

ILLINOIS POLLUTION CONTROL BOARD
January 21, 1988

IN THE MATTER OF:)
)
REGULATORY AND OTHER)
NON-ADJUDICATIVE) RES 88-1
HEARINGS AND PROCEEDINGS)

RESOLUTION OF THE BOARD (by J. Theodore Meyer):

In the course of the last several months, the Board and many others have given considerable thought to methods by which the Illinois regulatory system can be streamlined without undermining the quality, integrity, and public participation rights which characterize the system. Three major goals have been identified: to dovetail procedural requirements of the Environmental Protection Act (Act) with those of the Administrative Procedure Act, to enhance timely introduction and consideration of pertinent economic information in regulatory proceedings, and to more efficiently crystallize areas of dispute prior to hearing to allow for more efficient discussion of regulatory proposals at hearing. Full achievement of these goals will likely require pursuit of some statutory changes, a process to which the Board is fully committed.

In the interim, while scrutiny of the system continues, the Board believes that certain steps in the rulemaking process can be more efficiently managed by the Board and its hearing officers.

Generally, the Board believes that the system would be improved if hearings on a proposal are postponed until after first notice publication of the proposal and a subsequent round of comments and responses concerning that proposal. A preliminary written comment period would help resolve any ambiguities in the proposal and would frame the factual issues to be resolved at hearing. Specifically, the steps in the rulemaking process would be as follows.

1. Board review of a filed petition for completeness. After a rulemaking proposal is filed and docketed, it would be reviewed for completeness. A complete petition would include: a) the proposed regulation drafted in proper Administrative Procedure Act (APA) form; b) a statement of reasons, including a technical justification for the proposed

controls and, to the extent possible and appropriate, a list of the sources affected; c) copies of testimony expected to be presented at hearing; d) copies of all exhibits and references; and e) copies of any material to be incorporated by reference. The petition would proceed to hearing only after the proponent cures any inadequacy identified by Board Order.

2. Petition sent to APA first notice. When a petition appears to be complete, the Board would issue a first notice order, with the statement that the Board had not reviewed the merits of the proposal. The proposal would then be published in the Illinois Register. During the first notice period, members of the public would be requested to submit any questions they might have concerning either the form or substance of a rule, as well as to submit comments concerning the proposal.
3. Simultaneously with Step 2, above: Proposed rule sent to the Joint Committee on Administrative Rules (JCAR), the Department of Energy and Natural Resources (DENR), and the IEPA (in proceedings where the Agency is not a proponent) for preliminary review. By submitting the proposed rule to JCAR, DENR and the Agency at this stage, their questions and requests for information would be identified earlier than in some past proceedings. The proponent of the rule would be required to answer such questions (see below).
4. Proponent's responses to first notice comments, JCAR, DENR, and IEPA questions. After the APA first notice comment period is closed, the Board would require the proponent to file responses to comments received during the first notice period, including questions and comments from the Board, JCAR, DENR, and IEPA (where not a proponent). The Board would consider failure to make a timely response grounds for dismissal of the petition.
5. Authorization of hearing. If the comment and response step is completed without substantial modification of the proposal, the matter would be authorized for hearing. Substantial modifications might require a new comment period.
6. Notice of hearing and hearing officer order. The Board would direct its hearing officers to publish the notice of hearing in the Illinois Register in addition to giving the Board's usual methods of notice. The notice and hearing officer Order would state that priority in presentation of testimony and in questioning would be given to those who had pre-filed testimony by a date certain. While failure to pre-submit testimony would not absolutely preclude presentation of testimony, such testimony would be taken only if time remained during that hearing day.

7. Merit hearings. The Board believes that much of the element of "surprise" which has in past arisen because of lack of pre-hearing identification of areas of question and concern will have been eliminated, thereby reducing the need for cross-questioning. Pre-filed testimony would be entered into the record as if read, unless the hearing officer determines that it would aid public understanding to have the testimony read by the witness. (This would occur only in situations where there are members of the public in attendance who have not received copies of the testimony.)

The Board is aware that required pre-filing of testimony may inhibit hearing participation by those with limited resources. The Board is accordingly considering adding a new form of hearing participation: the sworn oral public comment. The commenter would answer only questions from the Board and the hearing officer. The oral comment would receive less weight than the weight given to testimony subject to questions by all participants. Specific hearing time would be allocated to the presentation of oral public comments.

8. Economic impact hearings. There would be a similar comment and response period prior to the economic impact statement hearings. Pre-filed testimony would also be required for these hearings.
9. Second notice. The Board believes that the interaction between the Board and JCAR at this stage would be improved, since JCAR's preliminary comments and concerns would have been earlier addressed.
10. Final adoption. The Board believes that the rules adopted pursuant to a record developed by these procedures should be no more susceptible to appeal than those under the current system.

The Board will shortly propose new procedural rules to implement these steps for all new regulatory proposals. In addition to the novel oral public comment provision, the Board will also consider adding a modified regulatory negotiating process to its procedures. In the meantime, the Board and its hearing officers will implement the above procedures on a case-by-case basis in ongoing proceedings by entry of such Orders as are lawful and appropriate.

The Board in cooperation with its sister agencies, will pursue any statutory changes necessary to authorize these, and any other procedures, which will improve the rulemaking system.

IT IS SO RESOLVED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Resolution was adopted on the 21st day of January, 1988, by a vote of 7-0.

Dorothy M. Gunn
Dorothy M. Gunn, Clerk
Illinois Pollution Control Board