ILLINOIS POLLUTION CONTROL BOARD
July 10, 1997

IN THE MATTER OF:	)	
	)	
PETITION OF RECYCLE	)	
TECHNOLOGIES, INC. FOR AN	)	
ADJUSTED STANDARD UNDER 35 ILL.	)	AS 97-9
ADM. CODE 720.131(c)	)	(Adjusted Standard - RCRA)

CONCURRING OPINION (by C.A. Manning):

The majority in this matter, in ruling on the Agency's motion to dismiss for the failure of RTI to be represented by an attorney, finds that only an attorney may represent a corporation in an adjusted standard proceeding before the Board. While I agree that the current Illinois case law, pursuant to the Attorney Act (705 ILCS 205/1 *et seq*. (1996)) and the Corporation Practice Law Prohibition Act (705 ILCS 229/1 *et seq*. (1996)), requires such a finding, I write separately to emphasize the policy concerns inherent in this issue as it applies to practice before the Board.

At the outset, I note that in the entire 26-year history of the Board, the issue of whether a corporation needs to be represented by an attorney has never been raised or addressed in the context of a proceeding before the Board. Moreover, non-attorneys have customarily, albeit not regularly, appeared before the Board in several contexts to seek Board opinions and orders in matters within the Board's jurisdiction. For instance, city engineers have sought variances from the Board's substantive environmental regulations; engineering consulting firms have pursued appeals of Agency decisions concerning underground storage tank determinations and other permit matters; and county solid waste administrators have filed administrative citation cases before the Board. Indeed, the Board has several pending matters which fall within this realm, and some of which the Agency is a party.

Based upon relevant case law, several salient principles have been established by the courts concerning the question of the unauthorized practice of law. First and foremost, the Board recognizes that it is the prerogative of the judiciary to regulate the practice of law in this State and that questions of what constitutes the "practice of law" are within the purview of the judicial branch of government, not the legislative. See People *ex rel*. Chicago Bar Association v. Goodman, 366 Ill. 346, 349-50, 352, 8 N.E.2d 941, 944, 945 (1937); Perto v. Board of Review, 274 Ill. App. 3d 485, 493, 654 N.E.2d 232, 238 (2nd Dist. 1995). Accordingly, while I appreciate Board Member Meyer's dissenting recitation of the "open access" legislative intent which underlies the Environmental Protection Act, such Act or intent is not legally decisive for us in this matter.

Second, while most cases in this area have dealt with a non-attorney's (or non-licensed attorney's) appearance in a court of law, the courts have recognized that a lay person's

appearance before an administrative tribunal may in certain circumstances also constitute the unauthorized practice of law. The case law is clear. The key consideration is the character and nature of the action, not the specific forum or tribunal. See *In re* Discipio, 163 Ill. 2d 515, 523, 645 N.E.2d 906, 910 (1995); *In re* Yamaguchi, 118 Ill. 2d 417, 427, 515 N.E.2d 1235, 1239 (1987); Chicago Bar Association v. Quinlan & Tyson, Inc., 34 Ill. 2d 116, 120, 214 N.E.2d 771, 774 (1966); Goodman, 366 Ill. at 357, 8 N.E.2d at 947; Perto, 274 Ill. App. 3d at 494, 654 N.E.2d at 239. If the action constitutes the "practice of law," the person bringing the action is in violation of the law. See Goodman, 366 Ill. at 357,8 N.E.2d at 947. Further, the case is subject to dismissal, and any court or administrative order entered may be voided. Janiczek v. Dover Management Co., 134 Ill. App. 3d 543, 545-46, 481 N.E.2d 25, 26 (1st Dist. 1985); Housing Authority of the County of Cook v. Tonsul, 115 Ill. App. 3d 739, 740, 450 N.E.2d 1248, 1249 (1st Dist. 1983); Marken Real Estate & Management Corp. v. Adams, 56 Ill. App. 3d 426, 428-30, 371 N.E.2d 1192, 1194-95 (1st Dist. 1977); Leonard v. Walsh, 73 Ill. App. 2d 45, 48, 220 N.E.2d 57, 58 (1966).

Accordingly, the focus of the Board's inquiry in a particular case "must be on whether the activity in question requires legal knowledge and skill in order to apply legal principles and precedent." Discipio, 163 Ill. 2d at 523, 645 N.E.2d at 910. While we recognize that the ultimate determination of "practice of law" is one which is to be made by the judiciary, as an administrative quasi-judicial agency, we must be cognizant of the question each and every time a non-attorney appears before us in an adjudicatory matter.

It is for this reason that the Board itself, based upon its own research of the case law, initiated a change in our current procedural rules and reiterated publicly, in our proposed new procedural rules, that our current rule (35 Ill. Adm. Code 101.107(a)(2)) and current Board practice appears to run afoul of the attorney practice case law. Specifically, while indicating that "[t]he question of 'at what point, if any' proceedings before the Board by non-attorneys may become the unauthorized practice of law is one which has not been considered by the courts," we took the "conservative approach" and announced a proposed revision which would change that section to prohibit corporations from being represented by non-attorneys in adjudicatory matters before us. See In the Matter of: Revisions of the Board's Procedural Rules: 35 Ill. Adm. Code 101-130 (October 3, 1996), R97-8, slip op. at 11.

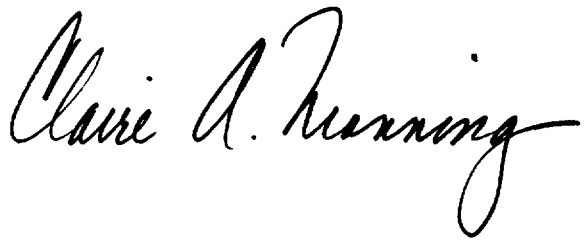
As an administrative tribunal whose decisions in the area of environmental law are directly appealable to the appellate courts, the Board in many ways is often the court of first impression. Accordingly, people "practice law" before us. Certainly, the Board is an administrative tribunal where many of the attorneys who appear before us regularly would, no doubt, argue that they are of course engaging in the "practice of law" in each and every proceeding and filing before us.

However, the Board is also an administrative tribunal with a long history of public accessibility and openness to environmental decisionmaking. No doubt that the many publicly or privately employed non-attorney engineers and administrators who have filed variance and adjusted standard petitions with us over the last 26 years would not agree that their "request for variance" from an environmental rule or standard necessarily constitutes the practice of

law. Indeed, the Board has had a long history of blending law and science. Board Members themselves have historically been from either the legal or the science and technical field. Moreover, the Board has always been comprised of lawyers and non-lawyers with technical expertise.

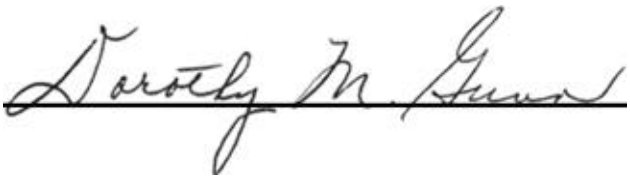
In part because of the Board's unique nature and history, we sought public comment on the proposed new procedural rule. Curiously, while the Agency filed substantial comments on those rules, it made no effort to comment on the attorney practice question. Indeed, it has also made no effort to request dismissal of other pending cases where non-attorneys appear on behalf of their companies or local government jurisdictions opposite the Agency. Accordingly, the ruling necessitated in this case by the Agency's motion leaves this Board at a cross-roads as to how to deal with the other cases. The Board questions whether the Agency (or any other party to a Board proceeding) makes a distinction between the nature of the action here and in those other cases as it relates to the question of the "practice of law" and, if so, the Board would like to be advised of such distinction. For example, a distinction may be drawn between the Board's contested cases wherein we act as a quasi-adjudicatory capacity and our regulatory matters wherein we act as a quasi-legislative body; between the mere filing of a matter and pursuing it through the hearing process; between the Board's cases wherein regulatory exception is requested (such as variances and adjusted standards) and the Board's cases wherein an appeal is taken of an Agency or local government decision.

These are questions that the Board will inevitably face in the future. Meanwhile, we again invite the Agency, and other interested parties, to comment on the attorney practice question as it relates to Board practice, as well as how the ruling in this case affects other cases. Such comment should of course be made in the proceedings dealing with revisions to the Board's procedural rules. See In the Matter of: Revisions of the Board's Procedural Rules: 35 Ill. Adm. Code 101-130 (October 3, 1996), R97-8.



Claire A. Manning

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above concurring opinion was filed on the 14th day of July, 1997.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board