ILLINOIS POLLUTION CONTROL BOARD
October 8, 1981

IN THE MATTER OF:	)	
	)	R80-18
AMENDMENT TO CHAPTER 1:	)	
PROCEDURAL RULES 304 AND 308	)	

OPINION OF THE BOARD (by J. Anderson):

This Proposed Opinion is written in support of the proposed rules, second notice of which was submitted to the Joint Committee on Administrative Rules (JCAR) pursuant to the Board's Order of October 8, 1981. If amendment of the rules is made pursuant to JCAR suggestion during this second notice period, the Board's Order adopting a Final Opinion will address any substantial changes.

On October 17, 1980 the Board on its own motion proposed to amend Procedural Rules 304 and 308. The proposal was published in the Environmental Register No. 226 on November 4, 1980 and in the Illinois Register on November 7, 1980, Vol. 4, p. 39. The Board has amended its proposal in light of timely comments filed December 22, 1980 by Sherex Chemical Company (PC 1) and Monterey Coal Company Company (PC 2), and the January 14, 1981 late filing of (PC 3) the Illinois Environmental Protection Agency (Agency). These comments will be discussed as each rule and changes therein are addressed.

Rule 304 Notice, Formal Complaint, and Answer

New subsection (d) is added in part as a "clean-up" matter. Answers to complaints had formerly been mentioned in Rule 308(a), dealing with motions. The Board believes it more appropriate to have the initial mention of all pleadings required in a case consolidated within the same rule.

The original proposal went on to provide "Affirmative defenses not raised by way of answer shall be deemed waived." The purpose of the proposed change was to require early pleading of affirmative defenses, to prevent the Board and the litigants from expending time and resources in bringing an action to hearing, only to have it dismissed on legal grounds which could have been foreseen.

Sherex and Monterey Coal agree that early pleading of such defenses is desirable. However, they contend that existence of

such defenses may only come to light during discovery, and that a litigant's rights to due process may be impaired if an affirmative defense is discovered after the initial 30 day answer period.

Rule 304(d) has been redrafted, and is patterned after Section 43(4) of the Civil Practice Act. Affirmative defenses must be pleaded by way of answer prior to hearing to prevent both surprise and unnecessary hearings, but may be raised in a supplemental answer filed by leave of the Hearing Officer as provided for in Procedural Rule 236(a).

Rule 308 Motions and Responses

The Board proposed modifications only in subsection (a), (b), and (e). The Agency has suggested that the Rule be revised and internally reordered in its entirety. The Agency's draft revision retains nearly all of the language of the current rule. While the suggested rearrangement would improve the clarity of the Rule, the Board believes that any gain would be overbalanced by the confusion which, the Board has noted, follows a wholesale revision of any of its Procedural Rules. The Board has therefore not adopted the suggested revision, but will retain them for consideration in any future proceeding which may involve a "clean-up" of Chapter 1 as a whole.

Discussion of the answer, now contained in Rule 304(d), has been deleted from Rule 308(a). Rule 308(a) has been amended to specifically provide for the time and manner of making voluntary motions to dismiss, concerning which the existing rule is silent. The original proposal provided that such a motion, if made in writing, should be made 14 days prior to hearing, as is the requirement of motions to dismiss made by respondent. Sherex and the Agency note that this is inconsistent with the provisions allowing such motion to be made on the hearing record, and would result in a 14 day hiatus when the motion could not be made. As there is merit in this observation, the Board has provided that complainant's written motions to dismiss may be made at any time before the Board issues its decision.

Rule 308(a) has been amended to explicitly require that written motions "state the reasons for and grounds upon which the motion is made." While this elementary principle should not need to be enunciated, motions in many categories, but particularly the dismissal one, fail to state the premises on which a request for Board action is made.

Rule 308(a) would also mandate that motions for voluntary dismissal be accompanied by affidavit, a requirement that should be examined in conjunction with the addition to Rule 308(e). Rule 308(e) would allow the Board, for reasons stated, to dismiss an action without leave to reinstate "if justice so demands".

While this had been past Board practice, an appellate decision indicated that in order to continue so doing, the Board should so provide by rule, Village of South Elgin v. Waste Management of Illinois, Inc. et al. 381 N.E. 2d 778, 783, 64 Ill. App. 3d 565 (2d Dist., 1978).

This rule was proposed in response to situations occurring in some enforcement actions, which will not be here specified. In one, the complainant sought dismissal with leave to reinstate on the grounds that "the parties arrived at a mutually acceptable manner of disclosing of the matters alleged in the complaint". Dismissal in that sort of circumstance may be an inappropriate means of bypassing the notice and comment procedures of Rule 334 "Settlements", a bypassing which the Board does not encourage. The use of informal tools to assure compliance by a pollution source may be perfectly appropriate in a given case at a given time. Once a formal complaint is made, and the Board's public adjudicatory processes are engaged, the public and the Board are entitled to know what is happening in a case, and for what reasons. This is especially true where the complaint represents or acts on behalf of the public.

The Board cannot force a complainant to move forward with a case. The Board believes that if voluntary dismissal is allowed, but with the proviso that reinstatement may not be allowed, that this may provide a disincentive to any inclination to short cut Board procedures, or attempt to over-reach in the settlement of a complaint of dubious merit or validity. If a complainant chooses to pursue an informal "compliance order" after the filing of a complaint, he must do so with awareness that the original cause of action is extinguished. The Board believes that the safeguarding of the integrity of its public process is consistent with its role as part of a check and balance system in protecting the environment.

The Agency suggests that the Board dismiss an action without leave to reinstate only if respondent so requests in reply to a complainant's motion to dismiss with leave to reinstate. Adoption of such a condition would insure only that respondents with sophisticated attorneys receive procedural protection from revival of causes of action. The Board declines to create such a situation.

The affidavit requirement of Rule 308(a) is intended to make sure that the Board is given the actual reasons for which dismissal is sought. While the "if justice demands" standard for decision concerning dismissal without leave to reinstate may be less narrow than some would prefer, it is one which is contained in and has been found workable in other Board rules (e.g., Rule 311). Its application to the facts in any given case will be detailed in the Board's Orders, which are of course subject to reconsideration and appeal. The Board believes that these changes to its procedural rules will allow it to continue to provide efficient, open and just resolutions of the disputes brought the Board.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion was adopted on the 8th day of October, 1981 by a vote of 5-0.

Christan L. Moffett, Clerk
Illinois Pollution Control Board