

ILLINOIS POLLUTION CONTROL BOARD
January 7, 1982

IN THE MATTER OF:)
)
PROPOSAL TO AMEND RULES 208 AND 209) R81-13
OF PART II OF CHAPTER 1, THE BOARD'S)
PROCEDURAL RULES.)

ORDER OF THE BOARD (by I. Goodman):

On February 23, 1981 the Illinois Pollution Control Board (Board) received a proposal to amend Rules 208 and 209 of its Chapter 1: Procedural Rules from the Illinois Environmental Protection Agency (Agency), which was later assigned docket number R81-13 and published in the Environmental Register #234 of March 18, 1981. The Agency proposed to amend these procedural rules so that participants testifying at regulatory public hearings about scientific or technical matters be required to submit written testimony fourteen days in advance of the hearing date. The proposed amendments further provided that such testimony be circulated among the proceeding's other participants. Failure to so comply could be cured only by the participant being available for cross-examination at the next hearing, otherwise the testimony would be stricken from the record. This matter is hereby dismissed.

Pursuant to Section 26 of the Illinois Environmental Protection Act (Ill. Rev. Stat., 1981, ch. 111-1/2, §1026), no public hearing was required in this regulatory matter. An initial public comment period from April 2 through May 15, 1981 was extended through June 30, 1981. Comments were received from private industry, individuals and public interest groups. In general, the commentators favored requiring submission of written testimony pre-hearing, but all sought to further refine the Agency's proposal. As a whole, it was urged that the same requirements should apply to economic testimony, to which the Agency later offered no objection, explaining that it believed such to be included under scientific testimony; the fourteen day submittal date was insufficient and should be increased to at least twenty days; identification of the proceeding's participants was uncertain and should be delineated, and the hearing officer's discretion should be strengthened so that a non-complying participant's testimony would not be unnecessarily barred.

The Board having reviewed the Agency's proposal, rationale and comments and those proffered by others finds that such a broad requirement for written testimony essentially makes for paper hearings, which have a chilling effect on public participation.

For example, a pre-hearing exchange of written testimony increases the potential for off-the-record compromise and resolutions between opposing participants. Not only does this inhibit fact-finding via cross-examination, but also leaves the Board with a deficient record. Secondly, if as suggested by the Agency, written testimony is not entirely read into the record, but rather accepted as an exhibit, participants not privy to the prehearing exchange would be unable to thoroughly cross-examine or respond. Perhaps the most chilling effect is felt by participants who are potential witnesses. Participants prompted at a hearing to testify may forego the opportunity simply because no prior writing was submitted. The Board cannot adopt general rules which in defining some participants and their roles in a regulatory matter, exclude others. Furthermore, regulatory hearings are intended to provide the Board with the information it needs to adopt fair, clear and complete regulations. To inhibit the participants, the Board would be inhibiting its own information-gathering activity.

The sanctions proposed by the Agency for failure to comply with pre-hearing submissions are more stringent than those currently contained in the Board's Chapter 1 rules pertaining to public comments. If a participant failed to abide by the rules, the Agency would not even have that testimony afforded the status of public comment, but rather would have it stricken from the record. Since the participant was available for cross-examination at the time the testimony was given, this result is unduly harsh.

Rules 206 and 209 of Chapter 1 are currently structured to provide for prior written submissions when the hearing officer discerns them necessary for the development of a fair and complete record. While supporting the Agency's proposal, the commentators consistently argued that an amendment vesting the hearing officer with discretionary power to not require prior written testimony was needed to safeguard the procedure. Given the similarity between the existing rules and the proposed amendment and the chilling effects of the proposal, this matter has been dismissed. The Board, as apparently do the commentators based on their suggestions, trusts that its hearing officers will properly exercise their discretion when so required.

Lastly the comments received in this matter brought to light a number of deficiencies in the current Rules 208 and 209. These will be corrected in the upcoming review of the procedural rules.

IT IS SO ORDERED.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 7th day of January, 1982 by a vote of 4-0.


Christan L. Moffett, Clerk
Illinois Pollution Control Board