

JUN 05 2000

STATE OF ILLINOIS
Pollution Control Board

ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)	<i>P.C. # 10</i>
)	
REVISION OF THE BOARD'S)	R00-20
PROCEDURAL RULES: 35 ILL. ADM.)	(Rulemaking – Procedural)
CODE 101 – 130)	

PUBLIC COMMENT OF THE ILLINOIS STATE BAR ASSOCIATION'S ENVIRONMENTAL LAW SECTION COUNCIL

The Environmental Law Section Council (Section) appreciates the opportunity to comment on the proposed Procedural Rules affecting matters pending before the Illinois Pollution Control Board. The Council is made up of a number of attorneys who regularly practice in the area of Environmental Law and who regularly appear before this Board. The following comments should not be construed to represent the position of the Illinois State Bar Association.

Section 101.400(a)(3) provides that “[a]ttorneys who are licensed to practice in a state other than Illinois and who are not licensed and registered to practice in the State of Illinois may request to appear pro hac vice on a particular matter on a motion filed with the Board.” The Section believes that such a provision is unwarranted and contrary to law.

Pursuant to Illinois law, only the Supreme Court can control the practice of law in this state. *See 735 ILCS 5/1-104.* The Illinois Pollution Control Board has consistently stated that adjudicatory proceedings constitute the practice of law.

The Supreme Court Rules provide that only attorneys licensed to practice in Illinois can appear as attorneys in Illinois. *See generally, S. Ct. Rule 707.* There the Rule provides that a circuit court may, in its discretion, allow attorneys licensed elsewhere to appear in Illinois courts.

However, there is no similar Supreme Court Rule which extends this authority to administrative agencies.

Section 101.400(d) provides that “[a]ny person may appear on behalf of himself or others in a rulemaking proceeding. . .” While the Section agrees that an individual has a right to represent themselves in any proceeding, it believes that a blanket allowance of non-attorneys to appear in a representative capacity in rulemaking proceedings seems inappropriate. The Section believes that a strong distinction does not necessarily exist between regulatory and adjudicatory proceedings. In any event it is possible to imagine rulemaking proceedings in which an individual's rights and interests are being impacted, in which legal counsel would be necessary, particularly with respect to site specific proceedings.

As stated above, the Section agrees with the prohibition against non-lawyers representing parties in adjudicatory proceedings, but disputes the assertion in the proposed regulations that all regulatory proceedings can be done with non-lawyers. At a minimum, such determinations should be handled on a case-by-case basis.

Section 103.204 (e) provides that “[e]xcept as provided in subsection (f) of this Section, the respondent *must* file an answer within 60 days after receipt of the complaint if respondent wants to deny any allegations in the complaint.” Past Board practice has indicated no answer need be filed. The statute says the respondent *may* file an answer. The proposed Rule mandates the filing of an answer. The Section opposes this mandate for a number of reasons.

First, the proposed Rule clearly conflicts with the permissive statutory language. It is well settled that when a statute is unambiguous, it must be enforced as enacted, and a court may not depart from its plain language by reading into it exceptions, limitations, or conditions not

expressed by the legislature. *People v. Woodard*, 175 Ill.2d 435, 443 (1997). Presumably this law is equally applicable to the Board.

Second, the proposed Rule would make unnecessary changes to past practice. Finally, such a change will likely increase costs. Because the experience of the Section is that most cases before the Board settle prior to a decision by the Board, such a mandate may unnecessarily increase the costs without any benefit to those before the Board. The Section is concerned that there is a reasonable probability that litigation will result over whether an answer will need to be filed.

Section 101.904(b) and Subpart G of Part 102 both deal with appeals of final orders of the Board. Absent is a clear indication that it is not necessary that a motion for reconsideration of a final Board Order be filed in order to exhaust administrative remedies prior to appeal as required by the Administrative Procedures Act.

In *Strube v. Illinois Environmental Protection Agency*, 610 N.E.2d 717 (3rd Dist. 1993), the Illinois Attorney General's office sought dismissal of an appeal taken from a final Board Order on the basis a motion for reconsideration of the Board's final order had not been filed prior to the appeal. Although the Third District rejected the argument a motion for reconsideration was a jurisdictional prerequisite to appeal of a final Board Order, there was considerable expense to the petitioner to address this issue. Clarification that a motion for reconsideration is not necessary would avoid any potential future ambiguity and unnecessary expense regarding this issue.

Subpart C of Part 104 of the proposed rules deals with Provisional Variances. Nowhere does the Subpart address appeal rights. Therefore, these provision should be amended to clarify that the Board also has authority to review the Agency's denial of a request for provisional

variance. The rules suggest the Board will not hear appeal of a provisional variance denial and will issue a provisional variance only upon IEPA recommendation.

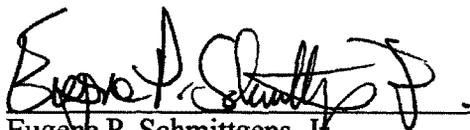
Currently, IEPA's denial of a provisional variance can be appealed to the Appellate Court (See *W.R. Meadows v. Illinois Environmental Protection Agency*, (Case No.4-96-0736, 4th Dist. Court of Appeals). It is not clear whether such a denial can be brought to the Board. For the same reasons the Board is the most appropriate body to hear permit and variance appeals, it should also be the reviewing body for provisional variance appeals. There is no reason for these appeals to be brought to the Appellate Court rather than the Board.

Finally, §104.304 provides that "[i]f the Agency fails to take a final action within 30 days after receipt of the request, the person may initiate a variance proceeding pursuant to Section 104.120 of this Part." There is no §104.120 in the proposed rules. Therefore, it appears as though the cited language contains a misprint.

The Section requests that the Pollution Control Board consider the above comments as it proceeds with this rulemaking. Again, it appreciates to opportunity to present these comments.

Respectfully submitted,

Environmental Law Section Council
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Illinois State Bar Association

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