

ILLINOIS POLLUTION CONTROL BOARD  
July 10, 1980

IN THE MATTER OF: )  
 )  
AMENDMENTS TO THE ) R80-2  
PROCEDURAL RULES )

PROPOSED RULE. SECOND NOTICE.  
OPINION AND ORDER OF THE BOARD (by J.D. Dumelle):

This proceeding was initiated on January 30, 1980 when the Board received a letter from the Chairman of the Environmental Law Committee of the Chicago Bar Association asking that Procedural Rule 311 (Continuances) be amended. On February 21, 1980 the Board adopted a Proposed Order on its own motion. The Proposed Order was published in Environmental Register 212 dated March 3, 1980 and in the March 14, 1980 Illinois Register.

Rule 311

This rule was first adopted by the Board on October 8, 1970 (In the Matter of: Procedural Rules, R70-4, 1 PCB 43-51). At that time continuances were granted by the Hearing Officers upon a showing of necessity and were not limited in their duration. Rule 311 was amended by the Board on February 14, 1974 to provide that continuances in excess of 45 days would require Board action (see In Matter of: Adoption of Revised Procedural Rules of the Pollution Control Board, R73-14, 14 PCB 155-158, October 10, 1974). Rule 311 was amended to its present form on December 16, 1976 (In the Matter of: Procedural Rules Revisions, R75-1, 24 PCB 481-489). At that time the Board limited the Hearing Officers' authority to 45 days per continuance and a total of 90 days. Continuances in variances and permit appeals were prohibited unless the statutory deadline for Board action was extended by the petitioner. (see In the Matter of: Procedural Rule Revisions, R75-1, May 12, 1977, 25 PCB 529, 533).

NEED FOR THIS RULEMAKING

In a fact sheet attached to the January 30, 1980 Chicago Bar Association letter, the 45 and 90 day limitations in Rules 311(a) and (b) were considered unrealistic. The Board agrees that it is practically impossible to proceed to a hearing in an enforcement case, even with a settlement, within 90 or even 180 days of the date a complaint is filed (the hearing officer can presently grant continuances that total up to 90 days without Board action, which can result in up to a 180 day period). The Board has recognized this difficulty by granting almost every motion for a continuance which has been filed in enforcement cases.

EFFECT OF THIS RULEMAKING

Granting additional authority to the Hearing Officers will place the responsibility to conduct an orderly proceeding where it belongs. The Hearing Officers already have the authority to rule on motions to amend complaints. It follows that they should be able to rule on continuances to avoid undue surprise and coordinate discovery.

Proposed Rule 311(b) concerns those permit appeals and variances in which hearings are scheduled. With the exception of NPDES permit appeals, to which the 90 day statutory decision period does not apply, no continuances are to be granted until a written waiver extending the decision date has been filed with the Clerk of the Board.

From time to time the Board has issued orders which have directed parties to proceed to a hearing or face dismissal. These orders are usually in cases which have no recorded activity for several months. Proposed Rule 311(c) will simply codify this existing Board practice.

PUBLIC COMMENT

Three public comments were received. Public Comment No. 1, from a Board Hearing Officer, suggested making extensions of deadlines automatic. The Board declines to follow this suggestion.

Public Comment No. 2 stated that the Illinois EPA has no objection to the proposed change.

Public Comment No. 3, submitted on behalf of Illinois Power Company and the law firm of Schiff Hardin & Waite, discusses two issues. First, the comment expresses disagreement with the statement that the 90 day limitation on Board action does not apply to NPDES permit appeals. The comment disapproves of the inclusion of the phrase "whenever applicable" in Rule 311(b) for this reason. The Board notes the comment but will not depart from its position in this matter as set forth in the February 21, 1980 Order of the Board in Nichols Homeshield, Inc. v. Environmental Protection Agency, PCB 79-66.

The second issue raised by Public Comment No.3 concerns possible interpretation of Rule 311(c). The comment contends that the rule as drafted could be interpreted as allowing the Board to dismiss a dilatory proceeding without a hearing. The comment states that the Board has no authority to do away with those hearings which, the comment says, must be held under §§31,40, and 37 of the Environmental Protection Act(Act).

The interpretation stated above is in fact the intended one. As discussed above, this is a codification of existing

Board practice. Dismissal (usually without prejudice) of cases is an essential tool that the Board uses sparingly. When properly used it aids in management of the caseload in an economical manner--directly, by actual dismissal, and indirectly, through threat of dismissal.

ORDER

This Order of the Board is subject to modification or withdrawal in the event of comment or objection by the Joint Committee on Administrative Rules.

Procedural Rule 311 shall read as follows:

311 Continuances

(a) A motion for continuance for any enforcement, variance, or permit appeal proceeding shall be granted by the Hearing Officer whenever justice may require. All motions for continuance must be supported by an affidavit or written motion before the Hearing Officer by the person or persons having knowledge of the facts supporting the motion.

(b) No continuance shall be granted for any variance or permit appeal proceeding unless the deadline for final Board action, whenever applicable, is extended by the petitioner.

(c) Whenever the Board notes, in its discretion, that any variance petition, permit appeal, or enforcement case is not proceeding expeditiously to a conclusion, the Board may order that a hearing be scheduled within 21 and held within 60 days or the variance petition, permit appeal, or enforcement case will be subject to dismissal.

IT IS SO ORDERED.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 10<sup>th</sup> day of July, 1980 by a vote of 5-0.

  
Christan L. Moffett, Clerk  
Illinois Pollution Control Board