BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	**)**	
	)	
REVISION OF THE BOARD'S	**)**	**PCB R00-20**
PROCEDURAL RULES: 35 ILL. ADM.	**)**	**(Rulemaking - Procedural)**
CODE 101-130	**)**	

COMMENTS ON FIRST NOTICE

JAMES E. RYAN, Attorney General of the State of Illinois, respectfully submits the following comments regarding the Illinois Pollution Control Board's March 16, 2000, First Notice Proposal in the above-referenced matter:

Introduction

The Attorney General's Office generally appears before the Board in enforcement actions which are governed by Parts 101 and 103. These actions are filed in the name of the People of the State of Illinois, usually at the request of the Illinois Environmental Protection Agency. The Attorney General's Office also represents the Office of State Fire Marshal in appeals. These Comments will focus on the procedural rules applicable to enforcement actions.

The Board and the circuit courts have concurrent jurisdiction over enforcement actions filed on behalf of the People of the State of Illinois. *See*, e.g., *People v. Fiorini* (1991), 143 Ill. 2d 318, 158 Ill. Dec. 499; *People v. N L Industries* (1992), 152 Ill. 2d 82, 178 Ill. Dec. 93. This fundamental point is important for several reasons. First of all, the Attorney General's Office may exercise its prosecutorial discretion in choosing the forum in

which to file. Secondly, the Board lacks equitable powers; this fact often influences the choice of forum. Thirdly, the Board may be considered to possess technical expertise regarding regulatory requirements. Lastly, the actions and decisions of the Board are reviewed according to different standards depending upon the nature of the proceedings.

In *National Marine v. Illinois EPA*, (1994) 159 Ill. 2d 381,203 Ill. Dec. 251, the Supreme Court has provided a context for these introductory comments:

> Within the framework of the Act, the General Assembly created two bodies to implement the Act's comprehensive, statewide pollution control provisions: the Board and the Agency. [*statutory citation omitted*] The Board serves both the quasi-legislative and the quasi-judicial functions. ([*statutory citation omitted*]; *Environmental Protection Agency v. Pollution Control Board* (1981), 86 Ill. 2d 390, 399, 56 Ill. Dec. 82, 427 N.E.2d 162; *Landfill, Inc. v. Pollution Control Board* (1978), 74 Ill. 2d 541, 554-55, 25 Ill. Dec. 602, 387 N.E.2d 258.) The Agency, on the other hand, serves investigative, permitting and/or prosecutorial functions. ([*statutory citation omitted*]; *Landfill, Inc*., 74 Ill. 2d at 554-55; *City of Waukegan v. Pollution Control Board* (1974), 57 Ill. 2d 170, 182.) The Agency is charged with investigating potential violations of the Act and prosecuting alleged violators of the Act before the Board [*statutory citation omitted*], or the circuit court (*People v. NL Industries, Inc.* (1992), 152 Ill. 2d 82, 178 Ill. Dec. 93, 604 N.E.2d 349). The Agency has the burden of proving violations of the Act and liability before the Board [*statutory citation omitted*], or the circuit court (*NL Industries, Inc*., 152 Ill. 2d at 100-01) and, in this regard, does not adjudicate any matters.

159 Ill. 2d at 386-7.

Concurrent jurisdiction essentially means that the Board functions, in enforcement actions, as an "environmental court." The Board acts in a quasi-judicial capacity when it determines rights or liabilities in an individual case based on the particular facts of the case. *EPA v. PCB* (2nd Dist. 1999), 308 Ill. App. 3d 741, 242 Ill. Dec. 444. Therefore, while the Board is subject to the Illinois Administrative Procedure Act, 5 ILCS 100/1 *et seq.*,the Board exercises quasi-judicial powers pursuant to a special statutory grant of

authority in its enforcement proceedings.

The Attorney General's Office recommends that the Board, consistent with its statutory authorization, promulgate procedural rules applicable to enforcement actions that are commensurate with the efficient and effective exercise of its quasi-judicial powers.

Comment

Section 101.302 Filing of Documents

The Board proposes in subsection (g) to require a minimum of 12 pitch font. The current rules do not have such a requirement. There are no similar regulations applicable to pleadings or petitions to be filed with any other State administrative agency, although 12 pitch font is required for some materials to be provided for public notification.

In subsection (j), the Board proposes a generally applicable page limitation of 30 pages. The current rules (Section 101.104) limit motions and briefs in support thereof to 15 pages and post-hearing briefs to 50 pages.

These proposed changes, especially in combination, could limit the scope of argument. The page limitations of the present rule are not unreasonable and should not be changed. There appears to be little need to expand the maximum length of motions from 15 pages to 30 pages. If the complexity of a given case warrants a 50 page brief, then such a length would seem to be necessary. The proposed restriction to 30 pages would likely prompt requests for leave to exceed such limit. No changes are recommended as to page limitations.

Section 101.304 Service of Documents

The Board proposes in subsection (d) that, in addition to dismissal of the

proceeding, “parties are subject to sanctions . . . if service is not timely made.” This is the first of many instances where the Board seeks to define and expand its authority to sanction noncompliance with its procedural rules. The concerns of the Attorney General’s Office are set forth, *infra*, in the comments on the proposed Section 101.800.

Section 101.400 Appearances, Withdrawals, and Substitutions of Attorneys

In subsection (a)(4), the Board proposes that a “separate” written notice of appearance be filed and that law firms, the Illinois EPA, and the Attorney General’s Office “must designate a lead attorney.” The Attorney General’s Office’s current practice, which is consistent with circuit court practice, is to simply file a Complaint with the assigned Assistant Attorney General indicated as “of counsel.” The proposed provision should be revised to allow this pleading practice to continue, i.e. that designation of lead complainant’s counsel on the complaint itself is adequate.

Section 101.616 Discovery

The Board employs the concepts of the Supreme Court Rules without making such Rules generally applicable. The current rules (Section 101.100(b)) provide that, “in the absence of a specific provision in these procedural rules to govern a particular situation, the parties or participants may argue that a particular provision of . . . the Illinois Supreme Court Rules provides guidance for the Board or hearing officer.” Section 101.100(b) as proposed also indicates that the Code of Civil Procedure and the Supreme Court Rules “do not expressly apply to proceedings before the Board.”

The Attorney General's Office suggests that it would be better to explicitly provide for the application of the Supreme Court Rules to discovery matters. Consistency with circuit court practice would reasonably be expected to further the objective of full and complete disclosure. In the First Notice, the Board does (as discussed below) make one provision of the Supreme Court Rules applicable to depositions. Piecemeal applicability could result in less consistency and more confusion, and thereby detract from the objective of a comprehensive and comprehensible record.

For instance, Supreme Court Rules 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, and 212 govern depositions. In contrast, as discussed *infra*, Section 101.622(g) would make only the time limitation of Supreme Court Rule 206(d) applicable.

Section 101.618 Admissions

The current rule (Section 103.162) and these proposed provisions impose a 20 day response deadline. Supreme Court Rule 216(c) allows 28 days. This discrepancy is the source of a certain amount of confusion among attorneys and respondents unfamiliar with Board practice. The Attorney General's Office would recommend a revision to extend the answer deadline from 20 days to 28 days in order to be consistent with Rule 216.

In subsection (j), the Board also seeks to define and expand its authority to sanction.

Section 101.620 Interrogatories

If Supreme Court Rule 213 were made applicable, the limit of 30 interrogatories including subparts would be imposed.

Section 101.622 Subpoenas

The Board's statutory authority (pursuant to Section 5(e) of the Act) to issue subpoenas is limited to hearings. 415 ILCS 5/5(e). Subsections (a) and (g) also refer to depositions.

Although the reference is to the "Amended" Supreme Court Rules, which is not necessary since such Rules have been effective since January 1, 1996, subsection (g) does propose to make Rule 206(d)'s three hour limit applicable to depositions in Board proceedings.

Judicial enforcement of a subpoena is suggested in subsection (h). This is an interesting suggestion because it would be consistent with the general applicability of the mandates of the Supreme Court Rules. It may be that a party, including the Attorney General as Complainant's counsel, could initiate a circuit court proceeding to enforce a subpoena. However, the Board also seeks to place an obligation or duty upon the Attorney General to do so upon the Board's request, even apparently in a proceeding in which the Attorney General may be representing an opposing party. This suggestion may require further study. This comment will simply request clarification as to the Board's position regarding legal authority.

Section 101.624 Examination of Adverse, Hostile or Unwilling Witness

The reference to the Code of Civil Procedure provision should be to Section 2-1102.

Section 101.626 Information Produced at Hearing

Even though the Illinois Administrative Procedure Act, 5 ILCS 100/1 *et seq.*, is generally applicable to Board proceedings, it is important to remember that there is concurrent jurisdiction between the circuit courts and the Board regarding enforcement actions. As discussed *supra*, Board enforcement proceedings are quasi-judicial in nature rather than administrative. Section 10-40(a) of the Administrative Procedure Act, 5 ILCS 100/10-40(a), states in part: "The rules of evidence and privileged as applied in civil cases in the circuit courts of this State shall be followed. Evidence not admissible under those rules of evidence may be admitted, however, (except where precluded by statute) if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs." This statutory provision does not expand the scope of admissible evidence as provided by the presently effective Section 103.204(a).

However, as proposed, subsection (a) would specifically make all hearsay admissible unless privileged. The hearsay must be "material, relevant, and would be relied upon by prudent persons in the conduct of serious affairs." This is not necessarily a helpful "standard" with which to consider hearsay.

For any evidence to be admissible, it must be competent, relevant, and material. A party must lay a foundation for admissibility, the nature and extent of which depend upon the evidence. In other words, competency must be established to show the evidence is not barred by some rule of evidence; materiality established to show that the evidence relates to the issues and allegations of the case; and relevance being whether it tends to prove or

disprove some fact in the case. Whether evidence "would be relied upon by prudent persons in the conduct of serious affairs" is merely one way of describing what is meant by the "weight" of the evidence or its probative value.

Hearsay's intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practiced under its cover, combine to support the rule that hearsay is inadmissible. 29 Am Jur 2d, Evidence § 493. The Board need not specifically refer to hearsay as being admissible in the revised provisions. Section 10-40(a) of the Administrative Procedure Act does not specifically refer to hearsay as being admissible. The business records exception to the hearsay rule has heretofore allowed the introduction of evidence that is "material, relevant, and would be relied upon by prudent persons in the conduct of serious affairs."

This type of evidence was at issue in *Discovery South Group et al. v. PCB and Village of Matteson*, 275 Ill. App. 3d 547, 211 Ill. Dec. 859 (1st Dist. 1995). The documents at issue were found to be admissible under the rules of administrative procedure. In so ruling, the appellate court quoted earlier decisions for the proposition that hearsay evidence is generally not admissible in an administrative proceeding. 275 Ill. app. 3d at 554.

The Attorney General's Office suggests that the word "hearsay" be deleted from Section 101.626(a).

Section 101.800 Sanctions for Failure to Comply with Procedural Rules, Board Orders, or Hearing Officer Orders

In its First Notice Opinion dated March 16, 2000, at page 18, the Board states that it is deleting the provisions proposed in the predecessor docket regarding the assessing of reasonable expenses and the removal of an attorney from a case. However, only the attorney removal provision has been deleted from subsection (b).

The Board's lack of authority to impose monetary sanctions was one of the rulings in *ESG Watts v. Pollution Control Board*, 286 Ill. App. 3d 325 (3rd Dist. 1997). In holding that the Board exceeded its statutory authority in awarding attorney's fees as a sanction, the Court provided the following as support:

> In cases other than where a court exercises its inherent powers and issues a contempt citation, specific authority to award attorney fees must be granted. *See Cummings v. Beaton & Associates, Inc.*, 249 Ill. App. 3d 287, 618 N.E.2d 292, 187 Ill. Dec. 701 (1992). In the absence of statutory authority or an agreement specifically authorizing them, attorney fees and other ordinary expenses of litigation may not be awarded. *Sanelli v. Glenview State Bank*, 126 Ill. App. 3d 411, 466 N.E.2d 1119, 81 Ill. Dec. 317 (1984); *Chicago Title & Trust Co. v. Walsh*, 34 Ill. App. 3d 458, 340 N.E.2d 106 (1975). Statutes which allow for the recovery of attorney fees must do so by specific language. *Miller v. Pollution Control Board*, 267 Ill. App. 3d 160, 642 N.E.2d 475, 204 Ill. Dec. 774 (1994); *State Farm Fire and Casualty Co. v. Miller Electric Co.*, 231 Ill. App. 3d 355, 596 N.E.2d 169, 172 Ill. Dec. 890 (1992). When the language of the statute does not specifically indicate that "attorney fees" are recoverable, the courts will not give the language an expanded meaning. *See Qazi v. Ismail*, 50 Ill. App. 3d 271, 364 N.E.2d 595, 7 Ill. Dec. 434 (1977) (citing *Waller v. Board of Education of Century Community Unit School District*, 28 Ill. App. 3d 328, 328 N.E.2d 604 (1975) (courts consistently deny recovery of attorney fees where such language as "attorney fees" has not been included in the statute)); *State Farm Fire and Casualty Co.*, 231 Ill. App. 3d at 359-60, 596 N.E.2d at 171-72.

286 Ill. App. 3d at 337-38. The Board has deleted reference to "attorney's fees" in its proposed rules, but seeks in subsection (b)(6) to exercise authority to grant "reasonable expenses" to the opposing party as a sanction. The Board does not possess this authority.

There is nothing in the Administrative Procedure Act or the Environmental Protection Act that could be construed as delegating such authority.

Section 103.204 Notice, complaint, and Answer

The Board seeks in subsection (e) to require that a respondent in an enforcement action "must" file an answer to a complaint. However, the statute clearly provides that such "respondent may file a written answer." 415 ILCS 5/31(c)(1). While the Attorney General's Office supports this concept, the issue should be evaluated in the context of the statutory authority given that Section 31(c)(1) utilizes the term "may" instead of "shall."

Section 103.212 Hearing on Complaint

The First Notice Opinion represents that this "Section codifies the existing practice of automatically setting all State enforcement actions for hearing." The Attorney General's Office encourages this practice and strongly supports subsection (c) as proposed.

Conclusion

The Attorney General's Office supports the Board's First Notice Proposal for the revision of its Procedural Rules. The Board is asked to consider the above comments and to make the changes necessary in the Second Notice in order to promulgate rules in strict

accord with the Board's delegated authority. As to discretionary matters, such as the general applicability of the Supreme Court Rules regarding discovery, the Board is strongly encouraged to make its practices more consistent with the requirements of the courts in order to achieve full and complete disclosure during the pretrial process. This was certainly the intent of the Supreme Court in amending these rules over four years ago and the Board would be well served to seek a similar objective during this rulemaking.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS
JAMES E. RYAN,
Attorney General of the
State of Illinois,

MATTHEW J. DUNN, Chief
Environmental Enforcement/Asbestos

BY: ***(Signature on Original)***
THOMAS DAVIS, Chief
Environmental Bureau
Assistant Attorney General

500 South Second Street
Springfield, Illinois 62706
217/782-9031
Dated: June 2, 2000