BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	R00-20
REVISION OF THE BOARD'S	)	(Rulemaking – Procedural)
PROCEDURAL RULES:	)	
35 Ill.Adm. Code 101-130	)	

COMMENTS OF THE ILLINOIS STEEL GROUP
AND
ROSS & HARDIES

INTRODUCTION

The following comments are submitted on behalf of the Illinois Steel Group and Ross & Hardies regarding certain provisions of the proposed procedural rules. As stated during oral testimony at the first hearing on April 11, 2000, the Illinois Steel Group ("I SG") and Ross & Hardies ("R&H") together congratulate the Illinois Pollution Control Board, its members, and staff for the tremendous work done on developing a comprehensive set of procedural rules for the Board. The commentators recognize the amount of work that such an effort requires and the great effort the Board made to accommodate comments of various interested parties in proposing this set of rules. There are only a few, but very important, issues which require comments at this time in addition to those already raised.

The procedural rules should not be used to set or modify substantive environmental standards or to establish new requirements for statutorily provided relief. In three instances, the Board's rules as proposed would appear to add requirements to obtain such statutorily provided relief. These are Site-Specific Rule Changes (Section 102.210(b)); Variances (Section 104.204(f)); and Adjusted Standards (Section 104.406(e)). The imposition of requirements other than those specified in the statute goes beyond the purpose of procedural rules and violates the

provisions of the Illinois Environmental Protection Act ("Act"). 415 ILCS 5/1 et seq. Commentators urge the Board to delete or qualify the language of these provisions to make it clear that the sole basis for obtaining such site-specific relief in the form of a site-specific rule change, variance, or adjusted standard will be the statutory criteria and not additional criteria imposed by or implied from the procedural rules.

Although the commentators realize that the proposed procedural rule provisions at issue are substantially similar to the rules currently in effect, these comments are submitted in light of the fact that the current rules were promulgated prior to the revision of Section 29 of the Act, which effectively precludes review of the validity of regulations in subsequent proceedings. See, 415 ILCS 5/29(b).

SITE-SPECIFIC REGULATIONS - PROPOSED RULE 102.210(b)

With respect to site-specific rule changes as set forth in Section 102.210(b) of the proposed rules, the Board purports to require a demonstration "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."

There is no requirement in the Act that a site specific regulation be based on a showing that the general rule is not technically feasible or economically reasonable. The Board has the authority and obligation to consider site-specific rules which would impose more stringent, less stringent, or simply different control requirements for different sites based upon different circumstances. The technical feasibility and economic reasonableness of the general rule for a specific facility would be only one consideration determining whether a site-specific rule might be

Appropriate. Section 27(a) of the Act provides that the Board may adopt substantive regulations as follows:

> The Board may adopt substantive regulations as described in this Act. Any such regulations may make different provisions as required by circumstances for different contaminant sources and for different geographical areas; may apply to sources outside this State causing, contributing to, or threatening environmental damage in Illinois; and may make special provision for alert and abatement standards and procedures respecting occurrences or emergencies of pollution or on other short-term conditions constituting an acute danger to health or to the environment; and may include regulations specific to individual persons or sites. In promulgating regulations under this Act, the Board shall take into account the existing physical conditions, the character of the area involved, including the character of surrounding land uses, zoning classifications, the nature of the existing air quality, or receiving body of water, as the case may be, and the technical feasibility and economic reasonableness of measuring or reducing the particular type of pollution. The generality of this grant of authority shall only be limited by the specifications of particular classes of regulations elsewhere in this Act. 415 ILCS 5/27(a).

In construing Section 27(a), the Illinois Supreme Court has held that the Board is only required to "consider" or "weigh carefully" the factors set forth in Section 27(a), including the technical feasibility and economic reasonableness of compliance. See, Granite City v. Pollution Control Board, 155 Ill.2d 149 613 N.E.2d 719 (1993). Moreover,

> The factors set forth in section 27(a) which the Board must consider in promulgating regulations, including technical feasibility and economic reasonableness of compliance, do not control the Board's authority to adopt regulations. Rather than imposing a specific burden on the Board.. section 27(a) provides general standards to guide the Board in the exercise of its broad authority to ensure that the regulations adopted by the Board are reasonable. Id. 613 N.E.2d at 734.

It is well-recognized that the Board seldom takes into account surrounding land uses, zoning classifications, the nature of the existing air quality or receiving body of water or other site-specific factors in adopting general regulations. In fact, the Board often states that such

factors will be considered through site-specific rulemaking, variances, or adjusted standards as the Board would have authority to adopt less stringent standards for specific location or facility if the more stringent standards were not required by the nature of its location, surrounding land use or other factors. Likewise, the Board can and has adopted more stringent standards as well. The commentators are aware of no court precedent which allows the Board to impose a requirement that a petitioner demonstrate that the generally applicable rule is not economically reasonable or technically feasible in order to obtain site-specific relief. This requirement should be stricken from the rule or reworded to provide that a petitioner shall address the economic reasonableness and technical feasibility of the generally applicable rule in its petition.

VARIANCES - PROPOSED RULE 104.204(1)

The Pollution Control Board has often treated variances as a mechanism solely for obtaining additional time to bring a facility into compliance. In keeping with this practice, Section 104.204(f) requires that a petition for variance include the following:

> 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.

There is no statutory authority for such a requirement. Section 35(a) of the Act provides, in part that:

> The Board may grant individual variances beyond the limitations prescribed in this 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.

Section 36(a) provides in the second sentence, "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." 415 ILCS 5/36(a).

Taken together, it is clear that the statute provides for variances, both in the case where time to come under compliance is a sole or principle basis for obtaining the variance as dealt with in Section 36(a) quoted above, or where the rule itself would impose an arbitrary unreasonable hardship under all the circumstances. This relief mechanism could be used, for example, where the nature of the facility made the generally applicable controls unreasonable or unnecessary in light of their cost and burden. As originally adopted, the variance was envisioned to be the primary method of relief of the generally applicable rules. Again the Board, in adopting the general rules, and courts upholding those rules, have often relied upon the existence of the variance mechanism to deal with situations where rules of general applicability would not be reasonable or appropriate for the specific facilities or situations. There is no legal basis to impose a requirement that every variance be based upon a compliance schedule to come into compliance

with the generally applicable rules[1]. Section 104.205(f) should be stricken or modified to make it clear that a compliance schedule will be included where appropriate.

ADJUSTED STANDARDS - PROPOSED RULE 104.406(e)

The provisions for adjusted standards were included in the Act after extensive negotiations between industry and the Agency following the Schneiderman Report. They were designed to provide a means of permanent long-term relief from generally applicable standards. The author of these comments was one of those who assisted in negotiating and drafting the adjusted standards provisions. In the case of adjusted standards, the Board appears to recognize that it would be improper to require a demonstration that the facility will ultimately come into compliance with the generally applicable standard. Nevertheless, the Board seems to impose arbitrary and unnecessary burdens to obtaining an adjusted standard based on the assumption that it would be possible to comply with the generally adjusted standard for some cost. Section 104.406(e) of the proposed rules requires a description of the efforts that would be necessary for the petitioner to comply with the regulation of general applicability. It further requires that "all compliance alternatives with the corresponding cost for each alternative, must be discussed." This is not a requirement set forth in the statute for obtaining an adjusted standard. At most, a requirement that the petitioner address the issue of the feasibility of meeting the generally applicable standard and the

[1]Commentator's realize that such a requirement, as set forth in 35 Ill.Adm.Code §104.121(f), has been found not to be arbitrary or capricious. See, City of Mendota v. Pollution Control Board, 161 Ill.App.3d 203, 112 Ill.Dec. *752*, 514 N.E.2d 218 (3rd Dist. 1987). But, the court in that case failed to address the issue raised by these comments. Specifically, whether the Board has the authority to promulgate such a requirement pursuant to the Act's variance provisions, instead the Court in City of Mendoza based its decision on a review of Section 11(b) of the Act addressing the purpose of the Act with respect to water pollution. Id. at 514 N.E.2d 222.

cost thereof, if feasible, might be appropriate. A requirement that assumes the technical feasibility of achieving that standard and an exhaustive examination of its costs at the petition stage would, in fact, demonstrate that the standard is unnecessary or inappropriate in the circumstances presented, and is not justified.

CONCLUSION

In summary, the effort to prepare a comprehensive and intelligent set of procedural rules is greatly appreciated. The imposition of apparently substantive requirements not found in the statute for obtaining any type of site-specific relief is, however, unwarranted and illegal. The commentators urge the Board to amend its proposed rules accordingly.

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By: ***(Signature on original)***

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