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AUTHORITY: Implementing Sections 5, 35, 36, 37 and 38 and authorized by Section 26 of the Environmental Protection Act (Ill. Rev. Stat. 1983, ch. 111^{1/2}, pars, 1005, 1035, 1036, 1037, 1038 and 1026)

SOURCE: 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 1, 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 at 9 Ill. Reg. 1409, effective January 16, 1985; amended in R82-27, 36 and R83-37 at _____ Ill. Reg. _____, effective _____.

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

PART 104
VARIANCES

SUBPART A: GENERAL PROVISIONS

Section 104.102 Variance from New Regulation

If any person files a petition for variance from a regulation within 20 days after the effective date of such regulation, the operation of such rule or regulation shall be stayed as to such person pending the disposition of the petition. The Board may hold a hearing upon the petition five days from the notice of such hearing, and in all other respects the rules in this Part shall apply to the extent they are consistent with the hearing date set by the Board.

Section 104.103 References

Unless the contrary is clearly indicated, all references to "Parts" or "Sections" are to Illinois Administrative Code, Title 35: Environmental Protection. For example, "Part 309" is 35 Ill. Adm. Code 309, and "Section 309.101" is 35 Ill. Adm. Code 309.101.

Section 104.104 RCRA Variances

- a) As used in this Part, "petition for a RCRA variance" shall mean any pleading which meets either, or both, of the following criteria:

- 1) It requests a variance from 35 Ill. Adm. Code 703, 720, 721, 722, 723, 724 or 725; or,
 - 2) It asks that the Board order the Agency to issue or modify any provision of a RCRA permit required pursuant to Section 21(f) of the Act.
- b) The federal RCRA rules contain procedures which are referred to as "variances" (40 CFR 260, 261, 262, 263, 264, 265 and 270 (1984)). The petitioner should consult the comparable Board regulations to decide whether the variance procedures of this Part need to be followed. As provided in Title IX of the Act and Section 104.160(f), the Board may grant a temporary variance. The Board may grant permanent relief from a rule pursuant to 35 Ill. Adm. Code 102. Pursuant to 35 Ill. Adm. Code 105 a permit applicant may request Board review of the Agency's denial of a permit or issuance with conditions.

SUBPART B: PETITION FOR VARIANCE

Section 104.120 Petition for Variance

A variance proceeding shall be commenced by any person by filing a petition for variance with the Agency and simultaneously filing 10 copies with the Clerk of the Board. All additional information or amendments to the petition for variance shall be filed with the Agency and Board in the same manner as that required for commencing the action.

Section 104.121 Contents of Variance Petition

To enable the Board to rule on the petition for variance, the following information, where applicable, shall be included in the petition:

- a) A clear and complete statement of the precise extent of the relief sought, including specific identification of the particular provisions of the regulations or Board Order from which the variance is sought;
- b) A description of the business or activity of the petitioner including the size of the business and number of employees and a description of the location and area affected by petitioner's operations;
- c) The quantity and types of materials used in the process or activity for which the variance is required and a full description of the particular process or activity in which the materials are used;

- d) The quantity and types of materials discharged from the process or activity requiring the variance; the location of the points of discharge, and, as applicable, the identification of the receiving waterway or land, or the location of the nearest air monitoring station maintained by the Agency;
- e) Data describing the nature and extent of the present failure to meet the numerical standards or particular provisions from which the variance is sought and a factual statement why compliance with the Act and regulations was not or cannot be achieved by the required compliance date;
- f) A detailed description of the existing and proposed equipment or proposed method of control to be undertaken to achieve full compliance with the Act and regulations, including a time schedule for the implementation of all phases of the control program from initiation of design to program completion and the estimated costs involved for each phase and the total cost to achieve compliance;
- g) An assessment, with supporting factual information, of the environmental impact that the variance will impose on human, plant and animal life in the affected area, including, where applicable, data describing the existing air and water quality which the discharge may affect;
- h) Past efforts to achieve compliance including costs incurred, results achieved, permit status, and, for publicly-owned treatment works or connections thereto, construction grant status;
- i) A discussion of 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 to achieve compliance;
- j) 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 which can be achieved during the period of the variance;
- k) A concise factual statement of the reasons the petitioner believes that compliance with the particular provisions of the regulations or Board Order would impose an arbitrary or unreasonable hardship; and
- l) Such other things as are required in this Subpart.

Section 104.122 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), shall indicate whether the Board may grant the requested relief consistent with the Clean Air Act (42 U.S.C. 7401 et seq.) and the Federal regulations adopted pursuant thereto. If granting a variance would constitute issuance of a delayed compliance order as that term is defined in 40 CFR 65.01(e), the petition shall indicate whether the requested relief is consistent with Section 113(d) of the Clean Air Act and 40 CFR 65.01-65.10 and 65.181. If granting a variance would require revision of the State Implementation Plan, the petition shall indicate whether the requirements of Section 110(a) of the Clean Air Act 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; or from water pollution related requirements of any other title of the Act or chapter of the Board's Regulations shall indicate whether the Board may grant the relief consistent with the Clean Water Act (33 U.S.C. 1251), U.S.E.P.A. effluent guidelines and standards, any other Federal regulations, or any areawide waste treatment management plan approved by the Administrator of U.S.E.P.A. pursuant to Section 208 of the Clean Water Act.
- c) All petitions for variances from Title IV of the Act or from 35 Ill. Adm. Code, Subtitle F, Ch. I (Public Water Supplies), shall indicate whether the Board may grant the relief consistent with the Safe Drinking Water Act (42 U.S.C. 300(f) et seq.) and the U.S.E.P.A. National Interim Primary Drinking Water Regulations (40 CFR 141).
- d) The petition may include an analysis of applicable federal law and legal arguments and facts which may be necessary to show compliance with federal law. If it does not and petitioner subsequently files a pleading containing such, it will be deemed an amended petition, thereby restarting the decision period. However, petitioner may, pursuant to Section 104.181, file a response to the Agency's analysis of federal laws without amending the petition.
- e) All petitions for RCRA variances shall include a showing that the Board can grant the requested relief consistent with, and establish RCRA permit conditions no less stringent than, that which would be required by the Solid Waste Disposal Act as amended by the Resource Conservation and Recovery Act of 1976 (P.L.94-580, as amended by P.L.95-609, 42 U.S.C. 6901 et seq.), and the regulations thereunder promulgated by the United States

Environmental Protection Agency (40 CFR 260, 261, 262, 263, 264, 265 and 270 (1984)). Such petitions shall indicate whether any federal provisions authorize the relief requested, and shall include any facts necessary to show that the petitioner would be entitled to the requested relief pursuant to federal law.

Section 104.123 Extension of Prior Variance

- a) A petition to extend a prior variance granted by the Board shall be commenced by filing a petition for variance with the Agency and the Board in accordance with the requirements of Sections 104.120 and 104.121. To the extent that the information required by Sections 104.120 and 104.121 has been included in the prior petition for variance for which extension is sought, a resubmission of that information shall not be required provided that the petition shall request the incorporation of the record, opinion and order in the prior proceeding into the new petition.
- b) A petition to extend a prior variance shall be a new petition for variance before the Board and shall be subject to all of the requirements of this Part except as provided in subsection (a).

Section 104.124 Hearing Request or Waiver; Affidavit

The petition shall contain a request for a hearing on the petition if desired by petitioner; or, in the alternative, a statement waiving a hearing, accompanied by such affidavits or other proof in support of the material facts alleged in the petition as the petitioner may submit, sufficient to enable the Board, if it so decides, to rule upon the petition without a hearing. In the event that a hearing on the variance petition has been waived by the petitioner and no hearing is held, the petition for variance, the Agency recommendation, and any amendments or responses thereto shall constitute the entire record in the proceeding and the decision of the Board shall be rendered after consideration of the record except that the Board may take official notice of prior regulatory proceedings and opinions of the Board in adopting the regulations or orders of the Board from which the variance is sought.

Section 104.125 Dismissal for Inadequacy

The failure to satisfy the requirements of this Subpart, to the extent that the Board is not reasonably informed of petitioner's circumstances, will render the petition for variance subject to dismissal for inadequacy, unless the Board shall rule otherwise.

Section 104.126 RCRA Variances: Additional Material

- a) The petitioner must clearly identify a petition for a RCRA variance as such.
- b) Persons who have, or are required to have, a RCRA permit and who seek a RCRA variance which 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 shall attach to the variance petition a copy of the RCRA permit application, or such portion as may be relevant to the variance request.
- d) Petitioner shall attach to the variance petition proof of service on USEPA as required by Section 104.142

SUBPART C: NOTICE AND OBJECTIONS

Section 104.140 Notice of Petition

- a) The Board shall give notice of all variance petitions to all persons on its mailing list through publication of notice of the petition in the Board's Environmental Register in the first publication of the Environmental Register after the Board has considered the petition in accordance with Section 104.160(b).
- b) The Agency shall give written notice of all variance petitions to any person in the county in which the installation or property is located for which the variance is sought who has in writing to the Agency requested notice of variance petitions, the States Attorney of such county, the Chairman of the County Board of such county, and to each member of the General Assembly from the legislative district in which the installation or property is located and to other persons as required by law. Within 10 days after the petition is filed, the Agency shall publish notice of such petition in a newspaper of general circulation in the county in which the installation or property is located for which the variance is sought.

Section 104.141 Objections to Petition

- a) Any person may file with the Clerk, within 21 days after the filing of the petition, a written objection to the grant of the variance. Such objection may or may not be accompanied by a petition to intervene in accordance

with Section 103.220. A copy of such objection shall be mailed to the petitioner and the Agency by the Clerk.

- b) Paragraph (a) does not apply to RCRA variances. Sections 104.183 and 104.200 provide for public comment and a public hearing on all such petitions.

Section 104.142 RCRA Variances: Notice of Filing of Petition

- a) Any petition requesting a RCRA variance shall not be deemed filed until proof of service has been filed with the Board. Petitioner shall serve the United States Environmental Protection Agency a copy of any petition requesting a RCRA variance at the following address:

Director, Waste Management Division
USEPA, Region V
230 South Dearborn Street
Chicago, IL 60604

- b) In addition to the requirements of Section 37 of the Act and Section 104.140, the Agency at a minimum shall give notice of the filing of a petition for a RCRA variance to the following persons:
 - 1) Federal agencies as designated by the United States Environmental Protection Agency;
 - 2) Illinois Department of Transportation;
 - 3) Illinois Department of Conservation;
 - 4) Illinois Department of Energy and Natural Resources;
 - 5) Illinois Department of Public Health;
 - 6) The Governor of any other State adjacent to the County in which the facility is located;
 - 7) 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 104.140, the Agency shall give notice by broadcast over at least one local radio station in the area of the facility containing the information required by paragraphs (d)(2) and (d)(4) through (d)(7).

- d) The notices required by paragraphs (b) and (c) shall be accomplished within the time limit established by Section 104.140(b).
- e) A notice of the filing of a petition for a RCRA variance shall include the following information:
 - 1) The address of the Board office;
 - 2) Name and address of the petitioner and, if different, of the facility for which the variance is sought;
 - 3) A brief description of the business conducted at the facility and the activity described in the petition;
 - 4) Name, address and telephone number of the Clerk of the Board, from whom interested persons may obtain further information, including copies of the variance petition; and
 - 5) A statement that the Agency is preparing a recommendation, the date on which the recommendation is to be filed, and the name, address and telephone number of the Agency employee responsible for the recommendation;
 - 6) A statement that a hearing will be held after the filing of the recommendation and that the record will remain open for written comments for 45 days after filing of the recommendation. The notice will include the address of the Board to which comments shall be mailed;
 - 7) A statement that the record in the variance proceeding is available at the Board office for inspection, except those portions which are claimed to be trade secrets, and that procedures are available whereby disclosure may be sought by the public.
 - 8) A statement that variances may be granted pursuant to Ill. Rev. Stat. 1983, ch. 111^{1/2}, pars. 1035 et seq. and 35 Ill. Adm. Code 104, and a reference to the Board regulations or order from which a variance is sought.
 - 9) Any additional information considered necessary or proper.

SUBPART D: AUTHORIZATION OF HEARINGS

Section 104.160 Board Action on Petitions for Variance
and Authorization of Hearing

- a) The Clerk shall assign a docket number to each petition filed, deposit the petition in the Board's files, and distribute copies to each Board Member. Copies of objections to the petition, amendments, the Agency's recommendations and responses to the recommendation shall be filed and distributed as received.
- b) All petitions for variance shall be placed on the Board agenda and the Board will authorize one or more of the following actions, as they shall determine:
 - 1) The petition may be dismissed if the Board determines that it is not adequate under Subpart B or the Act; or,
 - 2) The Board may enter an order for additional information in support of the petition; or,
 - 3) The Board may accept the petition and defer decision until an Agency recommendation has been served upon the petitioner and filed with the Board; or,
 - 4) The Board may authorize a hearing on the petition.
- c) The Board shall authorize a hearing on any petition for variance, determined to be an adequate petition by the Board, in any of the following circumstances:
 - 1) When a hearing is requested by the petitioner on filing the petition in accordance with Section 104.124; or,
 - 2) When an objection to the variance has been filed within 21 days after the filing of the petition in accordance with Section 104.141; or,
 - 3) When a petition for a RCRA variance has been filed; or,
 - 4) When a hearing is requested by an amended petition within 7 days after receipt of the Agency recommendation by the petitioner in accordance with Section 104.181(b); or,
- d) When a hearing has been authorized by the Board pursuant to subsections (b)(4) or (c), the Chairman shall designate a Hearing Officer in accordance with Section 103.181(b).

- e) If no hearing has been authorized pursuant to subsections (b)(4) or (c), the Board shall act within 90 days of the filing of the petition and shall prepare an opinion stating reasons supporting the grant or denial of the petition, except that the Board shall not act to grant or deny any petition until after 21 days have elapsed from the date of filing. The decision period on RCRA, UIC and NPDES Variances is as provided in Section 38(c) of the Act.
- f) No variance shall be granted, with or without hearing, without a showing by affidavits or other adequate proof by the petitioner that compliance with the regulations or Board order would impose an arbitrary or unreasonable hardship upon the petitioner.

Section 104.161 Notice of Hearing

- a) The Hearing Officer, after appropriate consultation with the parties, shall set a time and place for hearing to be held within 60 days of the filing of the petition.
- b) The Hearing Officer shall give notice of the hearing in accordance with 35 Ill. Adm. Code 103.123(b), at least 21 days before the hearing to the petitioner, the Agency, and anyone who has filed an objection to the petition.
- c) The Clerk shall publish the time and place of the hearing in the Board's Environmental Register in the first publication of the Environmental Register after the Hearing Officer shall have set the date for hearing.
- d) Notice of hearings on petitions for RCRA variances shall be subject to the following provisions instead of paragraphs (a), (b) and (c):
 - 1) The Hearing Officer, after appropriate consultation with the parties, shall set a time and place for the hearing to be held not less than 30 days after the filing of the recommendation. The Hearing Officer may give notice of any hearing prior to the actual filing of the recommendation. If the recommendation is actually filed less than 30 days before the scheduled date of the hearing, the Hearing Officer shall reschedule the hearing and give public notice again.
 - 2) The hearing shall be held in the County in which the facility is located, in the population center in such county closest to the facility.

- 3) The Hearing Officer shall give notice of the hearing to the persons entitled to notice in Section 104.140 and 104.142, and to any other persons who have commented, requested to comment or requested notice.
- 4) Notice shall be mailed not less than 30 days before the hearing.

(Source: New Section 104.161 recodified from former Section 104.200 at _____ Ill. Reg. _____)

SUBPART E: RECOMMENDATION AND RESPONSE

Section 104.180 Agency Investigation and Recommendation

- a) After investigating the variance petition and considering the views of persons who might be adversely affected by the grant of the variance, the Agency shall within 30 days of the filing of the petition or any amendment thereto make a recommendation to the Board on the disposition of the petition. The recommendation shall 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) 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;
 - 3) Allegations of any other facts the Agency believes relevant to the disposition of the petition;
 - 4) The Agency's estimate of the costs that compliance would impose on the petitioner and on others and 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;
 - 5) 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; and
 - 6) The Agency's conclusion of what disposition should be made of the petition.

- b) The Agency shall serve a copy of its recommendation on the petitioner in accordance with Section 103.123(b). Failure of the Agency to timely file its recommendation shall be grounds for the Hearing Officer to adjourn the hearing to a date which will allow reasonable time to prepare.

Section 104.181 Response or Amended Petition

Within 7 days after receipt of the Agency Recommendation, the petitioner may:

- a) File with the Board a response to any Agency recommendation and a copy shall be served upon the Agency; or,
- b) File an amended petition for variance in accordance with Section 104.121, requesting that the matter be set for hearing. The Board shall authorize the matter for hearing and render a final decision within 90 days after the filing of the amended petition.

Section 104.182 RCRA Variances: Additional Information in Recommendation

- a) This section shall apply to Agency recommendations on petitions for RCRA Variances in addition to the provisions of Section 104.180
- b) The Agency shall file its recommendation with the Board within 30 days after the petition is filed.
- c) The recommendation shall include a fact sheet or statement of basis as provided in 35 Ill. Adm. Code 705.141 through 705.143, insofar as relevant to the variance requested.
- d) If the Agency recommends that the variance be granted, a partial draft permit reflecting the variance and recommended conditions shall be included with the recommendation.
- e) If the Agency recommends that the variance be denied, a notice of intent to deny shall be included with the recommendation.
- f) The Agency shall serve its recommendation on the United States Environmental Protection Agency 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.

Section 104.183 RCRA Variances: Public Comment

- a) Any person, including the United States Environmental Protection Agency, may comment in writing within 45 days after the Agency files its recommendation.
- b) Comment may be on both the petition for a RCRA variance and on the recommendation.
- c) The Board will mail copies of any written comment to the petitioner, the Agency and the United States Environmental Protection Agency, unless the person filing the comment files a proof of service on the persons entitled to copies.

SUBPART F: HEARINGS

Section 104.200 Proceedings

- a) Proceedings upon a petition for variance shall be in accordance with Part 103, except as otherwise provided in this Part.
- b) In a hearing on the petition for variance the burden of proof shall be on the petitioner and it shall be the duty of the petitioner, at hearing, to prove each material fact alleged in the petition for variance.

(Source: Former Section 102.200 recodified to new Section 104.161; Section 102.200 recodified from Section 102.201 at _____ Ill. Reg. _____)

Section 104.201 Proceedings (Recodified)

(Source: Section 104.201 recodified to Section 104.200 at Ill. Reg. _____)

Section 104.202 Transcripts (Recodified)

(Source: Section 104.202 recodified to Section 104.221 at Ill. Reg. _____)

SUBPART G: FINAL ACTION

Section 104.220 Decision (Recodified)

(Source: Section 104.220 recodified to Section 104.224 at Ill. Reg. _____)

Section 104.221 Transcripts

- a) In any proceeding brought pursuant to this Part, where a hearing has been authorized by the Board, the petitioner at its own cost shall furnish to the Board within 15 days following the completion of the hearing seven legible copies of a complete stenographic transcript of the proceedings of the hearing and any delay in the filing of the transcript shall constitute waiver of the right to a decision within 90 days under Section 38 of the Act.
- b) Upon petition and good cause shown, the Board may assume the cost of the stenographic transcript of the hearing provided, however, that such petition shall have been filed with and granted by the Board prior to the hearing.

(Source: Former Section 104.221 recodified to Section 104.225; new Section 104.221 recodified from Section 104.202 at _____ Ill. Reg. _____)

Section 104.224 Decision

The Board shall render a final decision upon the petition within 90 days after the filing of the petition, except that any party may agree to waive his right to a decision within 90 days. Time included in a continuance granted at the request of the petitioner shall not be counted towards the running of the 90 days. When exigencies of time require, the Board may delay the filing of an opinion for 30 days after the filing of its final order under this Part. Where the petition for variance is amended, the 90 day period shall commence from the date of filing of the amendment. Any order for the filing of a bond shall be in accordance with the Act.

(Source: Section 104.224 recodified from Section 104.220 at _____ Ill. Reg. _____)

Section 104.225 RCRA Variances: Board Decision

- a) Decision periods for RCRA variances are as provided in Section 38(c) of the Act.
- b) The Board will not grant a variance from 35 Ill. Adm. Code 703, 720, 721, 722, 723, 724 or 725, or order issuance or modification of a RCRA permit, unless the procedures of this Part applicable to petitions for RCRA variances have been followed.
- c) The Board may grant a RCRA variance only to the extent consistent with, and with conditions no less stringent than, those which would be required by the Solid Waste Disposal Act as amended by the Resource Conservation and Recovery Act, and 40 CFR 260, 261, 262, 263, 264, 265 and 270. Variances shall require compliance with the regulations in the shortest possible time.
- d) The Board's final Order may direct the Agency to issue or modify a RCRA permit with conditions which may be set forth specifically in the Order, or which may consist of general guidelines to be followed by the Agency, together with applicable regulations, in issuing a permit.
- e) The Board will send copies of its final Opinion and Order to the Agency by messenger, to the United States Environmental Protection Agency, the petitioner and any other party by certified mail, and to all other persons who have requested such information by first class mail.

(Source: Section 104.225 recodified from Section 104.221 at _____ Ill. Reg. _____)

APPENDIX
OLD RULE NUMBERS REFERENCED


The following table is provided to aid in referencing old Board rule numbers to section numbers pursuant to codification.

Chapter 1: Procedural Rules	35 Ill. Adm. Code Parts 101-107
Part IV: Variances	Part 104: Variances
Rule 401(a)	Section 104.120
Rule 401(a)&(c)	Section 104.121
Rule 401(b)	Section 104.124
Rule 401(d)-(g)	Section 104.122
Rule 401(h)	Section 104.125
Rule 402	Section 104.123
Rule 403	Section 104.140
Rule 404	Section 104.141
Rule 405	Section 104.180

Rule 406	Section 104.181
Rule 407	Section 104.160
Rule 408	Section 104.200
Rule 409	Section 104.201
Rule 410	Section 104.220
Rule 411	Section 104.102
Rule 412	Section 104.202

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 14th day of May, 1987, by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board