of conclusions of law, a position that the Agency “welcomed.”

With respect to subsection (j) (formerly (k)), the Board proposed to subject a party whose sworn denial is actually proved to be true to the full range of Subpart H sanctions. The Agency suggested that the sanctions be limited to the costs of proving the fact to be true. Consistent with the title of this subsection (“Expenses of Refusal to Admit”), the Board adds language to clarify that the sanctions are limited to the “payment of reasonable expenses incurred.”



### Section 101.622 Subpoenas

To answer often asked questions, this Section refers to the Fees and Salaries Act, 55 ILCS 45/47 (1998), for the amount of witness fees and expenses, and to Illinois Supreme Court Rule 206(d) for a general three-hour limit to depositions.

### Section 101.626 Information Produced at Hearing

ISBA argued that subsection (c) is overly broad and contrary to “recent decisions which support strong foundations for scientific treatises.” ISBA suggested adding the following language: “The Illinois Code of Civil Procedure and Supreme Court Rules apply to the admissibility of scientific articles and treatises in contested cases.” The Board is unsure how the suggested language adds anything to the rules or Board case law on such admissions. ISBA can point the Board to particular recent decisions if it would like the Board to consider them. At this point, however, the Board declines the suggestion.

The Agency suggested expanding the scope of written testimony that a party can introduce. The Agency advocated that when witnesses who previously testified subject to cross-examination are unavailable, the Board rules should allow the use of that previous testimony. The Board declines this suggestion because of its uncertain impact. The Agency and other participants are welcome to further address this issue at hearing or in public comment.

Sidley commented that because prefiled testimony can expedite hearings, hearing officers should be allowed to require its use in adjudicatory proceedings. The Board notes that it already provided hearing officers with that authority in the predecessor docket under Section 101.610(a).

### Section 101.628 Statements from Participants

In this Section, the Board describes the public’s general right to participate in adjudicatory proceedings during and after hearings. The Board specifies how to make oral and written statements, what emphasis the Board will give to the various types of statements, and what public comments may contain. To facilitate public participation, the Board proposes to assume the burden and cost of copying and distributing public comments in adjudicatory proceedings. The Board also cross-references the filing requirements for *amicus curiae* briefs. The Board emphasizes that there is no requirement that participants be represented by counsel.

In response to an Agency comment, the Board changes “post-hearing comment” to “public comment” and defines “public comment” in Section 101.202.

Mayer suggested that comments filed after hearing be filed before the parties’ briefs. The Board does not change the rule. When necessary, the hearing officer will order a proper filing sequence.

### Section 101.700 Oral Argument

In the predecessor docket, the Board expanded the role of oral argument at the request of the organized bar. The Board noted, however, that it anticipated granting the requests sparingly.

The Agency sought reassurance that it would not suffer disadvantages not experienced by the defense bar requesting oral argument. The Agency fears that travel burdens would fall disproportionately on its attorneys. The Agency incorrectly assumes that most oral arguments necessarily would take place in Chicago at the James R. Thompson Center. The Board holds an increasing number of hearings and Board meetings in its Springfield office, and also has satellite offices as well as various hearing sites at which oral arguments could be held. If the Agency has location preferences, it can advise the Board, and the Board will accommodate the request to the extent practicable.

The Agency also expressed concern that requests for oral arguments in decision deadline cases had to be accompanied by a waiver. The Agency commented that it would therefore be unable to file a motion for oral argument without the petitioner's agreement. The Board deletes the requirement. The Board adds language to subsection (c), however, to clarify that in a proceeding with a decision deadline, the Board will deny a request for oral argument if there is insufficient time to hear argument and allow the Board to issue a decision.

In response to Sidley's suggestion that the deadline to file motions for oral argument might be unduly restrictive, the Board deletes the deadline.

With regard to subsection (d), Gardner commented that there may be cases that are appropriately addressed through oral argument alone, obviating the need for a briefing schedule. The Board agrees and modifies the language accordingly.

### Section 101.800 Sanctions for Failure to Comply with Procedural Rules, Board Orders, or Hearing Officer Orders

In the predecessor docket, the Board proposed two specific new sanctions: assessing reasonable expenses, including attorneys fees, that the Board or the other party incurred as a result of the non-compliance being sanctioned; and removing an attorney from a case. The AGO, the Agency, and the organized bar commented that the Board's authority to impose these sanctions is questionable, noting that these sanctions are not among the sanctions specified in Supreme Court Rules 137 and 231. The Board deletes these provisions. The Board also deletes the words "including attorneys fees" from subsection (b)(6).

### Section 101.900 Declaratory Rulings

In response to numerous comments that questioned whether this Section would be useful, the Board deletes it.

### Section 101.1000 Board Decisions

The Board deletes this Section because it is redundant of information contained in Section 10-40(c) of the IAPA.

### Part 101.Appendix G

Appendix G to Part 101 in the predecessor docket contained various forms for filings with the Board. The Board deletes Appendix G. See discussion of Section 101.302 above.

### Part 102: Regulatory and Informational Hearings and Proceedings

#### Section 102.108 Public Comments

Gardner suggested language that would require the Board's public comment period to be tied to the latest *Illinois Register* publication when the Board proposes to amend more than one Part. The Board declines this suggestion. The language is not necessary for the Board or hearing officer to set public comment periods in accordance with Gardner's suggested approach if appropriate.

Regarding subsection (b), CBA suggested that the Clerk notify persons on the service list when the Board receives the hearing transcript. The Board believes that such a requirement would be unduly burdensome on the Clerk's Office. Moreover, it is unnecessary. Before the last hearing in a regulatory proceeding closes, the hearing officer consults with the court reporter and determines approximately when the Board will receive the transcript. The hearing officer typically announces that date at hearing. Persons may contact the hearing officer or the Clerk's Office to confirm the actual date on which the Board receives the transcript.

CBA and Welch commented that requiring rulemaking commenters to serve multiple participants with a copy of their public comments may inhibit public comment. The proposed rule represents the Board's current policy, and the Board does not believe that the requirement has unduly inhibited public comment. As noted above, the Board authorizes the hearing officer to adjust service requirements in a particular rulemaking as may be appropriate. See discussion of "service list" in Section 101.202 above.

#### Section 102.202 Proposal Contents for Regulations of General Applicability

The Board adds a requirement to this Section: if the proponent is a State agency, the proposal must include a diskette of the rule language. It is the Agency's current practice to include a diskette when it files a rulemaking proposal with the Board. The Board adds this requirement elsewhere in Part 102 when the rules specify the required contents of a proposal.

IERG expressed concern that when neither the Agency nor the Department of Natural Resources (DNR) is the proponent, subsection (f) will circumscribe the Board's existing discretion to hold a hearing on a proposal that lacks a petition signed by at least 200 persons. The Board believes IERG's concerns are unwarranted. The language is based on Section 28(a)

of the Act and is nearly identical to the Board’s current rule. Additionally, a proponent may request that the Board waive the 200-signature requirement.

#### Section 102.206 Notice of Site-Specific RCRA Proposal<sup>1</sup>

CBA commented that subsection (b)(6) seems unduly burdensome and that the Board should notify only those elected officials whose job function includes oversight of public health, safety, or the environment. The Board declines this suggestion. The Board adopted this requirement in an identical-in-substance proceeding to incorporate federal notice requirements. The Board therefore must retain this language.

#### Section 102.210 Proposal Contents for Site-Specific Regulations

IERG commented that the Board should add the words “technically feasible and economically reasonable” to qualify “treatment or control options,” in order to provide a “reasonable limitation” on the amount of information that the proponent must include in the proposal. The Board declines this suggestion. One of the ultimate issues that the Board decides in a rulemaking is precisely whether options are “technically feasible and economically reasonable.” The Board does, however, remove the requirement that the proposal describe “all” options, to clarify that a proponent may explain why there are no options.

#### Subpart C: Clean Air Act Amendments (CAAA) Fast Track Rulemaking

This set of rules implements the fast track rulemaking mandates of Section 28.5 of the Act. The rules are designed to speed adoption of State rules responsive to the CAAA of 1990.

The Agency suggested that the Board adopt Section 28.5 *verbatim*. The Board declines this suggestion. The Board structured the rules to make them easier to follow than a quotation of Section 28.5 combined with various additional provisions necessary to implement the Act. The Board does make various revisions to ensure that the rules include all of the Section 28.5 requirements.

#### Section 102.304 Hearings

The Board modifies subsection (d) to reflect amendments to Section 27(b) of the Act since the proposal for public comment in the predecessor docket. Consistent with Section 28.5 and these amendments, the Board will hold a second hearing to, at a minimum, consider the Department of Commerce and Community Affairs’ (DCCA) economic impact study of the proposed rules or admit into the record DCCA’s statement declining to conduct one.

Subsection (f) provides that the hearing officer may choose hearing dates without consulting with the participants. The Agency requested that the rules reflect the Board’s current practice of consulting with the assigned Agency attorney before scheduling a hearing. The Agency argued that, given the intense level of technical effort and negotiation associated with

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<sup>1</sup> RCRA means the Resource Conservation and Recovery Act, 42 U.S.C. 6901 *et seq.*

fast track regulatory proposals, it would be burdensome if it had to withdraw the proposal and resubmit it because a critical Agency witness, or representative from an affected source, could not attend a hearing scheduled unilaterally.

The Board declines the suggestion. The Board notes that the Agency controls the time clock for Board actions because they are triggered when the Agency files the proposal. Although the Board's hearing officers will continue to make reasonable attempts to consult with the Agency for an agreeable hearing date, the Board must control the date to ensure that hearings are set within statutory deadlines. The Board encourages the Agency to confirm, before it files the proposal, that needed witnesses will be available during the statutory action periods.

#### Section 102.306 Prefiled Testimony

CBA asked why, in subsection (a), the closing date for the service list is 16 days before the hearing date. This responds to Section 28.5(g) of the Act, which requires the service list to be ready 15 days before hearing.

In response to the Agency's comment, the Board amends subsection (c) to reflect that the Board may waive the prefiling deadline and service requirement for "good cause," which is consistent with Section 28.5(g).

The Agency also observed that, while Section 28.5(g) states that "the Board shall require the written submission of all testimony" before hearing, subsection (d) of the proposed rule allows participants who do not prefile testimony to testify if time permits at hearing. The Board does not amend this language, which the Board believes is consistent with the Act. The purpose of the prefiling requirement is to prevent events, such as surprise, that could interfere with the timely adoption of the regulation. Allowing additional testimony on a scheduled hearing date, if time remains, enhances opportunities for the public to participate and does not unduly delay the proceeding.

#### Section 102.402 Motions, Production of Information, and Subpoenas

Gardner commented that it is unaware of any statutory requirement that participants automatically serve DNR or the AGO with copies of all of their motions and responses. The Board deletes this requirement, but invites these entities to comment if they wish to continue to receive all such filings in all rulemakings.

#### Section 102.404 Initiation and Scheduling of Prehearing Conferences

The Agency requested that the Board add language from the Board's current rule concerning who may file a motion to have a prehearing conference. Specifically, the Board adds to subsection (b) the definition of "potentially affected person."

### Section 102.414 Hearings on the Economic Impact of New Proposals

The Board revises this Section to reflect amendments to Section 27(b) of the Act since the proposal for public comment in the predecessor docket. The Board must request that DCCA conduct a study of the economic impact of proposed rules. The Board must conduct at least one hearing on the economic impact of proposed rules. At this hearing the Board must, among other things, consider DCCA's study or present any explanation DCCA gives for not producing a study.

### Section 102.418 Record

In response to an Agency comment, the Board changes exhibits "offered" to exhibits "admitted." The Board also clarifies that the proposal is part of the record.

### Section 102.422 Notice and Service Lists

Welch asked who persons should contact to be added to notice or service lists, and how persons are notified of changes to the lists. The Board amends this Section to state that persons may contact either the hearing officer or the Clerk to be added to a list. With respect to changes to a list, it is the responsibility of the person making a filing to obtain the most recent service list from either the hearing officer or the Clerk.

Welch also commented that subsection (c), which disallows general requests to appear on the notice list of all rulemakings, will inhibit public comment. The Board does not modify this language. The Board believes that adding a person's name to every list that the Board maintains would waste resources of time, paper, and postage. The Board publicizes rulemakings on its Web site and in the *Environmental Register*. In accordance with the IAPA, the Board also prepares a semi-annual regulatory agenda to publish in the *Illinois Register*. With all of these resources, the Board does not believe that it is unreasonable for a person to identify those proceedings in which he or she is interested. The Agency suggested that the rule refer persons to these information sources. The Board declines to use its rule text for such a list of resources.

### Section 102.424 Prehearing Submission of Testimony and Exhibits

CBA commented that 21 days seems too long before hearing to require the proponent to file written testimony and exhibits in light of the Board's trend toward expedited hearings. CBA recommended that the Board decrease the deadline to 14 days before hearing and close the service list ten days before hearing. The Board has found that the best way to expedite hearings is to ensure that participants have had an opportunity to review and digest the relevant information before hearing. This helps to prevent unnecessary questions and "surprise" to witnesses. The 21-day period has proven to be a good general rule. The Board notes that the hearing officer may alter this time period in appropriate cases and that CAAA fast track rulemakings have a 10-day period (see Section 102.306(b)).

The Agency requested that the Board prohibit hearing officers from requiring that only the proponent submit questions and responses. The Board understands the Agency's concern, but declines to put such language in the rules. The hearing officer can best address the matter in the context of a specific proceeding.

#### Section 102.428 Presentation of Testimony and Order of Hearing

Sidley commented that opposing testimony should be allowed unless it is duplicative, non-probative, or irrelevant. Section 102.426 already addresses this point.

### Part 103: Enforcement

#### Section 103.202 Parties

The Board makes no change to this Section, upon which the Agency commented favorably. The Section specifically acknowledges that the Agency may appear as a "party in interest" because of a Board request that the Agency investigate under Section 30 of the Act.

#### Section 103.204 Notice, Complaint, and Answer

This Section continues current practice with one major, and often requested, change found in subsection (e): failure to file an answer within 60 days now will result in all material allegations of a complaint being taken as admitted. This change makes the Board's rule consistent with Section 2-610 of the Civil Practice Law, 735 ILCS 5/2-610 (1998) (compare existing Section 103.122(d)). Although the proposal for public comment in the predecessor docket required an answer in 30 days, the Board believes that a 60-day deadline is more reasonable considering the severe consequences. The Board's hearing officers typically schedule and hold all initial status conferences with the parties to an enforcement case within 60 days after the complaint is filed. These initial status conferences allow the parties to discuss any questions they have regarding filing an answer. The rule also stays the 60-day period when the respondent timely files certain motions challenging the complaint.

The Board also includes in subsection (g) language similar to that in Section 101.618(c). The new language requires that all complaints include a notice of the consequences if a party fails to respond.

#### Section 103.206 Adding Parties

The Board adds this new Section based upon its recent experiences with multi-party litigation. The increasing complexity of enforcement litigation has necessitated that the Board develop detailed procedures with respect to joinder, counter-complaints, cross-complaints, and third-party complaints.

In this Section, the Board sets forth procedures for adding a non-party as a respondent to an enforcement proceeding when the Board cannot completely determine a controversy without the presence of the non-party. Upon its own motion (subsection (b)) or upon the motion of a respondent (subsection (a)), the Board may order that a person who is not already a

party to the proceeding be added as a respondent whenever the Board finds that the person must be present for a complete determination of a controversy. The Board then will grant the complainant permission to file an amended complaint that sets forth a claim in the complainant's favor against the added respondent. The proposed rules also specify the time limits for the added respondent to file an answer or responsive motions. If the complainant fails to file an amended complaint, the complainant's action may be subject to dismissal.

This Section also contains procedures for filing counter-complaints, cross-complaints, and third-party complaints. The Board defines each of these terms in Section 101.202. Section 103.206 requires the party who wishes to file the document to file a motion requesting the Board's permission to do so. The counter-complaint, cross-complaint, or third-party complaint must set forth a claim that arises out of the occurrence or occurrences that are the subject of the proceeding and must meet the requirements of Section 103.204. The person against whom the claim is made may file a response to the motion for permission to file the document, and if the Board grants the motion, the proposed rules specify the time limits for the person to file an answer or responsive motions.

This Section also addresses filing an amendment to a complaint, counter-complaint, cross-complaint, or third-party complaint that sets forth a new or modified claim in favor of the filing party against another person, whether or not the person against whom the claim is made is already a party to the proceeding.

#### Section 103.208 Request for Informal Agency Investigation

This Section replaces a Board resolution that established an informal citizen's complaint process. See *In re Duplicitous or Frivolous Determinations* (June 8, 1989), RES 89-2. The resolution will be repealed when the Board promulgates these rules.

The Board retains this Section as proposed, despite CBA's suggestion that citizens coming before the Board should be referred to the Agency directly without any paperwork on the part of the Board. The Board believes that this Section is well within its authority under Section 30 of the Act, and that the mechanism serves citizens' desires to alert the Agency to potential areas of environmental concern before engaging in formal litigation. Further, it is in many ways a codification of current practice.

#### Section 103.212 Hearing On Complaint

This Section codifies the existing practice of automatically setting all State enforcement actions for hearing. It also allows a respondent in a citizen's complaint 30 days in which to file a motion that a complaint is "duplicitous or frivolous," and states that the motion stays the deadline for filing an answer to the complaint. The Section also contemplates that the Board might hold hearings on discrete issues, such as violation only and then remedy only.



### Section 103.300 Request for Relief from Hearing Requirement in State Enforcement Proceeding

The Board retains the substance of the rules proposed in the predecessor docket. The Board believes, as does Welch and ISBA, that the suggestions of CBA and IERG that the Board eliminate hearing notices is contrary to the Act's requirements.

The Board also points out that Section 31(c) applies to State enforcement actions, not to citizen enforcement actions brought pursuant to Section 31(d). The Act does not address settlement of citizen enforcement actions. Accordingly, the Board will hold a hearing when parties to a citizen enforcement action ask the Board to approve the specific terms of a settlement agreement. If the parties do not desire a hearing on the settlement, they may file a motion to dismiss the case.

### Section 103.302 Contents of Proposed Stipulation and Settlement Agreement

This Section continues to detail the contents of a stipulation despite some commenters' desire that the Board eliminate this requirement. The Board does not believe that this Section is onerous, and it provides the Board with the essential information needed to approve the parties' stipulation.

### Subpart E: Imposition of Penalties, Fees and Costs

The Board declines CBA's request that it adopt a specific penalty policy. The Board believes that existing models are too mechanistic and unresponsive to the peculiarities of any given case. The Board's position is consistent with comments from ISBA and Gardner.

### Section 103.502 Civil Penalties Method of Payment

Regarding subsection (a), Sidley asked whether the Board must authorize installment payments, or whether one may pay by installment as of right. The ability to pay by installment is not available as of right, but only as the Board orders or the parties agree.

## Part 104: Regulatory Relief Mechanisms

### Section 104.200 General

CBA and Gardner requested that the rules elaborate on the statutory standard that the Board applies when it reviews variance requests ("adequate proof" that compliance would impose "an arbitrary or unreasonable hardship"). The Board declines. Board and court precedent further explain the statutory standard.

#### Section 104.204 Petition Content Requirements

The Board adds, at the Agency's suggestion, a new subsection (g)(3) that requires the petitioner to specify the measures it will take over the period of the variance to minimize impacts.

#### Section 104.210 Petition for Extension of Variance

In response to both CBA and Gardner, the Board modifies this Section. It now will allow a petitioner to file for an extension less than 120 days before its variance expires if the petitioner demonstrates it filed as soon as practicable after learning that it could not meet the compliance timeframe under the existing variance.

#### Section 104.212 Motion for Modification of Internal Variance Compliance Dates

This Section clarifies that a petitioner may file a motion to modify internal compliance dates within a variance that do not extend the variance term. Requests to extend variances proceed as new cases (see Section 104.210).

#### Section 104.216 Agency Investigation and Recommendation

In the predecessor docket, the Board proposed changing the time period for an Agency recommendation from the current 30 days to 50 days, believing that 50 days was a more realistic deadline. While the Agency supported the change, CBA, Gardner, and Mayer argued for a shorter deadline. Specifically, Mayer argued that even the current 30-day requirement limits discovery, which might become necessary if the Agency's recommendation is negative.

The Board does not believe that discovery is an issue in most variance cases and, if it is, the petitioner may waive the decision deadline. The Board continues to believe, as the Agency asserted, that the current 30-day requirement is unreasonably short. Accordingly, the Board maintains a longer time period for the Agency recommendation, but changes it to 45 days to be consistent with other provisions in the rules.

#### Section 104.220 Response to Agency Recommendation

In the predecessor docket, the Board set a seven-day deadline for the petitioner to respond. Mayer argued that seven days was too short. It also argued that this time period, coupled with the requirement that an amended petition or a request for hearing will recommence the decision period, made the rules "one-sided." The Board extends the petitioner's deadline to 14 days.

#### Section 104.224 Objections to Petition, Written Comments and Request for Hearing

In response to an Agency concern about open-ended comment periods, the Board revises subsection (d) to mirror Section 101.628(c)(1). If the Board holds a hearing, public comments must be filed within 14 days after the hearing closes, unless the hearing officer specifies a different date. If the Board does not hold a hearing, comments must be filed no later

than 30 days before the decision deadline, unless the hearing officer orders otherwise to prevent material prejudice.

#### Section 104.226 Amended Petition and Amended Recommendation

To respond to the comments of Mayer and Sidley, the Board cross-references Section 104.220 to clarify that the petitioner may respond to any Agency amended recommendation.

#### Section 104.230 Dismissal of Petition

As in the predecessor docket, subsection (d) makes clear that the Board considers a variance subject to dismissal if it seeks relief from a regulation that does not apply. The Board declines the Agency's suggestion to delete this subsection.

#### Section 104.234 Hearing

This Section no longer provides that an Agency recommendation to deny a variance will be treated as a request for hearing. CBA and the Agency correctly observed that this could lead to unnecessary hearings.

#### Section 104.240 Certificate of Acceptance

The Board declines the suggestion of CBA and Gardner that a petitioner should be able to void a variance within 45 days after issuance rather than be required to file a certification of acceptance within that timeframe to prevent the variance from becoming void. The Board may include conditions in granting a variance that neither the petitioner nor the Agency anticipated. The Board therefore believes that requiring the petitioner to accept the variance is more appropriate.

#### Section 104.250 Revocation

As Sidley suggested, this Section gives a petitioner the right to a hearing before the Board vacates or revokes a variance.

#### Section 104.310 Simultaneous Variance Prohibition

The Board amends this Section to clarify that the Board will not issue a provisional variance to the extent that the petitioner already holds a "regular" variance from the same requirement for the same time period.

#### Section 104.400 General

Webber suggested that the adjusted standard process does not adequately address solid waste determinations under RCRA and that the Board should consider developing specific procedural rules for such determinations. While the Board has made several solid waste determinations using the adjusted standard procedures, the Board welcomes further comment on this issue.

### Section 104.416 Agency Recommendation and Petitioner Response

The Board extends the deadline for the Agency to file a recommendation from 30 to 45 days, for the reasons expressed above in the Board's discussion of Section 104.216.

### Part 105: Appeals of Final Decisions of State Agencies

#### Section 105.108 Dismissal of Petition

CBA commented that dismissal of a petition for failure to comply with any order is unduly harsh. The Board disagrees. The Board's discretion to manage its own docket and to dismiss cases for failure to comply with its orders must be given weight in addition to petitioner's due process rights. Both of these interests can best be preserved by providing the petitioner with advance notice of the potential dismissal of the petition and by allowing an opportunity to correct or defend the failure to comply.

#### Section 105.114 Calculation of Decision Deadline

In response to CBA's suggestion, the Board moves the provision pertaining to the computation of time to Section 105.106. In addition, Section 105.114 no longer contains language that the Agency construed to limit the petitioner's right to waive a decision deadline.

#### Section 105.116 Record Filing

This Section eliminates rigid requirements for when the record must be filed. It allows the hearing officer flexibility to set deadlines based on waivers filed and the likelihood of a settlement versus proceeding to hearing. This Section makes clear that the due date to file the agency decision record is tied to the scheduled hearing date, absent any other directive from the Board or hearing officer.

#### Section 105.118 Sanctions for Untimely Filing of the Record

Section 105.118 now states that sanctions for a late-filed record are those set forth in Part 101.Subpart H.

#### Section 105.204 Who May File a Petition for Review

In the predecessor docket, the Board did not provide for third-party appeals of National Pollutant Discharge Elimination System (NPDES) permit decisions (in contrast to existing Section 105.102(b)(3)) because the Third District Appellate Court found them impermissible in Citizens Utilities Co. v. Illinois Pollution Control Board, 26 Ill. App. 3d 773, 639 N.E.2d 1306 (3rd Dist. 1994). Subsequent legislation, however, has specifically authorized these appeals (see Section 40(e) of the Act). Accordingly, the Board amends this Section to include third-party appeals of NPDES permit decisions.

This Section also provides for appeal of an Agency decision to terminate an EMSA under Section 52.3-4(b) of the Act. The EMSA legislation became effective after the proposal for public comment in the predecessor docket.

#### Section 105.206 Time to File the Petition or Request for Extension

The Board continues to believe that all petitions for review of Agency decisions must be filed within 35 days, notwithstanding comment to the contrary.

#### Section 105.208 Extension of Time to File a Petition for Review

The Board clarifies that the extension of the time in which to file certain petitions for review may be for any period to which the parties agree that does not exceed 125 days from the date of service or issuance of the Agency's final decision. The Board believes, as CBA suggested, that the 90-day extension period adds to the 35-day period, which would allow for a total of 125 days in which to petition.

#### Section 105.212 Agency Record

As CBA and IERG suggested, the Board amends the rule to provide that the Agency record must contain all materials or documents that the petitioner submitted to the Agency.

IERG further commented that the petitioner should also be allowed to offer additional information into the record that is relevant to the issues on appeal, especially when the petitioner's reason to appeal may be based on the Agency's failure to consider such information. The Board does not believe that the rule needs to be changed. Petitioner remains free to introduce materials consistent with applicable permit appeal case law, *e.g.*, Illinois Environmental Protection Agency v. Illinois Pollution Control Board, 86 Ill. 2d 390, 427 N.E. 162 (1981).

Regarding subsection (b)(5) (and also Section 105.410(b)(4)), the Agency commented that privileged information should not be included in the Agency record. The Board believes that the Agency must identify such documents, and argue that a privilege applies; it cannot simply exclude the material when forwarding the record to the Board.

The Subpart does not include CBA's suggested language that provided that the terms of an old permit will remain in effect during the appeal, unless the Board orders otherwise or the permittee and the Agency agree otherwise. Gardner disagreed with CBA's proposal, and correctly observed that the question of what permit terms and conditions apply during the pendency of a permit appeal has been an issue of debate. The Board has determined through case law whether conditions of a permit should be stayed during the pendency of an appeal. See, *e.g.*, ESG Watts v. Illinois Environmental Protection Agency (March 18, 1995), PCB 95-133. The Board continues to believe that the case-by-case approach is superior to that suggested by CBA.

### Subpart C: CAAPP Permit Appeals

The Agency suggested that the Board set out in a separate subpart the procedures for CAAPP permit appeals. The Board does so.

### Subpart F: Appeals of Other Final Decisions of State Agencies

This new Subpart provides general appeal procedures for new situations that may arise. The proposed rules presently cross-reference these provisions for appeals to the Board of trade secret determinations of DNR.

## Part 106: Proceedings Pursuant to Specific Rules or Statutory Provisions

### Subpart B: Heated Effluent, Artificial Cooling Lake and Sulfur Dioxide Demonstrations

The Board amends this Subpart to clarify that the standards for a heated effluent demonstration under 35 Ill. Adm. Code 302.211(f) are discrete from the standards for an artificial cooling lake demonstration under 35 Ill. Adm. Code 302.211(j)(3).

### Subpart C: Water Well Setback Exception Procedures

Section 106.308 provides that the hearing will be conducted in accordance with the rules for adjudicatory proceedings. CBA and Gardner asked why adjudicatory proceedings are better suited to use here, rather than the rulemaking procedures specified in the current rules. These proceedings are akin to adjusted standards under Section 28.1 of the Act, which are specified to be adjudicatory proceedings. Use of the same type of procedures for the same type of proceeding will eliminate confusion.

### Subpart D: Revocation and Reopening of CAAPP Permits; Subpart E: Maximum Achievable Control Technology Determinations

The Agency suggested several clarifications to these Subparts, which the Board accepts.

## Part 107: Petition to Review Pollution Control Facility Siting Decisions

### Section 107.200 Who May File Petition

CBA requested that the Board define the terms “adversely affected” and “participation.” The Board declines to define these terms in the proposed rules because their meanings are best determined on a case-by-case basis. Interpretations of the terms have been significantly developed over the years through case law.

### Section 107.202 Parties

Subsection (b) allows the AGO or State’s Attorney in the affected county to intervene, but does not limit the right as CBA suggested. CBA stated that the Board should consider

whether expressly allowing such intervention would or should preclude the AGO or State's Attorney from later bringing suit to challenge a siting approval that has been granted.

The Board refers CBA to Pioneer Processing, Inc. v. Illinois Environmental Protection Agency, 102 Ill. 2d 119, 464 N.E.2d 238 (1984), and Land and Lakes Co. v. Illinois Pollution Control Board, 245 Ill. App. 3d 631, 616 N.E.2d 349 (3rd Dist. 1993). The courts in these cases held that the Board has the authority to allow State officials who represent the public interest to intervene in appeal proceedings before the Board. The AGO or a State's Attorney would be allowed to intervene pursuant to those two cases and the Board's rules. If, for example, intervention is not sought until after the Board holds a hearing, the intervenor would only be allowed to participate in the briefing of the case.

#### Section 107.206 Filing and Service Requirements

The rule retains the requirement that only the parties to the case need be served with the petition. The Agency requested that it also be served. While proof of local siting is required before the Agency can issue a permit under Section 39 of the Act, the Agency stated that permit applicants do not usually update the Agency if the approval ordinance is appealed. The Board declines the Agency's suggestion because it is concerned that requiring the additional service would be too burdensome for many petitioners. Nonetheless, the Board will continue to develop its Web site to ensure the Agency and the public are informed of newly filed cases.

#### Section 107.300 Record

CBA commented that if the siting authority must keep a complete record, the Board should specify for what length of time it must do so. The Board modifies this Section to clarify that the siting authority is required, for purposes of these provisions, only to compile a complete record of its proceedings in order to fulfill its filing obligations under Section 107.302.

#### Section 107.404 Public Participation

The Board declines CBA's requested changes. Section 39.2(e) of the Act addresses public participation before the local siting authority, not before the Board.

### Part 108: Administrative Citations

#### Section 108.400 Standard of Review/Burden of Proof

The Board does not specify, as CBA suggested, that the Agency or Delegated Unit must prove a violation through "clear and convincing evidence." The Board is unclear why this standard should apply in these cases.

### Section 108.500 Assessment of Penalties and Costs

The Board amends subsection (a) to reflect a \$1,500 penalty for each violation that occurs on or after January 1, 2000, consistent with amendments to the Act that took place after the Board issued the proposal for public comment in the predecessor docket.

### Part 125: Tax Certifications

This Part contains new procedures under which the Board would certify “pollution control facilities” and “low sulfur dioxide emission coal fueled devices” for preferential tax treatment under the Property Tax Code. Persons will petition the Board for certification, rather than apply to the Agency for certification with the ability to appeal the Agency’s decision to the Board. The Board invites comment on these rules, which did not appear in the predecessor docket.

### Part 130: Identification and Protection of Trade Secrets and Other Non-Disclosable Information

#### Subpart A: General Provisions

The provisions of this Subpart now make clear that any article that is claimed or determined to be confidential must be segregated from articles that are open to public inspection, and kept secure from unauthorized access. This Subpart also makes clear that an agency may dispose of a confidential article only by shredding, burning, or returning the article to the owner. The Board makes these changes to respond to CBA comments that confidential information in addition to trade secrets should be so protected.

#### Section 130.200 Initiation of a Claim that an Article Represents a Trade Secret

Mayer suggested that the procedures should allow the owner of the article to supplement the justification if questions arise. Mayer argued that a detailed justification submitted with the trade secret material may lead to unnecessary work or a loss of trade secret due to an insufficient justification. Because it is the responsibility of the owner to provide all justifications necessary for the agency to make a fully-informed decision, the owner seeking trade secret protection is responsible for justifying protection without disclosing sensitive information.

To respond to CBA’s comment, the Board adds a new subsection (d), which requires that a person claiming trade secret protection must serve other parties with a description of the article and justification for the claim, but not with a copy of the article itself.

#### Section 130.208 Deadline for Agency Trade Secret Determination

The Board clarifies this Section to respond to Gardner’s comment. The rule now allows the owner of an article to waive the deadline for the agency to determine whether the article is a trade secret. If the owner does so and there is any statutory deadline for the agency to decide the underlying proceeding (e.g., a permit appeal), the owner also must waive the statutory deadline. A new subsection (c) specifies that the waiver of the statutory deadline for the agency to decide the underlying proceeding must be for at least the same amount of time as the waiver



of the deadline for the agency to determine whether the article is a trade secret, plus 45 days. The additional 45-day period is consistent with Sections 130.204 and 130.208(a).

#### Section 130.210 Standards for Agency Determination

The Board at this time declines to set forth the standard by which “competitive value” should be judged. The Board directs Gardner and the Agency to Board cases that discuss competitive value: Devro-Teepak v. Illinois Environmental Protection Agency (December 3, 1998), PCB 98-160, PCB 98-161; Burlington Environmental, Inc. v. Illinois Environmental Protection Agency (July 21, 1994), PCB 94-177; and In re Envirite Corporation for a Revised Adjusted Standard from 35 Ill. Adm. Code 721.Subpart D (June 2, 1994), AS 94-10.

#### Section 130.212 Agency Actions Following a Negative Determination

The rule now requires the agency to notify the owner and any requester of agency action by certified mail, return receipt requested, as the Agency requested. The Board makes the same change in Section 130.214.

#### Section 130.216 Review of Agency Trade Secret Determination

To respond to the Agency’s comment, the Board adds language to this Section specifying that appeals of Agency trade secret determinations to the Board will be pursuant to 35 Ill. Adm. Code 105.Subparts A and B. Appeals of DNR decisions will be under Subpart A and new Subpart F to Part 105.

#### Section 130.218 Effect of a Determination of Trade Secret Status on Other Agencies

The Board renames this Section from “Status of Article Claimed or Determined to Represent a Trade Secret,” as CBA suggested. The Board deletes subsections (b) and (c) because neither the Agency nor DNR can review Board decisions. In addition, the Board clarifies that it will honor trade secret determinations by the Agency and DNR except for those determinations appealed to and reversed by the Board.

#### Section 130.220 Status of Article Determined or Claimed to be a Trade Secret Before the Effective Date of this Part

The Agency commented that subsection (b) deems undetermined claims to “represent a trade secret” for 90 days after the effective date of this Part “to allow the Agency to make a determination.” According to the Agency, “the 90-day ‘grace’ period will not be sufficient considering the huge number of undetermined articles in the Agency’s possession.”

The Board notes that subsection (b) does not state that an article will be deemed a trade secret if the agency fails to make its trade secret determination in a given period of time. Instead, the provision merely states that an article will be deemed to have been claimed to be a trade secret for a given period of time.

The Board now adds language to subsection (b) to clarify the Board's intent and to lengthen the time period during which the article is deemed to have been claimed to be a trade secret from 90 to 180 days. Accordingly, if an article was claimed before the effective date of Part 130 to be a trade secret, and the agency did not determine its trade secret status before the effective date, the article is deemed to have been claimed to be a trade secret for purposes of Part 130 for 180 days after the effective date. If the owner of the article fails to file within the 180-day period a claim with the agency under Part 130, the article will be considered a matter of general public knowledge and will not be protected as a trade secret.

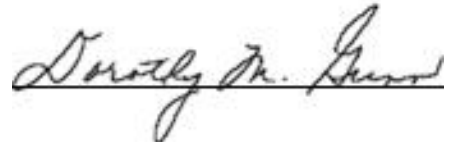
#### Section 130.402 Who May View Non-Disclosable Information

This Section does not include the suggested language of CBA and Gardner about confidentiality agreements. The Board questions their necessity and enforceability.

#### CONCLUSION

The Board today proposes and invites further comment on new procedural rules to govern how persons initiate and participate in all proceedings before the Board. The proposed rules will better implement the Act and other laws in Board proceedings. Upon final adoption, the proposed rules will replace all of the Board's current procedural rules and all Board resolutions relating to procedural matters. In the order that the Board adopts today in this docket, the Board directs the Clerk to cause publication of this proposal in the *Illinois Register* for first notice.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion was adopted on the 16<sup>th</sup> day of March 2000 by a vote of 5-0.



Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board

ILLINOIS POLLUTION CONTROL BOARD  
March 16, 2000

IN THE MATTER OF:	)	
	)	
REVISION OF THE BOARD'S	)	R00-20
PROCEDURAL RULES: 35 ILL. ADM.	)	(Rulemaking-Procedural)
CODE 101-130	)	

Proposed Rule. First Notice.

PROPOSED ORDER OF THE BOARD (by C.A. Manning, G.T. Girard, and E.Z. Kezelis):

SUMMARY OF TODAY'S ACTION

The Board proposes changes to 35 Ill. Adm. Code 101-130 to update and streamline its procedural rules. This order is supported by an opinion also entered today.

The first notice public comment period will end on June 1, 2000. All interested persons may request to be added to notice or service lists in this matter. The Board will hold two public hearings, the first in Springfield on April 11, 2000, and the second in Chicago on May 4, 2000. Details pertaining to public comment and the hearings will be announced in the hearing officer's order to be issued today. The Board's opinion and order, as well as the hearing officer order, will be available from the Board's Chicago office and the Board's Web site ([www.ipcb.state.il.us](http://www.ipcb.state.il.us)).

The Board directs the Clerk to cause first notice publication in the *Illinois Register* of this proposal to repeal existing 35 Ill. Adm. Code 101-130 and adopt new procedural rules. The complete text of the proposed rules follows.

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

PART 101  
GENERAL RULES

SUBPART A: GENERAL PROVISIONS

Section	
101.100	Applicability
101.102	Severability
101.104	Repeals
101.106	Board Authority
101.108	Board Proceedings
101.110	Public Participation
101.112	Bias and Conflict of Interest
101.114	Ex Parte Communications

SUBPART B: DEFINITIONS

Section	
101.200	Definitions Contained in the Act
101.202	Definitions for Board's Procedural Rules

SUBPART C: COMPUTATION OF TIME, FILING, SERVICE OF DOCUMENTS, AND  
STATUTORY DECISION DEADLINES

Section	
101.300	Computation of Time
101.302	Filing of Documents
101.304	Service of Documents
101.306	Incorporation of Documents by Reference
101.308	Statutory Decision Deadlines and Waiver of Deadlines

SUBPART D: PARTIES, JOINDER, AND CONSOLIDATION

Section	
101.400	Appearances, Withdrawals, and Substitutions of Attorneys in Adjudicatory Proceedings
101.402	Intervention of Parties
101.403	Joinder of Parties
101.404	Agency as a Party in Interest
101.406	Consolidation of Claims

101.408 Severance of Claims

#### SUBPART E: MOTIONS

##### Section

101.500 Filing of Motions and Responses  
 101.502 Motions Directed to the Hearing Officer  
 101.504 Contents of Motions and Responses  
 101.506 Motions Attacking the Sufficiency of the Petition, Complaint, or Other Pleading  
 101.508 Motions to Board Preliminary to Hearing  
 101.510 Motions to Cancel Hearing  
 101.512 Motions for Expedited Review  
 101.514 Motions to Stay Proceedings  
 101.516 Motions for Summary Judgment  
 101.518 Motions for Interlocutory Appeal from Hearing Officer Orders  
 101.520 Motions for Reconsideration  
 101.522 Motions for Extension of Time

#### SUBPART F: HEARINGS, EVIDENCE, AND DISCOVERY

##### Section

101.600 Hearings  
 101.602 Notice of Board Hearings  
 101.604 Formal Board Transcript  
 101.606 Informal Recordings of the Proceedings  
 101.608 Default  
 101.610 Duties and Authority of the Hearing Officer  
 101.612 Schedule to Complete the Record  
 101.614 Production of Information  
 101.616 Discovery  
 101.618 Admissions  
 101.620 Interrogatories  
 101.622 Subpoenas  
 101.624 Examination of Adverse, Hostile or Unwilling Witnesses  
 101.626 Information Produced at Hearing  
 101.628 Statements from Participants

#### SUBPART G: ORAL ARGUMENT

##### Section

101.700 Oral Argument

#### SUBPART H: SANCTIONS

Section	
101.800	Sanctions for Failure to Comply with Procedural Rules, Board Orders, or Hearing Officer Orders
101.802	Sanctions for Abuse of Discovery Procedures

#### SUBPART I: REVIEW OF FINAL BOARD OPINIONS AND ORDERS

Section	
101.902	Motions for Reconsideration
101.904	Relief from and Review of Final Opinions and Orders
101.906	Judicial Review of Board Orders
101.908	Interlocutory Appeal

APPENDIX A	Captions
ILLUSTRATION A	Enforcement Case
ILLUSTRATION B	Citizen's Enforcement Case
ILLUSTRATION C	Variance
ILLUSTRATION D	Adjusted Standard Petition
ILLUSTRATION E	Joint Petition for an Adjusted Standard
ILLUSTRATION F	Permit Appeal
ILLUSTRATION G	Underground Storage Tank Appeal
ILLUSTRATION H	Pollution Control Facility Siting Appeal
ILLUSTRATION I	Administrative Citation
ILLUSTRATION J	General Rulemaking
ILLUSTRATION K	Site-specific Rulemaking
APPENDIX B	Appearance Form
APPENDIX C	Withdrawal of Appearance Form
APPENDIX D	Notice of Filing
APPENDIX E	Certificate of Service
ILLUSTRATION A	Service by Non-Attorney
ILLUSTRATION B	Service by Attorney

**AUTHORITY:** Implementing Sections 5, 7.1, 7.2, 26, 27, 28, 29, 31, 32, 33, 35, 36, 37, 38, 40, 40.1, 40.2, 41, and 58.7 of the Environmental Protection Act (Act) [415 ILCS 5/5, 7.1, 7.2, 26, 27, 28, 29, 31, 32, 33, 35, 36, 37, 38, 40, 40.1, 40.2, 41, and 58.7] and authorized by Sections 26 and 27 of the Act [415 ILCS 5/26 and 27].

**SOURCE:** Filed with Secretary of State January 1, 1978; codified 6 Ill. Reg. 8357; Part repealed, new Part adopted in R88-5A at 13 Ill. Reg. 12055, effective July 10, 1989; amended in R90-24 at 15 Ill. Reg. 18677, effective December 12, 1991; amended in R92-7 at 16 Ill. Reg. 18078, effective November 17, 1992; Old Part repealed, new Part adopted in R00-20 at 24 Ill. Reg. \_\_\_\_\_, effective \_\_\_\_\_.

#### SUBPART A: GENERAL PROVISIONS

### Section 101.100 Applicability

- a) This Part sets forth the rules generally applicable to proceedings before the Illinois Pollution Control Board (Board), and should be read in conjunction with procedural rules for the Board's specific processes, found at 35 Ill. Adm. Code 103 through 130 and the Board's Administrative Rules, found at 2 Ill. Adm. Code 2175. In the event of a conflict between the rules of this Part and those found in subsequent Parts, the more specific requirement applies.
- b) The provisions of the Code of Civil Procedure [735 ILCS 5/1-101] and the Supreme Court Rules [Ill. S. Ct. Rules] do not expressly apply to proceedings before the Board. However, the Board may look to the Code of Civil Procedure and the Supreme Court Rules for guidance where the Board's procedural rules are silent.

### Section 101.102 Severability

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

### Section 101.104 Repeals

All resolutions the Board adopted prior to December 31, 1996 that relate to the Board's procedural rules are repealed and are superseded by 35 Ill. Adm. Code 101-130.

### Section 101.106 Board Authority

- a) The Board has the authority to *determine, define and implement the environmental control standards applicable in the State of Illinois and may adopt rules and regulations in accordance with Title VII of this Act.* [415 ILCS 5/5(b)]
- b) The Board has the *authority to conduct hearings upon complaints charging violations of this Act or of regulations thereunder; upon petitions for variances; upon petitions for review of the Agency's denial of a permit in accordance with Title X of this Act; upon petition to remove a seal under Section 34 of this Act; upon other petitions for review of final determination which are made pursuant to the Act or Board rules and which involve a subject which the Board is authorized to regulate; and such other hearings as may be provided by rule.* [415 ILCS 5/5(d)]
- c) In addition to subsections (a) and (b) of this Section, the Board has the authority to act as otherwise provided by law.

### Section 101.108 Board Proceedings

- a) Board proceedings can generally be divided into two categories: rulemaking proceedings and adjudicatory proceedings.
- b) The following are examples of Board rulemaking proceedings: Identical-in-Substance, Clean Air Act/Fast Track, Federally Required Rulemaking, General Rulemaking, and Site-Specific Rulemaking. Procedural rules for these types of proceedings can be found at 35 Ill. Adm. Code 102.
- c) The following are examples of Board adjudicatory proceedings: Permit Appeals, Underground Storage Tank Appeals, Pollution Control Facility Siting Appeals, Enforcement Proceedings, Administrative Citations, Variance Petitions, and Adjusted Standard Petitions. Procedural rules for these types of proceedings can be found at 35 Ill. Adm. Code 103 through 108.
- d) Board Decisions will be made at meetings open to the public. Except as provided in subsection (e) of this Section, 4 members of the Board constitute a quorum, and 4 affirmative votes are required to adopt a Board decision.
- e) At a hearing pursuant to Section 34(d) of the Act to determine whether a seal should be removed, *at least one Board Member shall be present, and those Board Members present may render a final decision without regard to the requirements of Section 5(a) of the Act.* [415 ILCS 5/34(d)]

### Section 101.110 Public Participation

- a) General. The Board encourages public participation in all of its proceedings. The extent to which the law allows for such participation varies, depending on the type of Board proceeding involved, the party status of the person or persons seeking to participate, and the rules governing that type of proceeding. Public participation in particular proceedings may be more specifically delineated by Board or hearing officer order consistent with the provisions of applicable law and the Board's procedural rules.
- b) Party/Non-Party Status. The issue of who constitutes a proper party in each type of adjudicatory proceeding before the Board is addressed in the rules. A person who wishes to participate in a Board adjudicatory proceeding and is not a party will be deemed a participant and will have only those rights specifically provided in these rules.
- c) Amicus Curiae Briefs. Amicus curiae briefs may be filed in any adjudicatory proceeding by any interested person, provided permission is granted by the Board. Response briefs may be allowed by permission of the Board, but not as



of right. Such briefs must consist of argument only and may not raise facts that are not in evidence in the relevant proceeding. Amicus curiae briefs, and any responses, will be considered by the Board only as time allows. Such briefs will not delay decision-making of the Board. See also Section 101.302(j) of this Part.

#### Section 101.112 Bias and Conflict of Interest

- a) No Board Member or Board employee may represent any other person in any Board proceeding.
- b) No former Board Member or Board employee may represent any other person in any Board proceeding in which he or she participated personally and substantially as a Board Member or Board employee, unless the Board and, as applicable, all parties or proponents in the proceeding consent in writing after disclosure of the participation. For purposes of subsections (a) and (b) of this Section, representation includes, but is not limited to, consulting on legal or technical matters, and Board employee means a person the Board employs on a full-time, part-time or contract basis.
- c) The Board, on its own motion or the motion of any party, may disqualify a hearing officer for bias or conflict of interest [5 ILCS 100/10-30(b) of the IAPA].

#### Section 101.114 Ex Parte Communications

- a) **Adjudicatory Proceedings.** Ex parte communications with respect to a pending adjudicatory proceeding are prohibited. (See definition of “ex parte communication” in Section 101.202 of this Part.) Information about a pollution source included in the record of a regulatory proceeding is not an ex parte communication with respect to any adjudicatory proceeding concerning the pollution source, but Board Members and Board employees will exercise caution to avoid prejudging the merits of the adjudicatory proceeding based on such information. For purposes of this Section, Board employee means a person the Board employs on a full-time, part-time, contract, or intern basis.
- b) **Regulatory Proceedings.** Board Members and Board employees should not engage in an ex parte communication designed to influence his or her action with respect to a pending regulatory proceeding. Whenever practicable, communications with respect to a pending regulatory proceeding must be in writing and addressed to the Clerk rather than to individual Board Members or Board employees.
- c) Nothing in this Section precludes Board Members or Board employees from receiving informal complaints about individual pollution sources, or forbids such

administrative contacts as would be appropriate for judges and other judicial officers.

- d) In the event that an ex parte communication occurs, the Board Member or Board employee will make that communication part of the record of the proceeding. To make an oral ex parte communication part of the record, the substance of the oral communication, along with the identity of each person involved in the communication, will be either set forth in a memorandum and placed in the record or announced on the record at a public hearing.

## SUBPART B: DEFINITIONS

### Section 101.200 Definitions Contained in the Act

Unless otherwise provided in 35 Ill. Adm. Code 101-130, or unless a different meaning of a word or term is clear from the context, the definitions of the Act apply to the Board's procedural rules, found in 35 Ill. Adm. Code 101 through 130.

### Section 101.202 Definitions for Board's Procedural Rules

Unless otherwise provided in 35 Ill. Adm. Code 101-130, or unless a different meaning of a word or term is clear from the context, the following definitions also apply to the Board's procedural rules, found in 35 Ill. Adm. Code 101 through 130:

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

"Adjudicatory proceeding" means an action of a quasi-judicial nature brought before the Board pursuant to authority granted to the Board under Section 5(d) of the Act or as otherwise provided by law. Adjudicatory proceedings include, but are not limited to, enforcement, variance, permit appeal, pollution control facility siting appeal, Underground Storage Tank (UST) Fund determination, water well set back exception, adjusted standard, and administrative citation proceedings. Adjudicatory proceedings do not include regulatory, quasi-legislative, or informational proceedings.

"Adjusted standard" or "AS" means an alternative standard granted by the Board in an adjudicatory proceeding pursuant to Section 28.1 of the Act and 35 Ill. Adm. Code 104.Subpart D. The adjusted standard applies instead of the rule or regulation of general applicability.

"Administrative citation" or "AC" means a citation issued pursuant to Section 31.1 of the Act by the Agency, or by a unit of local government acting as the Agency's delegate pursuant to Section 4(r) of the Act.

"Administrative citation review (appeal)" means a petition for review of an administrative citation filed pursuant to Section 31.1(d) of the Act. (See 35 Ill. Adm. Code 108)

"Affidavit" means a sworn, signed statement witnessed by a notary public.

"Affidavit of service" means an affidavit that states that service of a document upon specified persons was made, and the manner in which, and date upon which, service was made.

"Agency" means the Illinois Environmental Protection Agency as established by Section 4 of the Act.

"Agency recommendation" means the document filed by the Agency pursuant to Sections 37(a) and 28.1(d)(3) of the Act in which the Agency provides its recommended disposition of a petition for variance or an adjusted standard. This includes, but is not limited to, a recommendation to deny, or a recommendation to grant with or without conditions. (See 35 Ill. Adm. Code 104.218 and 104.416)

"Amicus curiae brief" means a brief filed in a proceeding by any interested person. (See Sections 101.110 and 101.628 of this Part.)

"Applicant" means any person who submits, or has submitted, an application for a permit or for local siting approval pursuant to any of the authorities to issue permits or granting of siting approval identified in Sections 39, 39.1, and 39.5 of the Act.

"Article" means *any object, material, device or substance, or whole or partial copy thereof, including any writing, record, document, recording, drawing, sample, specimen, prototype, model, photograph, culture, microorganism, blueprint or map.* [415 ILCS 5/7.1]

"Attorney General" means the Attorney General of the State of Illinois and/or representatives thereof.

"Authorized representative" means any person who is authorized to act on behalf of another person by formal agreement or contract.

"Board" means the Illinois Pollution Control Board as created in Section 5 of the Act or, if applicable, its designee.

"Board decision" means an opinion or an order voted in favor of by at least four members of the Board at an open Board meeting except in a proceeding to remove a seal under Section 34(d) of the Act.

"Board designee" means an employee of the Board who has been given authority by the Board to carry out a function for the Board. ( e.g., the Clerk, Assistant Clerk of the Board, or Hearing Officer.)

"Board meeting" means an open meeting held by the Board pursuant to Section 5(a) of the Act in which the Board makes its decisions and determinations.

"Board's procedural rules" means the Board's regulations set forth at 35 Ill. Adm. Code 101 through 130.

"Brief" means a written statement that contains a summary of the facts of a proceeding, the pertinent laws, and an argument of how the law applies to the facts supporting a position.

"CAAPP" means the Clean Air Act Permit Program, as adopted in Section 39.5 of the Act.

"Certificate of acceptance" means a certification, executed by a successful petitioner in a variance proceeding, in which the petitioner agrees to be bound by all terms and conditions that the Board has affixed to the grant of variance.

"Chairman" means the Chairman of the Board designated by the Governor pursuant to Section 5(a) of the Act.

"Citizen's enforcement proceeding" means an enforcement action brought before the Board pursuant to Section 31(d) of the Act by any person who is not authorized to bring the action on behalf of the People of the State of Illinois.

"Clean Air Act" or "CAA" means *the federal Clean Air Act, as now and hereafter amended, 42 U.S.C. 7401 et seq.* [415 ILCS 5/ 39.5.1]

"Clean Water Act" means the federal Clean Water Act, 33 USC 1251 et seq.

"Clerk" means the Clerk of the Board.

"Complaint" means the initial filing that begins an enforcement proceeding pursuant to Section 31 of the Act and 35 Ill. Adm. Code 103.

"Compliance plan" means a detailed description of a program designed to achieve compliance with the Act and Board regulations.

"Copy" means *any facsimile, replica, photograph or other reproduction of an article, and any note, drawing or sketch made of or from an article.* [415 ILCS 5/7.1]

“Counter-complaint” means a pleading that a respondent files setting forth a claim in its favor against a complainant. (See 35 Ill. Adm. Code 103.206.)

“Cross-complaint” means a pleading that a party files setting forth a claim in its favor against a co-party. (See 35 Ill. Adm. Code 103.206.)

“Cross-media impacts” means impacts that concern multiple environmental areas, such as air, land and/or water.

"Decision date" means the Board meeting immediately preceding the decision deadline.

"Decision deadline" means the last day of any decision period, as established by law, within which the Board is required to render a decision in an adjudicatory proceeding. (See Subpart C of this Part); (See also Sections 38(a), 40, and 40.1 of the Act that establish 120-day decision deadlines for variances, permit appeals, and review of pollution control facility siting decisions respectively.)

"Decision period" means the period of time established by the Act within which the Board is required to make a Board decision in certain adjudicatory proceedings. (See Subpart C of this Part); (See also Sections 38(a), 40, and 40.1 of the Act that establish 120-day decision deadlines for variances, permit appeals, and review of pollution control facility siting decisions, respectively.)

“Deinked stock” *means paper that has been processed to remove inks, clays, coatings, binders and other contaminants.* [415 ILCS 20/2.1]

"Delegated unit" means the unit of local government to which the Agency has delegated its administrative citation or other function pursuant to Section 4(r) of the Act.

“DNR” means the Illinois Department of Natural Resources.

"Discovery" means a prehearing process that can be used to obtain facts and information about the adjudicatory proceeding in order to prepare for hearing. The discovery tools include, but are not limited to, depositions upon oral and written questions, written interrogatories, production of documents or things, and requests for admission.

"DNS" means the Illinois Department of Nuclear Safety.

“DOA” means the Illinois Department of Agriculture.

“Duplicitious” or “Duplicative” means the matter is identical or substantially similar to one brought before the Board or another forum.

“Environmental Management System Agreement” or “EMSA” means the agreement between the Agency and a sponsor, entered into under Section 52.3 of the Act and 35

Ill. Adm. Code 187, that describes the innovative environmental measures to be implemented, schedules to attain goals, and mechanisms for accountability.

"Enforcement proceeding" means an adjudicatory proceeding brought upon a complaint filed pursuant to Section 31 of the Act by the Attorney General, State's Attorney, or other persons, in which the complaint alleges violation of the Act or any rule or regulation or Board order thereunder or any permit or term or condition thereof.

"Ex parte communication" means a communication between a person who is not a Board Member or Board employee and a Board Member or Board employee that reflects on the substance of a pending Board proceeding and that takes place outside the record of the proceeding. *Communications regarding matters of procedure and practice, such as the format of pleadings, number of copies required, manner of service, and status of proceedings, are not considered ex parte communications.* [5 ILCS 100/10-60(d)] For purposes of this definition, "Board employee" means a person the Board employs on a full-time, part-time, contract or intern basis. (See Section 101.114 of this Part.)

"Fast Track rulemaking" means a Clean Air Act rulemaking conducted pursuant to Section 28.5 of the Act.

"Federally required rule" means *a rule that is needed to meet the requirements of the federal Clean Water Act, Safe Drinking Water Act, Clean Air Act (including required submission of a State Implementation Plan), or Resource Conservation and Recovery Act, other than a rule required to be adopted under subsection (c) of Section 13, Section 13.3, Section 17.5, subsection (a) or (d) of Section 22.4, or subsection (a) of Section 22.40.* [415 ILCS 5/28.2]

"Filing" means the act of delivering a document or article into the custody of the Clerk with the intention of incorporating that document into a proceeding or record before the Board. The Clerk's Office is located at 100 West Randolph Street, Suite 11-500, Chicago, IL, 60601.

"Final order" means an order of the Board that terminates the proceeding leaving nothing further to litigate or decide and that is appealable to an appellate court pursuant to Section 41 of the Act. (See Subpart J of this Part.)

"Frivolous" means a request for relief that the Board does not have the authority to grant, or a complaint that fails to state a cause of action upon which the Board can grant relief.

"Hearing" means a public proceeding conducted by a hearing officer where the parties and other interested persons, as provided for by law and the Board's procedural rules, present evidence and argument regarding their positions.

"Hearing officer" means a person licensed to practice law in the State of Illinois who presides over hearings and otherwise carries out record development responsibilities as directed by the Board.

"IAPA" means the Illinois Administrative Procedure Act [5 ILCS 100 et. seq.].

"Identical-in-substance rules (or regulations)" means *State regulations which require the same actions with respect to protection of the environment, by the same group of affected persons, as would federal regulations if USEPA administered the subject program in Illinois.* [415 ILCS 5/7.2]

"Initial filing" means the filing that initiates a Board proceeding and opens a docket. For instance, the initial filing in an enforcement proceeding is the complaint; in a permit appeal it is a petition for review; and in a regulatory proceeding it is the proposal.

"Innovative environmental measures" means any procedures, practices, technologies or systems that pertain to environmental management and are expected to improve environmental performance when applied. (See Part 106 Subpart F.)

"Inquiry hearing" means a hearing conducted by the Board for the purpose of seeking input and comment from the public regarding the need for a rulemaking proceeding in a specific area.

"Interlocutory appeal" means an appeal of a Board decision to the appellate court that is not dispositive of all the contested issues in the proceeding. (See Section 101.1008(b)(4) of this Part) An interlocutory appeal may also be the appeal of a hearing officer ruling to the Board. (See Section 101.518 of this Part.)

"Intervenor" means a person, not originally a party to an adjudicatory proceeding, who voluntarily participates as a party in the proceeding with the leave of the Board. (See Section 101.402 of this Part.)

"Intervention" means the procedure by which a person, not originally a party to an adjudicatory proceeding, voluntarily comes into the proceeding as a party with the leave of the Board. (See Section 101.402 of this Part.)

"JCAR" means the Illinois General Assembly's Joint Committee on Administrative Rules established by the IAPA. [5 ILCS 100/5-90]

"Joinder" means the procedure by which the Board adds a person, not originally a party to an adjudicatory proceeding, as a party to the proceeding. (See Section 101.403 of this Part and 35 Ill. Adm. Code 103.206.)

"Misnomer" means a mistake in name, giving an incorrect name in a complaint or other document.

"Motion" means a request made to the Board or the hearing officer for the purposes of obtaining a ruling or order directing or allowing some act to be done in favor of the movant. (See definition of "Movant" in this Section.)

"Movant" means the person who files a motion.

"New pollution control facility" means: *a pollution control facility initially permitted for development or construction after July 1, 1981; or the area of expansion beyond the boundary of a currently permitted pollution control facility; or a permitted pollution control facility requesting approval to store, dispose of, transfer or incinerate, for the first time, any special or hazardous waste.* [415 ILCS 5/3.32(b)]

"Non-disclosable information" means *information which constitutes a trade secret; information privileged against introduction in judicial proceedings; internal communications of the several agencies; information concerning secret manufacturing processes or confidential data submitted by any person under this Act.* [415 ILCS 5/7(a)]

"Notice list" means the list of persons in a regulatory proceeding who will receive all Board opinions and orders and all hearing officer orders. Persons on a notice list generally do not receive copies of motions, public comments, or testimony. (See definition of Service List in this Section.) (See also 35 Ill. Adm. Code 102.422.)

"Notice to reinstate" means a document filed that recommences the decision period after a negotiation waiver has been filed. Such notice will give the Board a full decision period in which to make a decision. (See Section 101.308 of this Part.)

"Oral argument" means a formal verbal statement of advocacy on a proceeding's legal questions made at a Board meeting with the Board's permission. (See Section 101.700 of this Part.)

"OSFM" means Office of the State Fire Marshal.

"OSFM appeal" means an appeal of an OSFM final decision concerning eligibility and deductibility made pursuant to Title XVI of the Act. [415 ILCS 5/57]

"Participant" means any person, not including the Board or its staff, who takes part in an adjudicatory proceeding who is not a party, or a person 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 filing a comment, being added to the notice list of a particular proceeding, or testifying at hearing.



“Participant in a CAAPP Comment Process” means a person who takes part in a Clean Air Act Permit Program (CAAPP) permit hearing before the Agency or comments on a draft CAAPP permit.

"Party" means the person by or against whom a proceeding is brought.

"Party in interest" means the Agency when asked to conduct an investigation pursuant to Section 30 of the Act during an ongoing proceeding. (See Section 101.404 of this Part.)

"Permit appeal" means an adjudicatory proceeding brought before the Board pursuant to Title X of the Act.

"Person" means *any individual, partnership, co-partnership, firm, company, limited liability company, corporation, association, joint stock company, trust, estate, political subdivision, state agency, or any other legal entity, or their legal representative, agent or assigns.* [415 ILCS 5/3.26]

"Petition" means the initial filing in an adjudicatory proceeding other than an enforcement proceeding, including permit appeals, OSFM appeals, UST appeals, appeals of pollution control facility siting decisions, variances and adjusted standards.

“Pilot project” means an innovative environmental project that covers one or more designated facilities, designed and implemented in the form of an EMSA. (See Section 52.3 of the Act.)

"Pollution control facility" means *any waste storage site, sanitary landfill, waste disposal site, waste transfer station, waste treatment facility, or waste incinerator. This includes sewers, sewage treatment plants, and any other facilities owned or operated by sanitary districts organized under Metropolitan Water Reclamation District Act. The following are not pollution control facilities:*

*waste storage sites regulated under 40 CFR, 761.42;*

*sites or facilities used by any person conducting a waste storage, waste treatment, waste disposal, waste transfer or waste incineration operation, or a combination thereof, for wastes generated by such person's own activities, when such wastes are stored, treated, disposed of, transferred or incinerated within the site or facility owned, controlled or operated by such person, or when such wastes are transported within or between sites or facilities owned, controlled or operated by such person;*

*sites or facilities at which the State is performing removal or remedial action pursuant to Section 22.2 or 55.3;*

*abandoned quarries used solely for the disposal of concrete, earth materials, gravel, or aggregate debris resulting from road construction activities conducted by a unit of government or construction activities due to the construction and installation of underground pipes, lines, conduit or wires off of the premises of a public utility company which are conducted by a public utility;*

*sites or facilities used by any person to specifically conduct a landscape composting operation;*

*regional facilities as defined in the Central Midwest Interstate Low-Level Radioactive Waste Compact;*

*the portion of a site or facility where coal combustion wastes are stored or disposed of in accordance with subdivision (r)(2) or (r)(3) of Section 21;*

*the portion of a site or facility used for the collection, storage or processing of waste tires as defined in Title XIV;*

*the portion of a site or facility used for treatment of petroleum contaminated materials by application onto or incorporation into the soil surface and any portion of that site or facility used for storage of petroleum contaminated materials before treatment. Only those categories of petroleum listed in paragraph (5) of subsection (a) of Section 22.18(b) are exempt under this subdivision;*

*the portion of a site or facility where used oil is collected or stored prior to shipment to a recycling or energy recovery facility, provided that the used oil is generated by households or commercial establishments, and the site or facility is a recycling center or a business where oil or gasoline is sold at retail;*

*the portion of a site or facility utilizing coal combustion waste for stabilization and treatment of only waste generated on that site or facility when used in connection with response actions pursuant to the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, the federal Resource Conservation and Recovery Act of 1976, or the Illinois Environmental Protection Act or as authorized by the Agency;*

*the portion of a site or facility accepting exclusively general construction or demolition debris, located in a county with a population over 700,000, and operated and located in accordance with Section 22.38 of this Act. [415 ILCS 5/3.32(a)]*

"Pollution control facility siting appeal" means an appeal of a decision made by a unit of local government filed pursuant to Section 40.1 of the Act with the Board.

"Postconsumer material" means *paper, paperboard, and fibrous wastes from retail stores, office buildings, homes, and so forth, after the waste has been passed through its end usage as a consumer item, including used corrugated boxes, old newspapers, mixed waste paper, tabulating cards, and used cordage.* Additionally, it includes *all paper, paperboard, and other fibrous wastes that are diverted or separated from the municipal solid waste stream.* [415 ILCS 20/3(f)(2)(i), (ii)] (See also definition of "Recycled Paper" in this Section.)

"Preemptory rulemaking" means *any rulemaking which is required as a result of federal law, federal rules and regulations, or an order of a court, under conditions which preclude compliance with the general rulemaking requirements of Section 5-40 of the IAPA and which preclude the exercise by the Board as to the content of the rule it is required to adopt.* [5 ILCS 100/5-50]

"Prehearing conference" means a meeting held in an adjudicatory case to determine the status of the proceedings. A prehearing conference may also be a meeting held in a regulatory proceeding prior to the hearing, the purposes of which *shall be to maximize understanding of the intent and application of the proposal, if possible, and to attempt to identify and limit the issues of disagreement among participants to promote efficient use of time at hearing.* [415 ILCS 5/27(d).] (See 35 Ill. Adm. Code 102.404 and 102.406.)

"Proceeding" means an action conducted before the Board pursuant to authority granted under Section 5 of the Act or as otherwise provided by law. Board proceedings are of two types: quasi-legislative (e.g., rulemakings and inquiry proceedings) and quasi-judicial (adjudicatory proceedings).

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

"Provisional variance" means a short term variance sought by a party and recommended by the Agency pursuant to Section 35(b) of the Act. (See 35 Ill. Adm. Code 104.308.)

"Public comment" means information submitted to the Board during a pending proceeding either by oral statement made at hearing or written statement filed with the Board.

"Qualitative description" means a narrative description pertaining to attributes and characteristics.

"Quantitative description" means a numerically based description pertaining to attributes and characteristics.

"RCRA variance" means a variance from a RCRA rule or a RCRA permit required pursuant to Section 21(f) of the Act.

"Record" means the official collection, as kept by the Clerk, of all documents and exhibits including pleadings, transcripts, and orders filed during the course of a proceeding.

"Recycled paper" means paper which contains at least 50% recovered paper material. The recovered paper material must contain at least 40% deinked stock or postconsumer material; beginning July 1, 2000, must contain at least 45% deinked stock or postconsumer material. (See also "Postconsumer material" in this Section.)

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

"Regulatory hearing" or "proceeding" means a hearing or proceeding held pursuant to Title VII of the Act or other applicable law with respect to regulations.

"Regulatory relief mechanisms" means variances, provisional variances and adjusted standards. (35 Ill. Adm. Code 104.)

"Representing" means, for purposes of Part 130, *describing, depicting, containing, constituting, reflecting or recording*. [415 ILCS 5/7.1]

"Requester" means, for purposes of Part 130, the person seeking from the agency the material claimed or determined to be a trade secret. [415 ILCS 5/7.1]

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

"Rule or regulation of general applicability" means a rule or regulation adopted by the Board pursuant to Title VII of the Act or other applicable law, with such regulation applicable to all persons not explicitly exempted either by the regulation or by associated site-specific regulation or adjusted standard.

"Rulemaking" or "rulemaking proceeding" means a proceeding brought under Title VII of the Act or other applicable law for the purpose of adoption, amendment, or repeal of a regulation.

"Sanction" means a penalty or other mechanism used by the Board to provide incentives for compliance with the Board's procedural rules, Board orders or hearing officer orders. (See also Subpart H of this Part.)

"SDWA" means the federal Safe Drinking Water Act (42 USC 300f et seq.).

“Service” means delivery of documents upon a persons. (See Section 101.300(c) and 101.304 of this Part.)

"Service list" means the list of persons designated by the hearing officer or Clerk in a regulatory or adjudicatory proceeding upon whom participants must serve motions, prefiled questions and prefiled testimony and any other documents that the participants file with the clerk unless the hearing officer otherwise directs. (See definition of Notice list in this Section.) (See also 35 Ill. Adm. Code 102.422.)

"Severance" means the separation of a proceeding into two or more independent proceedings, each of which terminates in a separate, final judgment.

"Site-specific rule or regulation" means a proposed or adopted regulation, not of general applicability, that applies only to a specific facility, geographic site, or activity. (See 35 Ill. Adm. Code 102.208.)

“Sponsor” means the proponent of a pilot project that enters into an EMSA with the Agency.

"State enforcement proceeding" means an enforcement proceeding, other than a citizen's enforcement proceeding, that is brought pursuant to Section 31(a) of the Act.

"Stay" means a temporary suspension of the regular progress of a proceeding pursuant to an order of the Board or by operation of law. (See Section 101.514 of this Part.)

"Subpoena" means a command to appear at a certain time and place to give testimony upon a certain matter.

“Subpoena duces tecum” means a document that compels the production of specific documents and other items at a specified time and place.

"Summary judgment" means the disposition of an adjudicatory proceeding without hearing when the record, including pleadings, depositions and admissions on file, together with any affidavits, shows that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law. (See Section 101.516 of this Part.)

"Third party" means a person who is a party to a proceeding but was not one of the parties in the initial proceeding.

“Third party complaint” means a pleading that a respondent files setting forth a claim in its favor against a person who is not already a party to the proceeding. (See 35 Ill. Adm. Code 103.206.)

"Trade secret" means *the whole or any portion or phase of any scientific or technical information, design, process (including a manufacturing process), procedure, formula or improvement, or business plan which is secret in that it has not been published or disseminated or otherwise become a matter of general public knowledge, and which has competitive value. A trade secret is presumed to be secret when the owner thereof takes reasonable measure to prevent it from becoming available to persons other than those selected by the owner to have access thereto for limited purposes.* [415 ILCS 5/3.48]

"Trade secret petition" means a petition filed pursuant to the Board's procedural rules (35 Ill. Adm. Code 130) regarding trade secret information.

"Transcript" means the official recorded testimony from a hearing.

"USEPA" means the United States Environmental Protection Agency.

"Underground storage tank appeal" or "UST appeal" means an appeal of an Agency final decision made pursuant to Title XVI of the Act.

"UST" means underground storage tank.

"Variance" means a temporary exemption from any specified regulation, requirement or order of the Board granted to a petitioner by the Board pursuant to Title IX of the Act *upon presentation of adequate proof that compliance with the rule or regulation, requirement or order of the Board would impose an arbitrary or unreasonable hardship.* [415 ILCS5/35(a)]

"Waiver" means the intentional relinquishing of a known right, usually with respect to hearing before the Board or entry of a Board decision within the decision period. (See also Section 101.308 of this Part.)

"Web site" means the Board's computer-based informational service accessed on the Internet at <http://www.ipcb.state.il.us>.

#### SUBPART C: COMPUTATION OF TIME, FILING, SERVICE OF DOCUMENTS, AND STATUTORY DECISION DEADLINES

##### Section 101.300 Computation of Time

- a) Computation of Time. Computation of any period of time prescribed in the Act, other applicable law, or these rules will begin with the first calendar day following the day on which the act, event or development occurs and will run until the close of business on the last day, or the next business day if the last day is a Saturday, Sunday or national or State legal holiday.

- b) **Time of Filing.** Documents will be considered filed when they are filed in conformance with the requirements found in Section 101.302 of this Part and any other filing requirements specifically set out in the other Parts of these rules.
- 1) If filed in person, by messenger service or mail delivery service other than U.S. Mail, documents are considered filed when they are received in the Office of the Clerk.
  - 2) For purposes of filing deadlines, documents filed by U.S. Mail will be deemed filed when they are postmarked, provided all filing requirements are met as set forth in Section 101.302 of this Part.
  - 3) Documents filed other than those through U.S. Mail and received in the Office of the Clerk after 4:30 p.m. will be marked as filed the following business day. The Clerk will record the appropriate filing date on all filed documents.
  - 4) For purposes of Board decision deadlines, time does not begin until the date on which the initial filing is date-stamped by the Clerk.
- c) **Time of Service.** In the case of personal service, service is deemed complete on the date personal delivery was effectuated. In the case of facsimile transmission, service is deemed complete on the date of a complete and proper transmittal (facsimile filings are only allowed in accordance with Section 101.302(d) of this Part). In the case of service by registered or certified mail, or by messenger service, service is deemed complete on the date specified on the registered or certified mail receipt or the messenger service receipt. In the case of service by U.S. Mail, service is presumed complete four days after mailing. Such presumption can be rebutted by proper proof.
- d) **Date of Board Decision.**
- 1) For purposes of statutory decision deadline proceedings, the date of the Board decision is the date of the Board meeting where a final opinion and order of the Board was adopted by the vote of at least four Board members.
  - 2) For purposes of appeal, the date of the Board decision is the date of service of the final opinion and order by the Board upon the appealing party. Or, in the event of a timely filed motion for reconsideration filed pursuant to Section 101.520 of this Part, the date of the Board order ruling upon the motion is the date of service by the Board upon the appealing party.

- a) This Section contains the Board's general filing requirements. Additional requirements may exist for specific proceeding elsewhere in these rules. The Clerk will refuse for filing any document that does not comply with the minimum requirements below.
- b) All documents filed with the Board must be filed with the Clerk's Office. Service on a hearing officer does not constitute filing with the Board. Documents may be filed at:

Pollution Control Board, Attn: Clerk  
100 West Randolph Street  
James R. Thompson Center, Suite 11-500  
Chicago, Illinois 60601-3218
- c) Documents may be filed by U.S. Mail or other mail delivery service, in person or by messenger.
- d) Filing by electronic transmission or facsimile will only be allowed with the prior approval of the Clerk of the Board or hearing officer assigned to the proceeding.
- e) The following initial filings require filing fees and will only be considered filed when accompanied by the appropriate fee, which may be paid in the form of government voucher, money order, or check made payable to the Illinois Pollution Control Board, but which may not be paid in cash:
  - 1) Petition for Site-Specific Regulation, \$75;
  - 2) Petition for Variance, \$75;
  - 3) Petition for Review of Agency Permit Decision, UST Decision, or any other appeal filed pursuant to Section 40 of the Act, \$75;
  - 4) Petition to Review Pollution Control Facility Siting Decisions, pursuant to Section 40.1 of the Act, \$75; and
  - 5) Petition for Adjusted Standard, pursuant to Section 28.1 of the Act, \$75.
- f) All documents filed must be served in accordance with Subpart C of this Part.
- g) All documents filed by parties with the Board must be typed in at least 12 pitch font, should contain the relevant proceeding caption and number and must be submitted on 8 1/2 x 11 inch recycled paper as defined in Subpart B of this Part.



- h) Unless the Board or its procedural rules provide otherwise, all documents must be filed with a signed original and 9 duplicate copies (10 total), except that documents specifically directed to the assigned hearing officer, such as requests to admit, discovery motions, interrogatories, and answers, and subpoenas must be filed with the Clerk with a signed original and 4 copies (5 total), or as the hearing officer orders.
- i) **Non-Conforming Exhibits.** When possible, exhibits must be reduced to conform to 8 1/2 X 11 inch recycled paper. However, one non-conforming original copy may be filed with the Clerk's Office. Upon closure of the proceeding, the non-conforming copy may be returned to the person filing it in accordance with 2 Ill. Adm. Code 2175.300.
- j) **Page Limitation.** No motion, brief in support of motion, or brief may exceed 30 pages, and no amicus curiae brief may exceed 20 pages, without prior approval of the Board or hearing officer. These limits do not include appendices containing relevant material.

#### Section 101.304 Service of Documents

- a) **Service Requirements.** This Section contains the Board's general service requirements. However, the more specific Part for a proceeding type may contain additional requirements.
- b) **Duty to Serve.** Parties in Board adjudicatory proceedings are responsible for service of all documents they file with the Clerk's Office. Proof of service of initial filings must be filed with the Board upon completion of service.
- c) **Method of Service.** Service may be effectuated by U.S. Mail or other mail delivery service, in person, by messenger, or by facsimile, as prescribed in Section 101.302(d), except for service of enforcement complaints and administrative citations which must be made personally, by registered or certified mail, or by messenger service. Proof of service of enforcement complaints and administrative citations must be filed with the Board upon completion of service.
- d) **Affidavit or Certificate of Service.** A proceeding is subject to dismissal, and parties are subject to sanctions in accordance with Section 101.800 of this Part, if service is not timely made. Proof of proper service is the responsibility of the party filing and serving the document. An affidavit of service or certificate of service must accompany all filings of all parties. A sample form of the Affidavit of service and certificate of service is available at the Board's Offices (the locations of the Board's Offices are listed at 2 Ill. Adm. Code 2175.115) and may be obtained electronically at the Board's Web site.

- e) Service of Amicus Curiae Briefs. Any person who files an amicus curiae brief with the Board in any proceeding must serve copies of that brief on all parties in accordance with this Section.
- f) Service of Comments of Participants in an Adjudicatory Proceeding. Participants will not be required to serve their comments upon the parties to the proceeding. The Clerk's Office will serve all comments filed by participants upon all parties to the proceeding and the hearing officer. The Board will consider such comments as time and the Act or other applicable law allow.
- g) Service on State Agencies. Service must be at the addresses listed below unless a specific person has an appearance on file with the Board.

- 1) Service on the Illinois Environmental Protection Agency (Agency). The Agency must be served at the following address:

Division of Legal Counsel  
Illinois Environmental Protection Agency  
P.O. Box 19276  
Springfield, IL 62794-9276

- 2) Service on Office of State Fire Marshal (OSFM). The OSFM must be served at:

Division of Petroleum and Chemical Safety  
Office of the State Fire Marshal  
1035 Stevenson Dr.  
Springfield, IL 62703

- 3) Service on the Illinois Attorney General. The Office of the Attorney General must be served at:

Division Chief of Environmental Enforcement  
Office of the Attorney General  
188 West Randolph St., 20th Floor  
Chicago, IL 60601

- 4) Service on the Illinois Department of Natural Resources (DNR) must be served at:

Office of Legal Services  
Illinois Department of Natural Resources  
524 S. Second St.  
Springfield, IL 62701-1787

- 5) Service on the Illinois Department of Transportation (IDOT). IDOT must be served at:

Office of Chief Counsel  
DOT Administration Building  
2300 S. Dirksen Parkway, Room 300  
Springfield, IL 62764

- 6) Service on Region V of the United States Environmental Protection Agency (USEPA). USEPA Region V must be served at:

USEPA, Region V  
230 South Dearborn St.  
Chicago, IL 60604

#### Section 101.306 Incorporation of Documents by Reference

- 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 must file with the Board 9 copies of the material to be incorporated. The person seeking incorporation must demonstrate to the Board or the hearing officer that the material to be incorporated is relevant to the proceeding. Notice of the request must 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 101.308 Statutory Decision Deadlines and Waiver of Deadlines

- a) Petitions in the following proceedings each have a 120-day statutory decision deadline: Variances (Section 38 of the Act), Permit Appeals and UST appeals (Section 40 of the Act), and Pollution Control Facility Siting Review (Section 40.1 of the Act). Other adjudicatory proceedings may be subject to decision deadlines as provided by law.
- b) Where the petitioner does not waive the decision deadline, the Board will proceed expeditiously to establish all hearing and filing requirements. Failure to follow Board requirements on such deadlines will subject the party to sanctions pursuant to Subpart H of this Part. This Section will be strictly construed

where there is a decision deadline unless the Board receives a waiver as set out below.

- c) All waivers of a deadline for Board action must be filed as a separate document. Waivers must be clearly titled and state which type of waiver it is, identify the proceeding by name and docket number, and be signed by the party or by his authorized representative or attorney. A waiver of a statutory deadline does not preclude the Board from issuing an opinion or order prior to any decision deadline.
- 1) Open Waiver. Waives the decision deadline completely and unequivocally.
  - 2) Negotiation Waiver. Waives the decision deadline until such time as the petitioner elects to reinstate the decision period by filing a notice to reinstate. Upon proper filing of the notice, the decision period is reinstated. In accordance with Section 101.300(b)(4) of this Part, the decision period recommences as of the date the notice to reinstate is filed with the Board.
  - 3) Time Certain Waiver. Waives the decision deadline until a time certain. The time certain may be expressed in length of days or to a specific calendar date. If expressed in length of days, day one will be the first day after the date upon which the current time clock expires. If the petitioner files a time certain waiver before the hearing date, the waiver must be for at least 120 days. If the extension is not renewed for at least 90 days prior to the decision deadline, the Board will set the matter for hearing.

#### SUBPART D: PARTIES, JOINDER, AND CONSOLIDATION

##### Section 101.400 Appearances, Withdrawals, and Substitutions of Attorneys in Adjudicatory Proceedings

- a) Appearances. A person who is a party in a Board adjudicatory proceeding may appear as follows:
- 1) Individuals may appear on their own behalf or through an attorney-at-law licensed and registered to practice law. (Section 1 of the Attorney Act [705 ILCS 205/1 ])
  - 2) When appearing before the Board, any person other than individuals must appear through an attorney-at-law licensed and registered to practice law. (Section 1 of the Corporation of Law Prohibition Act [705 ILCS 220/1] and Section 1 of the Attorney Act [705 ILCS 205/1])

- 3) Attorneys who are licensed to practice in a state other than Illinois and who are not licensed and registered to practice in the State of Illinois may request to appear pro hac vice on a particular matter on a motion filed with the Board.
  - 4) Any attorney appearing in a representative capacity must file a separate written notice of appearance with the Clerk, together with proof of service and notice of filing of the appearance on all parties in the proceeding. Law firms, the Agency, and the Attorney General's Office when appearing before the Board must designate a lead attorney for purposes of phone and mail contact pertaining to the proceeding.
  - 5) Any person appearing before the Board may appear in a special limited capacity to contest jurisdiction.
- b) Withdrawals. An attorney who has appeared in a representative capacity and who wishes to withdraw from that representation must file a notice of withdrawal with the Clerk, together with proof of service and notice of filing on all parties or their representatives.
  - c) Substitution. Any attorney who substitutes for an attorney of record must file a written appearance pursuant to subsection (a) of this Section. That appearance must identify the attorney for whom the substitution is made. However, no attorney will be considered withdrawn from a proceeding until a formal withdrawal is filed in accordance with subsection (b) of this Section.
  - d) Any person may appear on behalf of himself or others in a rulemaking proceeding in accordance with 35 Ill. Adm. Code 102.100(b).

#### Section 101.402 Intervention of Parties

- a) The Board may permit any person to intervene in any adjudicatory proceeding. If a person seeks to intervene in an adjudicatory proceeding, the person must file a motion to do so with the Clerk and serve a copy of the motion on all parties to the proceeding. The motion must set forth the grounds for intervention. Each of the parties to the proceeding may file a response to the motion within 14 days after service.
- b) In determining whether to grant a motion to intervene, the Board will consider the timeliness of the motion and whether intervention will unduly delay or materially prejudice the proceeding or otherwise interfere with an orderly or efficient proceeding.

- c) Subject to subsection (b) of this Section, the Board will permit any person to intervene in any adjudicatory proceeding if:
  - 1) the person has an unconditional statutory right to intervene in the proceeding; or
  - 2) it may be necessary for the Board to impose a condition on the person.
- d) Subject to subsection (b) of this Section, the Board may permit any person to intervene in any adjudicatory proceeding if:
  - 1) the person has a conditional statutory right to intervene in the proceeding;
  - 2) the person may be materially prejudiced absent intervention; or
  - 3) the person is so situated that the person may be adversely affected by a final Board order.
- e) An intervenor will have all the rights of an original party to the adjudicatory proceeding, except that the Board may limit the rights of the intervenor as justice may require. Such limits may include, but are not limited to, providing that: the intervenor is bound by Board and hearing officer orders already issued or by evidence already admitted; that the intervenor does not control any decision deadline; and that the intervenor cannot raise issues that were raised or might more properly have been raised at an earlier stage of the proceeding.

#### Section 101.403 Joinder of Parties

- a) The Board, on its own motion or the motion of any party, may add a person as a party to any adjudicatory proceeding if:
  - 1) a complete determination of the controversy cannot be had without the presence of the person who is not already a party to the proceeding; or
  - 2) it may be necessary for the Board to impose a condition on the person who is not already a party to the proceeding.
- b) If a party to an adjudicatory proceeding seeks to move the Board to add a party pursuant to subsection (a) of this Section, the movant must file the motion with the Clerk and serve a copy of the motion on all other parties to the proceeding and the person sought to be added. The motion must set forth the grounds for joinder. The movant also must serve the person sought to be added with a copy of the initial filing in the proceeding, as amended, and all Board orders and hearing officer orders to date in the proceeding.

- c) The nonmoving parties and the person sought to be added each may file a response to the motion within 14 days after the respective service described in subsection (b) of this Section.

#### Section 101.404 Agency as a Party in Interest

Pursuant to Section 30 of the Act, the Board may request that the Agency investigate any alleged violation of the Act, the regulations, any permit granted by the Agency, or any term or condition of any such permit and any such other investigations as the Board may deem advisable. Upon such request, the Board may designate the Agency as a party in interest in any ongoing proceeding in that matter. The designation of the Agency as a party in interest does not require the Agency to take a position on the merits of the proceeding.

#### Section 101.406 Consolidation of Claims

The Board, upon the motion of any party or upon its own motion, may consolidate two or more proceedings for the purpose of hearing or decision or both. The Board will consolidate the proceedings if consolidation is in the interest of convenient, expeditious, and complete determination of claims, and if consolidation would not cause material prejudice to any party. The Board will not consolidate proceedings where the burdens of proof vary.

#### Section 101.408 Severance of Claims

Upon motion of any party or on the Board's own motion, in the interest of convenient, expeditious, and complete determination of claims, and where no material prejudice will be caused, the Board may sever claims involving any number of parties.

### SUBPART E: MOTIONS

#### Section 101.500 Filing of Motions and Responses

- a) The Board may entertain any motion the parties wish to file that is permissible under the Act or other applicable law, these rules, or the Illinois Code of Civil Procedure.
- b) All motions must be in writing, unless made orally on the record during a hearing, and must state whether directed to the Board or to the hearing officer. Motions that should be directed to the hearing officer are set out in Section 101.502 of this Part. All motions should be filed and served in conformance with Subpart C of this Part.
- c) Motions may be filed at any time unless otherwise specifically provided.
- d) Within 7 days after service of a motion, a party may file a response to the motion. If no response is filed, such party will 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 its disposition 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 except in deadline driven proceedings where no waiver has been filed. Parties may request that the Board grant more time to respond by filing a motion for extension of time.

- e) The moving person will not have the right to reply, except as permitted by the Board or the hearing officer to prevent material prejudice. A motion for leave to file a reply must be filed with the Board within 7 days after service of the response.

#### Section 101.502 Motions Directed to the Hearing Officer

- a) The hearing officer has the authority to rule on all motions that are not dispositive of the proceeding. Examples of motions that hearing officers may not rule upon are motions to dismiss, motions to decide a proceeding on the merits, motions to strike any claim or defense for insufficiency or want of proof, motions claiming lack of jurisdiction, motions for consolidation, motions for summary judgment, and motions for reconsideration. The duties and authorities of the hearing officer are further set out in Section 101.610 of this Part.
- b) An objection to a hearing officer ruling or any oral motion to the Board made at hearing will be deemed waived if not filed within 7 days after the Board receives the hearing transcript.
- c) Unless otherwise ordered by the Board, 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 will stay the proceeding or extend the time for the performance of any act. Unless otherwise provided, all hearing officer orders will remain in effect during the pendency of any appeal to the Board.

#### Section 101.504 Contents of Motions and Responses

All motions and responses must clearly state the grounds upon which the motion is made and must contain a concise statement of the position or relief sought. Facts asserted that are not of record in the proceeding must be supported by oath or affidavit. A brief or memorandum in support of the motion or response may be included.

#### Section 101.506 Motions Attacking the Sufficiency of the Petition, Complaint, or Other Pleading



All motions to strike, dismiss, or challenge the sufficiency of any pleading filed with the Board must be filed within 21 days after the service of the challenged document, unless the Board determines that material prejudice would result.

#### Section 101.508 Motions to Board Preliminary to Hearing

Motions that a party desires the Board to rule on before hearing should be filed 21 days prior to the regularly scheduled Board meeting before the noticed hearing date. Any motion filed after the above prescribed time will be considered by the Board if time permits.

#### Section 101.510 Motions to Cancel Hearing

- a) Time to file. Unless the Board or the hearing officer orders otherwise the hearing officer may grant motions to cancel hearings that are filed no fewer than 10 days or, if all parties agree to the motion, 5 days before the scheduled hearing date. The hearing officer may grant any such motion filed after the prescribed time only if the movant demonstrates that the movant will suffer material prejudice if the hearing is not canceled.
- b) Contents. All motions to cancel a hearing must set forth a proposed date to reschedule the hearing and must be supported by an affidavit of the person or persons with knowledge of the facts that support the motion. The affidavit must include the factual basis for the request to cancel and a complete status report that describes the progress of the proceeding and sets forth the number of cancellation requests previously granted to the movant. The hearing officer will grant the motion only if the movant demonstrates that the request to cancel is not the result of the movant's lack of diligence.
- c) In a proceeding for which there is a decision deadline, the hearing officer will deny a motion to cancel a hearing if the decision deadline does not allow enough time for the Board to reschedule the hearing, provide the required notice of the rescheduled hearing, complete the hearing, and deliberate and decide the matter.
- d) If the hearing officer grants a motion to cancel a hearing, the hearing officer will revise the schedule to complete the record in accordance with Section 101.612 of this Part. The hearing officer also will file the revised schedule with the Clerk and serve a copy of the revised schedule on all parties in accordance with Subpart C of this Part.
- e) If the hearing officer grants a motion to cancel a hearing, the Board may assess the movant the actual cost of newspaper notice of the rescheduled hearing.
- f) If a party files a motion to cancel a hearing less than two business days before the scheduled hearing, the Board may assess the movant the cancellation fee of the court reporter.

### Section 101.512 Motions for Expedited Review

- a) Motions for expedited review must be directed to the Board. All motions for expedited review must contain a complete statement of the facts and or reasons for the request and must be accompanied by an oath or affirmation attesting that the reasons and facts cited are true.
- b) In acting on a motion for expedited review, the Board will, at a minimum, consider all statutory requirements and whether material prejudice will result from the motion being granted or denied.
- c) The Board will grant a motion for expedited review consistent with available resources and decision deadlines.

### Section 101.514 Motions to Stay Proceedings

- a) Motions to stay a proceeding must be directed to the Board and must be accompanied by sufficient information detailing why a stay is needed, and in decision deadline proceedings, by a waiver of any decision deadline. A status report detailing the progress of the proceeding must be included in the motion. (See also Section 101.308 of this Part.)
- b) If the motion to stay is granted, at the close of the stay, the parties must file a status report in accordance with Subpart C of this Part. Additional requests for stay of the proceedings must be directed to the hearing officer.

### Section 101.516 Motions for Summary Judgment

- a) Any time after the opposing party has appeared (or after the expiration of time within which any party is required to appear), but no fewer than 30 days prior to the regularly scheduled Board meeting before the noticed hearing date, a party may move the Board for summary judgment for all or any part of the relief sought. Any response to a motion for summary judgment must be filed within 14 days after service of the motion for summary judgment.
- b) If the record, including 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, the Board will enter summary judgment.
- c) Any party wishing to cancel a hearing pending decision on a motion for summary judgment must file a motion to cancel hearing pursuant to Section 101.510 of this Part.

- d) Any issue raised in a motion for summary judgment not ruled on prior to the commencement of the hearing is deemed denied.

#### Section 101.518 Motions for Interlocutory Appeal from Hearing Officer Orders

Interlocutory appeals may be taken to the Board from a ruling of the hearing officer. The Board may consider an interlocutory appeal upon the filing of a written motion.

#### Section 101.520 Motions for Reconsideration

- a) Any motion for reconsideration or modification of a final Board order must be filed within 35 days after the receipt of the order. (See Section 101.1002 of this Part.)
- b) Any response to a motion for reconsideration or modification must be filed within 14 days after 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 in accordance with Section 101.300(d)(2) of this Part.

#### Section 101.522 Motions for Extension of Time

The Board or hearing officer, for good cause shown on a motion after notice to the opposite party, may extend the time for filing any document or doing any act which is required by these rules to be done within a limited period, either before or after the expiration of time.

### SUBPART F: HEARINGS, EVIDENCE, AND DISCOVERY

#### Section 101.600 Hearings

All hearings are open to the public and are held in compliance with the Americans with Disabilities Act of 1990 (42 USC 12101 et seq.). The hearings are generally held in the county in which the source or facility is located unless otherwise ordered by the hearing officer. All hearings are subject to cancellation without notice. Interested persons may contact the Clerk's office or the hearing officer for information about the hearing. Parties, participants, and members of the public must conduct themselves with decorum.

#### Section 101.602 Notice of Board Hearings

The Clerk will provide notice of all hearings, except for administrative citation hearings, in a newspaper of general circulation in the county in which the facility or pollution source is located, or where the activity in question occurred. Notice must be published at least 21 days prior to the hearing. If the proceeding involves federal rules which the State has been given delegated authority to administer, notice must be published at least 30 days prior to the hearing.

### Section 101.604 Formal Board Transcript

All Board hearings will be transcribed by a certified court reporter in accordance with Section 32 of the Act or other applicable law. Any party or witness may file a motion with the hearing officer to correct the transcript within 14 days after receipt of the transcript in the Clerk's Office. Failure of any party or witness to timely file a motion to correct the transcript constitutes waiver of right to correct, unless material prejudice results.

### Section 101.606 Informal Recordings of the Proceedings

Informal recording of Board proceedings is allowed as provided for in this Section. The hearing officer may prohibit audio or video recording at hearing if a witness refuses to testify on the grounds that the witness may not be compelled to testify if any portion of the testimony is to be broadcast or televised. If the hearing officer determines that recording is disruptive or detrimental to proper development of the record, the hearing officer may limit or prohibit audio and/or video recording.

### Section 101.608 Default

- a) Failure of a party to appear at the hearing, or failure to proceed as ordered by the Board or hearing officer, will constitute default.
- b) If a party fails to appear at hearing, the opposing party must prove their prima facie case in order to prevail on the merits.

### Section 101.610 Duties and Authority of the Hearing Officer

The hearing officer has the duty to manage proceedings assigned, to set hearings, 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 for timely transmission to the Board. The hearing officer has all powers necessary to these ends, including the authority to:

- a) Require parties to proceed to hearing and establish a schedule for, and notice and service of, any prefiled submission of testimony and written exhibits;
- b) Administer oaths and affirmations;
- c) Allow for the examination of or examine witnesses to ensure a clear and complete record;
- d) Regulate the course of the hearing, including controlling the order of proceedings;

- e) Establish reasonable limits on the duration of the testimony and questioning of any witness, and limit repetitive or cumulative testimony and questioning;
- f) Determine that a witness is adverse, hostile, or unwilling pursuant to Section 101.624 of this Part;
- g) Issue an order compelling the answers to interrogatories or responses to other discovery requests;
- h) Order the production of evidence pursuant to Section 101.614 of this Part;
- i) Order the filing of any required record or recommendation in a manner which provides for a timely review and development of issues prior to the hearing and consistent with any statutory decision deadline;
- j) Initiate, schedule, and conduct a prehearing conference;
- k) Order a briefing and comment schedule and exclude late-filed briefs and comments from the record;
- l) Rule upon objections and evidentiary questions;
- m) Order discovery pursuant to Sections 101.614 and 101.616 of this Part;
- n) Rule on any motion directed to the hearing officer or deferred to the hearing officer by the Board in accordance with Section 101.502 of this Part;
- o) Set status report schedules; and
- p) Require all participants in a rulemaking proceeding to state their positions with respect to the proposal.

#### Section 101.612 Schedule to Complete the Record

- a) The hearing officer must establish a schedule to complete the record. The schedule may provide dates and deadlines for prehearing conferences, discovery completion, and hearing and post-hearing submissions (including public comments). The schedule must provide for a completed record at least 30 days before the decision date, unless the hearing officer orders otherwise to prevent material prejudice. The schedule must be in the form of a hearing officer order. The hearing officer must file the schedule with the Clerk and serve a copy of the schedule on all parties in accordance with Subpart C of this Part.
- b) The hearing officer may rule upon any motion to revise the schedule to complete the record. The hearing officer may grant such motion to the extent that the

revised schedule provides for a completed record at least 30 days before the decision date or to prevent material prejudice. If the hearing officer grants a motion to revise the schedule, the hearing officer must file the revised schedule with the Clerk and serve a copy of the revised schedule on all parties in accordance with Subpart C of this Part. See also Section 101.510(d) of this Part.

#### Section 101.614 Production of Information

The hearing officer may, on his or her own motion or on the motion of any party, order the production of information that is relevant to the matter under consideration. The hearing officer will deny, limit or condition the production of information when necessary to prevent undue delay, undue expense, or harassment, or to protect materials from disclosure consistent with Sections 7 and 7.1 of the Act and 35 Ill. Adm. Code 130.

#### Section 101.616 Discovery

The assigned hearing officer will set all time deadlines for discovery not already provided for in this Subpart. Time deadlines will be consistent with Board deadlines. Discovery deadlines provided for in the Code of Civil Procedure do not apply. All discovery disputes will be handled by the assigned hearing officer.

- a) All relevant information and information calculated to lead to relevant information is discoverable, excluding those materials that would be protected from disclosure under 35 Ill. Adm. Code 130.
- b) If the parties cannot agree on the scope of discovery or the time or location of any deposition, the hearing officer has the authority to order discovery or to deny requests for discovery.
- c) All discovery must be completed at least 10 days prior to the scheduled hearing in the proceeding unless the hearing officer orders otherwise.
- d) The hearing officer may, on his or her own motion or on the motion of any party or witness, issue protective orders that deny, limit, condition or regulate discovery to prevent unreasonable expense, or harassment, to expedite resolution of the proceeding, or to protect non-disclosable materials from disclosure consistent with Sections 7 and 7.1 of the Act and 35 Ill. Adm. Code 130.
- e) 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. Any appeals of rulings by the hearing officer regarding discovery must be in writing and filed with the Board prior to hearing.

- f) Failure to comply with any order regarding discovery subjects the offending persons to sanctions pursuant to Subpart H of this Part.
- g) If any person files any request for discovery or answers to discovery for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation, or knowingly gives a false answer to discovery questions, the Board, on its own motion or the motion of a party, may impose sanctions pursuant to Subpart H of this Part.
- h) A party must amend any prior responses to interrogatories, requests for production, or requests for admission if the party learns that the response is in some material respect incomplete or incorrect, and the additional or corrected information has not otherwise been made known to the other parties during the discovery process or in writing.

#### Section 101.618 Admissions

- a) General. All requests to admit must be served upon a party no later than 35 days before hearing. Copies of such requests should be filed upon the Board and the hearing officer. All answers or objections to requests to admit must be served upon the party requesting the admission, the Board, and the hearing officer within 20 days of the service of the request.
- b) Extension of Time. In accordance with Sections 101.522 and 101.610 of this Part, the hearing officer may extend the time for filing any request, answer, or objection either before or after the expiration of time.
- c) Request to Admit. Any party serving a request to admit in accordance with subsection (d) or (e) must include the following language in the first paragraph of the request. "Failure to respond to the following requests to admit within 20 days may have severe consequences. Failure to respond to the following requests will result in all the facts requested being deemed admitted as true for this proceeding. If you have any questions about this procedure, you should contact the hearing officer assigned to this proceeding or an attorney."
- d) Request for Admission of Fact. A party may serve a written request for admission of the truth of specific statements of fact on any other party.
- e) Request for Admission of Genuineness of Document. A party may serve a written request for admission of the genuineness of documents on any other party. Copies of the document must be served.
- f) Admission in the absence of denial. Each of the matters of fact and the genuineness of each document of which admission is requested is admitted unless, within 20 days after service thereof, the party to whom the request is

directed serves upon the party requesting the admission either a sworn statement denying specifically the matters of which admission is requested or setting forth in detail the reasons why the party cannot truthfully admit or deny those matters or written objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper in whole or in part. If written objections to a part of the request are made, the remainder of the request must be answered within the period designated in the request. A denial must fairly address the substance of the requested admission.

- g) Partial denial or qualification. If good faith requires that a party deny a part of a matter for which an admission is requested, or if a part requires qualification, the party must specify the part which is denied or qualified and admit only the remainder.
- h) Objection. Any objection to a request or to any answer will be heard by the hearing officer upon prompt notice and motion of the party making the request.
- i) Effect of Admission. Any admission made by a party pursuant to a request under this Section is for the purpose of the pending proceeding only. It does not constitute an admission by the party for any other purpose and may not be used against him in any other proceeding.
- j) Expenses of Refusal to Admit. If a party, after being served with a request to admit the genuineness of any document or the truth of any matters of fact, fails to admit the truth of any of the matters or the genuineness of any documents and serves a sworn denial thereof, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter of fact, the party so moving may apply to the Board for an order under Subpart H of this Part for payment of reasonable expenses incurred.

#### Section 101.620 Interrogatories

- a) A party may serve written interrogatories on any other party, no later than 35 days before hearing. Unless otherwise ordered by the hearing officer, interrogatories must be filed pursuant to Section 101.302(i) of this Part and served upon the Clerk and the hearing officer.
- b) Within 20 days after service thereof, the party to whom the interrogatory is directed must serve the answers and objections, if any, upon the party submitting the interrogatories, the Clerk, and the hearing officer. Each interrogatory must be answered separately and fully in writing under oath, unless it is objected to. Answers must be signed by the person making them and objections must be signed by the attorney making them or, in the event of an individual representing himself or herself, the individual making them.



- c) Grounds for an objection to an interrogatory must be stated with specificity. Any ground that is not stated in a timely objection is waived.

#### Section 101.622 Subpoenas

- a) Upon request by any party to a contested proceeding, the Clerk will 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) Service of the subpoena must be completed 10 days before the date of the required appearance. A copy of the subpoena must be filed with the Clerk after service upon the witness and served upon the hearing officer. Failure to serve both the Clerk and the hearing officer will render the subpoena null and void. Service and filing must be in accordance with Subpart C of this Part.
- c) Subpoenas may include a command to produce books, papers, documents, or other tangible things designated therein and relevant to the matter under consideration.
- d) The hearing officer, 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 or irrelevant. The hearing officer will rule upon motions to quash or modify material requested in the subpoena pursuant to subsection (c) of this Part in accordance with the standards articulated in Section 101.614 of this Part.
- e) If the witness is not a resident of the State, the witness may be eligible for reasonable expenses from the party requesting the subpoena.
- f) Each witness subpoenaed by a party under this Section is entitled to receive witness fees from that party as provided in Section 47 of the Fees and Salaries Act [55 ILCS 45/47].
- g) Unless the hearing officer orders otherwise, any witness subpoenaed for a deposition may be required to attend only in the county in which he resides or maintains an office address. In accordance with Amended Supreme Court Rule 206(d), depositions must be limited to 3 hours in length unless the parties by stipulation agree to a longer time frame or unless the hearing officer orders otherwise after a showing of good cause. (See Ill. S. Ct. Amended Rule 206(d).)
- h) Failure of any witness to comply with a subpoena will subject the witness to sanctions under this Part, or the judicial enforcement of the subpoena. The

Board may, upon proper motion by the party requesting the subpoena, request the Attorney General to pursue such judicial enforcement of the subpoena on behalf of the Board.

#### Section 101.624 Examination of Adverse, Hostile or Unwilling Witnesses

- a) **Adverse Witnesses.** At hearing, upon motion granted by the hearing officer, any party, or any person for whose immediate benefit the proceeding is prosecuted or defended, or any officers, directors, managing agents, or foremen of any party may be called as an adverse witness as allowed by the Code of Civil Procedure. (Section 2-110Z of the Code of Civil Procedure.) Adverse witnesses may be examined as if under cross-examination. The party calling the adverse witness may rebut the testimony and may impeach the witness.
- b) **Hostile or Unwilling 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 101.626 Information Produced at Hearing

In accordance with Section 10-40 of the IAPA, the hearing officer will admit evidence that is admissible under the rules of evidence as applied in the civil courts of Illinois, except as otherwise provided in this Part.

- a) **Hearsay.** The hearing officer may admit hearsay evidence that is material, relevant, and would be relied upon by prudent persons in the conduct of serious affairs, unless such evidence is privileged.
- b) **Admissibility of Evidence.** When the admissibility of evidence depends upon an arguable interpretation of substantive law, the hearing officer will admit such evidence.
- c) **Scientific articles and treatises.** Relevant scientific or technical articles, treatises, or materials may be introduced into evidence by a party. Such materials are subject to refutation or disputation through introduction of documentary evidence or expert testimony.
- d) **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.
- e) **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 will

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 will not affect admissibility. The term "business," as used in this subsection (e), includes businesses, professions, occupations, and callings of every kind.

- f) 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.
- g) Oral and written statements. Oral and written statements from participants may be taken at hearing in accordance with Section 101.628 of this Part.

#### Section 101.628 Statements from Participants

- a) Oral statements. The hearing officer may permit a participant, to make oral statements on the record when time, facilities, and concerns for a clear and concise hearing record so allow. Such oral statements must be made under oath and are subject to cross-examination.
- b) Written statements. Any participant may submit written statements relevant to the subject matter at any time prior to hearing or at hearing. Participants submitting such a statement will be subject to cross-examination by any party. Written statements submitted without the availability of cross-examination will be treated as public comment in accordance with subsection (c) of this Section and will be afforded lesser weight than evidence subject to cross-examination.
- c) Public Comments or Amicus Curiae Briefs. Participants may file public comments subject to the requirements of this Section and the hearing officer's schedule for completion of the record. The Board also allows for the filing of amicus curiae briefs by non-party participants. Amicus Curiae briefs should be filed in accordance with Section 101.110 of this Part.
  - 1) Public comments must be filed within 14 days after the close of the last hearing unless the hearing officer specifies a different date for submission of post-hearing comments. However, all public comments must be filed with the Board no later than 30 days before the decision date, unless the hearing officer orders otherwise to prevent material prejudice. Consistent with the burden of proof in a proceeding, the hearing officer may provide for differing filing deadlines with respect to post-hearing comments by different persons. Pursuant to hearing officer order, rebuttal public comments may be submitted.

- 2) All public comments must present arguments or comments based on evidence contained in the record. Such comments may also present legal argument citing legal authorities.
- 3) Comments must be filed with the Board. Comments will be distributed to parties and the hearing officer by the Clerk's office.

#### SUBPART G: ORAL ARGUMENT

##### Section 101.700 Oral Argument

- a) The Board may hear oral argument upon written motion of a party or the Board's own motion. Such oral argument will be transcribed by a stenographer provided by the Board and become part of the record of the proceedings before the Board. The purpose of oral argument is to address legal questions. Oral argument is not intended to address new facts.
- b) Motions for oral argument must contain arguments supporting the grant of the motion for oral argument. In considering a motion for oral argument, the Board will consider, but is not limited to considering, the uniqueness of the issue or proceeding and whether the issue or proceeding involves a conflict of law.
- c) In any proceeding with a statutory decision deadline, the Board will deny the request for oral argument if there is insufficient time to schedule oral argument and allow time for the Board to issue its decision.
- d) If the Board grants the motion for oral argument, it will issue an order setting forth a schedule for oral argument that may include a briefing schedule. The brief will be limited to the issues for which oral argument was granted.

#### SUBPART H: SANCTIONS

##### Section 101.800 Sanctions for Failure to Comply with Procedural Rules, Board Orders, or Hearing Officer Orders

- a) If any person fails to comply with any provision of 35 Ill. Adm. Code 101 through 130 or fails to comply with any order entered by the Board or the hearing officer, including any subpoena issued by the Board, the Board may order sanctions. The Board may order sanctions on its own motion, or in response to a motion by a hearing officer or a party.
- b) Sanctions include, but are not limited to, the following:

- 1) Further proceedings may be stayed until the order or rules are complied with, except in proceedings with a statutory decision deadline. Proceedings with a statutory decision deadline may be dismissed prior to the date on which decision is due;
  - 2) The offending person may be barred from filing any other pleading relating to any issue to which the refusal or failure relates;
  - 3) The offending person may be barred from maintaining any particular claim, counterclaim, third-party complaint, or defense relating to that issue;
  - 4) As to claims or defenses asserted in any pleading to which that issue is material, a judgment by default may be entered against the offending person or the proceeding may be dismissed with or without prejudice;
  - 5) Any portion of the offending person's pleadings relating to that issue may be stricken and, if appropriate, judgment may be entered as to that issue;
  - 6) The offending person may be required to pay the amount of reasonable expenses incurred by the other party, as a result of their non-compliance with a Board rule or Board or hearing officer order; and
  - 7) The witness may be barred from testifying concerning that issue.
- c) In deciding what sanction to impose the Board will consider factors including: the relative severity of the refusal or failure to comply; the past history of the proceeding; the degree to which the proceeding has been delayed or prejudiced; and the existence or absence of bad faith on the part of the offending party or person.

#### Section 101.802 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 willfully obtains or attempts to obtain information by an improper discovery method, willfully obtains or attempts to obtain information to which he is not entitled, or otherwise abuses discovery rules, the Board or hearing officer may enter any order provided for in this Part.

### SUBPART I: REVIEW OF FINAL BOARD OPINIONS AND ORDERS

#### Section 101.902 Motions For Reconsideration

In ruling upon a motion under this Section, the Board will consider factors including new evidence, a change in the law, or any other reason to conclude that the Board's decision was in error. (See also Section 101.520 of this Part.)

#### Section 101.904 Relief from and Review of Final Opinions and Orders

- a) Upon its own motion or motion of any party, the Board may correct clerical mistakes in orders or other parts of the record and errors therein arising from oversight or omission. Such mistakes may be so corrected by the Board before the 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 proceeding, for the following:
  - 1) Newly discovered evidence that existed at the time of hearing and that by due diligence could not have been timely discovered;
  - 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 oath or affidavit or other appropriate showing as to matters not of record. All parties or participants in the proceeding must be notified by the movant as provided by Section 101.304 of this Part.
- d) A motion under subsection (b) of this Section must be filed with the Board within one year after entry of the order except that a motion pursuant to subsection (b)(3) of this Section must be filed within a reasonable time after entry of the order.
- e) Any response to a motion under this Section must be filed within 14 days after the filing of the motion.

#### Section 101.906 Judicial Review of Board Orders

- a) Pursuant to Sections 29 and 41 of the Act, Supreme Court Rule 335, and Section 10-50 of the APA, judicial review of final Board orders is available from the appellate court.
- b) For purposes of judicial review, final Board orders are appealable as of the date of service by the Board upon the appealing party.
- c) The procedure for stay of any final Board order during appeal will be as provided in Rule 335 of the Rules of the Supreme Court of Illinois. (Ill. S.Ct.Rule 335.)

#### Section 101.908 Interlocutory Appeal

Upon motion of any party the Board may consider an interlocutory appeal in accordance with Supreme Court Rule 308. (Ill. S.Ct.Rule 308.)

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

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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, 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, and 41] and authorized by Sections 26 and 27 of the Act [415 ILCS 5/26 and 27].

**SOURCE:** Originally adopted as Chapter 1: Procedural Rules, Part II: Regulatory and Other Nonadjudicative Hearings and Proceedings, in R70-4, 1 PCB 43, October 8, 1970; codified at 6 Ill. Reg. 8357; amended in R84-10 at 9 Ill. Reg. 1398, effective January 16, 1985; Part repealed, new Part adopted in R88-5(B) at 14 Ill. Reg. 9210, effective May 24, 1990; amended in R90-16 at 14 Ill. Reg. 20472, effective December 11, 1990; old Part repealed, new Part adopted in R00-20 at 24 Ill. Reg. \_\_\_\_\_, effective \_\_\_\_.

## SUBPART A: GENERAL PROVISIONS

### Section 102.100 Applicability

- a) This Part applies to all regulatory and informational hearings and proceedings, and must be read in conjunction with 35 Ill. Adm. Code 101. Hearings conducted pursuant to this Part are quasi-legislative in nature and the purpose of such hearings is to gather information and comments to guide the Board in its rulemaking process. All testimony must be sworn.
- b) All persons taking part in these hearings are participants, rather than parties as in contested cases. Non-attorneys may represent themselves and others at regulatory hearings and may ask questions of witnesses or give testimony or comment as allowed by the hearing officer.

### Section 102.102 Severability

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

### Section 102.104 Definitions

For the purpose of this Subpart, words and terms will have the meaning as defined in 35 Ill. Adm. Code 101.Subpart B unless otherwise provided, or unless the context clearly indicates otherwise.

### Section 102.106 Types of Regulatory Proposals

- a) The Act provides for 4 types of regulatory proposals:
  - 1) Identical in substance rulemakings, as defined in Sections 7.2, 13.3 , 28.2 and 28.4 of the Act [415 ILCS 5/7.2, 13.3., 28.2, and 28.4];

- 2) Federally required rules, as defined in Section 28.2 of the Act [415 ILCS 5/28.2];
  - 3) Other regulatory proposals, both of general applicability and not of general applicability as allowed by Sections 26, 27 and 28 of the Act [415 ILCS 5/26, 27, and 28]; and
  - 4) Clean Air Act fast track rulemakings as defined by Section 28.5 of the Act [415 ILCS 5/28.5].
- b) The IAPA provides for three types of rulemakings:
- 1) General rulemaking pursuant to Section 5-40 of the IAPA [5 ILCS 100/5-40];
  - 2) Emergency rulemaking pursuant to Section 5-45 of the IAPA [5 ILCS 100/5-45]; and
  - 3) Peremptory rulemaking pursuant to Section 5-50 of the IAPA [5 ILCS 100/5-50].

#### Section 102.108 Public Comments

- a) The Board will accept written comments from any person concerning a regulatory proposal during the first notice period as defined in Section 102.604 of this Part. However, when adopting identical-in-substance regulations, the Board will accept written comments from USEPA and other persons for at least 45 days after the date of publication of the proposed regulations or amendments in the Illinois Register in accordance with Section 102.610 of this Part.
- b) Any person may submit written comments on any proposal within 14 days after the receipt of the hearing transcript in Board offices unless otherwise specified by the hearing officer or the Board.
- c) Comments must be filed with the Clerk and served in accordance with 35 Ill. Adm. Code 101.Subpart C, upon the Environmental Protection Agency (Agency), Department of Natural Resources (DNR), the Attorney General (if a participant), the proponent, and the participants on any service list established by the hearing officer pursuant to Section 102.422 of this Part unless otherwise specified by the hearing officer or the Board.
- d) Comments that are not timely filed or properly served will not be considered, except as allowed by the hearing officer or the Board to prevent material prejudice.

### Section 102.110 Waiver of Requirements

The Board may waive any of the non-statutory requirements of this Part upon a showing by a person that a particular requirement would create an undue burden on that person such as where the burden of compliance imposes financial costs that would preclude further participation, or where compliance would result in the provision of information already provided in that proceeding.

### Section 102.112 Other Proceedings

Pursuant to Section 5(d) of the Act or other applicable law, the Board may conduct such other noncontested or informational hearings as may be necessary to accomplish the purposes of the Act or other applicable law. Such hearings may include, but are not limited to, inquiry hearings to gather information on any subject the Board is authorized to regulate.

## SUBPART B: REGULATIONS OF GENERAL APPLICABILITY, RESOURCE CONSERVATION AND RECOVERY ACT (RCRA) AMENDMENTS, AND SITE-SPECIFIC REGULATIONS

### Section 102.200 Proposal for Regulations of General Applicability

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

### Section 102.202 Proposal Contents for Regulations of General Applicability

Each proponent must set forth the following in its proposal:

- a) The language of the proposed rule, including any existing regulatory language proposed to be amended or repealed. Language being added must be indicated by underscoring and language being deleted must be indicated by strike-outs. The proposed rule must be drafted in accordance with 1 Ill. Adm. Code 100.Subpart C;
- b) A statement of the reasons supporting the proposal, including a statement of the facts that support the proposal, and a statement of the purpose and effect of the proposal, including environmental, technical, and economic justification. The statement must discuss the applicable factors listed in Section 27(a) of the Act. The statement must include, to the extent reasonably practicable, all affected sources and facilities and the economic impact of the proposed rule;
- c) A synopsis of all testimony to be presented by the proponent at hearing;

- d) Copies of any material to be incorporated by reference within the proposed rule pursuant to Section 5-75 of the IAPA [5 ILCS 100/5-75];
- e) Proof of service upon all persons required to be served pursuant to Section 102.422 of this Part;
- f) Unless the proponent is the Agency or DNR, a petition signed by at least 200 persons, pursuant to Section 28 of the Act and Section 102.410(b) of this Part;
- g) When the Agency proposes a rule it believes is federally required, a certification in accordance with Section 102.500 of this Part;
- h) When the proponent is a State agency, a diskette containing the information required under subsection (a) of this Section; and
- i) When any information required under this Section is inapplicable or unavailable, a complete justification for such inapplicability or unavailability.

#### Section 102.204 Proposal of RCRA Amendments

In addition to satisfying the requirements of Section 102.202 of this Part, any proposal to amend the RCRA regulations must:

- a) Indicate whether it is made pursuant to the provisions of Section 22.4(a), 22.4(b) or 22.4(c) of the Act;
- b) Include a listing of all amendments to the corresponding federal regulations since the period encompassed by the last amendment of the Board's RCRA rules; and
- c) Include a certificate of service indicating that a copy of the proposal has been served on the USEPA. Service must be made at the following address:

Director, Waste Management Division  
 USEPA, Region V  
 77 W. Jackson Street  
 Chicago, Illinois 60604

#### Section 102.206 Notice of Site-Specific RCRA Proposals

- a) Public notice of hearings on site-specific RCRA proposals will be given at least 30 days before the date of the hearing.
- b) In addition to the requirements of Section 28 of the Act, the Board, at a minimum, will give notice of hearings on a site-specific RCRA proposal to the following persons:

- 1) Federal agencies as designated by 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 28 of the Act and Section 102.416 of this Part, the Board will give notice by broadcast over at least one radio station in the area of the facility containing the information required by subsections (d)(2) and (d)(4) through (d)(8) of this Section.
- d) A hearing notice on a site-specific RCRA proposal will include the following information:
- 1) The address of the Board office;
  - 2) Name and address of the proponent and, if different, of the facility for which the site-specific rule is sought;
  - 3) A brief description of the business conducted at the facility and the activity described in the proposal;
  - 4) A description of the relief requested in the proposal;
  - 5) Name, address and telephone number of the Clerk of the Board, from whom interested persons may obtain further information, including copies of the proposal;
  - 6) The name, address and telephone number of the Agency's representative in the rulemaking;
  - 7) A description of any written comment period or a statement that a comment period will be established in the future;

- 8) A statement that the record in the rulemaking is available at the Board office for inspection, except those portions that are claimed or determined to be trade secrets, and that procedures are available whereby disclosure may be sought by the public. Any such claim must be made in accordance with 35 Ill. Adm. Code 130;
- 9) A statement that site-specific rules may be adopted pursuant to 415 ILCS 5/27 et seq. and Section 102.202 of this Part, and a citation to the Board regulations sought to be modified; and
- 10) Any additional information considered necessary or proper.

#### Section 102.208 Proposal for Site-Specific Regulations

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

#### Section 102.210 Proposal Contents for Site-Specific Regulations

Proponents of site-specific regulations other than those relating to RCRA must comply with the requirements of Section 102.202 of this Part in addition to the following requirements:

- a) The proposal must set forth the language of the proposed site-specific rule, including any existing regulatory language proposed to be amended or repealed. Language being added must be indicated by underscoring and language being deleted must be indicated by strike-outs. If the proposed site-specific rule seeks an exemption from or modification of a rule of general applicability, the proposed site-specific rule may not be proposed as an amendment to the general rule. Instead, the site-specific rule must be proposed as its own section;
- b) In the event that the proposed rule would replace the applicability of a general rule to the pollution source, the proposal must specify, with supporting documentation, the reasons why the general rule is not technically feasible or economically reasonable for the person or site. Such documentation must include relevant information on other similar persons' or sites' ability to comply with the general rule;
- c) The proposal must describe the person or site for which regulatory change is sought and the area affected by the proposed change. The proposal must also include a detailed assessment of the environmental impact of the proposed change, and include a description of available treatment or control options;

- d) The proposal must demonstrate that the Board may grant the requested relief consistent with federal law governing the subject of the proposal (e.g. Underground Injection Control program, Resource Conservation and Recovery Act, etc.);
- e) When the proponent is a State agency, the proponent also must provide a diskette containing the information required under subsection (a) of this Section; and
- f) When any information required under this Section is inapplicable or unavailable, the proposal must provide a complete justification for such inapplicability or unavailability.

#### Section 102.212 Dismissal

- a) Failure of the proponent to satisfy the content requirements for proposals under this Subpart or failure to respond to Board requests for additional information will render a proposal subject to dismissal for inadequacy.
- b) Failure of the proponent to pursue disposition of the proposal in a timely manner will render a proposal subject to dismissal. In making this determination, the Board will consider factors including the history of the proceeding and the proponent's compliance with any Board or hearing officer orders.
- c) A proposal will be dismissed for inadequacy in cases in which the Board, after evaluating the proposal, cannot determine the statutory authority on which the proposal is made. In all such cases, a statement informing the proponent of the Board's basis for dismissal will be made. Dismissal of a proposal will not bar a proponent from re-submitting a proposal in the absence of any deadline imposed by applicable law or Board regulations.
- d) Any person may file a motion challenging the statutory authority or sufficiency of the proposal pursuant to 35 Ill. Adm. Code 101.Subpart E.

#### SUBPART C: CLEAN AIR ACT AMENDMENTS (CAAA) FAST TRACK RULEMAKING

#### Section 102.300 Applicability

*This subpart applies to the adoption of rules proposed by the Agency and required to be adopted by the State under the Clean Air Act as amended by the Clean Air Act Amendments of 1990 (CAAA) A "fast-track" rulemaking proceeding is a proceeding to promulgate a rule that the CAAA requires to be adopted. For purposes of this Section, "requires to be adopted" refers only to those regulations or parts of regulations for which the United States Environmental Protection Agency is empowered to impose sanctions against the State for failure to adopt such rules. [415 ILCS 5/28.5(a), (c)]*



## Section 102.302 Agency Proposal

- a) When proposing a regulation required by the CAAA, the Agency must meet the following requirements:
- 1) The proposal must set forth the proposed rule, which must be drafted in accordance with 1 Ill. Adm. Code 100.Subpart C;
  - 2) The proposal must have a cover sheet that prominently states that the Agency proposes the rule under Section 28.5 of the Act, *unless another provision of this Act specifies the method for adopting a specific rule* [415 ILCS 5/28.5(c)];
  - 3) The proposal must *clearly identify the provisions and portions of the federal statute, regulations, guidance, policy statement, or other documents upon which the rule is based* [415 ILCS 5/28.5(e)(3)];
  - 4) The proposal must include *supporting documentation for the rule that summarizes the basis of the rule* [415 ILCS 5/28.5(e)(4)];
  - 5) The proposal must *describe in general the alternative selected and the basis for the alternative* [415 ILCS 5/28.5(e)(5)];
  - 6) The proposal must summarize the economic and technical data that the Agency relied upon in drafting the proposed rule;
  - 7) The proposal must include a list of any documents that the Agency directly relied upon in drafting the proposed rule or that the Agency intends to rely upon at hearing, and copies of the documents;
  - 8) The proposal must set forth *a description of the geographical area to which the rule is intended to apply, a description of the process or processes affected, and identification by classes of the entities expected to be affected, and a list of sources expected to be affected by the rule to the extent known to the Agency* [415 ILCS 5/28.5(e)(8)]; and
  - 9) The proposal must include a diskette containing the information required under subsection (a)(1) of this Section.
- b) If the proposal fails to meet any of the requirements of subsection (a) of this Section, the Board may decide not to accept the proposal for filing.

## Section 102.304 Hearings

- a) Within 14 days after the receipt of a rule the Board will file the proposed rule for first notice and schedule all hearings. Additionally, the Board will send notice to the appropriate newspaper of the scheduled hearing. Such notice will be published by the newspaper at least 30 days prior to the date of the hearing.
- b) The first hearing will be held within 55 days after receipt of the rule and is reserved for the Agency's testimony and witnesses.
- c) Within 7 days after the first hearing, any person may request a second hearing. Such a request may be made on the record at the first hearing or in writing. If done in writing it must be filed with the Board and served upon the service list.
- d) A second hearing will be held to hear comments on Department of Commerce and Community Affairs' economic impact study of the proposed rules. *At least 20 days before the hearing, the Board shall notify the public of the hearing and make the economic impact study, or the Department of Commerce and Community Affairs' explanation for not producing an economic impact study, available to the public. Such public hearing may be held simultaneously or as part of any Board hearing considering such new rules.* [415 ILCS 5/27(b)] See also Section 102.414 of this Part.
- e) *The third hearing shall be scheduled to commence within 14 days after the first day of the second hearing and shall be devoted solely to any Agency response to the material submitted at the second hearing and to any response by other parties.* [415 ILCS 5/28.5(g)] In order to cancel the third hearing, the Agency must state on the record at hearing that it and the affected entities are in agreement or notify the Board and the service list in writing.
- f) In order to meet statutory deadlines, hearing dates may be chosen by the assigned Board member and hearing officer without consultation with the participants. CAAA hearings need only be held in one affected area of the State.

#### Section 102.306 Prefiled Testimony

- a) The hearing officer will close the service list for purposes of prefiled testimony at 4:30 p.m. 16 days before the date of hearing.
- b) Ten days before the hearing, copies of prefiled testimony must be filed with the Clerk and served upon all people who are on the service list as closed pursuant to subsection (a) of this Section.
- c) The Board may grant a waiver of the pre-filing deadline or service requirement for good cause.

- d) Participants who do not pre-file their testimony will only be allowed to testify if time remains in that hearing day. The hearing will not be continued from day to day to accommodate participants who do not pre-file.

#### SUBPART D: SERVICE AND FILING OF DOCUMENTS, MOTIONS, PRODUCTION OF INFORMATION, SUBPOENAS, PREHEARING CONFERENCES, AND HEARINGS

##### Section 102.400 Service and Filing of Documents

All documents must be served and filed in accordance with 35 Ill. Adm. Code 101.Subpart C.

##### Section 102.402 Motions, Production of Information, and Subpoenas

Motion practice, production of information and the issuance of subpoenas in regulatory proceedings is governed by 35 Ill. Adm. Code 101. All motions and responses must be filed with the Board and served upon the hearing officer, the proponent, the Agency, and all persons on any service list established pursuant to subsection 102.422(b) of this Part.

##### Section 102.404 Initiation and Scheduling of Prehearing Conferences

- a) *To the extent consistent with any deadline for adoption of any regulations mandated by State or federal law, prior to initiating any hearing on a regulatory proposal, the Board may assign a qualified hearing officer who may schedule a prehearing conference between the proponents and any or all of the potentially affected persons. [415 ILCS 5/27(d)]*
- b) The hearing officer may schedule a prehearing conference on his or her own motion, or on the motion of the proponent or any potentially affected person. A “potentially affected person” is any person, as defined by the Act and 35 Ill. Adm. Code 101.202, who demonstrates any nexus to the source of the pollutant to be controlled by the proposal or who shows some impact from the pollutant to be controlled by the proposal. A motion to schedule a prehearing conference must be directed to the hearing officer.
- c) In accordance with Section 27(d) of the Act, the notice requirements of Section 28 of the Act and Section 102.416 will not apply to such prehearing conferences. However, the hearing officer will give notice to the proponents and any person who is included on the notice list of that proposal.

##### Section 102.406 Purpose of Prehearing Conference

The purpose of a prehearing conference is:

- a) *To maximize understanding of the intent and application of the proposal;*

- b) *To reach agreement on aspects of the proposal, if possible; and*
- c) *To attempt to identify and limit the issues of disagreement among the participants to promote efficient use of time at hearing. [415 ILCS 5/27(d).]*

#### Section 102.408 Prehearing Order

- a) *No record need be kept of the prehearing conference, nor shall any participant or the Board be bound by any discussions conducted at the prehearing conference. [415 ILCS 5/27(d)]*
- b) Notwithstanding subsection (a) of this Section, with the consent of all participants in the prehearing conference, the hearing officer may enter a prehearing order delineating issues to be heard, agreed facts, and other matters.
- c) If the participants in the prehearing conference agree to have a prehearing order entered pursuant to subsection (b) of this Section, the hearing officer may require that those participants furnish a draft of a proposed order setting forth the substance of the agreements reached at the prehearing conference. The hearing officer will enter that order if he agrees that it sets forth the substance of the agreement. The order will identify which participants have agreed to the substance of the order.
- d) A prehearing order will not be binding on non-participants in the prehearing conference. [415 ILCS 5/27(d)]

#### Section 102.410 Authorization of Hearing

- a) The Clerk will assign a docket number to any proposal. All regulatory proposals will be placed on the Board agenda for determination of adequacy under the applicable law and this Part. The proponent must cure any inadequacy identified by Board order before the proposal will proceed to hearing.
- b) The Board will schedule a hearing on a proposal if it finds that such proposal is *supported by an adequate statement of reasons, is accompanied by a petition signed by at least 200 persons, is not plainly devoid of merit and does not deal with a subject on which a hearing has been held within the preceding six months.* [415 ILCS 5/28(a)]
- c) In accordance with Section 28(a) of the Act, if a proposal is made by the Agency, or DNR, *the Board shall schedule a public hearing without regard to the above conditions* in subsection (b) of this Section as soon as practicable. [415 ILCS 5/28(a)]

- d) Pursuant to Section 28 of the Act, *the Board may also in its discretion schedule a public hearing upon any proposal without regard to the above conditions in subsection (b) of this Section.* [415 ILCS 5/28(a)]
- e) If the Board determines that a proposal meets the requirements of subsection (b) of this Section or is otherwise adequate under applicable law, and if any required filing fee has been paid, the Board will issue an order accepting the proposal for hearing. Such an order will be construed as starting the time clock for purposes of any first notice publication deadlines pursuant to Sections 28.2 and 28.5 of the Act. [415 ILCS 5/28(a)]
- f) When the Board authorizes a hearing, the Chairman will designate one or more attending Board members and a qualified hearing officer. A member of the Board may serve as hearing officer if otherwise qualified.
- g) The Board may consolidate proposals for hearing or decision.

#### Section 102.412 Scheduling of Hearings

- a) Except as otherwise provided by applicable law, *no substantive regulation shall be adopted, amended, or repealed until after a public hearing within the area of the State concerned.* In the case of site-specific rules, a public hearing will be held in the affected county. Except as otherwise provided by applicable law, *in the case of state-wide regulations, hearings shall be held in at least two areas.* [415 ILCS 5/28(a)]
- b) If the proponent or any participant wishes to request a hearing beyond the number of hearings specified by the hearing officer, that person must demonstrate, in a motion to the hearing officer, that failing to hold an additional hearing would result in material prejudice to the movant. The motion may be oral, if made at hearing, or written. The movant must show that he exercised due diligence in his participation in the proceeding and why an additional hearing, as opposed to the submission of written comments pursuant to Section 102.108 of this Part, is necessary.

#### Section 102.414 Hearings on the Economic Impact of New Proposals

- a) In accordance with Section 27(b) of the Act, except as otherwise provided by applicable law, before the adoption of any proposed rules, *the Board shall request that the Department of Commerce and Community Affairs conduct a study of the economic impact of the proposed rules. The Board shall conduct at least one public hearing on the economic impact of those new rules. At least 20 days before the hearing, the Board shall notify the public of the hearing and make the economic impact study, or the Department of Commerce and Community Affairs' explanation for not producing an economic impact study,*

*available to the public. Such public hearing may be held simultaneously or as a part of any Board hearing considering such new rules. In adopting any such new rule, the Board shall, in its written opinion, make a determination, based upon the evidence in the public hearing record, including, but not limited to the economic impact study, as to whether the proposed rule has any adverse economic impact on the people of the State of Illinois. [415 ILCS 5/27(b)]*

- b) If information of the economic impact of a proposed regulation is given at a general hearing on the proposal, the Board need not hold a special hearing on only the economic impact.

#### Section 102.416 Notice of Hearing

- a) The hearing officer will set a time and place for hearing. The Clerk will give notice of the date of the hearing as follows or as otherwise required by applicable law:
  - 1) By notice in the Board's Environmental Register and on the Board's Web site;
  - 2) *At least 20 days prior to the scheduled date of the hearing the Board shall give notice of such hearing by public advertisement in a newspaper of general circulation in the area of the state concerned. The notice will include, the date, time, place and purpose of such hearing [415 ILCS 5/28(a)]; and*
  - 3) Where required by federal law, including air pollution and RCRA proposals, newspaper notice will be published at least 30 days prior to the hearing date.
- b) In accordance with Section 28(a) of the Act or as otherwise required by applicable law, the Clerk will give notice by mail to the proponent and to all persons who are on the notice list in accordance with Section 102.422 of this Part.
- c) Hearings that are continued on the hearing record for a period of 45 days or less do not require notice that complies with subsections (a) and (b) of this Section.

#### Section 102.418 Record

All oral testimony will be recorded stenographically. The proposal and all attachments, the transcript, all written testimony, all exhibits admitted in connection with the hearing, and all written submissions filed with the Clerk under Section 102.108 of this Part before or after the close of the hearing will constitute the record.

### Section 102.420 Authority of the Hearing Officer

The hearing officer will have the same authorities in rulemaking proceedings as those granted for adjudicatory matters in 35 Ill. Adm. Code 101.Subpart F.

### Section 102.422 Notice and Service Lists

- a) The hearing officer will maintain a notice list for each regulatory proceeding. The notice list will consist of those persons who have furnished their names and addresses to the hearing officer or the Clerk's office concerning the proposal. Notice of all Board actions and hearing officer orders will be given to all persons included on the notice list.
- b) The hearing officer may establish a service list for any regulatory proceeding, in addition to the notice list. The hearing officer may direct participants to serve copies of all documents upon the persons listed on the service list. In deciding whether to establish a service list, the hearing officer will consider factors including the complexity of the proceeding and the number of participants. For purposes of fast-track rulemakings under Section 28.5 of the Act, participants of record will be the individuals on the service list.
- c) The Board will not accept general requests to appear on all notice lists. Interested persons must submit their names for each proceeding in accordance with subsection (a) of this Section.

### Section 102.424 Prehearing Submission of Testimony and Exhibits

- a) The proponent must submit all written testimony and any related exhibits 21 days prior to the hearing at which the witness testifies, unless the hearing officer directs otherwise to prevent material prejudice or undue delay.
- b) The hearing officer may require the prehearing submission of testimony, questions, responses, answers, and any related exhibits by the proponent or participants other than the proponent if the hearing officer determines that such a procedure will provide for a more efficient hearing.
- c) The original and 9 copies of any pre-submitted testimony, questions, answers, responses, or exhibits must be filed with the Clerk. The hearing officer, the Agency, and, if a participant, the Attorney General and DNR must each be served with one copy of each pre-submitted testimony, questions, answers, responses, or exhibits. One copy of any pre-submitted testimony, questions, answers, responses, or exhibits must also be served upon the proponent and each participant on any service list, unless otherwise specified or limited by the hearing officer. Such service must be initiated on or before the date that copies are filed with the Clerk.

- d) All testimony, questions, answers, responses, and exhibits must be served and submitted in the form required by 35 Ill. Adm. Code 101.Subpart C 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.
- e) The proponent and each participant who has pre-submitted testimony, questions, answers, or responses must bring the number of copies designated by the hearing officer of that testimony and any exhibits to the hearing.
- f) Testimony submitted prior to hearing will be entered into the record as if read, unless the hearing officer determines that it will aid public understanding to have the testimony read. All persons testifying will be sworn and will be subject to examination. Modifications to previously submitted testimony and exhibits may be allowed by the hearing officer at hearing provided that such modifications are either non-substantive in nature or would not materially prejudice another person's participation at hearing. Objections to such modifications are waived unless raised at hearing.
- g) Where prehearing submission of testimony is required pursuant to subsections (a) and (b) of this Section, any testimony that is not pre-submitted in a timely manner will be allowed only as time permits pursuant to Section 102.420 of this Part.

#### Section 102.426 Admissible Information

All information that is relevant and not repetitious or privileged will be admitted by the hearing officer.

#### Section 102.428 Presentation of Testimony and Order of Hearing

- a) All witnesses at hearings must be sworn;
- b) Testimony must be in narrative form; and
- c) Proponents must present testimony in support of the proposal first. Any questions or testimony in support or opposition to the proposal must follow as directed by the hearing officer.

#### Section 102.430 Questioning of Witnesses

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



## SUBPART E: CERTIFICATION OF REQUIRED RULES

## Section 102.500 Agency Certification

- a) *When the Agency proposes a rule which it believes to be a required rule, as defined by Section 28.2(a) of the Act the Agency shall so certify in its proposal, identifying the federal law to which the proposed rule will respond and the rationale upon which the certification is based. [415 ILCS 5/28.2(b)] Such certification must include a citation to the specific section of the specific federal law to which the proposed rule will respond.*
- b) *The Board shall either accept or reject the certification within 45 days and shall reference the certification in the first notice of the proposal published in the Illinois Register as provided by the Illinois Administrative Procedure Act. [415 ILCS 5/28.2(b)]*

## Section 102.502 Challenge to Agency Certification

- a) If any person wishes to challenge the Agency's certification that a proposed rule is a required rule, that person must file an objection to that certification within 21 days after the date of the Board's order accepting a proposal for hearing. Such objection must state the reasons that the objector believes that the proposed rule is not a required rule, and must include all arguments that the objector wishes the Board to consider. A copy of the objection must be served upon the Agency and DNR.
- b) The Agency may file a response to any objection within 14 days after the service of that objection. No reply by the objector will be allowed, unless the Board orders otherwise to avoid material prejudice.
- c) No hearing will be held on any objection filed pursuant to this Section.

## Section 102.504 Board Determination

- a) The Board will rule upon any objection filed pursuant to this Subpart within 60 days after the date that the Board accepts a proposal for hearing.
- b) In ruling upon an objection to an Agency certification, the Board will consider all information in the record of that proceeding, including the proposal, the objection, and the Agency response to the objection. The burden of proof is on the objector.
- c) The Board will give notice of its determination to the objector, the Agency, DNR, and any person who has asked to be placed on the notice list pursuant to Section 102.422 of this Part for that proposal.

- d) Orders entered pursuant to this Section are interlocutory in nature and may be appealed only pursuant to 35 Ill. Adm. Code 101.308.

#### SUBPART F: BOARD ACTION

##### Section 102.600 Revision of Proposed Regulations

- a) The Board may revise the proposed regulations before adoption upon its own motion or in response to suggestions made at hearing and in written comments made prior to second notice. No additional hearing on the revisions need be held.
- b) Unless otherwise provided by applicable law, *the Board may revise the proposed regulations after hearing in response to objections or suggestions made by the Joint Committee on Administrative Rules (JCAR) pursuant to subsection (b) of Section 5.40 and subsection (a) of Section 5.110 of the Illinois Administrative Procedure Act.* The Board may make such revision where it finds:
- 1) *That such objections or suggestions relate to the statutory authority upon which the regulation is based, whether the regulation is in proper form, or whether adequate notice was given; and*
  - 2) *That the record before the Board is sufficient to support such a change without further hearing.* [415 ILCS 5/28(a)]

##### Section 102.602 Adoption of Regulations

The Board adopts first notice, second notice and final opinions and orders in regulatory matters. Only the first notice proposal and the final adopted rules are published by the Secretary of State in accordance with the IAPA. In adopting any new regulation, except a required rule or an identical in substance regulation or as applicable law otherwise provides, *the Board shall, in its written opinion, make a determination, based upon the evidence in the public hearing record, including, but not limited to the economic impact study, as to whether the proposed rule has any adverse economic impact on the people of the State of Illinois.* [415 ILCS 5/27(b)]

##### Section 102.604 First Notice of Proposed Regulations

Except when otherwise directed by applicable law, the Board will give first notice of its proposed adoption, amendment, or repeal of regulations pursuant to Section 5-40 of the IAPA. [5 ILCS 100/5-40] The first notice period will be at least 45 days, and will begin on the day that first notice is published in the Illinois Register. The Board will accept written comments from any person concerning the proposed regulations during the first notice period.

### Section 102.606 Second Notice of Proposed Regulations

- a) Except when otherwise directed by applicable law, the Board will give second notice of its proposed adoption, amendment, or repeal of regulations to JCAR. The second notice period will begin on the date written notice is received by JCAR, and will expire 45 days after the date, except as provided by Section 5-40 of the IAPA. [5 ILCS 100/5-40] The Board will accept comments only from JCAR during the second notice period.
- b) After the beginning of the second notice period, no substantive changes will be made to the proposed regulation, except in response to objections or suggestions from JCAR. Such changes will be made pursuant to Section 102.600 of this Part.

### Section 102.608 Notice of Board Final Action

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

### Section 102.610 Adoption of Identical In Substance Regulation

- a) Prior to adopting Identical In Substance regulations, the Board will:
  - 1) Make available to the public a proposed opinion and order containing the text of the rules at the Board's Chicago Office and on the Board's Web site;
  - 2) Publish the proposed regulations in the Illinois Register;
  - 3) Serve a copy of the proposed opinion and order on USEPA; and
  - 4) Receive written comments from USEPA and other persons for at least 45 days after the date of publication in the Illinois Register.
- b) After consideration of comments from USEPA, the Agency, the Attorney General and the public, the Board will adopt the verbatim text of such USEPA regulations as are necessary and appropriate for authorization of the program. Except as provided in Section 7.2 of the Act, the only changes that may be made by the Board to the federal regulations are those changes that are necessary for compliance with the Illinois Administrative Code, and technical changes that in no way change the scope or meaning of any portion of the regulations. [415 ILCS 5/7.2(a)]

- c) As provided by Sections 13(c), 13.3, 17.5, 22.4(a), 22.4(d), and 22.7(d) of the Act, the provisions of Title VII of the Act and Section 5-35 of the IAPA [5 ILCS 100/5-35] will not apply to Identical In Substance Rulemakings. [415 ILCS 5/13(c), 13.3, 17.5, 22.4(a), 22.4(d), and 22.7(d)]

#### Section 102.612 Adoption of Emergency Regulations

- a) *When the Board finds that a situation exists which reasonably constitutes a threat to the public interest, safety, or welfare, the Board may adopt regulations pursuant to and in accordance with Section 5-45 of the IAPA.* [415 ILCS 27(c)]
- b) *When the Board finds that a severe public health emergency exists, the Board may, in relation to any proposed regulation, order that such regulation shall take effect without delay. The Board will proceed with any required hearings while the regulation continues in effect.* [415 ILCS 5/27(c)]

#### Section 102.614 Adoption of Peremptory Regulations

- a) When the Board finds that a peremptory rulemaking is necessary and states in writing its reasons for that finding, the Board will adopt said peremptory rulemaking upon filing a notice of rulemaking with the Secretary of State pursuant to Section 5-70 of the IAPA.
- b) Notice of such peremptory rulemaking will be published in the Illinois Register in accordance with Section 5-50 of the IAPA.

### SUBPART G: MOTION FOR RECONSIDERATION AND APPEAL

#### Section 102.700 Filing of Motion for Reconsideration

Motion for reconsideration or modification of any Board order taking substantive action on a regulatory proposal must be filed in accordance with 35 Ill. Adm. Code 101.1002. The contents of such motions are governed by 35 Ill. Adm. Code 101.Subpart J.

#### Section 102.702 Disposition of Motions for Reconsideration

- a) After commencement of the second notice period, no substantive changes may be made to a proposed rulemaking unless they are made in response to an objection or suggestion of JCAR in accordance with Section 5-40(c) of the IAPA. [5 ILCS 100/5-40(c)] Therefore, submission of second notice of a proposal to JCAR will preclude the Board from revising that proposal in response to a motion for reconsideration. However, the Board may resubmit a rule for first notice if necessary to prevent material prejudice.

- b) An adopted rule becomes effective upon the filing of that rule with the Secretary of State. Therefore, the Board is precluded from allowing a motion for reconsideration of a final order adopting a rule, if that rule has been filed with the Secretary of State.

#### Section 102.704 Correction of Publication Errors

The Board may make technical corrections to proposed or adopted rules, published in the Illinois Register or filed with the Secretary of State, only in accordance with 1 Ill. Adm. Code 100.240. No hearing need be held on such corrections.

#### Section 102.706 Appeal

Any final Board order may be appealed to the appellate court within 35 days of the service of that order, pursuant to Sections 29 and 41 of the Act. [415 ILCS 5/29 and 41]

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

PART 103  
 ENFORCEMENT

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## SUBPART E: IMPOSITION OF PENALTIES, FEES, AND COSTS

Section	
103.500	Default
103.502	Civil Penalties Method of Payment

**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; Old Part repealed, new Part adopted in R00-20 at 24 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.
- b) This Part must be read in conjunction with 35 Ill. Adm. Code 101, which contains procedures generally applicable to all of the Board's adjudicatory 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 is adjudged invalid, such adjudication does not affect the validity of this Part as a whole or of any portion not adjudged invalid.

### Section 103.104 Definitions

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

### Section 103.106 General

Enforcement proceedings 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(d)]. 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

Pursuant to Section 31 of the Act, an enforcement proceeding may be commenced by any person.

#### Section 103.202 Parties

- a) The person initiating an enforcement proceeding must be named the complainant. Any adverse party must 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 name the Agency as a "party in interest" pursuant to 35 Ill. Adm. Code 101.404.
- 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, Complaint, and Answer

- a) An enforcement proceeding will be commenced by the service of a notice and complaint by certified mail or personal service upon all respondents and the filing of 1 original and 9 copies of the notice and complaint with the Clerk.
- b) The notice must 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 complaint filed by the Attorney General on behalf of the People of the State of Illinois must 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 must 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) of this Section.
- e) Except as provided in subsection (f) of this Section, the respondent must file an answer within 60 days after receipt of the complaint if respondent wants to deny any allegations in the complaint. All material allegations of the complaint will be taken as admitted if no answer is filed or if not specifically denied by the answer. Any facts constituting an affirmative defense must be plainly set forth before hearing in the answer or in a supplemental answer.
- f) If the respondent timely files a motion under Section 103.212(b) or 35 Ill. Adm. Code 101.506, the 60-day period to file an answer described in subsection (e) of this Section will be stayed. The stay will begin when the motion is filed and end when the Board disposes of the motion.
- g) Any party serving a complaint upon another party must include the following language in the complaint: "Failure to file an answer to this complaint within 60 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 proceeding. If you have any questions about this procedure, you should contact the hearing officer assigned to this proceeding, the Clerk's Office or an attorney."

#### Section 103.206 Adding Parties

- a) If a complete determination of the controversy cannot be had without the presence of a person who is not already a party to the proceeding, the Board, on the motion of a respondent, may order the person to be added as a respondent.
- 1) The movant must serve, personally or by certified mail, return receipt requested, the person sought to be added with a copy of the complaint, all Board orders and hearing officer orders to date, and the motion to add a respondent. The movant also must serve the complainant with a copy of the motion to add a respondent.

- 2) The person sought to be added and the complainant each may file a response to the motion to add a respondent within 14 days after the respective service described in subsection (a)(1) of this Section.
- b) If a complete determination of a controversy cannot be had without the presence of a person who is not already a party to the proceeding, the Board, on its own motion, may order the person to be added as a respondent.
  - c) If the Board orders a person to be added as a respondent pursuant to subsection (a) or (b) of this Section, the Board will grant the complainant leave to file an amended complaint that sets forth a claim in the complainant's favor against the added respondent. The complainant must serve the added respondent, personally or by certified mail, return receipt requested, with the amended complaint. The amended complaint must meet the requirements of Section 103.204 of this Subpart. The added respondent may file an answer under Section 103.204(e) of this Subpart or a responsive motion under Section 103.212(b) of this Subpart or 35 Ill. Adm. Code 101.506. Failure of the complainant to file an amended complaint in accordance with the Board's grant of leave to file an amended complaint under this subsection may subject the complainant's action to dismissal.
  - d) With respect to a counter-complaint, cross-complaint or third party complaint, subsections (a), (b) and (c) of this Section apply to adding, as a counter-respondent, cross-respondent or third-party respondent, respectively, a person who is not already a party to the proceeding.
  - e) If a party wishes to file a counter-complaint, cross-complaint or third-party complaint, the party must move the Board for leave to file the document. If a party wishes to file an amendment to a complaint, counter-complaint, cross-complaint or third-party complaint that sets forth a new or modified claim in its favor against another person, whether or not the person against whom the claim is made is already a party to the proceeding, the party who wishes to file the document must move the Board for leave to file the document.
    - 1) The document sought to be filed must:
      - A) set forth a claim that arises out of the occurrence or occurrences that are the subject of the proceeding; and
      - B) meet the requirements of Section 103.204.
    - 2) The movant must serve the person against whom the claim is made with a copy of the document and the motion for leave to file the document. If the person against whom the claim is made is not already a party to the

proceeding, the movant must serve the person personally or by certified mail, return receipt requested.

- 3) The person against whom the claim is made may file a response to the motion for leave to file the document within 14 days after the service described in subsection (e)(2) of this Section.
- f) If the Board grants a motion for leave to file a document pursuant to subsection (e) of this Section, the time period for the person against whom the claim is made to file an answer under Section 103.204(e) or a responsive motion under Section 103.212 (b) or 35 Ill. Adm. Code 101.506 will begin when the Board serves the person with a copy of the Board's order that grants the motion for leave to file the document.

#### Section 103.208 Request for Informal Agency Investigation

- a) To request an informal Agency investigation, a citizen may submit to the Board an informal investigation request.
- b) The Board will forward the request to the Agency with a copy to the person requesting the investigation. The Agency must 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 described in subsection (b) of this Section.

#### 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, must 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 preceeding 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(c)(1)]*
- b) Failure to comply with the provisions of this Section may not be used as a defense to an enforcement proceeding, 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 Hearing 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.* Such a complaint is known as a citizen's complaint. When the Board receives a citizen's complaint, *unless the Board determines that such complaint is duplicitous or frivolous, it shall schedule a hearing.* [415 ILCS 5/31(d)] The definition for duplicitous and frivolous can be found at 35 Ill. Adm. Code 101.Subpart B.
- b) Motions made by respondents alleging that a citizen's complaint is duplicitous or frivolous must be filed no later than 30 days following the date of service of the complaint upon the respondent. Motions under this subsection may be made only with respect to citizen's enforcement proceedings. Timely filing the motion will, pursuant to Section 103.204(f) of this Subpart, stay the 60 day period for filing an answer to the complaint.
- 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.

#### SUBPART C: SETTLEMENT PROCEDURE

##### Section 103.300 Request for Relief from Hearing Requirement in State Enforcement Proceeding

- 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(c)(2) of the Act. [415 ILCS 5/31(c)(2)] The proposed stipulation and settlement agreement must 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 will 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 will 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 must 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(c)(1) of the Act. [415 ILCS 5/31(c)(2)]

- d) If a hearing is scheduled pursuant to subsection (c) of this Section, 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

No proceeding pending before the Board will be disposed of or modified without an order of the Board. A proposed stipulation and settlement agreement must 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 must include:

- a) A full stipulation of all material facts pertaining to the nature, extent, and causes of the alleged violations;
- b) The nature of the relevant parties' operations and control equipment;
- c) *The character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;* [415 ILCS 5/33(c)(i)]
- d) Details as to future plans for compliance, including a description of additional control measures and the dates for their implementation, if any; and
- e) The proposed penalty, if any.

#### Section 103.304 Hearing on 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 will conduct a hearing in which interested persons may make statements 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 statements must be in accordance with 35 Ill. Adm. Code 101.628.

### 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 deems appropriate. Where a National Pollutant Discharge Elimination System (NPDES) permit is involved in the settlement, notice of settlement must 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: PROCEEDINGS 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 proceeding involves issuance or modification of a RCRA permit.
- b) Enforcement proceedings that 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 that 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.
- c) These procedures provide methods by which the Board will formulate a 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) of this Section.

- 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 proceeding is an enforcement action that 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 will 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 must 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 must be in compliance with the requirements of 35 Ill. Adm. Code 705.141 and must 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 must 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 must include the following:
  - 1) Proposed mandatory orders that 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 must serve a copy of any partial draft permit on 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 must, at a minimum, give notice of the filing of a partial draft permit to the following persons:
  - 1) Federal agencies as designated by 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 must 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).
- d) A notice of a partial draft permit must 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 proceeding;
  - 3) A brief description of the business conducted at the facility and the activity which is the subject of the enforcement proceeding;
  - 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 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 or stipulated remedy for written comments;
  - 8) A statement that the record in the proceeding 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 proceedings 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 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. Parties will receive distributions from the Clerk's Office in accordance with 35 Ill. Adm. Code 101.628(c)(3).

#### Section 103.414 Hearing

- a) The hearing officer, after appropriate consultation with the parties, will set a time and place for the hearing to be held not less than 30 days after the filing of the partial draft permit or stipulated remedy.
- b) The hearing will 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 will 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 will be mailed not less than 30 days before the hearing.
- e) Failure to comply with the provisions of this Section may not be used as a defense to an enforcement proceeding, 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 will, 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 that 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 will require compliance as soon as practicable; 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 must 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 must 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)].

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

PART 104  
 REGULATORY RELIEF MECHANISMS

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**AUTHORITY:** Subparts B and C: Implementing Sections 5, 35, 36, 37 and 38 of the Environmental Protection Act (Act) [415 ILCS 5/5, 35, 36, 37, and 38] and authorized by Sections 26 and 27 of the Act [415 ILCS 5/26 and 27]. Subparts D through I: Implementing Sections 5, 14.2(c), 22.4, 27, 28, 28.1, 28.5 and 39.5 of the Act [415 ILCS 5/5, 14.2(c), 22.4, 27, 28, 28.1, 28.5, 26 and 39.5] and authorized by Sections 26 and 27 of the Act [415 ILCS 5/26 and 27].

**SOURCE:** Subpart B: Originally adopted as Chapter I: Procedural Rules, Part IV: Variances, in R70-4, at 1 PCB 43, October 8, 1970; amended in R77-16, 29 PCB 503, at 2 Ill. Reg. 16, p. 3, effective May 1978, amended in R79-9, 35 PCB 433, at 3 Ill. Reg. 51, p. 128, effective December 7, 1979; amended in R80-12, 40 PCB 451, at 5 Ill. Reg. 2763, effective March 2, 1981; codified at 6 Ill. Reg. 8357; amended in R84-10, 62 PCB 87, at 9 Ill. Reg. 1409, effective January 16, 1985; Old Part repealed, new Part adopted in R00-20 at 24 Ill. Reg. \_\_\_\_\_, effective \_\_\_\_\_.

## SUBPART A: GENERAL PROVISIONS

### Section 104.100 Applicability

- a) This Part applies to adjudicatory proceedings before the Board that provide relief from environmental regulations under certain circumstances as set forth in Titles VII and IX of the Act. Specifically, this Part applies to regulatory relief mechanisms, meaning variances, provisional variances and adjusted standards.
- b) This Part must be read in conjunction with 35 Ill. Adm. Code 101, which contains procedures generally applicable to all of the Board's adjudicatory 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 104.102 Severability

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

### Section 104.104 Definitions

For the purpose of this Subpart, words and terms will have the meaning as defined in 35 Ill. Adm. Code 101.Subpart B unless otherwise provided, or unless the context clearly indicates otherwise.

## SUBPART B: VARIANCES

### Section 104.200 General

- a) Description:
  - 1) **General Variance.** A variance is a temporary exemption from any specified rule, regulation, requirement or order of the Board, which may be granted by the Board with or without conditions for a period of time not to exceed five years, *upon presentation of adequate proof*, by the petitioner *that compliance with any rule, regulation, requirement or order of the Board would impose an arbitrary or unreasonable hardship*. [415 ILCS 5/35(a)]
  - 2) **Resource Conservation and Recovery Act (RCRA) Variance.** A RCRA variance is an exemption from 35 Ill. Adm. Code 703, 720, 721, 722, 723, 724 or 725 or which allows the Illinois Environmental Protection

Agency (Agency) to issue or modify any provision of a RCRA permit required pursuant to Section 21(f) of the Act.

- b) Effect of Filing:
- 1) The filing of a petition for a variance does not stay enforcement of a regulation except as provided in subsection (b)(2) of this Section.
  - 2) *If any person files a petition for variance from a rule or regulation within 20 days after the effective date of such rule or regulation, the operation of such rule or regulation shall be stayed as to such person pending the disposition of the petition; provided, however, that the operation of any rule or regulation adopted by the Board which implements, in whole or in part, a State RCRA, Underground Injection Control (UIC), or National Pollutant Discharge Elimination System (NPDES) program shall not be stayed. The Board may hold a hearing upon said petition 5 days from the date of notice of such hearing or thereafter. [415 ILCS 5/38(b)]*

#### Section 104.202 Filing Requirements

- a) **Who May File.** Any person seeking a variance from any rule or regulation, requirement or order of the Board that would otherwise be applicable to that person may file a variance petition.
- b) **General Filing and Service Requirements.** All general filing and service requirements for Board filings, including the form of filing and the fee requirements for filing, apply to the filing of a petition for variance. These general requirements are found at 35 Ill. Adm. Code 101.Subpart C.
- c) **Special Filing and Service Requirements.** In addition to the general requirements found at 35 Ill. Adm. Code 101.Subpart C, a person filing a petition for variance must meet the following requirements:
  - 1) One copy of the petition and all related documents must be served on the Agency. Such service on the Agency must be initiated on or before the date the petition is filed with the Board. Additionally, all RCRA variance petitions must be served on the United States Environmental Protection Agency (USEPA) Region V Director of Waste Management. An affidavit of service of the petition and related documents must accompany the filing with the Board; and
  - 2) The petition must contain all information or documents necessary to satisfy the petition contents requirements found in Sections 104.204, 104.206, and 104.208 of this Part.

## Section 104.204 Petition Content Requirements

The petition must include the information required by subsections (a) through (n) of this Section. Additionally, there are specific content requirements set forth at Section 104.206 of this Part for RCRA variance petitions. If the petitioner believes that any of these requirements are not applicable to the specific variance requested, the petitioner must so state and explain the reasoning.

- a) A statement describing the regulation, requirement, or order of the Board from which a variance is sought. If variance from a regulation is sought, the statement must include the Illinois Administrative Code citation to the regulation as well as the effective date of that regulation. If variance from a requirement or order of the Board is sought, the statement must include the citation to that requirement or order of the Board promulgating that requirement, including docket number;
- b) A complete and concise description of the nature of petitioner's activity that is the subject of the proposed variance, including:
  - 1) The location of, and area affected by, the petitioner's activity;
  - 2) The location of points of discharge, and, as applicable, the identification of the receiving waterway or land, or, if known, the location of the nearest air monitoring station maintained by the Agency;
  - 3) An identification, including docket number, of any prior variance issued to petitioner and, if known, petitioner's predecessors, concerning similar relief;
  - 4) An identification, including number, of the environmental permits held by petitioner for the activity which may be affected by grant of variance;
  - 5) The number of persons employed by the petitioner's facility at issue and the age of that facility;
  - 6) The nature and amount of the materials used in the process or activity for which the variance is sought and a full description of the particular process or activity in which the materials are used;
  - 7) A description of the relevant pollution control equipment already in use; and
  - 8) The nature and amount of emissions, discharges or releases of the constituent in question currently generated by the petitioner's activity;



- c) Data describing the nature and extent of the present or anticipated failure to meet the regulation, requirement, or order of the Board from which variance is sought and facts that support petitioner's argument that compliance with the regulation, requirement, or order of the Board was not or cannot be achieved by any required compliance date;
- d) A description of the efforts that would be necessary for the petitioner to achieve immediate compliance with the regulation, requirement, or Board order at issue. All possible compliance alternatives, with the corresponding costs for each alternative, must be set forth and discussed. The discussion of compliance alternatives must include the availability of alternate methods of compliance, the extent that such methods were studied, and the comparative factors leading to the selection of the control program proposed for compliance. The discussion of the costs of immediate compliance may include, but is not limited to, the overall capital costs and the annualized capital and operating costs;
- e) Facts that set forth the reasons the petitioner believes that immediate compliance with the regulation, requirement, or order of the Board would impose an arbitrary or unreasonable hardship;
- f) A detailed description of the compliance plan, including:
  - 1) A discussion of the proposed equipment or proposed method of control to be undertaken to achieve full compliance with the regulation, requirement, or order of the Board;
  - 2) A time schedule for the implementation of all phases of the control program from initiation of design to program completion; and
  - 3) The estimated costs involved for each phase and the total cost to achieve compliance;
- g) A description of the environmental impact of the petitioner's activity including:
  - 1) The nature and amount of emissions, discharges, or releases of the constituent in question if the requested variance is granted, compared to that which would result if immediate compliance is required;
  - 2) The qualitative and quantitative description of the impact of petitioner's activity on human health and the environment if the requested variance is granted, compared to the impact of petitioner's activity if immediate compliance is required. Cross-media impacts, if any, must be discussed; and

- 3) A statement of the measures to be undertaken during the period of the variance to minimize the impact of the discharge of contaminants on human, plant, and animal life in the affected area, including the numerical interim discharge limitations that can be achieved during the period of the variance;
- h) Citation to supporting documents or legal authorities whenever such are used as a basis for the petition. Relevant portions of such documents and legal authorities other than Board decisions, reported state and federal court decisions, or state and federal regulations and statutes must be appended to the petition;
- i) If the requested variance involves an existing permit or a pending permit application, a copy of the material portion of the permit or permit application must be appended to the petition;
- j) Any conditions petitioner suggests for the requested variance;
- k) A proposed beginning and ending date for the variance. If the petitioner requests that the term of the variance begin on any date other than the date on which the Board takes final action on the petition, a detailed explanation and justification for the alternate beginning date;
- l) A discussion of consistency with federal law, including an analysis of applicable federal law and facts that may be necessary to show compliance with federal law as set forth in Section 104.208 of this Part;
- m) An affidavit verifying any facts submitted in the petition; and
- n) A statement requesting or denying that a hearing should be held in this matter.

#### Section 104.206 Resource Conservation and Recovery Act (RCRA) Variance Petition Contents

In addition to the requirements of Sections 104.204 and 104.208 of this Part, a petition for a RCRA variance must meet the following requirements:

- a) All petitions for RCRA variances must include a showing that the Board can grant the requested relief consistent with, and establish RCRA permit conditions no less stringent than, those that would be required by RCRA, and the regulations thereunder promulgated by USEPA (40 CFR 260, 261, 262, 263, 264, 265, 266, 267, 268 and 270). Petitions must indicate whether any federal provisions authorize the relief requested, and must include any facts necessary to show that the petitioner would be entitled to the requested relief pursuant to federal law;

- b) Persons who have, or are required to have, a RCRA permit and who seek a RCRA variance that could result in modification or issuance of the RCRA permit must have on file with the Agency a RCRA permit application reflecting the requested variance prior to filing the variance petition;
- c) Petitioner must attach to the variance petition a copy of the RCRA permit application, or such portion as may be relevant to the variance request; and
- d) Petitioner must attach to the variance petition proof of service on USEPA as required by Section 104.202 of this Part.

#### Section 104.208 Consistency with Federal Law

- a) All petitions for variances from Title II of the Act or from 35 Ill. Adm. Code.Subtitle B, Ch. I "Air Pollution," must indicate whether the Board may grant the requested relief consistent with the Clean Air Act (CAA) (42 USC 7401 et seq.) and the federal regulations adopted pursuant thereto. If granting a variance would require revision of the State Implementation Plan, the petition must indicate whether the requirements of Section 110(a) of the CAA (42 USC 7410(a)) and 40 CFR 51 will be satisfied.
- b) All petitions for variances from Title III of the Act; from 35 Ill. Adm. Code.Subtitle C, Ch. I "Water Pollution," or from water pollution related requirements of any other title of the Act or chapter of the Board's regulations, must indicate whether the Board may grant the relief consistent with the Clean Water Act (CWA) (33 USC 1251 et seq.), USEPA effluent guidelines and standards, any other federal regulations, or any area-wide waste treatment management plan approved by the Administrator of USEPA pursuant to Section 208 of the CWA (33 USC 1288).
- c) All petitions for variances from Title IV of the Act or from 35 Ill. Adm. Code.Subtitle F, Ch. I "Public Water Supplies," and to the extent applicable, from Title V of the Act or from 35 Ill. Adm. Code.Subtitle D, Ch. I "Mine Related Water Pollution," must indicate whether the Board may grant the relief consistent with the Safe Drinking Water Act (42 USC 300(f) et seq.), the federal National Primary Drinking Water Regulations (40 CFR 141) and Underground Injection Control Program and other federal regulations adopted pursuant thereto.
- d) All petitions for variances from Title V of the Act or from 35 Ill. Adm. Code.Subtitle G, Ch. I "Waste Disposal" must indicate whether the Board may grant the requested relief consistent with the RCRA, and the federal regulations adopted pursuant thereto.

- e) For all petitions for RCRA variances, petitioner should consult the federal RCRA rules which contain procedures that are referred to as "Variances" (40 CFR 260, 261, 262, 263, 264, 265, 266, 267, 268 and 270) The petitioner should consult the comparable Board regulations to decide whether the variance procedures of this Part need to be followed.

#### Section 104.210 Petition for Extension of Variance

- a) A variance extension pursuant to Section 36(b) of the Act *may be extended from year to year by affirmative action of the Board, but only if satisfactory progress has been shown* by the petitioner. [415 ILCS 5/36(b)]
- b) A petition to extend a variance granted by the Board is a new petition for variance before the Board, and must be filed in accordance with this Subpart and 35 Ill. Adm. Code 101.Subpart C, including payment of the filing fee pursuant to Section 104.202(b) of this Part and 35 Ill. Adm. Code 101.302(f)(2).
- c) If the petitioner desires to have the term of the variance extension be sequential with the term of the prior variance, the petition to extend variance must be filed with the Board no later than 120 days prior to the termination of the variance, unless the petitioner can demonstrate that the petition for variance extension was filed as soon as practicable after the petitioner learned that it could not meet the compliance timeframe under the existing variance.
- d) In addition to the requirements of this Subpart, the petition for extension of variance must contain:
  - 1) A detailed statement showing that *satisfactory progress* toward compliance has been or will have been achieved during the term of the prior variance [415 ILCS 5/36(b)];
  - 2) A statement that the conditions of the prior variance have been fully met, or, if any condition or conditions have not been fully met, a detailed explanation of the reason or reasons that the condition or conditions have not been fully met; and
  - 3) A motion to incorporate any material from the record of the prior variance proceeding in accordance with 35 Ill. Adm. Code 101.306.

#### Section 104.212 Motion for Modification of Internal Variance Compliance Dates

- a) The petitioner may request, by written motion, modification of internal dates within a compliance schedule of an existing variance, so long as the modification does not extend the length of the existing variance period. Such written motion will not be considered to be an extension of the prior variance. The motion must

be filed under the docket number of the existing variance, and must be filed with the Clerk and served upon the Agency, and any joined parties pursuant to 35 Ill. Adm. Code 101.Subpart D. The Agency must, and any joined parties may, file a response to that motion. Any response must be filed within 14 days after receipt of the motion.

- b) A motion for modification that would extend the length of the existing variance period constitutes a Petition for Extension of Variance and must be filed in accordance with Section 104.210 of this Part.

#### Section 104.214 Agency's Notice of Petition

- a) Within 14 days after receipt of the petition *the Agency shall publish a single notice of such petition in a newspaper of general circulation in the county where the facility or pollution source is located.* [415 ILCS 5/37(a)]
- b) Upon receipt of a petition for variance, *the Agency shall promptly give written notice of such petition to:*
  - 1) *Any person in the county in which the installation or property for which variance is sought is located who has in writing requested notice of variance petitions, the State's attorney of such county;*
  - 2) *The Chairman of the County Board of such county; and*
  - 3) *Each member of the General Assembly from the legislative district in which that installation or property is located.* [415 ILCS 5/37(a)]
- c) Upon receipt of a petition for RCRA variance, the Agency must promptly give notice of such petition to:
  - 1) Federal agencies as designated by USEPA;
  - 2) Illinois Department of Transportation;
  - 3) 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 or pollution source is located; and
  - 6) Elected officials of any counties, in other states, adjacent to the county in which the facility or pollution source is located, and elected officials in

any municipality, in another state, if it is the closest population center to the facility or pollution source.

- d) In addition to the methods of notice stated in subsection (c) of this Section in a RCRA variance the Agency must also give notice by broadcast over at least one local radio station in the area of the facility or pollution source containing the information required by subsections (e) and (f) of this Section.
- e) The notices required by this Section must include the following:
  - 1) The street address of the facility or pollution source, and if there is no street address then the legal description or the location with reference to any well known landmark, highway, road, thoroughfare or intersection;
  - 2) A description of the requested relief;
  - 3) An indication that any person may request a hearing by filing with the Board a written objection to the grant of such variance within 21 days after the publication of the Agency's notice, together with a written request for hearing; and
  - 4) The Clerk of the Board's address and phone number and a statement that a copy of the variance may be obtained through the Clerk's Office.
- f) The Agency must file with the Board a certification of publication which states the date on which the notice was published and attach a copy of the published notice within 21 days after the publication of the notice.

#### Section 104.216 Agency Investigation and Recommendation

- a) Upon receipt of a petition for variance, *the Agency shall promptly investigate such petition and consider the views of persons who might be adversely affected by the grant of a variance.* [415 ILCS 5/37(a)]
- b) *The Agency shall make a recommendation to the Board as to the disposition of the petition.* [415 ILCS 5/37(a).] Unless otherwise allowed by the hearing officer or the Board, the recommendation must be filed with the Board within 45 days after the filing of the petition or amended petition, or where there has been a hearing scheduled, at least 30 days before hearing, whichever is earlier. The Agency must serve a copy of its recommendation by First Class mail on the petitioner, joined parties, and assigned hearing officer, if applicable. At a minimum, the recommendation must include:

- 1) A description of the efforts made by the Agency to investigate the facts as alleged and to ascertain the views of persons who might be affected, and a summary of the views so ascertained;
- 2) The location of the nearest air monitoring station maintained by the Agency where applicable;
- 3) A statement of the degree to which, if at all, the Agency disagrees with the facts as alleged in the petition, including facts refuting any allegations in the petition for variance;
- 4) Allegations of any other facts the Agency believes relevant to the disposition of the petition, including any past or pending enforcement actions against petitioner;
- 5) The Agency's estimate of the costs that compliance would impose on the petitioner and on others;
- 6) The Agency's estimate of the injury that the grant of the variance would impose on the public including the effect that continued discharge of contaminants will have upon the environment;
- 7) The Agency's analysis of applicable federal laws and regulations and an opinion concerning the consistency of the petition with such federal laws and regulations;
- 8) The status of any permits or pending permit applications that are associated with or affected by the requested variance;
- 9) Allegation of any facts that the Agency believes are relevant to whether the Board should condition a grant of variance on the posting of a performance bond pursuant to Section 104.246 of this Part;
- 10) Citation to supporting documents or legal authorities whenever such are used as a basis for the Agency's recommendation. Relevant portions of such documents and legal authorities other than Board decisions, reported state and federal court decisions, state and federal regulations and statutes must be appended to the recommendation if not already in the record of the proceeding;
- 11) The Agency's recommendation of what disposition should be made of the petition, deny or grant, and suggested conditions. If the Agency recommends that variance be granted, a recommended beginning and end date of the requested variance, and any recommended conditions on the variance; and

- 12) An affidavit verifying any facts outside the record referenced in the recommendation.

#### Section 104.218 Agency Recommendation to RCRA Variance

In addition to the recommendation requirements stated in Section 104.216 of this Part the Agency recommendation on petitions for RCRA variances must also include the following and, in addition to the service requirements Section 104.216 of this Part, the Agency must serve its recommendation on USEPA and all persons who have notified the Agency that they intend to comment or have otherwise asked to be served a copy of the recommendation.

- a) The recommendation must include a fact sheet or statement of basis as provided in 35 Ill. Adm. Code 705.141 through 705.143, where relevant.
- b) If the Agency recommends that the variance be granted, a partial draft permit reflecting the variance and recommended conditions must be included with the recommendation.

#### Section 104.220 Response to Agency Recommendation

- a) Within 14 days after service of the Agency recommendation the petitioner may file a response to the Agency recommendation or an amended petition. The petitioner must serve a copy of the response or amended petition upon the hearing officer, the Agency, and any other parties to the proceeding.
- b) The response or amended petition may include a request for hearing. New information in a response or amended petition must be verified by oath or affidavit.
- c) Any amended petition or request for hearing under this Section recommences the decision period pursuant to Section 104.232 of this Subpart.

#### Section 104.222 Stipulations

Filing of a stipulation in a variance proceeding is permissible to the extent that the stipulation conveys to the Board those facts upon which the parties agree. However, the Board is not bound to accept as fact any stipulation to findings of ultimate fact or conclusion of law, such as, stipulating that it would impose an arbitrary or unreasonable hardship if petitioner were to immediately comply with the applicable rule or regulation.

#### Section 104.224 Objections to Petition, Written Comments and Request for Hearing

- a) A person who files an objection, request for hearing, or a comment is a "participant" as defined in 35 Ill. Adm. Code 101.Subpart B.



- b) Except as provided in subsection (e) of this Section for RCRA variances, any person may file with the Clerk, within 21 days after the publication of the Agency's notice pursuant to Section 104.214 of this Part, a written objection to the grant of variance. The Clerk will mail a copy of the objection to the petitioner, the Agency, the hearing officer, and any joined parties by First Class mail.
- c) Any person may also file a written request for hearing. The written request must be filed within 21 days after the publication of the Agency's notice pursuant to Section 104.214 of this Part in order for a hearing to be held in accordance with Section 104.236 of this Part and 35 Ill. Adm. Code 101.Subpart F.
- d) Any person may file written comments in a variance proceeding. If a hearing is held, public comments must be filed within 14 days after the close of the hearing unless the hearing officer specifies a different date. If there is no hearing, comments must be filed no later than 30 days before the decision date, unless the hearing officer orders otherwise to prevent material prejudice. (See 35 Ill. Adm. Code 101.628(c)(1).)
- e) In RCRA variances, subsection (b) and (c) of this Section do not apply. However, persons may file written comments within 45 days after the Agency files its recommendation.

#### Section 104.226 Amended Petition and Amended Recommendation

- a) The petitioner may amend the 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, by filing a motion pursuant to 35 Ill. Adm. Code 101.Subpart E. Amended petitions subsequent to hearing will be accepted only with leave of the Board. Amended petitions must be in writing and filed with the Board and served in accordance with 35 Ill. Adm. Code 101.Subpart C. The filing of an amended petition recommences the decision period, pursuant to Section 104.232 of this Part, and requires additional notice pursuant to Section 104.214 of this Part.
- b) If the petitioner amends the petition, the Agency must file or give an amended recommendation in writing or orally at hearing, but in any event not later than 30 days after the filing of an amended petition. The Agency may amend its recommendation even if the petitioner has not amended its petition. In such an instance, a recommendation may be amended prior to close of the hearing, if a hearing is held, or 40 days prior to the Board's decision date if a hearing is not held. The petitioner may file a response to an Agency recommendation pursuant to Section 104.220 of this Part.

- c) Written amendments to the petition or recommendation 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.

#### Section 104.228 Insufficient Petition

If the Board finds the petition fails to contain information as required by Sections 104.204, 104.206, and 104.208 of this Part, the Board may order the petitioner to supplement the information contained in the petition. Filings made in response to such order constitute an amended petition for the purposes of calculating the decision deadline pursuant to Section 104.232 of this Part. Alternatively, pursuant to Section 104.230 of this Part, the Board may dismiss the petition for lack of sufficient information. Failure of the Board to require supplemental information does not preclude a later finding that the information provided is insufficient to support grant of variance, or constitute a Board decision on the merits of the petition.

#### Section 104.230 Dismissal of Petition

A petition is subject to dismissal if the Board determines that:

- a) The petition requests relief that the Board is not empowered to grant;
- b) The petition fails to comply with the requirements of 35 Ill. Adm. Code 101.Subpart C and Sections 104.202, 104.204, 104.206 and 104.208 of this Part;
- c) The petitioner fails to timely comply with any order issued by the Board or the hearing officer, including an order requiring additional information pursuant to Section 104.228 of this Part; or
- d) The petitioner is not subject to the rule or regulation, requirement, or order of the Board at issue.

#### Section 104.232 Calculation of Decision Deadline

- a) Pursuant to Section 38(a) of the Act the Board will render its final decision on the petition within 120 days after the date of filing of the petition, except:
  - 1) When the petitioner waives its right to a decision within the prescribed decision period in accordance with 35 Ill. Adm. Code 101.Subpart C;
  - 2) When the petitioner files an amended petition for variance pursuant to this Subpart or files a request for hearing after filing the original petition, the decision period recommences from the date of filing of the amended petition or the request for hearing; or

- 3) When a hearing is canceled pursuant to 35 Ill. Adm. Code 101.510.
- b) Time will be computed in accordance with 35 Ill. Adm. Code 101.Subpart C.

#### Section 104.234 Hearing

The Board will order a hearing on a variance petition if:

- a) A hearing is requested by the petitioner at the time of initial filing on the associated form or in writing, which is filed and served in accordance with 35 Ill. Adm. Code 101.Subpart C;
- b) A hearing is requested in a response or amended petition;
- c) *The Board, in its discretion, concludes that a hearing would be advisable* [415 ILCS 5/37(a)];
- d) *The Agency or any other person files a written objection to the grant of such variance within 21 days after the publication of the Agency's notice pursuant to Section 104.214 of this Part, together with a written request for hearing;* [415 ILCS 5/37(a)];
- e) The variance request, if granted, would require an amendment to the State Implementation Plan for a criteria pollutant under the CAA; or
- f) The request concerns a RCRA variance.

#### Section 104.236 Hearing Procedures

Hearings will be conducted pursuant to 35 Ill. Adm. Code 101.Subpart F, except that:

- a) All hearings are to be held in the county where the petitioner's facility or pollution source is located unless otherwise ordered by the hearing officer (see 35 Ill. Adm. Code 101.600);
- b) Hearings may be canceled pursuant to a motion filed in accordance 35 Ill. Adm. Code 101.510 at the discretion of the hearing officer; and
- c) If all parties and participants who have requested a hearing pursuant to this Subpart have withdrawn their requests for a hearing, the hearing will not be held unless the Board in its discretion deems it advisable.
- d) The hearing officer shall give notice of RCRA hearings to the following persons:

- 1) Any person in the county in which the installation or property for which variance is sought is located who has in writing requested notice of variance petitions, the State's attorney of such county;
- 2) The Chairman of the county board of such county;
- 3) Each member of the General Assembly from the legislative district in which that installation or property is located;
- 4) Federal agencies as designated by USEPA;
- 5) Illinois Department of Transportation;
- 6) Department of Natural Resources;
- 7) Illinois Department of Public Health;
- 8) The Governor of any other state adjacent to the county in which the facility or pollution source is located;
- 9) Elected officials of any counties, in other states, adjacent to the county in which the facility or pollution source is located, and elected officials in any municipality, in another state, if it is the closest population center to the facility or pollution source; and
- 10) USEPA's Region V Director of Waste, Pesticides and Toxics Division.

#### Section 104.238 Standard of Review

- a) *The Board may grant individual variances beyond the limitations prescribed by the Act, whenever it is found, upon presentation of adequate proof, that compliance with any rule or regulation, requirement or order of the Board would impose an arbitrary or unreasonable hardship. [415 ILCS 5/35(a)]* The burden of proof in a variance proceeding is on the petitioner.
- b) In addition to subsection (a) of this Section the Board may grant a RCRA variance only to the extent consistent with, and with conditions no less stringent than, those that would be required by RCRA and 40 CFR 260, 261, 262, 263, 264, 265, 266, 267, 268, and 270. Variances must require compliance with the regulations in the shortest practicable time.

#### Section 104.240 Certificate of Acceptance

The petitioner's filing with the Board, which must be served on the Agency, will include a certificate of acceptance in all variances. The certificate constitutes acceptance of the variance and its conditions by the petitioner. A variance and its conditions are not binding upon the petitioner until the certificate is filed with the Board and served on the Agency. Failure to timely file the certificate with the Board and serve on the Agency renders the variance void. However, execution of the certificate is not necessary prior to seeking reconsideration pursuant to 35 Ill. Adm. Code 101.Subpart J, or appeal pursuant to Section 104.244 of this Part.

#### Section 104.242 Term of Variance

*Except as provided by Section 38(a) of the Act, any variance granted pursuant to the provisions of this part shall be for such period of time, not exceeding five years, as shall be specified by the Board at the time of the grant of such variance, and upon the condition that the person who receives such variance shall make such periodic progress reports as the Board shall specify. Such variance may be extended from year to year by affirmative action of the Board, but only if satisfactory progress is shown. [415 ILCS 5/36(b)]*

#### Section 104.244 Variance Conditions

*In granting a variance the Board may impose such conditions as the policies of the Act may require. [415 ILCS 5/36(a)] In a RCRA variance the Board may direct the Agency to issue or modify a RCRA permit with conditions that may be set forth specifically in the order, or that may consist of general guidelines to be followed by the Agency, together with applicable regulations, in issuing a permit.*

#### Section 104.246 Performance Bonds

*If the hardship complained of consists solely of the need for a reasonable delay in which to correct a violation of this Act or of the Board regulations, the Board shall condition the grant of such variance upon the posting of sufficient performance bond or other security to assure the completion of the work covered by the variance. The original amount of such performance bond shall not exceed the reasonable cost of the work to be completed pursuant to the variance. The obligation under such bond shall at no time exceed the reasonable cost of work remaining pursuant to the variance. [415 ILCS 5/36(a)]*

#### Section 104.248 Objection to Conditions

*Notwithstanding this subsection, the Board may include such conditions in granting a variance and may adopt such rules and regulations as the policies of this Act may require. If an objection is made to a variance condition, the Board shall reconsider the condition within not more than 75 days from the date of the objection. [415 ILCS 5/41(b)] An objection to a specific variance condition may be made by filing a motion pursuant to 35 Ill. Adm. Code 101.Subpart E, within 35 days after the receipt of the Board's opinion and order containing the objectionable condition.*

### Section 104.250 Revocation

The Board has the authority to, upon its own motion or upon a motion filed pursuant to 35 Ill. Adm. Code 101.Subpart E by petitioner, Agency or any person , revoke or vacate any variance or any condition of any variance. The Board will vacate or revoke a variance or any condition in a variance for reasons including non-compliance with the variance or any conditions of the variance. Upon petitioner's or the Agency's request, or upon its own motion, the Board will hold a hearing pursuant to 35 Ill. Adm. Code 101.Subpart F if necessary to determine whether the variance or any condition of a variance should be revoked or vacated.

## SUBPART C: PROVISIONAL VARIANCES

### Section 104.300 Applicability

This Subpart applies to any person seeking a provisional variance pursuant to Title IX of the Act. This Subpart must be read in conjunction with 35 Ill. Adm. Code 101 and this Part. In the event of conflict between this Subpart and the requirements of 35 Ill. Adm. Code 101, the requirements of this Subpart apply.

### Section 104.302 Board Action

*The Board shall grant provisional variances only upon notification from the Agency that compliance on a short term basis with any rule or regulation, requirement or order of the Board, or with any permit requirement would impose an arbitrary or unreasonable hardship. Such provisional variances shall be issued within 2 working days of notification from the Agency. [415 ILCS 5/35(b)]*

### Section 104.304 Initiating a Request

*Any person seeking a provisional variance pursuant to Section 104.401 of this Part shall make a request to the Agency. The Agency shall promptly investigate and consider the merits of the request. The Agency may notify the Board of its recommendation. If the Agency fails to take final action within 30 days after receipt of the request, the person may initiate a variance proceeding pursuant to Section 104.120 of this Part. [415 ILCS 5/37(b)]*

### Section 104.306 Notice

*The Board shall give prompt notice of its action on provisional variance requests to the public by issuing a press release for distribution to newspapers of general circulation in the county. [415 ILCS 5/37(b)]*

### Section 104.308 Term

*Any provisional variance granted by the Board pursuant to subsection (b) of Section 35 shall be for a period of time not to exceed 45 days. Upon receipt of a recommendation from the Agency*

*to extend this time period, the Board shall grant up to an additional 45 days. The provisional variances granted to any one person shall not exceed a total of 90 days during any calendar year. [415 ILCS 5/36(c)]*

#### Section 104.310 Simultaneous Variance Prohibition

The Board will not grant a provisional variance pursuant to this Subpart to the extent that the petitioner holds a variance pursuant to Subpart B of this Part from the same regulation or order of the Board for the same time period.

### SUBPART D: ADJUSTED STANDARDS

#### Section 104.400 General

- a) **Description.** An adjusted standard has the effect of an environmental regulation that would apply to petitioner, if granted, in lieu of the general regulation that would otherwise be applicable to a petitioner and the regulated community.
- b) **Applicability.** This Subpart will apply to any person seeking an adjusted standard pursuant to Section 28.1 of the Act. This includes an adjusted standard sought pursuant to 35 Ill. Adm. Code 212.126 (CAA) and 35 Ill. Adm. Code 700 through 750 (RCRA). This Subpart must be read in conjunction with 35 Ill. Adm. Code Part 101 which contains procedures generally applicable to all adjudicatory proceedings before the Board. In the event of a conflict between the requirements of 35 Ill. Adm. Code 101 and those of this Subpart, the provisions of this Subpart apply.

#### Section 104.402 Initiation of Proceeding

A person may initiate an adjusted standard proceeding by filing a petition that meets the requirements of Section 104.406 of this Part. A petition for an adjusted standard (petition) may be filed either jointly with the Agency or singly pursuant to the filing requirements of 35 Ill. Adm. Code 101. If filed singly the petitioner shall also serve the petition upon the Agency in accordance with 35 Ill. Adm. Code 101. Additionally, a person may file a petition and request the Agency to join as a co-petitioner as set forth in Section 104.404 of this Part.

#### Section 104.404 Request to Agency to Join as Co-Petitioner

- a) The Agency may, in its discretion, act as a co-petitioner in any adjusted standard proceeding.
- b) Any person may request Agency assistance in initiating a petition for adjusted standard. 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 promptly 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 must state the basis for this decision.

- c) Discretionary 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 will grant the Agency co-petitioner status upon joint motion of the Agency and the petitioner who originally filed the petition.

#### Section 104.406 Petition Content Requirements

If the Agency is a co-petitioner, the petition must so state. The petition must contain headings corresponding to the informational requirements of each subsection of this Section. If the petitioner believes that any of the informational requirements are not applicable to the specific adjusted standard requested, the petitioner must so state and explain his reasoning. The following information must be contained in the petition:

- a) A statement describing the standard from which an adjusted standard is sought. This must include the Illinois Administrative Code citation to the regulation of general applicability imposing the standard as well as the effective date of that regulation;
- b) A statement that indicates whether the regulation of general applicability was promulgated to implement, in whole or in part, the requirements of the CWA (33 USC 1251 et seq.), Safe Drinking Water Act (42 U.S.C. 300(f) et seq.), Comprehensive Environmental Response, Compensation and Liability Act (42 USC 9601 et seq.), CAA (42 USC 7401 et seq.), or the State programs concerning RCRA, UIC, or NPDES [415 ILCS 5/28.1];
- 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 [415 ILCS 5/28.1] (See Section 104.426);
- d) A description of the nature of the petitioner's activity that is the subject of the proposed adjusted standard. The description must include the location of and area affected by the petitioner's activity. This description must 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 description of the nature of emissions, discharges or releases currently generated by the petitioner's activity;



- e) A description of the efforts that 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, must be discussed. The discussion of costs must 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 that would impose the standard. Efforts necessary to achieve this proposed standard and the corresponding costs must also be presented;
- g) The quantitative and qualitative description of the 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 must be discussed. Also, the petitioner must compare the qualitative and quantitative nature of emissions, discharges or releases that 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 must also inform the Board of all procedural requirements applicable to the Board's decision on the petition that are imposed by federal law and not required by this Subpart. Relevant regulatory and statutory authorities must be cited;
- j) A statement requesting or waiving a hearing on the petition (pursuant to Section 104.422(a)(4) of this Part a hearing will be held in all petitions for adjusted standards filed pursuant to 35 Ill. Adm. Code 212.126 (CAA));
- k) The petition must 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 must be appended to the petition;
- l) Any additional information which may be required in the regulation of general applicability.

#### Section 104.408 Petition Notice Requirements

- a) *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 by the petitioner's activity that is the subject of the adjusted standard proceeding. [415 ILCS 5/28.1.]*
- b) The title of the notice must be in the form as follows: "Notice of Petition by [petitioner's name] for an Adjusted Standard before the Illinois Pollution Control Board." The notice must contain the name and address of the petitioner and the statement that the petitioner has filed with the Board a petition for an adjusted standard. The notice must 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 that is the subject of the adjusted standard proceeding, and the location of that activity. This information must be presented so as to be understood in accordance with the context of this Section's requirements. The concluding portion of the notice must 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 must be mailed to the Clerk of the Board, Illinois Pollution Control Board, 100 W. Randolph Street, Suite 11-500, Chicago, Illinois 60601."

#### Section 104.410 Proof of Petition Notice Requirements

Within 30 days after the filing of the petition, the petitioner must file a certificate of publication, issued by the publisher of the petition notice certifying the publication of that notice. The certificate must be issued in accordance with Section 1 of "Notice by Publication Act" [715 ILCS 5/1].

#### Section 104.412 Effect of Filing a Petition: Stay

- 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. [415 ILCS 5/28.1(e)]*

- 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. [415 ILCS 5/28.1(f)]*

#### Section 104.414 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 104.406, 104.408, and 104.410 of this Part; or
- b) The Board determines that the petitioner is not pursuing disposition of the petition in a timely manner.

#### Section 104.416 Agency Recommendation and Petitioner Response

- a) Unless otherwise ordered by the hearing officer, the recommendation must be filed with the Board within 45 days after the filing of the petition or amended petition. If a hearing has been scheduled, the recommendation must be filed at least 30 days before hearing. The recommendation must set forth the rationale for the Agency's position and 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 recommendation must identify the types of information needed to correct the deficiencies.
- b) At a minimum, the Agency must address and respond to the petition with respect to each issue raised by the requirements of subsections (a) through (j) of Section 104.406 of this Part.
- c) The recommendation must 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 must be appended to the recommendation if not already in the record of the proceeding.
- d) The petitioner may file a response to the recommendation within 14 days after the date of service of the recommendation.

### Section 104.418 Amended Petition, Amended Recommendation, and Amended Response

- a) Amended Petition. The petitioner may amend its petition at any time. Such an amendment must be in writing and filed with the Board unless made orally at hearing. If the petitioner amends the petition such that the amendment is a substantive change to the requested relief in that it requests additional or alternative relief, petitioner must re-notice the amended petition pursuant to Section 104.408 of this Part.
- b) Amended Recommendation. The Agency may amend its recommendation at any time, even if the petitioner has not amended its petition, if such amendment does not cause material prejudice. Such an amendment must be in writing and filed with the Board unless made orally at hearing.
- c) Amended Response. The petitioner may file a reply to a written amended recommendation within 14 days after the date of receipt of the amended recommendation or within 14 days after the hearing when the Agency orally amended its recommendation.
- d) Written amendments to the petition or recommendations 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.

### Section 104.420 Request for Public Hearing

- a) Any person can request that a public hearing be held in an adjusted standard proceeding. Such requests must be filed not later than 21 days after the date of the publication of the petition notice in accordance with subsections (a) and (b) of Section 104.408 of this Part. 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 and Agency by the Clerk of the Board. Participation by the public at such hearing must be in accordance with 35 Ill. Adm. Code 101.110 and 101.628.
- b) Where all parties and participants who have requested a hearing pursuant to this Subpart have withdrawn their requests for a hearing, the hearing will not be held unless the Board in its discretion deems it advisable.

### Section 104.422 Public Hearing

- a) A public hearing will be held and the Board will assign a hearing officer to an adjusted standard proceeding when:

- 1) The petitioner requests a hearing be held; or
  - 2) The Board receives a hearing request by any person pursuant to Section 104.420 of this Part, not later than 21 days after the date of the publication of the petition notice in accordance with Section 104.408 of this Part; or
  - 3) The Board *in its discretion determines that a hearing would be advisable.* [415 ILCS 5/28.1]; or
  - 4) The adjusted standard is sought pursuant to 35 Ill. Adm. Code 212.126 (CAA).
- 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 that is the subject of the proposed adjusted standard.

#### Section 104.424 Hearing Notice

After receiving notification from the hearing officer of the scheduled hearing date made pursuant to Section 104.422 of this Part, the Clerk will cause the publication of a hearing in accordance with Section 28.1 of the Act and 35 Ill. Adm. Code 101. [415 ILCS 5/28.1]

#### Section 104.426 Burden of Proof

The burden of proof in an adjusted standard proceeding is on the petitioner. A petitioner must justify an adjusted standard consistent with subsection (a) of Section 27 of the Act.

- a) *If the regulation of general applicability does not specify a level of justification required of a petitioner to qualify for an adjusted standard, the Board may grant individual adjusted standards whenever the Board determines, upon adequate proof by petitioner, 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;*
  - 2) *the existence of those factors justifies an adjusted standard;*
  - 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; and*

- 4) *the adjusted standard is consistent with any applicable federal law.* [415 ILCS 5/28.1(c)].
- 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.

#### Section 104.428 Board Action

- a) In adopting adjusted standards the Board may impose such conditions as may be necessary to accomplish the purposes of the Act.
- b) 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 that adopted the adjusted standard, and a brief narrative description of the adopted adjusted standard.
- c) *Board orders and opinions shall be maintained for public inspection by the Clerk of the Board and a listing of all determinations made pursuant to Section 28.1 of the Act shall be published in the Illinois Register and the Environmental Register at the end of each fiscal year.* [415 ILCS 5/28.1(d)] Board opinions and orders will also be available from the Board's Web site.

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

PART 105  
APPEALS OF FINAL DECISIONS OF STATE AGENCIES

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#### Illustration A: Agency LUST Final Decisions that are Reviewable

**AUTHORITY:** Authorized by Sections 26 and 27 of the Environmental Protection Act (Act) [415 ILCS 5/26 and 27] and implementing Sections 5, 39, 39.5, 40, 40.1, 40.2, and 57 of the Act [415 ILCS 5/5, 39, 39.5, 40, 40.1, 40.2 and 57].

**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 R93-24 at 18 Ill. Reg. 4244, effective March 8, 1994; amended in R94-11 at 18 Ill. Reg. 16594, effective November 1, 1994. Old Part repealed, new Part adopted in R00-20 at 24 Ill. Reg. \_\_, effective\_\_\_\_.

#### SUBPART A: GENERAL PROVISIONS

Section 105.100 Applicability



- a) This Part applies to appeals of final decisions of State agencies to the Board as authorized by law.
- b) This Part must be read in conjunction with 35 Ill. Adm. Code 101, which contains procedures generally applicable to all of the Board's adjudicatory 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 105.102 Severability

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

#### Section 105.104 Definitions

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

#### Section 105.106 Computation of Time, Filing and Service Requirements

Unless applicable law or this Part provides otherwise, service, filing, and computation of time must be in accordance with 35 Ill. Adm. Code 101.Subpart C.

#### Section 105.108 Dismissal of Petition

A petition is subject to dismissal if the Board determines that:

- a) The petition does not contain the informational requirements set forth in Section 105.210, 105.308, 105.408, 105.506 or 105.610 of this Part;
- b) The petition is untimely pursuant to Section 105.206, 105.304, 105.404, 105.504 or 105.608 of this Part;
- c) The petitioner fails to timely comply with any order issued by the Board or the hearing officer, including an order requiring additional information; or
- d) The petitioner does not have standing under applicable law to petition the Board for review of the State agency's final decision.

#### Section 105.110 Hearing Process

Unless applicable law or this Part provides otherwise, proceedings held pursuant to this Part will be in accordance with the rules set forth in 35 Ill. Adm. Code 101.Subpart F.

#### Section 105.112 Burden of Proof

Unless applicable law or this Part provides otherwise:

- a) *The burden of proof shall be on the petitioner except as provided in subsection (b) of this Section. [415 ILCS 5/40(a)(1), 40(b) and (e)(3) and 40.2(a)]*
- b) *The burden of proof is on the Agency if the Agency issues an NPDES permit that imposes limits which are based upon a criterion or denies a permit based upon application of a criterion, then the Agency shall have the burden of going forward with the basis for the derivation of those limits or criterion which were derived under the Board's rules. [415 ILCS 5/40(a)(1)]*

#### Section 105.114 Calculation of Decision Deadline

The Board will render its final decision on the petition within any applicable decision period (which commences when the petition is filed in accordance with 35 Ill. Adm. Code 101.300(b)(4)), except:

- a) When the petitioner waives its right to a decision within the prescribed decision period in accordance with 35 Ill. Adm. Code 101.Subpart C; or
- b) When the petitioner files an amended petition, in which case the decision period recommences when the amended petition is filed in accordance with 35 Ill. Adm. Code 101.300(b)(4).

#### Section 105.116 Record Filing

Unless applicable law or this Part provides otherwise, the State agency must file the entire record of its decision with the Clerk as the Board or hearing officer directs and in accordance with any applicable decision deadline, but in no event later than 30 days before the date of any scheduled hearing. If the State agency wishes to seek additional time to file the record, it must file a request for extension before the date on which the record is due to be filed.

#### Section 105.118 Sanctions for Untimely Filing of the Record

If the State agency fails to file the record on or before the date required under this Part, the Board may sanction the State agency in accordance with 35 Ill. Adm. Code 101.Subpart H.

### SUBPART B: APPEAL OF AGENCY PERMIT DECISIONS AND OTHER FINAL DECISIONS OF THE AGENCY

### Section 105.200 Applicability

This Subpart applies to any appeal to the Board of the Agency's final permit decisions and other final decisions of the Agency, except:

- a) When the appeal is of a final CAAPP decision of the Agency, which is addressed in Subpart C of this Part; and
- b) When the appeal is of a final leaking underground storage tank decision of the Agency, which is addressed in Subpart D of this Part.

### Section 105.202 Parties

- a) Petitioner. The person who files a petition for review of the Agency's final decision must be named the petitioner.
- b) Respondent(s). The Agency must be named the respondent. If a petition is filed pursuant to Section 105.204(b), (c) or (d) by a person other than the permit applicant, the permit applicant must be named as a respondent in addition to the Agency.

### Section 105.204 Who May File a Petition for Review

- a) General. *If the Agency refuses to grant or grants with conditions a permit under Section 39 of the Act, the applicant may. . . petition for a hearing before the Board to contest the decision of the Agency.* [415 ILCS 5/40(a)(1)]
- b) National Pollutant Discharge Elimination System (NPDES) permit. *If the Agency grants or denies a permit under subsection (b) of Section 39 of the Act, a third party, other than the permit applicant or Agency, may petition the Board . . . for a hearing to contest the decision of the Agency.* [415 ILCS 5/40(e)(1)]
- c) Resource Conservation and Recovery Act (RCRA) Permit for a Hazardous Waste Disposal Site. *If the Agency grants a RCRA permit for a hazardous waste disposal site, a third party, other than the permit applicant or Agency, may petition the Board . . . for a hearing to contest the issuance of the permit. This subsection does not apply to the granting of permits issued for the disposal or utilization of sludge from publicly-owned sewage works.*[415 ILCS 5/40(b)]
- d) Hazardous Waste Permit. *Any party to an Agency proceeding conducted pursuant to Section 39.3 of this Act may petition as of right to the Board for review of the Agency's decision.*[415 ILCS 5/40(c)]

- e) EMSAs. If the Agency terminates an EMSA under Section 52.3-4(b) of the Act, the sponsor may petition the Board for review of the Agency's final decision.
- f) Other Agency Final Decisions. If the Agency's final decision is to deny or to conditionally grant or approve, the person who applied for or otherwise requested the Agency decision, or the person to whom the Agency directs its final decision, may petition the Board for review of the Agency's final decision. In addition, any third party authorized by law to appeal a final decision of the Agency to the Board may file a petition for review with the Clerk.

#### Section 105.206 Time to File the Petition or Request For Extension

- a) Except as provided in subsection (b) of this Section, if a person who may petition the Board under Section 105.204 of this Subpart wishes to appeal the Agency's final decision to the Board under this Subpart, the person must file the petition with the Clerk within 35 days after the date of service of the Agency's final decision.
- b) If a person with standing as described in Section 105.204(d) of this Subpart, or any third party who is authorized by law to appeal a final decision of the Agency to the Board, wishes to appeal the Agency's final decision to the Board under this Subpart, the person must file a petition for review with the Clerk within 35 days after the date of issuance of the Agency's final decision.
- c) Except as provided in subsection (d) of this Section, if a person who may petition the Board under Section 105.204 of this Subpart wishes to request an extension of time to file a petition for review pursuant to Section 105.208(a) of this Subpart, the person must file the request within 35 days after the date of service of the Agency's final decision.
- d) If a person with standing as described in Section 105.204(d), or any third party who is authorized by law to appeal a final decision of the Agency to the Board, wishes to request an extension of time to file a petition for review pursuant to Section 105.208(b) of this Subpart, the person must file the request within 35 days after the date of issuance of the Agency's final decision.

#### Section 105.208 Extension of Time to File a Petition for Review

- a) Permit or Other Agency Final Decision. For appeals pursuant to Section 40(a)(1) of the Act, *the 35-day period* described in Section 105.206(a) of this Subpart *for petitioning for a hearing may be extended by the applicant for a period of time not to exceed 90 days by written notice provided to the Board from the applicant and the Agency within the initial appeal period.* [415 ILCS 5/40(a)(1).]

- 1) The applicant and the Agency must jointly file a request for extension within 35 days after the date of service of the Agency's final decision.
  - 2) The joint request described in subsection (a)(1) of this Section may seek an appeal period not exceeding 125 days from the date of service of the Agency's final decision to file a petition for review under this Subpart.
- b) Hazardous Waste Permit. For appeals pursuant to Section 40(c) of the Act, *the 35-day period described in Section 105.206(b) of this Subpart for petitioning for a hearing may be extended by the applicant for a period of time not to exceed 90 days by written notice provided to the Board from the applicant and the Agency within the initial appeal period. If another person with standing to appeal a hazardous waste disposal permit wishes to obtain an extension, there must be a written notice provided to the Board by that person, the Agency, and the applicant, within the initial appeal period.* [415 ILCS 5/40(c).]
- 1) If the applicant is the petitioner, the applicant and the Agency must jointly file a request for extension within 35 days after the date of issuance of the Agency's final decision.
  - 2) If a person with standing other than the applicant is the petitioner, the Agency, the applicant and the other person must jointly file a request for extension within 35 days after the date of issuance of the Agency's final decision.
  - 3) The joint request described in subsection (b)(1) or (2) of this Section may seek an appeal period not exceeding 125 days from the date of issuance of the Agency's final decision to file a petition for review under this Subpart.
- c) Any request for extension of time under this Section must be accompanied by written evidence that the Agency joins in the request, e.g., affidavit of the petitioner or signature of the Agency's representative.
  - d) Extensions of time to file petitions under Section 105.204(b), (c), or (e) of this Subpart are not available.

#### Section 105.210 Petition Content Requirements

In addition to the requirements of 35 Ill. Adm. Code 101.Subpart C, the petition must include:

- a) The Agency's final decision or issued permit;

- b) A statement specifying the date of issuance or service of the Agency's final decision or issued permit, as applicable pursuant to Section 105.206 of this Subpart;
- c) A statement specifying the grounds of appeal; and
- d) For petitions under Section 105.204(b) of this Subpart, *a demonstration that the petitioner raised the issues contained within the petition during the public notice period or during the public hearing on the NPDES permit application, if a public hearing was held, and a demonstration that the petitioner is so situated as to be affected by the permitted facility.* [415 ILCS 5/40(e)(2)]

#### Section 105.212 Agency Record

- a) The Agency must file its entire record of its decision with the Clerk in accordance with Section 105.116 of this Part.
- b) The record must include:
  - 1) Any permit application or other request that resulted in the Agency's final decision;
  - 2) Correspondence with the petitioner and any documents or materials submitted by the petitioner to the Agency;
  - 3) The permit denial letter that conforms to the requirements of Section 39(a) of the Act or the issued permit or other Agency final decision;
  - 4) The hearing file of any hearing that may have been held before the Agency, including any transcripts and exhibits; and
  - 5) Any other information the Agency relied upon in making its final decision.

#### Section 105.214 Board Hearing

- a) Except as provided in subsections (b), (c) and (d) of this Section, the Board will conduct a public hearing, in accordance with 35 Ill. Adm. Code 101.Subpart F, upon an appropriately filed petition for review under this Subpart. The hearing will be based exclusively on the record before the Agency at the time the permit or decision was issued, unless the parties agree to supplement the record pursuant to Section 40(d) of the Act.

- b) The Board will not hold a hearing on a petition for review under this Subpart if the Board disposes of the petition on a motion for summary judgment brought pursuant to 35 Ill. Adm. Code 101.516.
- c) The Board will not hold a hearing on a petition for review under Section 105.204(c) of this Subpart if the Board determines that:
  - 1) The petition is duplicitous or frivolous; or
  - 2) The petitioner is so located as to not be affected by the permitted facility.
- d) The Board will not hold a hearing on a petition for review under Section 105.204(b) or (d) of this Subpart if the Board determines that the petition is duplicitous or frivolous.
- e) If the Board determines to hold a hearing, the Clerk will give notice of the hearing pursuant to 35 Ill. Adm. Code 101.602.

#### SUBPART C: CAAPP PERMIT APPEALS

##### Section 105.300      Applicability

This Subpart applies to proceedings before the Board concerning appeals from CAAPP final determinations made pursuant to Section 39.5 of the Act.

##### Section 105.302      General Requirements

- a) The definitions of 35 Ill. Adm. Code 101.202 and Section 39.5 of the Act will apply to this Subpart unless otherwise provided, or unless the context clearly indicates otherwise.
- b) If the Agency denies a CAAPP permit, permit modification, or permit renewal it shall provide to USEPA, the permit applicant and, upon request, affected states, any person who participated in the public comment process and any other person who could obtain judicial review under Section 40.2 and 41 of the Act a copy of each notification of denial pertaining to the permit applicant.
- c) In the case of a denial of a CAAPP permit, including a permit revision or permit renewal, or a determination of incompleteness by the Agency regarding a submitted CAAPP application, or the issuance by the Agency of a CAAPP permit with one or more conditions or limitations, or the failure of the Agency to act on an application for a CAAPP permit, permit renewal, administrative permit amendment or significant permit modification within the time frames specified in Section 39.5(5)(j) or Section 39.5(13) of the Act, as applicable, or the failure of the Agency to take final action within 90 days after receipt of an application

requesting minor permit modification procedures (or 180 days for modifications subject to group processing requirements) pursuant to Section 39.5(14) of the Act, to which the applicant, any person who participated in the public comment process pursuant to Section 39.5(8) of the Act, or any other person who could obtain judicial review pursuant to Section 41(a) of the Act objects, such persons may contest the decision of the Agency by filing with the Clerk a petition for review of the Agency's action in accordance with this Section.

- d) For purposes of this Subpart, a person who participated in the public comment process is someone who, during the public comment period, either commented on the draft permit, submitted written comments, or requested notice of the final action on a specific permit application.
- e) The petition filed pursuant to subsection (c) of this Section must be filed within 35 days after the Agency's final permit action. Notwithstanding the above, if the petition is based solely on grounds arising after the 35 day period expires, the petition may be filed within 35 days after the new grounds for review arise. If the applicant is challenging the Agency's failure to timely take final action pursuant to Section 39.5 of the Act, the petition must be filed before the Agency takes such final action. Under no circumstances may a petition challenging the final permit action on a Phase II acid rain permit be filed more than 90 days subsequent to such final permit action.
- f) The Agency must appear as respondent at the hearing and must file within 30 days after service of the petition, an answer consisting of the entire Agency record of the CAAPP application including the CAAPP permit application, the hearing record, the CAAPP permit denial or issuance letter, and correspondence with the applicant concerning the CAAPP permit application.
- g) The Clerk will give notice of the petition and hearing in accordance with 35 Ill. Adm. Code 101.
- h) The proceeding will be conducted in accordance with 35 Ill. Adm. Code 101.
- i) *The Agency shall notify USEPA, in writing, of any petition for hearing brought under this Part involving a provision or denial of a Phase II acid rain permit within 30 days of the filing of the petition. USEPA may intervene as a matter of right in any such hearing. The Agency shall notify USEPA, in writing, of any determination or order in a hearing brought under this Section that interprets, voids, or otherwise relates to any portion of a Phase II acid rain permit. [415 ILCS 5/40.2(e)]*

#### Section 105.304      Petition Content Requirements

- a) The petition must include:



- 1) a concise description of the CAAPP source for which the permit is sought;
  - 2) a statement of the Agency's decision or part thereof to be reviewed;
  - 3) a justification as to why the Agency's decision or part thereof was in error; and
  - 4) such other materials upon which the petitioner relies in its petition.
- b) The petition may include a request to stay the effectiveness of a denial of the CAAPP permit until final action is taken by the Board pursuant to Section 40.2 of the Act.

#### SUBPART D: APPEAL OF AGENCY LEAKING UNDERGROUND STORAGE TANK (LUST) DECISIONS

##### Section 105.400 Parties

- a) **Petitioner.** The person who files a petition for review of the Agency's final decision made pursuant to Sections 57.1 *et seq.* of the Act must be named as petitioner.
- b) **Respondent.** The Agency must be named as the respondent.

##### Section 105.402 Who May File a Petition for Review

Any owner or operator may file a petition for review pursuant to Section 40 of the Act of an Agency final determination made pursuant to Sections 57.1 *et seq.* of the Act. There are several Agency determinations that may be appealed pursuant to Section 40 of the Act. The Agency determinations that may be appealed are included in Illustration A of this Part.

##### Section 105.404 Time for Filing the Petition

Petitions must be filed in accordance with this Section or the Board does not have the authority to review the Agency's decision and will dismiss the proceeding on its own motion or on the motion of any party. Within 35 days after the date of service of the Agency's final decision the petitioner may file with the Clerk of the Board:

- a) a petition for review that contains the requirements of Section 105.408 of this Part;
- or

- b) a request for an extension of time to file a petition for hearing pursuant to Section 105.406 of this Part.

#### Section 105.406 Extension of Time to File a Petition for Review

Pursuant to Section 40(a)(1) of the Act, *the 35-day period for petitioning for a hearing may be extended by the applicant for a period of time not to exceed 90 days by written notice provided to the Board from the applicant and the Agency within the initial appeal period.* [415 ILCS 5/40(c)] The applicant and the Agency must jointly file a request for extension with the Board within 35 days after the date of service of the Agency's final decision. Upon an appropriately filed request for an extension, the applicant has a period not exceeding 125 days after the date of service of the Agency's final decision to file a petition for review before the Board pursuant to Section 105.408 of this Part.

#### Section 105.408 Petition Content Requirements

In addition to the requirements of 35 Ill. Adm. Code 101.Subpart C the petition must contain:

- a) The Agency's final decision;
- b) A statement specifying the date of service of the Agency's final decision; and
- c) A statement specifying the grounds of appeal.

#### Section 105.410 Agency Record

- a) The entire Agency record of its decision must be filed with the Board as directed by the Board or hearing officer pursuant to Section 105.116 of this Part.
- b) The record must include:
  - 1) The plan or budget submittal or other request that requires an Agency decision;
  - 2) Correspondence with the petitioner and any documents or materials submitted by the petitioner to the Agency;
  - 3) The final determination letter; and
  - 4) Any other information the Agency relied upon in making its determination.

#### Section 105.412 Board Hearing

The Board will conduct a public hearing, in accordance with 35 Ill. Adm. Code 101.Subpart F upon an appropriately filed petition for review, unless a petition is disposed of by a motion for summary judgment brought pursuant to 35 Ill. Adm. Code 101.516. Such hearing will be *based exclusively on the record before the Agency* at the time the permit or decision was issued. [415 ILCS 5/40(d) and 5/40.2]

## SUBPART E: APPEAL OF OSFM LUST DECISIONS

### Section 105.500 Applicability

This Subpart applies to proceedings before the Board concerning appeals from OSFM final determinations made pursuant to Section 57.9(c) of the Act.

### Section 105.502 General Overview

OSFM final determinations are made either through the issuance of an “Eligibility and Deductibility Final Determination” letter or by the failure of OSFM to act upon receipt of such form within 60 days pursuant to Section 57.9(c)(2) of the Act. The process before the Board for review of final determinations by the OSFM includes, but is not limited to, the following steps. Upon receipt of a petition for review, unless the Board determines that the petition is insufficient, a hearing date and location will be assigned. Hearings will be publicly-noticed in the county where the underground storage tank site is located. Most hearings will be held in either Chicago or Springfield. If the parties enter into a settlement agreement 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 105.504 General Requirements

- a) **Who may file.** Any owner or operator of an underground storage tank who has been issued an "Eligibility and Deductibility Final Determination" letter or who has not received an “Eligibility and Deductibility Determination” from the OSFM within the time prescribed by 415 ILCS 5/57.9(c), which is deemed to be a final decision appealable to the Board, may file a petition with the Board seeking review of that final decision. The owner/operator must be named as the petitioner, and the OSFM must be named as the respondent. Filing requirements are set forth at 35 Ill. Adm. Code 101.Subpart C.
- b) **Timely Petition.** The petition for review must be filed with the Board within 35 days after the date of the OSFM's "Eligibility and Deductibility Final Determination" letter or within 35 days from the OSFM's final decision due to its failure to act as required under 415 ILCS 5/57.9(c). There will 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.

- c) **Service and Filing.** The petitioner must serve all filings upon the OSFM at the address listed in 35 Ill. Adm. Code 101.Subpart C. All filings must be accompanied by a notice of filing. Methods and proof of service, as well as the effective date of service, are governed by 35 Ill. Adm. Code 101.Subpart C.

#### Section 105.506 Petition Content Requirements

In addition to the requirements of 35 Ill. Adm. Code 101.Subpart C the petition 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 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 Illinois Emergency Management Agency notification;
- c) A statement specifying the date of service of the OSFM's final determination letter and documentation to demonstrate the petition's timely filing;
- d) A statement specifying the grounds of appeal;
- e) If the owner or operator is represented by counsel, an appearance must be filed in conjunction with the petition; and
- f) A request to hold the hearing in either Springfield or Chicago, or a request to conduct the 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 105.508 OSFM Record and Appearance

- a) Within 14 days after a petition for review of an OSFM eligibility or deductibility determination, the attorney representing the OSFM must file an appearance with the Board.
- b) The entire OSFM record of its decision must be filed with the Board as directed by the Board or hearing officer. The record must include:
  - 1) The request for OSFM determination of eligibility or deductibility;
  - 2) Correspondence with the petitioner;
  - 3) The denial letter; and

- 4) Any other information the OSFM relied upon in making its determination.

#### Section 105.510 Location of Hearing

The hearing will be held in either Springfield or Chicago or in such other location as the hearing officer or the Board may designate to prevent material prejudice or undue delay. Upon the proceeding 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 F: APPEALS OF OTHER FINAL DECISIONS OF STATE AGENCIES

#### Section 105.600 Applicability

This Subpart applies to any appeal of a State agency's final decision to the Board when:

- a) The appeal is authorized by law; and
- b) The appeal is not otherwise addressed in this Part.

#### Section 105.602 Parties

- a) Petitioner. The person who files a petition for review of the State agency's final decision must be named the petitioner.
- b) Respondent(s). The State agency must be named the respondent. If the law authorizing the appeal allows third-party appeals to the Board and such a petition is filed with the Clerk in accordance with this Subpart, the person who applied for or otherwise requested the State agency's final decision, or the person to whom the State agency directs its final decision must be named as a respondent in addition to the State agency.

#### Section 105.604 Burden of Proof

The burden of proof is as prescribed by the law authorizing the appeal. If that law does not address the burden of proof, the petitioner has the burden of proof.

#### Section 105.606 Who May File a Petition for Review

Any person authorized by law to appeal a State agency's final decision to the Board may file with the Clerk a petition for review of the State agency's final decision.

#### Section 105.608 Time to File the Petition; Service

- a) **Time to File.** If a person who may petition the Board under Section 105.606 of this Subpart wishes to appeal a State agency's final decision to the Board under this Subpart, the person must file the petition with the Clerk within the time prescribed by the law authorizing the appeal. If that law does not address the time within which the person must file the petition for review, the petition must be filed:
  - 1) within 35 days after the date of service of the State agency's final decision if the petitioner is the person who applied for or otherwise requested the State agency's final decision, or the person to whom the State agency directs its final decision; or
  - 2) within 35 days after the date of issuance of the State agency's final decision if the petitioner is a third party.
- b) **Service.** In addition to any service requirements in the law authorizing the appeal, the petitioner must serve a copy of the petition on all parties to the proceeding in accordance with Section 105.106 of this Part.

#### Section 105.610 Petition Content Requirements

In addition to any information or materials that the law authorizing the appeal may require to be included in the petition, the petition must include:

- a) The State agency's final decision;
- b) A statement specifying the date of issuance or service of the State agency's final decision, as applicable pursuant to Section 105.608(a) of this Subpart;
- c) A statement specifying the grounds of appeal; and
- d) Any filing fee prescribed by the law authorizing the appeal.

#### Section 105.612 State Agency Record

- a) **Time to File.** The State agency must file with the Clerk the entire agency record of its decision within the time prescribed by the law authorizing the appeal. If that law does not address the time within which the State agency must file the record, the State agency must file the record in accordance with Section 105.116 of this Part.
- b) **Contents.** In addition to any information or materials that the law authorizing the appeal may require to be included in the State agency's record of its decision, the record must include:

- 1) Any application or other request that resulted in the State agency's final decision;
  - 2) Correspondence with the petitioner and any documents or materials that the petitioner submitted to the State agency;
  - 3) The State agency's final decision;
  - 4) The hearing file of any hearing that may have been held before the State agency, including any transcripts and exhibits; and
  - 5) Any other information that the State agency relied upon in making its final decision.
- c) Service. In addition to any service requirements in the law authorizing the appeal, the State Agency must serve a copy of the record on all parties to the proceeding in accordance with Section 105.106 of this Part.

#### Section 105.614 Board Hearing

- a) The Board will conduct a public hearing as prescribed by the law authorizing the appeal. If that law does not address the conduct of a public hearing, the Board will conduct a public hearing in accordance with 35 Ill. Adm. Code 101.Subpart F.
- b) The basis of a public hearing will be as prescribed in the law authorizing the appeal. If that law does not address the basis for a public hearing, the hearing will be based exclusively on the record before the State agency at the time it issued the final decision.
- c) The Clerk will give notice of the hearing as prescribed in the law authorizing the appeal. If that law does not address the notice of a public hearing, the Clerk will give notice of the hearing pursuant to 35 Ill. Adm. Code 101.602.

### Illustration A: Agency LUST Final Decisions that are Reviewable

The following table includes Agency final determinations which may be appealed to the Board pursuant to the Leaking Underground Storage Tank Program, Title XVI of the Act. Appealable determinations are listed in Title XVI, so the reader should consult the Act for amendments to Title XVI which may affect this list.

Description of Final Determination	Section of the Act Citation	35 Ill. Adm. Code Citation
Agency's determination concerning the owner's or operator's physical soil classification and groundwater investigation plan.	57.7(a)(1)(A)	732.305(a) and (c) and 732.503(b) and (f)
Agency's determination as to a request for reimbursement for costs associated with early action pursuant to Section 57.6(b) of the Act.	57.7(a)(1)(B)	732.305(b)(1) and (c) and 732.602
Agency's determination concerning the owner's or operator's budget for the physical soil classification and groundwater investigation plan.	57.7(a)(2)	732.305(b)(2) and (c) and 732.503 (b) and (f)
Agency's determination concerning the site classification.	57.7(b)	732.309, 732.500(a) and 732.503(b) and (f)
Agency's determination concerning the corrective action plan submitted for a high priority site.	57.7(c)(1)(A)	732.405(a) and 732.503(b) and (f)
Agency's determination concerning the budget associated with a corrective action plan submitted for a high priority site.	57.7(c)(1)(B)	732.405(b) and 732.503(b) and (f)
Agency's determination as to issuance of a no further remediation letter in accordance with Section 57.10 of the Act for a high priority site.	57.7(c)(1)(E)	732.410(a) and (d)
Agency's determination concerning the groundwater monitoring plan and associated budget submitted for a low	57.7(c)(2)(B)	732.403(b) and (c) and 732.503(b) and (f)



priority site.

Agency's determination associated with a groundwater monitoring completion report.	57.7(c)(2)(C)	732.403(g)
Agency's determination as to issuance of a no further remediation letter in accordance with Section 57.10 of the Act for a low priority site.	57.7(c)(2)(E)	732.403(f) and 732.410(d)
Agency's determination as to the site classification for a no further action site.	57.7(c)(3)(B)	732.402 and 732.410(d)
Agency's determination as to amount of reimbursement.	57.8(i)	732.602(h)
Agency's determination concerning the completeness of plan or budget submittals by the owner or operator.		732.502(b), 732.503(f)
Agency's determination concerning the completeness of reimbursement submittals by the owner or operator.		732.602(a) and (b)

(Board Note: The above list was complete at time of adoption. However, the list is subject to subsequent changes in the Act, the Board's regulations and the interpretation of the corresponding law. By no means should this list be interpreted to limit any right to appeal an Agency final determination before the Board. The list should only be used as an aid for interpreting Title XVI and the corresponding law.)

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

PART 106  
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106.728	Settlement Procedure
106.730	Authority of Hearing Officer, Board Members, and Board Assistants
106.732	Order and Conduct of Hearing
106.734	Evidentiary Matters
106.736	Post-Hearing Procedures
106.738	Motion After Entry of Final Order
106.740	Relief from Final Orders

AUTHORITY: Implementing and authorized by Sections 5, 14.2.(c), 22.4, 26, 27, 28, 28.1, 28.5 35, 36, 37, 38, 39.5 and 52.3 of the Environmental Protection Act. [415 ILCS 5/5]

SOURCE: Subpart B: Originally adopted as Chapter I: Procedural Rules, Part IV: Variances, in R70-4, at 1 PCB 43, October 8, 1970; amended in R77-16, 29 PCB 503, at 2 Ill. Reg. 16, p. 3, effective May 1978, amended in R79-9, 35 PCB 433, at 3 Ill. Reg. 51, p. 128, effective December 7, 1979; amended in R80-12, 40 PCB 451, at 5 Ill. Reg. 2763, effective March 2, 1981; codified at 6 Ill. Reg. 8357; amended in R84-10, 62 PCB 87, at 9 Ill. Reg. 1409, effective January 16, 1985; Old Part repealed, new Part adopted in R00-20 at 24 Ill. Reg. \_\_\_\_\_, effective \_\_\_\_\_.

#### SUBPART A: GENERAL PROVISIONS

##### Section 106.100      Applicability

- a) This Part applies to adjudicatory proceedings pursuant to specific rules or statutory provisions. Specifically, the Part applies to heated effluent, artificial cooling lake and sulfur dioxide demonstrations, water well setback exception procedures, revocation and reopening of CAAPP permits, maximum achievable control technology determinations, culpability determinations for particulate matter less than or equal to 10 microns, and the involuntary termination of environmental management system agreements.
- b) This Part must be read in conjunction with 35 Ill. Adm. Code 101 which contains procedures generally applicable to all of the Board's adjudicatory 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 106.102      Severability

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

##### Section 106.104      Definitions

For the purpose of this Subpart, words and terms will have the meaning as defined in 35 Ill. Adm. Code 101.Subpart B unless otherwise provided, or unless the context clearly indicates otherwise.

SUBPART B: HEATED EFFLUENT, ARTIFICIAL COOLING LAKE, AND SULFUR  
DIOXIDE DEMONSTRATIONS

Section 106.200 General

a) Description

1) Heated Effluent Demonstration

- A) The owner or operator of a source of heated effluent that discharges 150 megawatts (0.5 billion British thermal units per hour) or more must demonstrate in an adjudicatory proceeding before the Board, pursuant to 35 Ill. Adm. Code 302.211(f), that discharges from that source have not caused and cannot be reasonably expected to cause significant ecological damage to the receiving waters.
- B) The owner or operator must make the demonstration under subsection (a)(1)(A) of this Section not less than 5 years nor more than 6 years after operations commence.
- C) If the Board finds that the proof of the owner or operator under subsection (a)(1)(A) of this Section is inadequate, the Board's order will include, but not be limited to, a requirement that the owner or operator perform appropriate corrective measures within a reasonable time as determined by the Board.

2) Artificial Cooling Lake Demonstration

- A) If a discharger wishes to have the Board establish specific thermal standards for its discharge to an artificial cooling lake pursuant to 35 Ill. Adm. Code 302.211(j)(5) that would apply to the discharge in lieu of the applicable provisions of the thermal water quality standards set forth in 35 Ill. Adm. Code 302.211 and 303, the discharger must demonstrate in an adjudicatory proceeding before the Board, pursuant to 35 Ill. Adm. Code 302.211(j)(3), that the artificial cooling lake receiving the heated effluent will be environmentally acceptable and within the intent of the Act.

- B) If the Board finds that the proof of the discharger under subsection (a)(2)(A) of this Section is adequate, the Board will establish, pursuant to 35 Ill. Adm. Code 302.211(j)(5), specific thermal standards to be applied to the discharge to the artificial cooling in lieu of the applicable provisions of the thermal water quality standards set forth in 35 Ill. Adm. Code 302.211 and 303.
  - C) A Board order providing alternate thermal standards under subsection (a)(2)(B) of this Section will include, but not be limited to, the following conditions:
    - i) Pursuant to 35 Ill. Adm. Code 302.211(j)(1), all discharges from the artificial cooling lake to other waters of the State must comply with the applicable provisions of 35 Ill. Adm. Code 302.211(b) through (e); and
    - ii) Pursuant to 35 Ill. Adm. Code 302.211(j)(2), the heated effluent discharged to the artificial cooling lake must comply with all applicable provisions of 35 Ill. Adm. Code Subtitle C, Chapter I, except 35 Ill. Adm. Code 302.211(b) through (e).
- 3) Sulfur Dioxide Demonstrations. Any owner or operator of a fuel combustion emission source may petition the Board, pursuant to 35 Ill. Adm. Code 214.185 and this Subpart, for approval of substitute standards from those set forth in 35 Ill. Adm. Code 214.183 and 214.184.
- b) Initiation of Proceeding. The owner or operator may initiate a heated effluent, artificial cooling lake or sulfur dioxide demonstration by filing with the Clerk a petition in accordance with this Subpart.
  - c) Parties. The owner or operator must be named the petitioner and the Agency must be named the respondent.
  - d) Filing and Service. Filing and service must be in accordance with 35 Ill. Adm. Code 101.Subpart C.

#### Section 106.202 Petition Requirements

- a) Heated Effluent Demonstration. The petition must include, where applicable, the following information but may include additional information that the petitioner believes will be relevant to the proceeding:
  - 1) General Plant Description:

- A) Generating capacity;
  - B) Type of fuel used;
  - C) Operating characteristics of the condenser cooling system;
  - D) History of the load factor of the plant for the time during which the plant has operated, but for no more than the last 5 years;
  - E) Projected load factors for the life of the plant;
  - F) Estimated date of retirement for each unit at the plant and any plans for additional units at the plant;
  - G) History of plant shutdowns; and
  - H) Planned, emergency, and projected shutdowns with frequency and duration.
- 2) Description of Method for Heat Dissipation:
- A) Type of system used (such as once-through, mechanical, and draft cooling towers) in narrative form; and
  - B) Summary information on temperature of discharge to receiving waters in narrative form.
- 3) Plume Studies:
- A) Actual plume studies in the last 5 years correlated with plant operation and meteorological conditions;
  - B) Theoretical plume studies for all four seasons for typical and worst case conditions. Worst case conditions must be identified as worst conditions of plant load factors, precipitation, ambient water temperature, air temperature; such studies must consider the frequency of occurrence and their joint probabilities of occurrence; and
  - C) Theoretical plume studies that identify isotherms at 3<sup>0</sup> Fahrenheit (1.7<sup>0</sup> Centigrade) intervals down to ambient temperature indicating three dimensional effects.

- 4) A demonstration that discharges from the source of heated effluent have not caused and cannot be reasonably expected to cause significant ecological damage to the receiving waters, including:
    - A) Biological studies in the last 5 years on receiving waters, including species studied, location of studies, and conclusions reached, including conclusions as to both the lethal and sublethal effects of the thermal discharge;
    - B) The impact on other animal life (such as waterfowl and amphibians) in the area as a result of the thermal discharge; and
    - C) Secondary Considerations
      - i) Possible and known impact on recreation from thermal discharges; and
      - ii) Management practices employed or planned in order to limit the effect of any environmental harm established under this subsection (a)(4).
    - D) The demonstration required under this subsection (a)(4) may take any of the forms described in subsection (b)(2) of this Section.
  - 5) A citation to any prior proceedings, in which the petitioner was a party, brought pursuant to 35 Ill. Adm. Code 302.211(f) or (j)(3).
- b) Artificial Cooling Lake Demonstration. The petition must include, where applicable, the following information but may include additional information that the petitioner believes will be relevant to the proceeding:
- 1) A demonstration that the artificial cooling lake receiving the heated effluent will be environmentally acceptable and within the intent of the Act, including:
    - A) Provision of conditions capable of supporting shellfish, fish and wildlife, and recreational uses consistent with good management practices; and
    - B) Control of the thermal component of the discharger's effluent by a technologically feasible and economically reasonable method.
  - 2) The demonstration required under subsection (b)(1) of this Section may take the form of any of the following:



- A) A final environmental impact statement;
  - B) Pertinent provisions of environmental assessments used to prepare the final environmental impact statement; or
  - C) A showing pursuant to Section 316(a) of the Clean Water Act [33 USC 1326].
- 3) A citation to any prior proceedings, in which the petitioner was a party, brought pursuant to 35 Ill. Adm. Code 302.211(f) or (j)(3).
- c) Sulfur Dioxide Demonstration. The petition must include but not be limited to the following information:
- 1) An explicit statement of the site-specific emission limitation (in pounds of sulfur dioxide per million British Thermal Units (btu) actual heat input and total pounds of sulfur dioxide per hour) that is proposed for the facility.
  - 2) Emission Sources Description:
    - A) The diameter, height, exit gas temperature, and exit gas velocity for all stacks or vents through which sulfur dioxide is emitted into the atmosphere;
    - B) A description of the fuels used including type, ultimate analysis, sulfur content, and heat content;
    - C) A description of the type of fuel combustion equipment including method of firing and size (in million btu per hour capacity);
    - D) A topographic map of terrain within 30 miles of the emission source(s);
    - E) A specific description of the location of the emission sources, including a plot plan; and
    - F) A specific description of the operating conditions which produce maximum sulfur dioxide emissions.
  - 3) A summary of any and all ambient air quality data collected by the owner or operator of the source(s) since January 1, 1973. The summary must include annual averages; maximum and second-highest one-hour, three-hour, and 24-hour averages for each month; and the number of times the

three-hour and 24-hour sulfur dioxide standards were exceeded during each month.

- 4) A summary of any and all meteorological data collected by the owner or operator of the source(s) since January 1, 1973, if such data are used in the development of the site-specific emission standard.
- 5) A complete description of and justification for all dispersion models and plume rise equations that are used to develop the site-specific emission limitation including all model equations.
- 6) A description of and justification for the use of all data that were inputs to the dispersion and plume rise formula used to establish the site-specific emission standard. The description and justification must cover, as a minimum, the following input data;
  - A) Stack diameters, stack heights, exit gas temperatures, and exit gas velocities for all stacks and vents emitting sulfur dioxide at the subject facility as well as for any other sources of sulfur dioxide that were modeled;
  - B) All sulfur dioxide emission sources that were modeled; and
  - C) All meteorological data.
- 7) Calculated maximum ground-level concentrations using the following method, or such other method (or modification of the hereinafter stated method) that the petitioner proves to the satisfaction of the Board to be acceptable.
  - A) Selection of simulation model:
    - i) Gaussian models that allow the input of hourly meteorological data must be used which are appropriate for the specific location and type of source(s) in question.
    - ii) Dispersion models presented in "Guidelines on Air Quality Models" (EPA-450/2-78-027), as amended from time to time, or those deemed by the Board to be equivalent to these models must be used for detailed air quality studies.
  - B) Selection of meteorological data and stack parameters:
    - i) The most recent 5 years of hour-by-hour meteorological data reasonably available, including wind speed, wind

direction, atmospheric stability, mixing height and surface temperature must be used, unless the petitioner demonstrates that one of the 5 years causes substantially higher concentrations than the other four, in which case detailed analyses conducted for only that "worst case" year would be acceptable. Notwithstanding the previous sentence, one year of on-site data may be used in lieu of the 5-year data requirement;

- ii) Data must be from the nearest, representative, quality controlled meteorological collecting site; and
- iii) Stack parameters (including emission rate, stack height, stack diameter, exit velocity, and exit temperature) must reflect the maximum operating rate for comparison with the 24-hour and 3-hour sulfur dioxide standards.

C) Receptors:

- i) Receptors must be located so as to ensure that the source's maximum impact is detected;
- ii) The determination of the receptor grid must be fully documented in the modeling study;

D) Special conditions:

- i) All special conditions that may affect the dispersion of the effluent plume, including local terrain effects and aerodynamic downwash, must be considered in the modeling study;
- ii) If terrain is a factor in the vicinity of the source, a model capable of handling variable-height receptors must be used; and
- iii) If the computed height of the effluent plume is less than 2.5 times the height of nearby buildings or local obstructions, aerodynamic downwash must be studied and considered as a possible factor in the dispersion of that effluent.

E) Determination of violation: The determination of whether an applicable air quality increment or standard is being violated must be based on the second highest predicted

concentration over the receptor grid for short-term averaging times and on the highest predicted concentration for annual averaging times. However, if only one year of meteorological data is used in the short-term analysis, then the highest-predicted concentration may be compared to the applicable standard to determine whether a violation has occurred.

- F) Other sources: Effects of other sources of sulfur dioxide must be taken into account in the modeling study. Methods by which other sources of sulfur dioxide may be accounted are as follows:
- i) An acceptable method is to estimate the "background" from monitoring data which has been subjected to adequate quality control where available. When monitored data is used, the background must be estimated using monitoring days with meteorological conditions similar to those identified as "worst case" for the source in question; or
  - ii) If monitoring data is not available, then all sources of sulfur dioxide having a significant impact in the area of the source's impact area must be used in the simulation model. These sources of sulfur dioxide must also be modeled at their maximum allowable emission rate for any studies addressing 24-hour or 3-hour averaging times.
- 8) Estimates of the frequency, characteristics, probable time of occurrence, and duration of the meteorological conditions associated with the maximum ground-level concentration of sulfur dioxide to which the facility under study contributes. A description of the techniques used in arriving at the above estimates must be included.
- 9) Background concentrations that were determined for all meteorological conditions required to be examined under subsection (c)(7) of this Section and for any other meteorological conditions considered in the development of the alternative standard.
- 10) A description of the method that was used to determine background sulfur dioxide concentrations in the vicinity of the subject facility for each of the meteorological conditions required to be examined under subsection (7) of this Section and for any additional meteorological conditions considered in developing the alternative standard.

- 11) An evaluation and calibration of the dispersion model if air quality monitoring data were available to perform such evaluation and calibration.

#### Section 106.204 Additional Petition Requirements in Sulfur Dioxide Demonstrations

In addition to meeting the petition contents requirements of Section 106.202(c) of this Part the petitioner must ensure that the procedural requirements of 40 CFR 51.4 (1977) are met and, at least 30 days prior to the date of the hearing, petitioner must:

- a) Give notice to the public by prominent advertisement in the Air Quality Control Region affected announcing the date, time and place of such hearing;
- b) Make available a copy of the petition for public inspection in at least one location in the Air Quality Control Region in which the source is located;
- c) Notify the Administrator of USEPA (through the appropriate Regional Office);
- d) Notify each local air pollution control agency located within the affected Air Quality Control Region; and
- e) Notify, in the case of an interstate Air Quality Control Region, any air pollution control agencies of other states included, in whole or in part, in the Region.

#### Section 106.206 Notice

The Clerk will give notice of the petition and hearing in accordance with 35 Ill. Adm. Code 101.602. The proceedings must be in accordance with 35 Ill. Adm. Code 101.Subpart F.

#### Section 106.208 Agency Recommendation and Response

The Agency must file a recommendation on a petition under this Subpart as prescribed below. The petitioner or any other party to the proceeding may file a response to the Agency recommendation within 14 days after service of the petition. Any person other than a party to the proceeding may file a response to the Agency recommendation within 14 days after the Agency files the recommendation.

- a) Heated Effluent Demonstration
  - 1) Within 60 days after the owner or operator files the petition, the Agency must make a recommendation to the Board on the petition. The recommendation may include, but is not limited to:
    - A) A description of the Agency's efforts in conducting its review of the petition;

- B) The Agency's conclusion as to whether discharges from the source have caused or can reasonably be expected to cause significant ecological damage to the receiving waters;
  - C) The factual basis for the Agency's conclusion;
  - D) Any corrective measures that the Agency recommends be taken and the recommended time period to implement the measures; and
  - E) The Agency's recommendation on how the Board should dispose of the petition.
- b) Artificial Cooling Lake Demonstration
- 1) Within 60 days after the owner or operator files the petition, the Agency must make a recommendation to the Board on the petition. The recommendation may include, but is not limited to:
    - A) A description of the Agency's efforts in conducting its review of the petition;
    - B) The Agency's conclusion as to whether the artificial cooling lake receiving the heated effluent will be environmentally acceptable and within the intent of the Act;
    - C) The factual basis for the Agency's conclusion; and
    - D) The Agency's recommendation on how the Board should dispose of the petition.
- c) Sulfur Dioxide Demonstration
- 1) Within 90 days after the filing of the petition the Agency must make a recommendation to the Board as to be proposed site-specific emission limitation. Such recommendation may include, but is not limited to, the following:
    - A) A description of the efforts made by the Agency in conducting its review;
    - B) The Agency's conclusion as to whether the proposed site-specific emission limitation is adequate to prevent violations of the Primary and Secondary Sulfur Dioxide Ambient Air Quality Standards; and

- C) The Agency's conclusion as to what disposition should be made of the petition.

#### Section 106.210 Burden of Proof

The burden of proof will be on the petitioner.

### SUBPART C: WATER WELL SETBACK EXCEPTION PROCEDURES

#### Section 106.300 General

- a) **Description.** This Subpart applies to any *owner of a new potential route, a new potential primary source other than landfilling or land treating, or new potential secondary source* who files a petition for an exception from the setback requirements of Sections 14.2 and 14.3(e) of the Act pursuant to Section 14.2(c) of the Act and this Subpart. [415 ILCS 5/14.2(c)]
- b) **Parties.** The owner filing the petition for an exception must be named the petitioner and the Agency must be named the respondent. Affected well owners who are not petitioners also must be named respondents.
- c) **Filing and service.** The filing and service requirements of 35 Ill. Adm. Code 101.Subpart C will apply to the proceedings of this Subpart.

#### Section 106.302 Initiation of Proceeding

- a) The petitioner must file the petition for exception with the Clerk of the Board, and must serve one copy upon the Agency.
- b) The petitioner must notify and provide a copy of the petition to the owners of each potable water supply for which the setback requirements would be affected by the exception.

#### Section 106.304 Petition Content Requirements

The petition must contain the following information:

- a) A written statement, signed by the petitioner or an authorized representative, outlining the scope of the evaluation, the nature of, the reasons for and the basis of the exception, consistent with the burden of proof contained in Section 106.310 of this Part;
- b) The nature of the petitioner's operations and control equipment;

- c) Proof of service on owners required to be notified and provided with a copy of the petition as required by Section 106.302(b) of this Part, 35 Ill. Adm. Code 101, and Section 14.2(c) of the Act; and
- d) Any other information which may be required by Section 14.2 of the Act.

#### Section 106.306 Response and Reply

- a) Within 21 days after the filing of a petition, the Agency and any owner required to be notified may file a response to any petition in which it has not joined as co-petitioner. The response must include the comments concerning potential Board action on the petition.
- b) The petitioner may file a reply within 14 days after the service of any response.

#### Section 106.308 Hearing

The Board will hold at least one public hearing in an exception proceeding. The hearing officer will schedule the hearing. The Clerk will give notice of hearing in accordance with 35 Ill. Adm. Code 101. The proceedings will be in accordance with 35 Ill. Adm. Code 101.Subpart F.

#### Section 106.310 Burden of Proof

The burden of proof is on the petitioner. The petitioner must demonstrate that:

- a) Compliance with the setback requirements of Section 14.2 or 14.3(e) of the Act would pose an arbitrary and unreasonable hardship;
- b) The petitioner will utilize the best available control technology economically achievable to minimize the likelihood of contamination of the potable water supply well;
- c) The maximum feasible alternative setback will be utilized; and
- d) The location of such potential route will not constitute a significant hazard to the potable water supply well.

### SUBPART D: REVOCATION AND REOPENING OF CLEAN AIR ACT PERMIT PROGRAM (CAAPP) PERMITS

#### Section 106.400 General

- a) Description. The provisions of this Subpart will apply to:



- 1) Any revocation proceeding initiated by the Agency when it determines that there are grounds to revoke and reissue a Clean Air Act Permit Program (CAAPP) permit for cause, pursuant to Section 39.5(15)(b) of the Act; and
  - 2) Any reopening proceeding initiated by the Agency pursuant to a notice that there are grounds to terminate or revoke and reissue a CAAPP permit for cause, pursuant to Section 39.5(16) of the Act.
- b) Parties.
- 1) In a revocation proceeding initiated by the Agency, the Agency will be named as petitioner and the holder of the CAAPP will be named as respondent.
  - 2) In a reopening proceeding initiated by the Agency, the Agency will be named as petitioner and the holder of the CAAPP will be named as respondent.
- c) Filing and service. The filing and service requirements of 35 Ill. Adm. Code 101.Subpart C will apply to the proceedings of this Subpart.

#### Section 106.402 Definitions

The definitions of 35 Ill. Adm. Code 101.Subpart B and Section 39.5 of the Act will apply to this Subpart unless otherwise provided, or unless the context clearly indicates otherwise. If there is a conflict, the definitions of Section 39.5 of the Act will apply.

#### Section 106.404 Initiation of Proceedings

- a) Agency revocation proceeding. The Agency may initiate a revocation proceeding before the Board by serving a petition for revocation upon the respondent and filing the petition with the Board.
- b) USEPA reopening proceeding. If the Agency receives from USEPA a notice to terminate or revoke and reissue a CAAPP permit for cause, the Agency must, within 30 days after receipt of USEPA's notice, serve a petition upon the respondent and file the petition with the Board.

#### Section 106.406 Petition Content Requirements

- a) Agency revocation proceeding. The petition in a revocation proceeding must include:
  - 1) The grounds for the revocation of the CAAPP permit;

- 2) The associated permit record; and
  - 3) Any other information necessary to establish that the CAAPP permit should be revoked.
- b) USEPA reopening proceeding. The petition in a reopening proceeding must include:
- 1) USEPA notice to terminate or revoke and reissue a CAAPP permit for cause that initiated the matter;
  - 2) The associated permit record; and
  - 3) The Agency's proposed determination and the justification for the proposed determination.

#### Section 106.408 Response and Reply

- a) The respondent may file a response to the Agency's petition within 21 days after service of the petition.
- b) The Agency may file a reply within 21 days after filing of any response.

#### Section 106.410 Hearing

The Board will hold at least one public hearing in the county where the CAAPP source is located. The Clerk will give notice of the petition and hearing in accordance with 35 Ill. Adm. Code 101.602. The proceeding must be conducted in accordance with 35 Ill. Adm. Code 101.Subpart F.

#### Section 106.412 Burden of Proof

- a) Agency revocation proceeding. The burden of proof will be on the Agency to establish that the permit should be revoked under the standards set forth in this Act and the Clean Air Act.
- b) USEPA reopening proceeding. The burden of proof will be on the Agency.

#### Section 106.414 Opinion and Order

- a) Agency revocation proceeding:

- 1) The Board will issue a written opinion and order within 120 days after the filing of the petition that sets forth the Board's decision and supporting rationale.
  - 2) If the Board determines that the permit should be revoked and reissued, its final order will direct the Agency to revoke and reissue the CAAPP permit consistent with Section 39.5 of the Act.
- b) USEPA reopening proceeding:
- 1) *After due consideration of the written and oral statements, the testimony and arguments that shall be submitted at hearing, the Board shall issue and enter an interim order for the proposed determination within 120 days after the filing of the petition, which shall set forth all changes, if any, required in the Agency's proposed determination. The interim order shall comply with requirements for final order as set forth in Section 33 of this Act. Issuance of an interim order by the Board under this [subsection (b)], however, shall not affect the permit status and does not constitute a final action for purposes of this Act or the Administrative Review Law. [415 ILCS 5/39.5(16)(b)(ii)]*
  - 2) *The Board shall cause a copy of its interim order to be served upon all parties to the proceeding as well as upon USEPA. The Agency shall submit the proposed determination to USEPA in accordance with the Board's interim order within 180 days after receipt of the notification from USEPA. [415 ILCS 5/39.5(16)(b)(iii)]*

#### Section 106.416 USEPA Review of Proposed Determination

- a) If USEPA does not object to the proposed determination within 90 days after receipt, the Board will, within 7 days after receipt of USEPA's final approval or within 21 days after expiration of the 90-day period, whichever is earlier, enter the interim order as a final order. The final order may be appealed as provided by Title XI of the Act. The Agency must take final action in accordance with the Board's final order.
- b) USEPA Objection.
  - 1) If USEPA objects to the proposed determination within 90 days after receipt, *the Agency shall submit USEPA's objection and the Agency's comments and recommendation on the objection to the Board and permittee upon receipt of the objection. Within 15 days after receipt of USEPA's objection, the Agency must submit the Agency's comments and recommendation on the objection to the Board and permittee. [415 ILCS 5/39.5(16)(c)(ii)]*

- 2) *The Board shall review its interim order in response to USEPA's objection and the Agency's comments and recommendation and issue a final order in accordance with Sections 32 and 33 of this Act within 60 days after receipt of the Agency's comments and recommendation on USEPA's objection. The Agency shall, within 90 days after receipt of such objection, respond to USEPA's objection in accordance with the Board's final order. [415 ILCS 5/39.5(16)(c)(ii)]*

#### SUBPART E: MAXIMUM ACHIEVABLE CONTROL TECHNOLOGY DETERMINATIONS

##### Section 106.500 General

- a) **Description.** The provisions of this Subpart will apply to any proceeding initiated by an owner or operator of a CAAPP source pursuant to Section 39.5(19)(a) or (e) of the Act challenging the Agency's determination not to utilize the hazardous air pollutant emission limitation proposed by the CAAPP source or the hazardous air pollutant limitation for a case-by-case maximum achievable control technology (MACT) proposed by the CAAPP source.
- b) **Parties.** The owner or operator of the CAAPP source who initiates the proceeding must be named as petitioner and the Agency must be named as respondent.
- c) **Filing and service.** The filing and service requirements of 35 Ill. Adm. Code 101.Subpart C will apply to the proceedings of this Subpart.

##### Section 106.502 Definitions

The definitions of 35 Ill. Adm. Code 101.Subpart B and Section 39.5 of the Act will apply to this Subpart unless otherwise provided, or unless the context clearly indicates otherwise. If there is a conflict, the definitions of 39.5 of the Act will apply.

##### Section 106.504 Initiation of Proceedings

The owner or operator of a CAAPP source may initiate a proceeding before the Board by serving a petition upon the Agency and filing with the Clerk of the Board.

##### Section 106.506 Petition Content Requirements

A petition filed pursuant to Sections 39.5(19)(a) and (e) of the must include:

- a) A detailed description of and justification for the emission limitation that is being proposed for the source and an explanation of how such emission limitation

provides for the level of control required under Section 112 of the CAA (42 USC 7412);

- b) A petition filed pursuant to Section 39.5(19)(a) of the Act must also include justification for the Board to determine whether the emission limitation proposed by the owner or operator of the CAAPP source provides for the emission limitation equivalent to the emission limitation that would apply to the source if USEPA had promulgated the applicable emission standard pursuant to Section 112(d) of the CAA (42 USC 7412(d)) in a timely manner; and
- c) The Agency's notification of its refusal to adopt the CAAPP source's proposed emission limitation or the CAAPP source's MACT determination.

#### Section 106.508 Response and Reply

- a) The Agency may file a response to the petition of the owner or operator within 21 days after service of the petition.
- b) The owner or operator may file a reply within 21 days after the filing of any response.

#### Section 106.510 Hearing

The Board will hold at least one public hearing in the county where the CAAPP source is located. The Clerk of the Board will give notice of the petition and any hearing in accordance with 35 Ill. Adm. Code 101.602. The proceeding will be conducted in accordance with 35 Ill. Adm. Code 101.Subpart F.

#### Section 106.512 Burden of Proof

The burden of proof will be on the petitioner to demonstrate that the emission limitation provides for the level of control required under Section 112 of the Clean Air Act.

#### Section 106.514 Board Action

*The Board shall determine whether the emission limitation proposed by the owner or operator or an alternative emission limitation proposed by the Agency provides for the level of control required under Section 112 of the Clean Air Act, or shall otherwise establish an appropriate emission limitation, pursuant to Section 112 of the Clean Air Act. [415 ILCS 5/39.5(19)(a) and (e)]*

### SUBPART F: CULPABILITY DETERMINATIONS FOR PARTICULATE MATTER LESS THAN OR EQUAL TO 10 MICRONS (PM-10)

#### Section 106.600 General

- a) Description. The provisions of this Subpart will apply to any appeal initiated under 35 Ill. Adm. Code 212.702 by an owner or operator of a source pursuant to a finding of culpability for an exceedance of the 24-hour ambient air quality standard for particulate matter less than or equal to ten (10) microns (PM-10) at 35 Ill. Adm. Code 243.120 by the Agency.
- b) Parties. The owner or operator of a source who initiated the proceeding will be named as the petitioner and the Agency will be named as respondent.
- c) Filing and service. The filing and service requirements of 35 Ill. Adm. Code 101.Subpart C will apply to the proceedings of this Subpart.

#### Section 106.602 Initiation of Proceedings

The owner or operator of a source may initiate a proceeding before the Board by serving a petition for review of the Agency culpability determination and filing with the Clerk of the Board.

#### Section 106.604 Petition Content Requirements

A petition for review filed pursuant to this Subpart must include, but need not be limited to:

- a) A copy of the letter, or other written communication, setting forth the Agency's finding of culpability;
- b) A clear identification of the county in which the source is located; and
- c) A detailed description of, and justification for, the source's position that the Agency's finding of culpability is incorrect.

#### Section 106.606 Response and Reply

- a) The Agency must file a response to a petition appealing a determination of culpability within 21 days after service of the petition.
- b) The Agency's response must contain, at a minimum, the basis of its determination of the petitioner's culpability, including any meteorological, monitoring, or sampling data upon which the determination was made.
- c) The petitioner may file a reply within 7 days after the service of any response by the Agency.

#### Section 106.608 Hearing

- a) Within 14 days after a petition is filed, the Agency must publish notice of such petition in a newspaper of general circulation in the county in which the source is located. Within 30 days after the filing of the petition, any person may file with the Clerk of the Board a request for hearing on the petition.
- b) The hearing officer will schedule any hearing. The Clerk of the Board must give notice of the hearing in accordance with 35 Ill. Adm. Code 101.602. The proceeding will be conducted in accordance with 35 Ill. Adm. Code 101.Subpart F.

#### Section 106.610 Burden of Proof

The burden of proof will be on the petitioner to demonstrate that the Agency's determination of culpability is incorrect.

### SUBPART G: INVOLUNTARY TERMINATION OF ENVIRONMENTAL MANAGEMENT SYSTEM AGREEMENTS (EMSAs)

#### Section 106.700 Purpose

The purpose of this Subpart is to set forth the criteria and procedures under which the Board or the Agency may terminate an EMSA, as defined in 35 Ill. Adm. Code 101.202.

#### Section 106.702 Applicability

- a) When the Agency terminates an EMSA under Section 52.3 4(b) of the Act, only Section 106.704 of this Subpart applies.
- b) This Subpart, except for Section 106.704, applies to proceedings in which the Board will determine whether to terminate an EMSA.

#### Section 106.704 Termination Under Section 52.3-4(b) of the Act

- a) To terminate an EMSA under Section 52.3-4(b) of the Act, the Agency must determine that the sponsor's performance under the EMSA has failed to:
  - 1) *Achieve emissions reductions or reductions in discharges of wastes beyond the otherwise applicable statutory and regulatory requirements through pollution prevention or other suitable means; or*
  - 2) *Achieve real environmental risk reduction or foster environmental compliance by other persons regulated under this Act in a manner that is clearly superior to the existing regulatory system. [415 ILCS 5/52.3-1(b)]*
- b) If the Agency terminates an EMSA under Section 52.3-4(b) of the Act, the sponsor

may file an appeal with the Board. Appeals to the Board will be pursuant to 35 Ill. Adm. Code 105 Subparts A and B.

#### Section 106.706 Who May Initiate, Parties

- a) Only the Agency may commence a proceeding to terminate an EMSA under this Subpart.
- b) The Agency must be designated the complainant. The sponsor must be designated the respondent.
- c) Misnomer of a party is not a ground for a dismissal; the name of any party may be corrected at any time.

#### Section 106.707 Notice, Statement of Deficiency, Answer

- a) A proceeding to terminate an EMSA will be commenced when the Agency serves a notice of filing and a statement of deficiency upon the respondent and files 1 original plus 9 copies of the notice of filing and statement of deficiency with the Clerk.
- b) The statement of deficiency must contain:
  - 1) The stated basis for the respondent's alleged deficient performance under Section 106.612(a) of this Subpart;
  - 2) The dates, location, nature, extent and duration of any act or omission, and amount and other characteristics of any discharges or emissions, alleged to violate provisions of the Act or regulations that apply to the pilot project that the EMSA does not address;
  - 3) The dates, location, nature, extent and duration of any act or omission, and amount and other characteristics of any discharges or emissions, alleged to violate the EMSA; and
  - 4) With respect to subsections (b)(1) through (b)(3) of this Section, the statement of deficiency must contain sufficient detail to advise the respondent of the extent and nature of the alleged violations to reasonably allow the respondent to prepare a defense.
- c) The respondent must file an answer within 15 days after receipt of the statement of deficiency, unless the Board or the hearing officer extends the 15-day period for good cause. All material allegations of the statement of deficiency will be taken as admitted if not specifically denied by the answer, or if no answer is filed. Any facts that constitute an affirmative defense that would be likely to



surprise the complainant must be plainly set forth in the answer before hearing.

#### Section 106.708 Service

- a) The Agency must serve a copy of the notice of filing and statement of deficiency either personally on the respondent or the respondent's authorized agent, or by registered or certified mail with return receipt signed by the respondent or the respondent's authorized agent. Proof must be made by affidavit of the person who makes personal service, or by properly executed registered or certified mail receipt. The Agency must file proof of service of the notice of filing and statement of deficiency with the Clerk immediately upon completion of service.
- b) The Agency and the respondent must serve all motions and all other notices personally, by First Class United States mail, with sufficient postage, or by overnight delivery by a nationally recognized courier service. The Agency and the respondent must file an original and 9 copies of the motions and notices with the Clerk with proof of service.
- c) Service is presumed complete upon personal service, four days after deposit in the United States First Class mail, with sufficient postage, or the next business day upon deposit with a nationally recognized courier service for overnight delivery.

#### Section 106.710 Notice of Hearing

- a) The Clerk will assign a docket number to each statement of deficiency filed. Any hearing will be held not later than 60 days after the respondent files the answer, subject to any extensions ordered under subsection (c) of this Section.
- b) The Chairman of the Board will designate a hearing officer and the Clerk will notify the parties of the designation. The hearing officer may be a Member of the Board if otherwise qualified.
- c) The hearing officer, after reasonable efforts to consult with the parties, will set a time and place for hearing. The Board or the hearing officer may extend the time for hearing if all parties agree or there are extreme and unanticipated or uncontrollable circumstances that warrant a delay. The Board or the hearing officer may delay the hearing more than once. In each event, the Board or the hearing officer will not delay the hearing for more than 30 days.
- d) The hearing will be held in the county in which the pilot project is located, or in another county that the hearing officer designates for cause.
- e) The hearing officer or the Clerk will give notice of the hearing, at least 30 days before the hearing, to the parties under Section 106.708(b) of this Subpart, and

to the public by public advertisement in a newspaper of general circulation in the county in which the pilot project is located.

- f) The Agency must give notice of each statement of deficiency and hearing under Section 106.708(b) of this Part at least 10 days before the hearing to:
- 1) All stakeholders named or listed in the EMSA; and
  - 2) Any person who submitted written comments on the respondent's EMSA or participated in the public hearing on the respondent's EMSA by signing an attendance sheet or signature card under the procedures set forth in 35 Ill. Adm. Code 187.404, if less than 100 persons attended the public hearing on the respondent's EMSA as indicated by signatures on the attendance sheet or signature cards.
- g) Failure to comply with this Section is not a defense to an involuntary termination proceeding under this Subpart, but the hearing officer may postpone the hearing upon the motion of any person prejudiced by a failure to comply with this Section.

#### Section 106.712 Deficient Performance

- a) For purposes of this Subpart, a respondent's performance under its EMSA is deficient if the Agency asserts and the Board finds that any of the following conditions exist:
- 1) The respondent misrepresented the factual basis for entering into the EMSA.
  - 2) The respondent failed to provide access to the pilot project for the Agency to monitor compliance with an EMSA.
  - 3) The respondent falsified any monitoring data, recordkeeping information or reports regarding the pilot project.
  - 4) The respondent or the owner or operator of the pilot project failed to comply with any requirement of any federal or local environmental law or regulation that applies to the pilot project and that the EMSA does not address, and for which a citizen's complaint has been filed with a court of competent jurisdiction or the appropriate authority has sent a notice of violation, complaint or other notice of failure to comply to the respondent or the owner or operator of the pilot project.
  - 5) The respondent or the owner or operator of the pilot project failed to

comply with any requirement of any State environmental law or regulation that applies to the pilot project and that the EMSA does not address, and for which a citizen's complaint has been filed with the Board or the Agency has mailed a notice of violation to the respondent or the owner or operator of the pilot project under Section 31(a) or (b) of the Act.

- 6) The respondent failed to comply with its EMSA, subject to any grace or cure periods or rights contained in the EMSA.
- b) Any Board finding of deficient performance under subsection (a)(4) or (a)(5) of this Section will not be binding for any purpose or in any other proceeding under the Act, other than under this Subpart.

#### Section 106.714 Board Decision

- a) The Board will prepare a written opinion and order for all final determinations that will include findings of fact (with specific page references to principal supporting items of evidence in the record) and conclusions of law (supported by adequate reasoning) on all material issues.
- b) The Board will render its decision as expeditiously as practicable. The Board will render a decision as an order that:
  - 1) Terminates the EMSA;
  - 2) Defers termination for a specified time, not to exceed 90 days from the date of the order, during which the respondent may rectify the deficient performance; or
  - 3) Rejects termination of the EMSA.
- c) The Board may extend the time period under subsection (b)(2) of this Section for good cause.
- d) The Board may order any or all of the following:
  - 1) Direct the respondent to cease and desist from violating the Act, the Board's regulations, or the EMSA;
  - 2) Require the respondent to provide performance assurance compensation in appropriate amounts;
  - 3) Require the respondent to post a sufficient performance bond or other security to assure that the respondent corrects the violation within the time

that the Board prescribes;

- 4) Enforce any remedy provision of the EMSA; and
  - 5) Order other relief as appropriate.
- e) The Clerk will publish the order and opinion with the vote of each Board Member recorded and will notify the parties required to be notified of the hearing from which the order arose of the order and opinion.

#### Section 106.716 Burden of Proof

The Agency has the burden to prove, by a preponderance of the evidence, that there has been deficient performance under the EMSA, as set forth in Section 106.712(a) of this Subpart.

#### Section 106.718 Motions, Responses

- a) All motions before a hearing must be presented to the hearing officer at least 10 days before the date of the hearing.
- b) The complainant's motion to voluntarily dismiss an action as to any or all claims must be directed to the Board and may be made orally upon the hearing record, or may be made in writing at any time before the Board issues its decision.
- c) All motions must be served on all parties, including the Agency and its representative and the hearing officer, with proof of service.
- d) Unless made orally on the record during a hearing or unless the hearing officer directs otherwise, a motion must be in writing, must state the reasons for and grounds upon which the motion is made, and may be accompanied by any affidavits or other evidence relied on and, when appropriate, by a proposed order.
- e) Within 7 days after a written motion is served, or another period that the Board or hearing officer may prescribe, a party may file a response to the motion, accompanied by affidavits or other evidence. If no response is filed, the parties will be deemed to have waived objection to the motion, but the waiver of objection does not bind the Board. The moving party does not have the right to reply, except as the hearing officer or the Board permits.
- f) No oral argument will be heard on a motion before the Board unless the Board directs otherwise. A written brief may be filed with a motion or an answer to a motion.
- g) The hearing officer may rule upon all motions, except that the hearing officer has

no authority to dismiss, or rule upon a motion to dismiss or decide a proceeding on the merits, or for failure to state a claim, or for want of jurisdiction, or to strike any claim or defense for insufficiency or want of proof.

- h) No interlocutory appeal of a motion may be taken to the Board from a ruling of the hearing officer.
- i) After the hearing, the Board may review the hearing officer's rulings. The Board will set aside the hearing officer's ruling only to avoid material prejudice to the rights of a party. The hearing officer, if a member of the Board, may vote upon motions to review his or her rulings as hearing officer.
- j) Unless the Board orders or this Subpart provides otherwise, the filing of a motion will not stay the proceeding or extend the time to perform any act.

#### Section 106.720 Intervention

- a) Upon timely written motion and subject to the need to conduct an orderly and expeditious hearing, the Board will permit a person to intervene in an involuntary termination proceeding under this Subpart if the person submitted written comments on the respondent's EMSA or participated in the public hearing on the respondent's EMSA by signing an attendance sheet or signature card at hearing under the procedures set forth in 35 Ill. Adm. Code 187.404, or is named or listed in the respondent's EMSA as a stakeholder, and if the Board's final order may adversely affect the person.
- b) The movant must file an original and 9 copies of a motion to intervene with the Board and serve a copy on each party not later than 48 hours before the hearing. The Board may permit a person to intervene at any time before the beginning of the hearing when that person shows good cause for the delay.
- c) An intervenor has all the rights of an original party, except that the Board may limit the rights of the intervenor in accordance with 35 Ill. Adm. Code 101.402.

#### Section 106.722 Continuances

The hearing officer will grant a motion to continue an involuntary termination proceeding under this Subpart when justice requires. All motions to continue must be supported by an affidavit or written motion before the hearing officer by the person or persons with knowledge of the facts that support the motion. However, if the Board determines that any involuntary termination proceeding under this Subpart is not proceeding expeditiously, the Board may order actions that it deems appropriate to expedite the proceeding.

#### Section 106.724 Discovery, Admissions

- a) Discovery, except requests to produce documents, admit facts and state the identity and location of persons with knowledge of facts, as set forth in subsection (b) of this Section, is not permitted unless the hearing officer orders otherwise.
- b) Regarding any matter not privileged, the hearing officer may order a party to produce documents and to state the identity and location of persons with knowledge of facts upon the written request of any party when parties cannot agree on the legitimate scope of the requests. It is not a ground for objection that the documents will be inadmissible at hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence or is relevant to the subject matter involved in the pending proceeding.
- c) The hearing officer may order a party:
  - 1) To state the identity and location of persons with knowledge of relevant facts.
  - 2) To produce evidence that a party controls or possesses so that it may be inspected, copied or duplicated. The order may grant the right to reasonably inspect the pilot project.
- d) The hearing officer may at any time on his or her own initiative, or on motion of any party or witness, make a protective order as justice requires. The protective order may deny, limit, condition or regulate discovery to prevent unreasonable delay, expense, harassment, or oppression, or to protect non-disclosable materials from disclosure consistent with Sections 7 and 7.1 of the Act and 35 Ill. Adm. Code 130.
- e) All objections to rulings of the hearing officer must be made in the record.
- f) Sections 106.718(d), (e), (f), (g), (h), (i) and (j) of this Subpart apply regarding procedures to rule on objections.
- g) Failure to comply with any ruling will subject the person to sanctions under 35 Ill. Adm. Code 101, Subpart H.
- h) A party may serve on any other party, no sooner than 15 days after the Agency files the statement of deficiency, a written request that the latter admit the truth of any specified relevant fact set forth in the request.
- i) A party may serve on any other party, no sooner than 15 days after the Agency files the statement of deficiency, a written request to admit to the genuineness of any relevant documents described in the request. Copies of the document must be served with the request unless copies have already been furnished.

- j) Each of the matters of fact and the genuineness of each document of which admission is requested is admitted unless, within 15 days after service under subsection (h) or (i) of this Section, the party to whom the request is directed serves upon the party requesting the admission either a sworn statement that denies specifically the matters on which the admission is requested or that sets forth in detail the reasons why the party cannot truthfully admit or deny those matters or written objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper in whole or in part. If a party objects in writing to a part of the request, the remainder of the request must be answered within the period designated in the request. A denial must fairly meet the substance of the requested admission. If good faith requires that a party deny only a part, or requires qualification, of a matter of which an admission is requested, the party must specify so much of it as is true and deny only the remainder. The hearing officer will hear any objection to a request or to an answer upon prompt notice and motion of the party making the request.
- k) Any admission made under this Section is for the purpose of the pending proceeding only. It does not constitute an admission by the party for any other purpose and may not be used against the party in any other proceeding.
- l) If a party, after being served with a request to admit the genuineness of any documents or the truth of any matters of fact, serves a sworn denial in response to the request, and if the party requesting the admissions later proves the genuineness of the document or the truth of the matter of fact, the latter party may apply to the Board for an order under 35 Ill. Adm. Code 101.Subpart H for payment of reasonable expenses incurred.

#### Section 106.726 Subpoenas

- a) Upon any party's timely motion to the Board, or on motion of the hearing officer or the Board, the hearing officer or the Board may issue a subpoena to attend a hearing. The subpoena may include a command to produce evidence reasonably necessary to resolve the matter under consideration, subject to this Subpart's limitations on discovery. A copy of the subpoena must be served upon the Clerk. If the witness, other than a respondent or owner or operator of a pilot project, is a non-resident of the State, the order may provide terms and conditions regarding his or her appearance at the hearing that are just, including payment of his or her reasonable expenses.
- b) Every subpoena must state the title of the proceeding and command each person to whom it is directed to attend and give testimony at the time and place specified.

- c) The hearing officer or the Board, upon motion made promptly and in any event at or before the time specified for compliance with the subpoena, may quash or modify the subpoena if it is unreasonable and oppressive.
- d) Failure of any witness to comply with a Board subpoena will subject the witness to sanctions under 35 Ill. Adm. Code 101.Subpart H.

#### Section 106.728 Settlement Procedure

- a) All parties to any proceeding in which a settlement or compromise is proposed must file with the Clerk before the time of the scheduled hearing a written statement, signed by the parties or their authorized representatives, that outlines the nature of, the reasons for, and the purpose to be accomplished by, the settlement. The statement must contain:
  - 1) A full stipulation of all material facts that pertain 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 from the failure to comply;
  - 4) Details about future plans for compliance, including a description of additional control measures and the dates on which they will be implemented; and
  - 5) The proposed performance assurance payment, if any.
- b) If an agreed settlement is filed under this Section, the Board may dismiss the proceeding without holding a hearing.

#### Section 106.730 Authority of Hearing Officer, Board Members, and Board Assistants

- a) The hearing officer has the duty to conduct a fair hearing, to take all necessary action to avoid delay, to maintain order, and to ensure development of a clear and complete record. The hearing officer has all powers necessary to these ends including the authority to:
  - 1) Issue discovery orders;
  - 2) Rule upon objections to discovery orders;
  - 3) Make protective orders as justice requires, which may deny, limit condition or regulate discovery to prevent unreasonable delay, expense,



harassment, or oppression, or to protect materials from disclosure by the party who obtains the materials;

- 4) Administer oaths and affirmations;
  - 5) Rule upon offers of proof, receive evidence and rule upon objections to introducing evidence, subject to Section 106.732(b) of this Subpart;
  - 6) Regulate the course of the hearings and the conduct of the parties and their counsel;
  - 7) Examine witnesses solely to clarify the record of the hearing. When any party is not represented by counsel, the hearing officer may examine and cross-examine any witness to insure a clear and complete record. However, the hearing officer may not exclude exhibits or other testimony because of the examination unless all parties agree; and
  - 8) Except as otherwise provided, consider and rule as justice may require upon motions appropriate to an adjudicative proceeding.
- b) Any Board Member or assistant to a Board Member present at the hearing may advise the hearing officer and may interrogate witnesses but does not have the authority to rule on objections or motions or to overrule the hearing officer during the hearing.

#### Section 106.732 Order and Conduct of Hearing

- a) The following will be the order of all involuntary termination hearings under this Subpart, unless modified by the hearing officer for good cause:
  - 1) Present, argue and dispose of preliminary motions on the matters that the statement of deficiency raises;
  - 2) Present opening statements;
  - 3) Complainant's case in chief;
  - 4) Respondent's case in chief;
  - 5) Complainant's case in rebuttal;
  - 6) Statements from interested citizens, as the hearing officer authorizes;
  - 7) Complainant's opening argument, which may include legal argument;

- 8) Respondent's closing argument, which may include legal argument;
  - 9) Complainant's closing argument, which may include legal argument;
  - 10) Present and argue all motions before submitting the transcript to the Board; and
  - 11) A schedule to submit briefs to the Board.
- b) All hearings under this Subpart will be public, and any person not a party and not otherwise a witness for a party may submit written statements relevant to the subject matter of the hearing. Any party may cross-examine any person who submits a statement. If the person is not available to be cross-examined upon timely request, the written statement may be stricken from the record. The hearing officer will permit any person to offer reasonable oral testimony whether or not a party to the proceedings.
  - c) All witnesses will be sworn.
  - d) At the conclusion of the hearing, the hearing officer will make a statement about the credibility of witnesses. This statement will be based upon the hearing officer's legal judgment and experience and will indicate whether he or she finds credibility to be at issue in the proceeding and if so, the reasons why. This statement will become a part of the official record and will be transmitted by the hearing officer to each of the parties. No other statement will be made or be appropriate unless the Board orders otherwise.

#### Section 106.734 Evidentiary Matters

The provisions of 35 Ill. Adm. Code 101 regarding admissible evidence, written narrative testimony, official notice, viewing premises, admitting business records, examining adverse parties or agents and hostile witnesses and compelling them to appear at hearing, and amendment and variance of pleadings and proof will apply to proceedings under this Subpart.

#### Section 106.736 Post-Hearing Procedures

The provisions of 35 Ill. Adm. Code 101 regarding default, transcripts, the record, briefs and oral arguments will apply to proceedings under this Subpart.

#### Section 106.738 Motion After Entry of Final Order

Within 35 days after the Board adopts a final order, any party may file a motion to rehear, modify or vacate the order or for other relief. Response to the motion must be filed within 14 days after the motion is filed. A motion filed within 35 days stays enforcement of the final order.

### Section 106.740 Relief from Final Orders

- a) The Board may at any time correct errors in orders or other parts of the record that arise from oversight or omission or clerical mistakes. The Board may do so on its own initiative or on the motion of any party and after notice, if any, as the Board orders. During the pendency of an appeal, the Board may correct the mistakes before the appeal is docketed in the appellate court. While the appeal is pending, the Board may correct the mistakes with leave of the appellate court.
- b) On motion and upon terms that are just, the Board may relieve a party or a party's legal representative from a final order, for the following:
  - 1) Newly discovered evidence that by due diligence could not have been discovered in time under Section 106.714 of this Subpart;
  - 2) Fraud (whether previously denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; or
  - 3) Void order.
- 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 Board entered the order but the motion 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 must be notified under Section 106.708(b) of this Subpart.
- d) This motion must be filed with the Board within 60 days after entry of the order.

TITLE 35: ENVIRONMENTAL PROTECTION  
 SUBTITLE A: GENERAL PROVISIONS  
 CHAPTER 1: POLLUTION CONTROL BOARD

PART 107

PETITION TO REVIEW POLLUTION CONTROL FACILITY SITING DECISIONS

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**AUTHORITY:** Authorized by Sections 26 and 27 of the Environmental Protection Act (Act) [415 ILCS 5/26 and 27] and Implementing Sections 39.2, and 40.1 of the Act [415 ILCS 5/39.2 and 40.1].

**SOURCE:** Filed with Secretary of State January 1, 1978; amended at 4 Ill. Reg. 2, p. 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 13 Ill. Reg. 12094, effective July 10, 1989; amended in R88-5(B) at 14 Ill. Reg. 9442, effective June 5, 1990; amended in R93-24 at 18 Ill. Reg. 4230, effective March 8, 1994; amended in R93-30 at 18 Ill. Reg. 11579, effective July 11, 1994; amended in R99-9 at 23 Ill. Reg. 2697, effective February 16, 1999; old part repealed, new Part adopted in R00-20 at 24 Ill. Reg. , effective .

## SUBPART A: GENERAL PROVISIONS

### Section 107.100 Applicability

- a) This Part applies to adjudicatory proceedings before the Board concerning petitions to review a pollution control facility siting decision made by local government pursuant to Sections 39.2 and 40.1 of the Act.
- b) This Part must be read in conjunction with 35 Ill. Adm. Code 101, which contains procedures generally applicable to all of the Board's adjudicatory 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 107.102 Severability

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

### Section 107.104 Definitions

For purposes of this Part, words and terms will have the meaning as defined in 35 Ill. Adm. Code 101.Subpart B unless otherwise provided, or unless the context clearly indicates otherwise.

## Section 107.106 Description

Pursuant to Section 39(c) of the Act, any new pollution control facility, prior to receiving a permit from the Agency to construct and operate, must first receive siting approval from the *County Board of the county if in an unincorporated area, or the governing body of the municipality when in an incorporated area, in which the facility is to be located.* [415 ILCS 5/39(c)] Such siting approval can only be given pursuant to Section 39.2 of the Act and only after the local unit of government conducts a public hearing that comports with the requirements of Section 39.2(d) and with general standards of fundamental fairness. Pursuant to Section 40.1 of the Act, a decision of local government to site or deny siting of a new pollution control facility is reviewable by the Board. The decision of the Board is appealable to the Illinois appellate court.

### SUBPART B: PETITION FOR REVIEW

## Section 107.200 Who May File Petition

The following persons may file a petition for review of a decision concerning siting of a new pollution control facility pursuant to Section 40.1 of the Act:

- a) Siting applicants. Any person who has properly applied to one or more units of local government, pursuant to Section 39.2 of the Act, for siting approval of a new pollution control facility and has been denied siting approval under Section 39.2 of the Act, may file a petition for review of the decision to deny siting. The siting applicant may also appeal conditions imposed in a decision granting siting approval.
- b) Other persons. Any person who has participated in the public hearing conducted by the unit of local government and is so located as to be affected by the proposed facility may file a petition for review of the decision to grant siting. Associations that file a petition before the Board must be represented by an attorney in accordance with 35 Ill. Adm. Code 101.400.

## Section 107.202 Parties

- a) In a petition to review a local government's decision concerning a new pollution control facility, the following are parties to the proceeding:
  - 1) The petitioner or petitioners are the persons described in Section 107.200 of this Part. If there is more than one petitioner, they must be referred to as co-petitioners; and
  - 2) The unit(s) of local government whose decision is being reviewed must be named the respondent(s). In an appeal pursuant to Section 107.200(b), the siting applicant must also be named as a respondent.

- b) Where the interests of the public would be served, the Board or hearing officer may allow intervention by the Attorney General or the State's Attorney of the county in which the facility will be located.

#### Section 107.204 Time For Filing Petition

A petition for review must be filed within 35 days after the local siting authority's action to approve or disapprove siting. Action means the local government's official written decision granting or denying local siting approval. Pursuant to Section 39.2(e) of the Act, action includes failure of the governing body to act within 180 days after receiving request for siting approval.

#### Section 107.206 Filing and Service Requirements

- a) **Filing.** The petition for review must be filed with the Clerk of the Board in accordance with the filing requirements contained in the Board's general procedural rules, found at 35 Ill. Adm. Code 101.Subpart C and Section 107.208 of this Part.
- b) **Service.** The petition for review must be served upon all parties in accordance with the Board's service requirements contained in the Board's general procedural rules, found at 35 Ill. Adm. Code 101.Subpart C.

#### Section 107.208 Petition Content Requirements

In addition to the requirements of 35 Ill. Adm. Code 101.Subpart C the petition must also include:

- a) A copy of the local siting authority's written decision or ordinance;
- b) A statement as to how the filing party is a proper petitioner under Section 107.200 of this Part; and
- c) In accordance with Section 39.2 of the Act, a specification of the grounds for the appeal, including any allegations for fundamental unfairness or any manner in which the decision as to particular criteria is against the manifest weight of the evidence.

### SUBPART C: FILING OF LOCAL RECORD

#### Section 107.300 Record

Pursuant to Sections 39.2 and 40.1 of the Act, the siting authority must compile a complete record of its proceedings.

### Section 107.302 Filing of the Record

The siting authority must file the record of its proceedings with the Board as directed by Board or hearing officer order. Failure to file the entire record on the date directed by the Board or hearing officer may subject the respondent to sanctions as may be ordered by the Board in accordance with 35 Ill. Adm. Code 101.Subpart H.

### Section 107.304 Record Contents

- a) The record must contain all information or evidence presented to the local siting authority or relied upon by the local siting authority during its hearing process including:
  - 1) The siting application;
  - 2) Any and all transcripts of local hearings;
  - 3) All briefs and other arguments and statements of parties and participants;
  - 4) All exhibits relied upon by the local siting authority in making its decision;
  - 5) All written public comments relevant to the local government proceeding;
  - 6) Minutes of all relevant open meetings of the siting authority;
  - 7) Notices of hearing or all relevant meetings of the siting authority;
  - 8) The written decision of the siting authority made pursuant to Section 39.2 of the Act ;
  - 9) Certificate of Record as described in Section 107.308 of this Part; and
  - 10) *If, prior to making a final local siting decision, a county board or governing body of a municipality has negotiated and entered into a host agreement with the local siting applicant, the terms and conditions of the host agreement, whether written or oral, shall be disclosed and made a part of the hearing record for that local siting proceeding. In the case of an oral agreement, the disclosure shall be made in the form of a written summary jointly prepared and submitted by the county board or governing body of the municipality and the siting applicant and shall describe the terms and conditions of the oral agreement. [415 ILCS 5/39.2(e)]*



- b) The record must contain the originals or legible copies of all documents, must be arranged in chronological sequence, and must be sequentially numbered, placing the letter "C" before the number of each page.
- c) Seven copies of the transcript and 1 original and 9 copies of all other documents in the record must be filed with the Board.

#### Section 107.306 Preparing of the Record

Unless petitioner is a citizen or citizen's group, the petitioner must pay the costs of preparing and certifying the record to the Board. If the petitioner is a citizen or citizen's group, *such petitioner shall be exempt from paying the costs of preparing and certifying the record.* [415 ILCS 5/39.2(n)]

#### Section 107.308 Certification of Record

The record filed with the Board must be certified by the county clerk, if the siting authority is a county, or the municipal clerk, if the siting authority is a municipality. The certification must be entitled "Certificate of Record on Appeal." The Certificate must contain an index that lists the documents comprising the record and shows the page number upon which they start and end. The Certificate of Record must be served on all parties.

### SUBPART D: HEARING

#### Section 107.400 General

Hearings and discovery will be conducted in accordance with the provisions set forth in the Board's general procedural rules found at 35 Ill. Adm. Code 101.Subpart F.

#### Section 107.402 Authority and Duties of Hearing Officer

The authority and duties of the hearing officer are set forth in the Board's general procedural rules found at 35 Ill. Adm. Code 101.Subpart F.

#### Section 107.404 Public Participation

Parties to the proceeding will have all rights of examination and cross-examination relevant in any judicial proceeding. Persons who are not parties as set forth in Section 107.202 of this Part are considered participants and will have such hearing participation rights as determined by the hearing officer in accordance with 35 Ill. Adm. Code 101.628. Participants may offer comment at a specifically determined time in the proceeding, but may not examine or cross-examine witnesses for either party. In accordance with this Section and 35 Ill. Adm. Code 101.628, public comment will not be considered testimony unless sworn and subject to cross-examination.

## SUBPART E: BOARD REVIEW AND DECISION

### Section 107.500 Preliminary Board Determination/Set for Hearing

Upon proper filing of the petition, the Board will set the matter for hearing unless it determines that the matter is frivolous or duplicitous as required by Section 40.1(b) of the Act.

### Section 107.502 Dismissal of Petition

- a) The Board on its own motion or motion by any party, may dismiss any petition:
  - 1) Which is untimely filed pursuant to Section 107.204 of this Part;
  - 2) Which fails to name all parties as required by Section 39.2 of the Act;
  - 3) Which fails to include the required fee and all information as required by Section 107.206 of this Part; or
  - 4) Which fails to meet the requirements in 35 Ill. Adm. Code 101.Subpart C.
- b) Upon motion by any unit of local government that is required to prepare and certify its record alleging that any petitioner required to pay costs has failed to pay said costs, the Board may enter a dismissal or other order as allowed by Section 39.2(n) of the Act.

### Section 107.504 Decision Deadline

In accordance with Section 40.1 of the Act only the applicant for siting may waive the decision deadline. Unless the applicant for siting waives the decision deadline in accordance with 35 Ill. Adm. Code 101.308 of the Board's general procedural rules, the Board will issue its decision within 120 days after the proper filing and service of a petition for review.

### Section 107.506 Burden of Proof/Standard of Review

- a) The petitioner bears the burden of proof in accordance with Section 40.1(a) of the Act.
- b) The Board may reverse the siting decision of the local siting authority only:
  - 1) If the decision is against the manifest weight of the evidence presented in the local siting authority's record;

- 2) If the proceeding of the local siting authority did not comport with general standards of fundamental fairness; or
  - 3) If the local siting authority did not have jurisdiction.
- c) Where the Board determines that the hearing of the local siting authority did not comport with general standards of fundamental fairness it may, in its discretion, remand the decision to the siting authority as an alternative to reversal. Any Board order allowing for such remand will clearly set forth the reasons for the remand order and set a time frame for the local siting authority to cure the defect upon remand.

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

PART 108  
 ADMINISTRATIVE CITATIONS

SUBPART A: GENERAL PROVISIONS

Section	
108.100	Applicability
108.102	Severability
108.104	Definitions

SUBPART B: ISSUANCE OF THE CITATION AND PETITION TO CONTEST

Section	
108.200	Administrative Citation Issuance
108.202	Service of Citation/Filing of Citation with the Board
108.204	Filing Requirements for Petition to Contest
108.206	Petition Contents
108.208	AC Recipient's Voluntary Withdrawal

SUBPART C: HEARINGS

Section	
108.300	Authorization of Hearing

SUBPART D: BOARD DECISIONS

Section	
108.400	Standard of Review/Burden of Proof
108.402	Dismissal
108.404	Default
108.406	Non-Contested Citations

SUBPART E: ASSESSMENT OF PENALTIES AND COSTS

Section	
108.500	Assessment of Penalties and Costs
108.502	Claimed Costs of Agency or Delegated Unit
108.504	Board Costs
108.506	Response to Claimed Costs and Reply

**AUTHORITY:** Authorized by Sections 26 and 27 of the Environmental Protection Act (Act) [415 ILCS 5/26 and 27] and implementing Sections 21(o), 21(p), 31.1, and 42(b)(4) of the Act. [415 ILCS 5/21(o), 21(p), 31.1, and 42(b)(4)]

**SOURCE:** Adopted in R00-20 at Ill. Reg. \_\_\_\_\_, effective \_\_\_\_\_.

## SUBPART A: GENERAL PROVISIONS

### Section 108.100 Applicability

- a) This Part applies to proceedings before the Board concerning petitions to contest the issuance of an administrative citation pursuant to Section 31.1 of the Act.
- b) This Part must be read in conjunction with 35 Ill. Adm. Code 101 which contains procedures generally applicable to all of the Board's adjudicatory proceedings. In the event of a conflict between the requirements of 35 Ill. Adm. Code 101 and this Part, the provisions of this Part will apply.

### Section 108.102 Severability

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

### Section 108.104 Definitions

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

## SUBPART B: ISSUANCE OF THE CITATION AND PETITION TO CONTEST

### Section 108.200 Administrative Citation Issuance

An administrative citation (AC) may be issued by either of the following:

- a) Illinois Environmental Protection Agency (Agency). The Agency may issue an AC pursuant to Section 31.1 of the Act.
- b) Delegated Unit of Local Government (Delegated Unit). Pursuant to Section 4(r) of the Act, the Agency may by agreement delegate its AC authority to a unit of local government which may then issue an AC. All Delegated Units must submit to the Clerk of the Board a copy of the delegation agreement annually on or before July 1 of every year.

**Section 108.202 Service of Citation/Filing of Citation with the Board**

- a) In accordance with Section 31.1 of the Act, the Agency or Delegated Unit may serve an AC upon any person (AC Recipient) believed, through direct observation, to have violated subsections (o) or (p) of Section 21 of the Act.
- b) Such AC must be issued and served upon the AC Recipient not more than 60 days after the date of the observed violation and must contain the following information:
  - 1) A statement specifying the provisions of subsection (o) or (p) of Section 21 of the Act that the AC Recipient was observed to be in violation;
  - 2) A copy of the inspection report in which the Agency or Delegated Unit recorded the violation, which report must include the date and time of inspection, and weather conditions prevailing during the inspection;
  - 3) The penalty imposed by Section 42(b)(4) of the Act for such violations;
  - 4) Instructions for contesting the AC findings, including notification that the AC Recipient has 35 days within which to file a petition to contest the AC; and
  - 5) An affidavit by the personnel observing the violation, attesting to their material actions and observations;
- c) As required by Section 31.1 of the Act, the Agency or Delegated Unit must file the AC with the Board no later than 10 days after the date of service upon the AC Recipient.

**Section 108.204 Filing Requirements for Petition to Contest**

- a) **Who May File.** The AC Recipient may file with the Board a petition to contest the AC. The AC Recipient must be named as the respondent and the Agency or Delegated Unit must be named as the complainant in accordance with Section 31.1(d)(2) of the Act.
- b) **Time to File.** The petition to contest must be filed with the Board within 35 days from the date of the service of the AC as required by Section 31.1(d)(1) of the Act.
- c) **Additional Requirements.** Additional filing and service requirements are set forth at 35 Ill. Adm. Code 101.Subpart C.

### Section 108.206 Petition Contents

A formal petition to contest must include:

Any reasons why the AC Recipient believes the AC was improperly issued, including:

- a) The AC Recipient does not own the property;
- b) The AC Recipient did not cause or allow the alleged violations;
- c) The AC was not timely filed or properly served; or
- d) The alleged violation was the result of uncontrollable circumstances.

### Section 108.208 AC Recipient's Voluntary Withdrawal

The AC Recipient may, at any time before entry of the Board decision, withdraw its petition to contest. It must do so in writing or orally on the record at hearing. If an AC Recipient withdraws its petition to contest, the Board will adopt an order in accordance with Section 108.406 of this Part.

## SUBPART C: HEARINGS

### Section 108.300 Authorization of Hearing

- a) The hearing date will be set within 60 days after the filing of the petition to contest unless the hearing officer orders otherwise to prevent material prejudice.
- b) The hearing officer will give the parties at least 21 days written notice of the hearing in accordance with Section 31.1(d) of the Act
- c) The hearing will be held in accordance with 35 Ill. Adm. Code 101.Subpart F.
- d) The hearing will be held at a time and location consistent with the Board's resources as designated by the hearing officer.

## SUBPART D: BOARD DECISIONS

### Section 108.400 Standard of Review/Burden of Proof

- a) The burden of proof is on the Agency or Delegated Unit.
- b) The Board will issue an order finding a violation as alleged in the AC and will impose the penalty as specified in Section 42(b)(4) of the Act if, based on the

record of the proceeding, the alleged violation occurred and the AC Recipient has not shown that the violation was the result of uncontrollable circumstances.

#### Section 108.402 Dismissal

The Board may issue an order dismissing the AC and closing the docket upon its own motion or a motion by the AC Recipient, Agency or Delegated Unit if the AC was not timely and properly served pursuant to Section 31.1 of the Act and Section 108.200 of this Part.

#### Section 108.404 Default

Failure of a party to appear at the hearing, or failure to proceed as ordered by the Board or hearing officer, may constitute default. Upon default the Board will issue an order against the defaulting party.

#### Section 108.406 Non-Contested Citations

The Board will consider the AC non-contested if the AC Recipient does not file a petition to contest, fails to timely file a petition to contest, or withdraws its petition to contest pursuant to Section 108.208. If the AC is non-contested prior to hearing, the Board will adopt a final order in accordance with Section 108.500(a). If the AC Recipient withdraws its petition to contest after the hearing the Board, will adopt a final order in accordance with Section 108.500(c) of this Part.

### SUBPART E: ASSESSMENT OF PENALTIES AND COSTS

#### Section 108.500 Assessment of Penalties and Costs

The Board will assess the penalties and costs in the following manner:

- a) If the AC is non-contested or defaulted as set forth in Sections 108.404 and 108.406 of this Part, the Board will issue an order assessing a \$500 penalty per adjudicated violation against the AC recipient for violations occurring prior to January 1, 2000, and a \$1,500 penalty per adjudicated violation against the AC recipient for violations occurring on or after January 1, 2000.
- b) If the AC Recipient contests the AC and the Board finds based on the record that the violations occurred and that the AC Recipient has not shown that the violation resulted from uncontrollable circumstances, the Board will impose a \$1,500 penalty per adjudicated violation in the AC and associated hearing costs as set forth in Sections 108.502 and 108.504 of this Part against the AC Recipient.
- c) If the AC Recipient contests the AC but voluntarily withdraws the petition for review pursuant to Section 108.208 of this Part after the start of the hearing but



before the Board issues an order, the Board will impose a \$1,500 penalty per adjudicated -violation in the AC and associated hearing costs as set forth in Sections 108.502 and 108.504 of this Part against the AC Recipient.

#### Section 108.502 Claimed Costs of Agency or Delegated Unit

Within 30 days after the close of the hearing or as otherwise directed by the hearing officer, the Agency or Delegated Unit must submit to the Clerk of the Board and serve on all parties an itemized listing of the costs associated with the hearing. Such costs must not include attorney's fees or witness fees for persons employed by the Agency or Delegated Unit.

#### Section 108.504 Board Costs

At the beginning of every fiscal year the Board will place on file a schedule of hearing costs for AC cases. Such schedule will include a per day breakdown of the Board's costs for holding a hearing. A copy will be available at the Board's offices and on the Board's Web site.

#### Section 108.506 Response to Claimed Costs and Reply

- a) The AC Recipient may challenge the claimed costs submitted by the Agency, Delegated Unit, or the Board by filing a response. The response must be filed within 21 days after the service of the claimed costs and must be served on all parties.
- b) The Agency or Delegated Unit may file a reply to the AC Recipient's Response to claimed costs within 14 days after the service of the response.

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

PART 125  
TAX CERTIFICATIONS

SUBPART A: GENERAL PROVISIONS

Section	
125.100	Applicability
125.102	Severability
125.104	Definitions

SUBPART B: TAX CERTIFICATION OF POLLUTION CONTROL FACILITIES AND  
LOW SULFUR DIOXIDE EMISSION COAL FUELED DEVICES

Section	
125.200	General
125.202	Initiation of Tax Certification Proceeding
125.204	Petition Content Requirements
125.206	Dismissal of Petition
125.208	Agency Recommendation and Petitioner Response
125.210	Public Hearing
125.212	Hearing Notice
125.214	Burden of Proof
125.216	Board Action

AUTHORITY: Implementing and authorized by Sections 11-5, 11-10, 11-20, 11-25, 11-30, 11-35, 11-40, 11-50, and 11-55 of the Property Tax Code [35 ILCS 200] and Sections 26 and 27 of the Environmental Protection Act [415 ILCS 5].

SOURCE: Adopted in R00-20 at 24 Ill. Reg. \_\_\_\_\_, effective \_\_\_\_\_.

SUBPART A: GENERAL PROVISIONS

Section 125.100      Applicability

- a) This Part applies to any person seeking, for property tax purposes, a Board certification that a facility or portion thereof is a pollution control facility, as defined in Section 125.200(a)(1) of this Part, or that a device is a low sulfur dioxide emission coal fueled device as defined in Section 125.200(b)(1) of this Part.

- b) This Subpart must be read in conjunction with 35 Ill. Adm. Code 101, which contains procedures generally applicable to all adjudicatory proceedings before the Board. In the event of a conflict between the requirements of 35 Ill. Adm. Code 101 and those of this Subpart, the provisions of this Subpart apply.

#### Section 125.102 Severability

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

#### Section 125.104 Definitions

For the purpose of this Subpart, words and terms will have the meaning as defined in 35 Ill. Adm. Code 101.Subpart B unless otherwise provided, or unless the context clearly indicates otherwise.

### SUBPART B: TAX CERTIFICATION OF POLLUTION CONTROL FACILITIES AND LOW SULFUR DIOXIDE EMISSION COAL FUELED DEVICES

#### Section 125.200 General

- a) **Pollution Control Facilities.** *For tax purposes, pollution control facilities shall be certified as such by the Board.* [35 ILCS 200/11-20]
- 1) “Pollution control facility” means, for purposes of this Part, *any system, method, construction, device or appliance appurtenant thereto, or any portion of any building or equipment, that is designed, constructed, installed or operated for the primary purpose of: eliminating, preventing, or reducing air or water pollution, as the terms “air pollution” and “water pollution” are defined in the Act; or treating, pretreating, modifying or disposing of any potential solid, liquid or gaseous pollutant which if released without treatment, pretreatment, modification or disposal might be harmful, detrimental or offensive to human, plant or animal life, or to property.* This term does not include any of the following:
- A) *Any facility with the primary purpose of eliminating, containing, preventing or reducing radioactive contaminants or energy, or treating waste water produced by the nuclear generation of electric power;*

- B) *A large diameter pipes or piping systems used to remove and disperse heat from water involved in the nuclear generation of electric power;*
  - C) *Any facility operated by any person other than a unit of government, whether within or outside of the territorial boundaries of a unit of local government, for sewage disposal or treatment; or*
  - D) *land underlying a cooling pond. [35 ILCS 200/11-10]*
- 2) *It is the policy of this State that pollution control facilities should be valued, at 33 1/3% of the fair cash value of their economic productivity to their owners. [35 ILCS 200/11-5]*
- b) **Low Sulfur Dioxide Emission Coal Fueled Devices.** *For tax purposes, a low sulfur dioxide emission coal fueled device shall be certified as such by the Board. [35 ILCS 200/11-50]*
- 1) *“Low sulfur dioxide emission coal fueled device” means, for purposes of this Part, any device used or intended for the purpose of burning, combusting or converting locally available coal in a manner which eliminates or significantly reduces the need for additional sulfur abatement that would otherwise be required under State or Federal air emission standards. For purposes of this definition, the word device includes all machinery, equipment, structures and all related apparatus, including coal feeding equipment, of a coal gasification facility designed to convert locally available coal into a low sulfur gaseous fuel and to manage all waste and by-product streams. [35 ILCS 200/11-40]*
  - 2) *It is the policy of this State that the use of low sulfur dioxide emission coal fueled devices should be encouraged as conserving nonrenewable resources, reducing pollution and promoting the use of abundant, high-sulfur, locally available coal as well as promoting the health and well-being of the people of this State, and should be valued at 33 1/3% of their fair cash value. [35 ILCS 200/11-35]*

#### Section 125.202 Initiation of Tax Certification Proceeding

A person may initiate a tax certification proceeding by filing a petition that meets the requirements of Section 125.204 of this Subpart. The petitioner also must serve a copy of the petition on the Agency.

#### Section 125.204 Petition Content Requirements

- a) **Pollution Control Facilities.** The following information must be contained in a petition for a Board certification that a facility or portion thereof is a pollution control facility:
- 1) A detailed description of the nature of petitioner's activities at the location of the facility or portion thereof for which the petitioner seeks a tax certification;
  - 2) A detailed description of the facility or portion thereof for which the petitioner seeks a tax certification;
  - 3) A detailed description of the primary purpose for which the facility or portion thereof is designed, constructed, installed or operated;
  - 4) A statement requesting or waiving a hearing on the petition;
  - 5) Citation to supporting documents or legal authorities whenever such are used as a basis for the petition (relevant portions of such documents and legal authorities other than Board decisions, reported state and federal court decisions, and state and federal regulations and statutes must be appended to the petition);
  - 6) If the facility or portion thereof for which the petitioner seeks a tax certification involves an existing environmental permit or a pending environmental permit application, a copy of the material portion of the permit or permit application; and
  - 7) An affidavit verifying any facts submitted in the petition.
- b) **Low Sulfur Dioxide Emission Coal Fueled Devices.** The following information must be contained in a petition for a Board certification that a device is a low sulfur dioxide emission coal fueled device:
- 1) A detailed description of the nature of petitioner's activities at the location of the device for which the petitioner seeks a tax certification;
  - 2) A detailed description of the device for which the petitioner seeks a tax certification;
  - 3) A detailed description of the purpose for which the device is used or intended;
  - 4) A statement requesting or waiving a hearing on the petition;

- 5) Citation to supporting documents or legal authorities whenever such are used as a basis for the petition (relevant portions of such documents and legal authorities other than Board decisions, reported state and federal court decisions, and state and federal regulations and statutes must be appended to the petition);
  - 6) If the device for which the petitioner seeks a tax certification involves an existing environmental permit or a pending environmental permit application, a copy of the material portion of the permit or permit application; and
  - 7) An affidavit verifying any facts submitted in the petition.
- c) The petition may contain information not required by this Section that is relevant to whether the facility or portion thereof or the device is entitled to a tax certification. The petition must contain headings corresponding to the information described in each subsection of this Section. If the petitioner believes that any of the informational requirements of this Section do not apply to the tax certification sought, the petition must so state and provide supporting reasons.

#### Section 125.206 Dismissal of Petition

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

- a) The petition fails to comply with any of the requirements of Section 125.204 of this Part; or
- b) The petitioner is not pursuing disposition of the petition in a timely manner.

#### Section 125.208 Agency Recommendation and Petitioner Response

- a) If the Agency wishes to file a recommendation on the petition, it must do so within 45 days after the petition is filed, or when a hearing has been scheduled, at least 30 days before hearing, whichever is earlier. The recommendation may present any information that the Agency believes is relevant to the Board's consideration of the requested tax certification. The Agency must serve a copy of the recommendation on the petitioner and the hearing officer.
- b) The petitioner may file a response to any Agency recommendation within 14 days after the Agency serves the petitioner with a copy of the recommendation. The petitioner must serve a copy of any response on the Agency and the hearing officer.

#### Section 125.210 Public Hearing

- a) The Board will hold a public hearing in a tax certification proceeding when:
  - 1) The petitioner or the Agency requests a hearing; or
  - 2) The Board in its discretion determines that a hearing would be advisable.
- b) If a hearing is to be held, 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 before scheduling a hearing. Hearings will be held in the county where the facility or portion thereof or the device for which the petitioner seeks a tax certification is located, unless the hearing officer orders otherwise.

#### Section 125.212 Hearing Notice

After receiving notification from the hearing officer of the scheduled hearing date made pursuant to Section 125.210 of this Subpart, the Clerk will, in accordance with 35 Ill. Adm. Code 101, cause publication of a notice of hearing in a newspaper of general circulation in the county where the facility or portion thereof or the device for which the petitioner seeks a tax certification is located.

#### Section 125.214 Burden of Proof

The burden of proof in a tax certification proceeding is on the petitioner. The petitioner must prove that the facility or portion thereof for which it seeks a tax certification is a pollution control facility, as defined in Section 125.200(a)(1) of this Part, or that the device for which it seeks a tax certification is a low sulfur dioxide emission coal fueled device, as defined in Section 125.200(b)(1) of this Part.

#### Section 125.216 Board Action

- a) *Pollution Control Facilities. If it is found that the claimed facility or relevant portion thereof is a pollution control facility as defined in Section 125.200(a)(1) of this Part, the Board shall enter a finding and issue a certificate to that effect. The certificate shall require tax treatment as a pollution control facility, but only for the portion certified if only a portion is certified. The effective date of a certificate shall be the date of the petition for the certificate or the date of the construction of the facility, which ever is later. [35 ILCS 200/11-25]*
- b) *Low Sulfur Dioxide Emission Coal Fueled Devices. If it is found that the claimed device meets the definition of low sulfur dioxide emission coal fueled device as set forth in Section 125.200(b)(1) of this Part, the Board shall enter a finding and issue a certificate that requires tax treatment as a low sulfur dioxide emission coal fueled device. The effective date of a certificate shall be on January 1 preceding the date of certification or preceding the date construction*

*or installation of the device commences, whichever is later.* [35 ILCS 200/11-55]

- c) After notice to the holder of the certificate and an opportunity for a hearing pursuant to this Subpart, *the Board may on its own initiative revoke or modify a pollution control certificate or a low sulfur dioxide emission coal fueled device certificate whenever any of the following appears:*
- 1) *The certificate was obtained by fraud or misrepresentation;*
  - 2) *The holder of the certificate has failed substantially to proceed with the construction, reconstruction, installation, or acquisition of pollution control facilities or a low sulfur dioxide emission coal fueled device; or*
  - 3) *The pollution control facility to which the certificate relates has ceased to be used for the primary purpose of pollution control and is being used for a different purpose.* [35 ILCS 200/11-30]
- d) The Clerk will provide the petitioner and the Agency with a copy of the Board's order setting forth *the Board's findings and certificate, if any.* [35 ILCS 200/11-30]



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

PART 130  
 IDENTIFICATION AND PROTECTION OF TRADE SECRETS AND OTHER NON-  
 DISCLOSABLE INFORMATION

SUBPART A: GENERAL PROVISIONS

Section	
130.100	General
130.102	Purpose
130.104	Additional Procedures
130.106	Definitions and Severability
130.108	Segregation of Article
130.110	Disposal of Articles

SUBPART B: PROCEDURES FOR IDENTIFYING ARTICLES THAT REPRESENT  
 TRADE SECRETS

Section	
130.200	Initiation of a Claim that an Article is a Trade Secret
130.202	Contents of Statement of Justification
130.204	Waiver of Statutory Deadlines
130.206	Response to the Trade Secret Claim
130.208	Deadline for Agency Trade Secret Determination
130.210	Standards for Agency Determination
130.212	Agency Actions Following a Negative Determination
130.214	Agency Actions Following a Positive Determination
130.216	Review of Agency Trade Secret Determination
130.218	Effect of a Determination of Trade Secret Status on Other Agencies
130.220	Status of Article Determined or Claimed to be a Trade Secret Before the Effective Date of this Part
130.222	Extension of Deadlines to Participate in Proceedings

SUBPART C: PROCEDURES FOR PROTECTING ARTICLES THAT REPRESENT  
 TRADE SECRETS

Section	
130.300	Applicability
130.302	Owner's Responsibility to Mark Article
130.304	Agency's Responsibility to Mark Article
130.306	Transmission of Article Between Agencies
130.308	Public Access to Information Related to Article

130.310	Access to Claimed or Determined Article
130.312	Unauthorized Disclosure or Use of Article
130.314	Limitation on Copying Article

#### SUBPART D: NON-DISCLOSABLE INFORMATION OTHER THAN TRADE SECRETS

Section	
130.400	General
130.402	Who May View Non-Disclosable Information
130.404	Application for Non-Disclosure
130.406	Public Inspection
130.408	Board Order

**AUTHORITY:** Implementing Sections 7 and 7.1 of the Environmental Protection Act (Act) [415 ILCS 5/7 and 7.1] and authorized by Sections 7, 7.1, 26, and 27 of the Act [415 ILCS 5/7, 7.1, 26, 27].

**SOURCE:** Subparts A, B, and C originally adopted in R81-30 at 7 Ill. Reg. 16149 , effective November 23, 1983. Subpart D originally adopted in R88-5(A) at 13 Ill. Reg. 12055, effective July 10, 1989;old Part repealed, new Part adopted in R00-20 at 24 Ill. Reg. \_\_, effective\_\_\_\_.

#### SUBPART A: GENERAL PROVISIONS

##### Section 130.100 General

In accordance with 2 Ill. Adm. Code 2175.300, all files, records, and data of the Board are open to reasonable public inspection and copying in the Board's Chicago office except for information exempted from inspection by Section 7 of the Environmental Protection Act (Act) and Section 7 of the Freedom of Information Act (FOIA) [5 ILCS 140/7]. The following rules deal specifically with non-disclosable information and trade secret information.

##### Section 130.102 Purpose

Section 7 of the Act provides that *all files, records, and data of the Agency, the Board, and the Department shall be open for reasonable public inspection . . . except for information which constitutes a trade secret; information privileged against introduction in judicial proceedings; internal communications of the several agencies; and information concerning secret manufacturing processes or confidential data submitted by any person under the Act.* [415 ILCS 5/7] Section 7.1 of the Act provides that *the Board shall adopt regulations . . . which prescribe: (i) procedures for determining whether articles represent a trade secret; and (ii) procedures to protect the confidentiality of such articles.* [415 ILCS 5/7.1(b)]

##### Section 130.104 Additional Procedures

Each agency may adopt additional procedures that are not inconsistent with this Part for the protection of articles that are claimed or determined to represent a trade secret.

#### Section 130.106 Definitions and Severability

- a) **Definitions.** For the purpose of this Part, words and terms have the meanings set forth in 35 Ill. Adm. Code 101.Subpart B, unless otherwise provided or unless the context clearly indicates otherwise.
- b) **Severability.** If any provision of this Part or its application to any person is adjudged invalid, such adjudication does not affect the validity of this Part as a whole or of any portion not adjudged invalid.

#### Section 130.108 Segregation of Article

Any article, or any page or portion thereof, which is claimed or determined to be a trade secret or other non-disclosable information must be kept segregated from articles which are open to public inspection, and must be kept secure from unauthorized access.

#### Section 130.110 Disposal of Articles

An agency may dispose of an article which is claimed or determined to represent a trade secret or other non-disclosable information, and any copies made of that article, only by shredding, burning, or returning the article and any copies to the owner.

### SUBPART B: PROCEDURES FOR IDENTIFYING ARTICLES THAT REPRESENT TRADE SECRETS

#### Section 130.200 Initiation of a Claim that an Article is a Trade Secret

- a) The owner of an article may claim that the article is a trade secret only by providing the agency with the information required by subsection (b) of this Section at the time the owner submits the article to the agency. If the owner of the article submits the article to the agency without the information required by subsection (b) of this Section, the article will be considered a matter of general public knowledge and cannot be protected as a trade secret.
- b) Any person wishing to have an article considered as a trade secret must file with the agency holding the article and any hearing officer, the following information:
  - 1) A claim letter which clearly states the name of the article, gives a brief description of the article, and states that the article is claimed to represent a trade secret, as defined in these rules and the Act;

- 2) A copy of the article marked as provided in Section 130.302 of this Part; and
  - 3) A statement of justification for the claim meeting the requirements of Section 130.202 of this Part and a waiver of the statutory deadlines for any agency decision as provided in Section 130.204 of this Part.
- c) If an agency is provided with the information required in this Section, it must consider such article a trade secret and must protect such article from disclosure pursuant to Subpart C of this Part until a final determination is made by the agency and the appeal time has expired.
- d) A person claiming trade secret protection for an article must serve all other parties to the case with the following:
- 1) A claim letter that clearly states the name of the article, gives a brief description of the article, and states that the article is claimed to represent a trade secret, as defined in these rules and the Act;
  - 2) Where less than an entire article is claimed to represent a trade secret, a copy of the article marked and redacted as provided in Section 130.302(b)(4) of this Part; and
  - 3) A statement of justification for the claim meeting the requirements of Section 130.202 of this Part and a waiver of the statutory deadlines for any agency decision as provided in Section 130.204 of this Part.

#### Section 130.202 Contents of Statement of Justification

A statement of justification must contain the following:

- a) A detailed description of the procedures used by the owner to safeguard the article from becoming available to persons other than those selected by the owner to have access thereto for limited purposes;
- b) A detailed statement identifying the persons or class of persons to whom the article has been disclosed;
- c) A certification that the owner has no knowledge that the article has ever been published, disseminated or otherwise become a matter of general public knowledge;
- d) A detailed discussion of why the owner believes the article to be of competitive value; and

- e) Any other information that will support the claim.

#### Section 130.204 Waiver of Statutory Deadlines

When the owner of an article files with the agency an article and a claim that the article is a trade secret, the owner must simultaneously file with the agency a waiver of any statutory deadline for the agency to decide the underlying proceeding. The waiver must extend for at least 90 days past any statutory deadline for the agency to decide the underlying proceeding. This is to allow 45 days for the agency to decide the trade secret claim and 35 days for any appeal of the agency's trade secret determination, plus mailing time.

#### Section 130.206 Response to the Trade Secret Claim

Any party in a contested case before any of the agencies in which a trade secret claim is made will have 7 days in which to file a response to the trade secret claim. All responses must be filed with the agency holding the article, and served upon all other parties to the case, and the hearing officer if applicable.

#### Section 130.208 Deadline for Agency Trade Secret Determination

- a) The agency must determine whether the article is a trade secret within 45 days after the date of receipt of a complete statement of justification as prescribed in Section 130.202 of this Part.
- b) The owner of an article may extend the time period for the agency decision to determine whether the article is a trade secret by filing with the agency:
  - 1) waiver of any statutory deadline for the agency to decide the underlying proceeding as provided for in Section 130.204 of this Part; and
  - 2) a waiver of the deadline for the agency to determine whether the article is a trade secret.
- c) The waiver described in subsection (b)(1) of this Section must be for at least the same amount of time as the waiver described in subsection (b)(2) of this Section, plus 45 days. This is to allow 35 days for any appeal of the agency's trade secret determination, plus mailing time.

#### Section 130.210 Standards for Agency Determination

- a) An article will be determined to represent a trade secret if:
  - 1) The owner has complied with the procedures for making a claim and justification as prescribed by this Part; and

- 2) The statement of justification demonstrates that:
  - A) The article has not been published, disseminated or otherwise become a matter of general public knowledge; and
  - B) The article has competitive value.
- b) There will be a rebuttable presumption that an article has not been published, disseminated or otherwise become a matter of general public knowledge, if:
  - 1) The owner has taken reasonable measures to prevent the article from becoming available to persons other than those selected by the owner to have access to the article for limited purposes; and
  - 2) The statement of justification contains a certification that the owner has no knowledge that the article has ever been published, disseminated, or otherwise become a matter of general public knowledge.
- c) The agency may determine that any page or portion of the article is a trade secret without finding that the entire article is a trade secret.

#### Section 130.212 Agency Actions Following a Negative Determination

- a) If the agency determines that an article, or any page or portion thereof, does not meet the standards specified in subsection 130.210(a)(1) or (2) of this Part, the agency must deny the claim for trade secret protection for the article or page or portion thereof, and must give written notice of such denial to the owner of the article and any requester pursuant to subsection (b) of this Section.
- b) Written notice of the denial of a claim for trade secret protection must be given by certified mail, return receipt requested, and must contain the following information:
  - 1) A statement of the agency's reason for denying the claim;
  - 2) A notification of the availability of review of the agency decision pursuant to the procedures prescribed in Section 130.216 of this Part; and
  - 3) A notification that the agency will cease protecting the article, or the page or portion thereof, as a trade secret unless the agency is served with notice of the filing of a petition for review within 35 days after the date of notice to the owner.
- c) If the agency is served with notice of the filing of a petition for review of its determination within 35 days after the notice of denial to the owner, the agency

must notify the requester of such action and must continue to protect the article, or the page or portion thereof, pursuant to Subpart C of this Part until such time as it receives official notification of a final order by a reviewing body with proper jurisdiction that does not reverse the agency determination and that is not subject to further appeal.

- d) If the agency does not receive the notification of a petition for review within 35 days or does receive official notification of a final, non-appealable action which does not reverse the agency determination, the article will not be protected pursuant to Subpart C of this Part and the agency must so notify the owner and any requester by certified mail, return receipt requested.

#### Section 130.214 Agency Actions Following a Positive Determination

- a) If the agency determines that an article, or any page or portion thereof, meets the standards specified in subsection 130.210(a)(1) and (2) of this Part, the agency must grant the claim for trade secret protection for the article or page or portion thereof, and must give written notice to the owner and any requester by certified mail, return receipt requested, of such granting to the owner of the article pursuant to subsection (b) of this Section.
- b) Written notice of the granting of a claim for trade secret protection must be given by certified mail to all parties, return receipt requested, and must contain the following information:
  - 1) A statement of the agency's reasons for granting the claim;
  - 2) A notification of the availability of review of the agency's determination pursuant to the procedures prescribed in Section 130.216 of this Part; and
  - 3) A notification that the article, or the page or portion thereof, will be protected pursuant to Subpart C of this Part until such time as the agency receives official notification of a final order by a reviewing body that reverses the agency determination and that is not subject to further appeal.
- c) The agency must continue to protect an article, or the page or portion thereof, for which trade secret protection has been granted pursuant to Subpart C of this Part until such time as it receives official notification of a final order by a reviewing body with proper jurisdiction which reverses the agency determination and which is not subject to further appeal.

#### Section 130.216 Review of Agency Trade Secret Determination

- a) An owner or requester who is adversely affected by a final determination of either the Agency or Department pursuant to this Part may petition the Board to review the final determination within 35 days after entry of the determination.
  - 1) Appeals to the Board of the Agency's final decisions will be pursuant to 35 Ill. Adm. Code 105.Subparts A and B.
  - 2) Appeals to the Board of Department's final decisions will be pursuant to 35 Ill. Adm. Code 105.Subparts A and F.
- b) An owner or requester who is adversely affected by a final determination of the Board pursuant to this Part, may obtain judicial review from the appellate court by filing a petition for review pursuant to Section 41 of the Act.
- c) The failure of an agency to make a final determination within the time limits prescribed in this Part may be deemed to be a final determination for purposes of appeal.
  - 1) If an agency fails to make a final determination within the time limits, the agency must continue to protect the article as set out in Subpart C of this Part during the 35 day appeal time.
  - 2) If after 35 days no appeal is taken, the article will be treated as if it received a negative determination from the agency and the article will no longer be protected pursuant to Subpart C.

#### Section 130.218 Effect of a Determination of Trade Secret Status on Other Agencies

A claim or determination by one agency that an article is a trade secret made pursuant to this Part will apply to that same article when in the possession of either of the other two agencies. Notwithstanding the foregoing sentence, when such an article is the subject of a review before the Board pursuant to Section 130. 216(a) of this Part, the article will be treated as a trade secret only unless or until the Board determines that the article is not a trade secret.

#### Section 130.220 Status of Article Determined or Claimed to be a Trade Secret Before the Effective Date of this Part

- a) Any article that was determined by an agency prior to the effective date of this Part to represent a trade secret in accordance with agency procedures adopted pursuant to the IAPA will be deemed to have been determined to represent a trade secret for the purposes of this Part. The agency must protect the article in accordance with Subpart C of this Part
- b) If an agency possesses an article that was claimed before the effective date of this Part to be a trade secret and the agency did not determine before the effective



date of this Part whether the article is a trade secret in accordance with procedures adopted pursuant to the APA, the article is deemed to have been claimed to be a trade secret for the purposes of this Part for 180 days after the effective date of this Part. If the owner of the article fails to file within the foregoing 180-day period a claim with the agency under Section 130.200 of this Subpart with respect to the article, the article will be considered a matter of general public knowledge and cannot be protected as a trade secret.

#### Section 130.222 Extension of Deadlines to Participate in Proceedings

Upon the agency's finding that any person will be adversely affected in a proceeding before that agency due to the timing of the agency's determination of the trade secret status of an article and that the article is relevant to the proceeding, the agency must extend any deadline for the person to participate in that proceeding until 10 days after the agency determines the trade secret status of the article. The person has the burden to demonstrate that the person will be adversely affected in the proceeding due to the timing of the agency's trade secret determination and that the article is relevant to the proceeding.

### SUBPART C: PROCEDURES FOR PROTECTING ARTICLES THAT REPRESENT TRADE SECRETS

#### Section 130.300 Applicability

Any article that is claimed or determined to represent a trade secret pursuant to Subpart B of this Part must be protected from unauthorized disclosure pursuant to this Subpart.

#### Section 130.302 Owner's Responsibility to Mark Article

- a) Where an entire article is claimed to represent a trade secret, the owner must mark the article with the words "Trade Secret" in red ink on the face or front of the article.
- b) Where less than an entire article is claimed to represent a trade secret, the owner must:
  - 1) Mark the article with the words "Trade Secret" in red ink on the face or front of the article;
  - 2) Indicate on the face or front of the article which page or portion of the article is claimed to represent a trade secret;
  - 3) Mark every page or portion of the article which is claimed to represent a trade secret with the words "Trade Secret;" and

- 4) Furnish the agency with a second copy of the article which is marked pursuant to paragraphs (1) and (2) of this subsection and from which the page or portion of the article that is claimed to represent a trade secret is deleted.

#### Section 130.304 Agency's Responsibility to Mark Article

- a) Where an entire article is determined to represent a trade secret pursuant to Section 130.210 of this Part, the agency must mark the article with the word "DETERMINED" in red ink on the face or front of the article and must also mark any claim letter submitted for the article.
- b) Where less than an entire article is determined to represent a trade secret pursuant to Section 130.210 of this Part, the agency must:
  - 1) Mark the article with the word "DETERMINED" in red ink on the face or front of the article;
  - 2) Indicate on the face or front of the article and any claim letter submitted for the article which page or portion of the article is determined to represent a trade secret; and
  - 3) Mark every page or portion of the article which is determined to represent a trade secret with the word "DETERMINED."

#### Section 130.306 Transmission of Article Between Agencies

Prior to transmitting any article which is claimed or determined to represent a trade secret to another agency, the agency must insure that the article is properly marked pursuant to Sections 130.302 and 130.304 of this Part and is clearly distinguished and segregated from other transmitted materials.

#### Section 130.308 Public Access to Information Related to Article

- a) A copy of the claim letter submitted pursuant to Section 130.200(b)(1) of this Part will be open to public inspection.
- b) Where an article was determined to represent a trade secret prior to the effective date of this Part and no claim letter exists, the agency must prepare a statement that will be open to public inspection, and that names and briefly describes the article.
- c) Where a page or portion of an article is claimed or determined to represent a trade secret, a copy of the article must be open to public inspection, with the part

or portion of the article that is claimed or determined to represent a trade secret or that would lead to disclosure of the trade secret deleted.

#### Section 130.310 Access to Claimed or Determined Article

- a) The agency must designate the agency employees or officers who are authorized to review articles that are claimed to represent trade secrets for the purpose of making a determination pursuant to Section 130.210 of this Part.
- b) Access to an article that is claimed or determined to represent a trade secret must be limited to:
  - 1) Employees or officers designated pursuant to subsection (a) of this Section;
  - 2) Other employees, officers, or authorized representatives of the State specifically authorized by the agency to have access to the article for the purpose of carrying out the Act or regulations promulgated thereunder or when relevant to a proceeding under the Act; or
  - 3) Employees, officers, or authorized representatives of the United States who are specifically authorized by the agency to have access to the article for the purpose of carrying out federal environmental statutes or regulations.
- c) The agency must maintain the following information with regard to an article which is claimed or determined to represent a trade secret:
  - 1) A record of the number of copies held by the agency;
  - 2) A log of the location of all copies; and
  - 3) A log of all persons who are authorized to review the article or copies thereof.

#### Section 130.312 Unauthorized Disclosure or Use of Article

- a) The agency must insure that all persons who are authorized to have access to an article that is claimed or determined to represent a trade secret are given notice of the restrictions on disclosure and use of the article contained in this Subpart.
- b) No agency officer, employee, or authorized representative may disclose, except as authorized by this Subpart, or use for private gain or advantage, any article that is claimed or determined to represent a trade secret.

- c) Each agency officer, employee, or authorized representative must take reasonable measures to safeguard an article that is claimed or determined to represent a trade secret and to protect against disclosure that is inconsistent with these rules.
- d) Each authorized representative of the agency who is furnished with access to an article that is claimed or determined to represent a trade secret pursuant to this Part must use or disclose that information only as authorized by the contract or agreement under which such person is authorized to represent the agency.

#### Section 130.314 Limitation on Copying Article

No agency officer, employee, or authorized representative of the State or the United States may copy an article which is claimed or determined to represent a trade secret pursuant to this Part except where authorized to do so by the agency officer or employee designated to review the article pursuant to subsection 130.312(a) of this Part. All copies must be recorded and logged in accordance with subsection 130.312(c) of this Part.

### SUBPART D: NON-DISCLOSABLE INFORMATION OTHER THAN TRADE SECRETS

#### Section 130.400 General

This Subpart applies only to filings of articles with the Board, and only with respect to Board determinations of whether articles are non-disclosable information other than trade secrets. Trade secret determinations are addressed in Subparts A, B and C of this Part. “Non-disclosable information” will have the meaning as defined in 35 Ill. Adm. Code 101.Subpart B.

#### Section 130.402 Who May View Non-Disclosable Information

*Any information accorded confidential treatment may be disclosed or transmitted to other officers, employees, including Board Members, Board attorneys, environmental scientists of the Board’s technical unit, Board hearing officers, the Clerk, Assistant Clerk, or authorized representatives of this State or of the United States concerned with or for the purposes of carrying out this Act or the federal environmental statutes and regulations; provided, however, that such information shall be identified as confidential by . . . the Board . . . , the case may be. [415 ILCS 5/7(e)]*

#### Section 130.404 Application for Non-Disclosure

- a) Except as provided in subsection (c)(4) of this Section, the applicant must file a single copy of the following:
  - 1) The article that is sought to be protected from disclosure; and
  - 2) The application for non-disclosure.

- b) When an entire article is sought to be protected from disclosure, the applicant must mark the article with the words “NON-DISCLOSABLE INFORMATION” in red ink on the face or front of the article.
- c) When less than an entire article is sought to be protected from disclosure, the applicant must:
  - 1) Mark the article with the words “NON-DISCLOSABLE INFORMATION” in red ink on the face or front of the article;
  - 2) Indicate on the face or front of the article which page or portion of the article is claimed to be non-disclosable information;
  - 3) Mark every page or portion of the article sought to be protected from disclosure with the words “NON-DISCLOSABLE INFORMATION;”
  - 4) File with the Clerk a second copy of the article that is marked pursuant to paragraphs (1) and (2) of this subsection and from which the page or portion sought to be protected from disclosure is deleted.
- d) In an adjudicatory proceeding, the applicant must serve all other parties to a proceeding and the hearing officer with the following:
  - 1) A copy of the application for non-disclosure under subsection (f) of this Section; and
  - 2) When less than an entire article is sought to be protected from disclosure, a copy of the article marked and redacted as provided in subsection (c)(4) of this Section.
- e) Each party served pursuant to subsection (d) of this Section may file a response to the application for non-disclosure within 7 days after service. Each party filing a response must serve the other parties to the adjudicatory proceeding and the hearing officer.
- f) The application for non-disclosure must contain the following:
  - 1) Identification of the particular non-disclosure category into which the material that is sought to be protected from disclosure falls (see 35 Ill. Adm. Code 101.202 for the definition of “non-disclosable information”);
  - 2) A concise statement of the reasons for requesting non-disclosure;

- 3) Data and information on the nature of the material that is sought to be protected from disclosure, identification of the number and title of all persons familiar with such data and information, and a statement of how long the material has been protected from disclosure;
- 4) An affidavit verifying the facts set forth in the application for non-disclosure that are not of record in the proceeding; and
- 5) A waiver of any decision deadline in accordance with Section 130.204 of this Part.

#### Section 130.406 Public Inspection

- a) The public cannot inspect material for which a non-disclosure application is pending before the Board.
- b) If the Board determines that the material is not entitled to be protected from disclosure, the public cannot inspect the material:
  - 1) until the time for appeal of the Board's determination has expired; or
  - 2) if an appeal of the Board's determination is filed, until such time as the Board receives official notification of a final order of a court with proper jurisdiction that does not reverse the Board's determination and that is not subject to further appeal.
- a) If the Board determines that the material is entitled to be protected from disclosure, the Board will protect from public inspection any page or portion of the material that the Board determined to be non-disclosable information until such time as the Board receives official notification of a final order of a court with proper jurisdiction that reverses the Board's determination and that is not subject to further appeal.

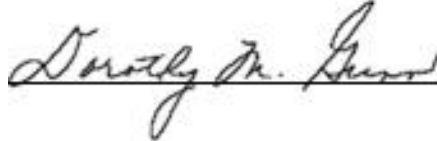
#### Section 130.408 Board Order

- a) If the Board determines that the article or any page or portion thereof is non-disclosable information, the Board will mark the word "DETERMINED" on the face or front and on every page or portion determined to be non-disclosable information.
- b) If the Board determines that the article, or any page or portion thereof is not non-disclosable information, the Board may enter a conditional non-disclosure order allowing the applicant to withdraw the material addressed in the order. If the applicant fails to withdraw the material by the deadline given in the Board

order, the material will be returned to the Clerk's normal file and will be available for the public to inspect.

IT IS SO ORDERED.

I, Dorothy M. Gunn, clerk of the Illinois Pollution Control Board, do hereby certify that the above order was adopted on the 16<sup>th</sup> of March 2000 by a vote of 5-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", written over a horizontal line.

Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board