ILLINOIS POLLUTION CONTROL BOARD
December 4, 1980

IN THE MATTER OF PROPOSED)
AMENDMENTS TO PROCEDURAL RULES) R80-12
401 and 405.)

Proposed Rules. Second Notice
OPINION AND ORDER OF THE BOARD (by D. Satchell):

On July 10, 1980 the Board proposed amendments to Procedural Rules 401 and 405 (Proposed Rule, First Notice.) The proposal was published in the Environmental Register Number 220 on July 21, 1980 and in Illinois Register on August 1, 1980. The comment period has elapsed and the Board has received only one comment, that of the Illinois Environmental Protection Agency (Agency).

The Board recently amended these rules in R79-9 (Proposed Order of the Board, June 22, 1979, 34 PCB 113; Opinion and Order of the Board, September 20, 1979, 35 PCB 433; Illinois Register, October 12, 1979, p. 39; Order of the Board, November 29, 1979, 36 PCB 209; Illinois Register December 7, 1979, pp. 111, 128). Because a number of misinterpretations of the adopted Procedural Rules have arisen, the Board proposed to modify them for the purpose of clarification.

The June 22, 1979 Order of the Board in R79-9 proposed to amend only Rule 405 to require that the Agency in its recommendation provide an analysis of federal law. In its comments of August 21, 1979 the Illinois Environmental Protection Agency requested that Rule 401 be amended to place the duty on the petitioner to make the initial analysis of federal law in the variance petition. The Agency's duty under Rule 405 was to give its views with respect to the petitioner's assertions concerning federal law. The Agency's comment was substantially adopted in the Board's Opinion and Order of September 20, 1979.

In a dissenting Opinion, Mr. Werner stated, "It seems somewhat unfair to place a new legal procedural burden on those individuals or corporate entities who request help from the Board by a variance petition." On November 20, 1979 the Joint Committee on Administrative Rules objected to the rulemaking, stating that, "The proposed amendments . . . require petitioner . . . to prove consistency with applicable federal laws and regulations." The Joint Committee further stated that, "Under the Board's authority, the Board, not the petitioner, was given the responsibility to ensure conformity with federal laws and regulations." Legislation was proposed placing the burden of proof on the Agency.

The Agency filed comments on September 15, 1980. It supports the proposed language in Rule 405(a)(5), which requires that the Agency include an analysis of federal law in the recommendation. However, the Agency opposes the modification of Rule 401 because the burden of initially establishing that the requested relief can legally be granted should rest on the petitioner.

Before discussing what is meant by "the burden of proving consistency with federal laws" it is necessary to clarify some of the ways in which federal law acts upon the Board's jurisdiction. One must answer at least three questions to determine whether the Board can grant a variance consistently with federal law:

1. What is the text of the federal law?

2. What does the text mean?

3. What are the operative facts needed to show compliance with federal law or entitlement to a variance or exemption under federal law?

The Board does not require that the text of federal law be proved as a fact. The Board takes official notice of the text without even so stating. No one objects to this procedure [Ill. Rev. Stat. (1979) ch. 51, §10 et seq.]. It is useless to assign a burden of proving the text of federal law.

The text of federal regulations is sometimes helpful in determining the meaning. In addition the Board often considers interpretations by USEPA, court decisions and the legal arguments advanced by the Agency and the variance petitioner. Parts of the petition and recommendation sometimes resemble appellate briefs or memoranda of law. The interpretation of the applicable law rests with the Board, subject to review by the Appellate Courts and in some cases by USEPA. However, this is not a matter of evidence. The fact that the burden of proof is on the petitioner does not infer that the Agency's legal arguments are presumably correct. There is no burden of proof as to the meaning of federal law.

Usually the Board must make findings of fact to determine the effect of federal law. For example, the Board must determine what effect a facility's emissions will have on ambient air quality or whether a treatment technology is reasonably available to the petitioner. The burden of proving these facts is determined by federal law.

Rule 401 is a rule concerning pleading. The burden of proof is fixed by the substantive federal law. Usually the burden of pleading an issue lies with the party having the burden of proof, however, there are notable exceptions. For example, in a negligence action based on state law, but brought in federal court through diversity of citizenship, the defendant is required to raise the issue of contributory negligence by way of pleading it in an answer. However, the burden of proving (lack of) contributory negligence lies with the plaintiff where the applicable state law so provides, regardless of the procedural rule on pleading [Palmer v. Hoffman, 318 U.S. 109 (1943)].

The procedural rules in question are similar to those in Palmer v. Hoffman, although the federal/state roles are reversed. There a federal court was applying its procedural rules and state substantive law. The Board is a state agency applying its procedural rules to a case governed by federal substantive law. In either situation the forum must provide procedural rules to ensure orderly presentation of the case, but may not alter the substantive law.

As a second example, a party seeking to enforce a contract has the burden of proving that all the conditions on his part have been satisfied. However, in Illinois the plaintiff need not set forth in the complaint the detail of performance of conditions: "It is sufficient to allege generally that the party performed all of the conditions on his part; if the allegation be denied, the facts must be alleged in connection with the denial showing wherein there was a failure to perform." [Supreme Court Rule 133(c); Ill. Rev. Stat. ch. 110A, Section 133(c)]. In a contract there may be hundreds of conditions, only one of which is in dispute. The pleadings are shortened greatly if the defendant is obliged to point out which condition is in dispute, as opposed to the alternative where the plaintiff is required to plead the lengthy affirmative proposition. Placement of the burden of pleading on the defendant does not shift the burden of proof from the party seeking to enforce the contract. Similar considerations prevail with respect to pleading consistency of variances with federal law.

Rules 401(d), 401(e) and 401(f) have been modified to require petitioners to "indicate whether" the Board can grant the requested relief consistently with federal law. Where a detailed analysis is unnecessary or unavailable, the petitioner may elect to present only a legal conclusion as to whether the relief is consistent or not consistent with federal law.

Rule 401(g) has been added: "The petition may include an analysis of applicable federal law and legal arguments and facts which may be necessary to show compliance with federal law. If it does not and petitioner subsequently files a pleading containing

such, it will be deemed an amended petition." Under Rule 405(a) (5) the Agency is required to produce an analysis. The petitioner may include the detailed analysis in the petition or may await the recommendation. If it elects the latter and then decides to present the Board with its own analysis, the Board will deem the pleading an amended petition. The decision period will be moved up, giving the Agency the opportunity to file an amended recommendation.

The petitioner may respond to the Agency analysis under Rule 406 without restarting the decision period. Whether the analysis is a response or amendment depends on the extent to which it introduces new material. In this context new material may include, among other things, new facts, reference to rules not mentioned in the recommendation and legal arguments which are not merely the negation of the Agency's arguments. This will be decided on a case-by-case basis under the principles applicable to responses in general.

The amendments which the Board previously adopted were not intended to increase the burden on variance petitioners. A principal purpose was to notify petitioners of the existence of these federal requirements at the time they first begin to prepare the petition. Under the older practice some petitioners apparently first learned of federal requirements upon receipt of the recommendation. It was then necessary to request a continuance in order to prepare an analysis of federal law. The proposed procedures will further this purpose of advance notice. A petition may proceed by one of three routes:

1. Petitioner may include a complete analysis in the petition; or

2. Petitioner may rely on the Agency analysis; or

3. Petitioner may force the Agency to perform the analysis first, but must extend the decision time if it seeks thereafter to file its own analysis.

ORDER

The Board proposes to adopt the language of the July 10, 1980 proposed rule, first notice Order without change. The Clerk is directed to file a second notice with the Joint Committee on Administrative Rules.

IT IS SO ORDERED.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order were adopted on the 4th day of December, 1980 by a vote of 5-0.

Christan L. Moffett, Clerk
Illinois Pollution Control Board