STATE OF ILLINOIS
POLLUTION CONTROL BOARD
October 8, 1970

In the matter of	)	
	)	
	)	#R70-4
	)	
PROCEDURAL RULES	)	

OPINION OF THE BOARD (by Mr. Currie):

At its first meeting on July 14, 1970, the Pollution Control Board appointed a Technical Advisory Committee consisting of Messrs. Joseph Karaganis, Michael Schneiderman, and Thomas Scheuneman to draft proposed rules to govern the Board's procedures. The committee draft was revised by members of the Board and was published by Board order August 19. Pursuant to notice, public hearings were held and testimony received relative to the proposed rules September 16 in Chicago and September 18 in Alton. On the basis of testimony at these hearings and of written statements subsequently received and made a part of the record, the Board published a revised draft of the proposed rules September 25 together with a notice stating that additional comments would be accepted until October 6 and that the Board intended to adopt the final rules at its October 8 meeting. The revised proposal was amended in certain respects in response to suggestions* and was adopted by the Board October 8, 1970. The Rules become effective ten days after their filing with the Secretary of State.

On September 2 the Board voted to publish and to consolidate with this proceeding a proposal to repeal Rules and Regulations SWB-3 and SWB-16. Both provisions were obsolete; SWB-3 consisted of procedural rules for the Sanitary Water Board, which has been abolished, and SWB-16 provided for adoption and use of a common seal for the Sanitary Water Board. No one raised any objection at the hearings to the repeal of these provisions, and the Board repealed them on October 8.

*The minutes of the October 8 meeting contain the text and explanation of the amendments adopted at that time.

The Rules are based partly on the Federal Rules of Civil Procedure for judicial proceedings, partly on the rules of procedure of various state and federal agencies and partly on the independent thinking of the Technical Advisory Committee and the Board within the framework laid down by the procedural sections of the Environmental Protection Act, all as modified in response to suggestions made by the public. The Rules are in five parts. The first part is a general catch-all section dealing, among other things, with public information and with the conduct of Board meetings. Part II deals with rule-making and other non-adjudicative proceedings. Part III prescribes procedures for enforcement proceedings, Part IV for variances and Part V for permits. Part VI prescribes two fundamental canons of ethics to govern Board Members.

Part I.

The reason for the detail with which Rule 104 provides for the form of papers submitted to the Board is to avoid repeated inquiries from attorneys or others wishing to file papers as to the correct procedure. The requirement that 10 copies be filed is imposed in view of the necessity, in the absence of such a requirement, for the Board itself to reproduce all documents filed for circulation to each Board Member as well as to the Board's own files.

Section 105 prescribes in detail the method to be used for computing dates on which notice must be given and other acts taken in accordance with the Act and these Rules. As with many such technical provisions, it is less important what the rule is than that some reasonably clear rule be stated.

Section 106 makes clear that any person may appear in his own behalf and that any corporation or other business entity may appear by any authorized representative. The presence of an attorney is permitted but not required.

Section 107 attempts to deal with the complicated subject of public information in accord with the requirements of the Environmental Protection Act. It requires that virtually all information received or produced by members of the Board in regard to the Board's business, except internal Board communications, be made a matter of record in the Board's official files, and it prescribes a restrictive procedure for the identification of material in those files which may be withheld from public disclosure. Neither the Committee nor the Board felt able at this point to attempt to define what classes of data might be eligible for treatment as "confidential" under the statute. Accordingly, the definition of confidential data will be worked out on a case-by-case basis by the Board. A provision for copying fees in Rule 107 (e) is based on our own estimate of the actual cost to the Board of reproducing the original document.

Rule 109 essentially incorporates the notice requirements of the Environmental Protection Act and of the Public Meetings Act in regard to Board meetings, making clear, in accord with the overall policy of these rules, that wherever possible the Board will satisfy its requirements of notice by the mailing of a newsletter or of special notice to everyone on the mailing list. No attempt is made in this rule to detail the situations in which the law permits the Board to hold executive sessions. The Rule does contain a statement of the Board's policy to make all important decisions at meetings open to the public. The Public Meetings Act, however, does permit executive sessions on certain limited types of matters, and we have requested an opinion from the Attorney General as the the scope of that authority. In particular, it may be desirable for the Board, like any other tribunal, to hold preliminary discussions of the merits of adjudicative cases in private, since public discussion of such matters prior to an actual decision might tend to encourage improper attempts to influence the Board's decision.

Rule 110 specifies the procedure to be followed by the Board upon receipt of an informal complaint about a particular pollution source. This rule reflects the statutory separation of the powers of prosecution on the one hand and decision on the other and indicates that the Board itself has no power to institute proceedings against individual polluters.

Part II.

The rules in this part detail the procedure for the proposal of new regulations, for the authorization of a hearing, and for hearing procedures regarding rule-making proposals. Particular attention is called to Rule 203 (b), which requires the proponent of a proposed regulation to prepare and submit a statement of the reasons supporting his proposal. This statement should serve essentially the same purpose in rule-making proceedings that is served by the complaint in an individual pollution case, namely, to apprise other interested persons of the basis for the proposal in order to afford a meaningful opportunity for evaluation. Similarly, the proponent will be expected to support his proposed rule with testimony or other evidence at public hearing. Although the Board itself has the obligation to propose regulations on its own, its limited staff will require the Board, in many cases, to act as arbiter on the basis of evidence presented by others in rule-making as well as in adjudicative proceedings.

Rule 205 requires certain hearings to be held within 60 days after the receipt of the proposal in order to eliminate undue delay on the part of the Board.

Rule 206 (a) permits the hearing officer to require the submission of written expert testimony in advance of the hearing. The reason for this provision is to facilitate cross-examination of experts at the hearing itself. An alternative means of achieving the same goal, at the discretion of the hearing officer, is to require witnesses who have not submitted prior written testimony to attend a later session of the hearing for cross-examination purposes.

Rule 212 requires the Board to file a written opinion explaining its reasons for the adoption of any new or revised regulations. Such an opinion serves a number of purposes, such as informing the public as to the reasons for the decision, requiring the attention of Board members to the facts in the record and building a case to support the legality of such regulations in the event of a future court challenge.

Rule 213, which provides for the conduct of other types of non-adjudicative hearings by the Board, will apply among other things to exploratory hearings held on substantive subjects as to which no specific regulation has yet been proposed, Such a hearing would facilitate the gathering of information on which the Board can base an intelligent proposed regulation. We were asked to specify what additional kinds of hearings might be held under this provision. At this early stage in the Board's existence we are unable to do so and prefer to retain the flexibility afforded by the statute, which allows us to call new kinds of hearings without first amending the regulations.

Part III.

The rules in this part specify the contents of and the means of serving complaints in proceedings against alleged polluters, the procedures for authorization of hearing and for notice of hearing, and rules for the conduct of hearings and pre-trial proceedings. Rule 307, as in the case of certain rule-making proceedings, requires adjudicative hearings to be set no later than 60 days after the filing of the complaint.

Rules 308 and 315 essentially spell out the relationship between the hearing officer and the Board. The hearing officer, without interference by the Board, is to conduct the hearing and pre-trial proceedings and to pass on all motions not dealing with the merits of the case. Interlocutory appeals from the decisions of the hearing officer on such motions are forbidden in the interest of conducting an expeditious and orderly proceeding. Provision is made for the hearing officer to obtain a Board ruling on important questions that arise prior to the conclusion of the hearing by certification, but such a procedure is intended to be rarely invoked. Any motion to dismiss on the merits or for failure to state a claim or for want of jurisdiction can be decided only by the Board, and under Rule 320 (c) the hearing officer is required to admit any evidence whose admissibility depends upon an arguable interpretation of substantive law, in order once again that the merits of the case be decided only by the Board itself.

Special appearances to contest jurisdiction are allowed by Rule 308 (j).

The hearing officer, under Rule 309, is given broad power to consolidate or sever claims or to add parties in the interest of convenience. Intervention will be allowed under Rule 310 without the necessity of proving that the intervenor suffers an injury distinct from that of the population as a whole. However, the heairng officer may refuse a petition for intervention where such action is necessary in order to assure an orderly and expeditious hearing.

Rule 312 authorizes pre-hearing conferences largely for the simplification of issues and not principally as a medium of settling cases. The hearing officer himself has no authority to settle a case, and proposed Rule 333 requires the approval of the Board for settlement or compromise of any case pending before the Board. If the parties agree on a settlement, a written statement of the reasons for the agreement should be submitted to the Board.

Rule 313 provides for limited discovery in order to minimize the element of surprise at trial and to facilitate the development of a complete record. Recognizing that discovery procedures and litigation over the availability of such procedures have at times proved a ready instrument for

delay of court actions, the Board proposes to delegate wide discretion to the hearing officer to determine when discovery is appropriate. Consequently, the complicated provisions of the Federal Civil Rules regarding discovery, which have served largely to promote further litigation over discovery procedures, are not included in these Rules.

Rule 322 provides a limited opportunity for the Board or the hearing officer to view the premises involved in an individual enforcement case. Although the value of such a viewing to Board members actually participating may be considerable, the impact of a viewing is largely subjective. Consequently, the Board thought it desirable to allow any party a veto over any viewing by less than the entire Board since the results of the viewing do not appear in the written record.

Rule 330 permits the parties to file written briefs and, with Board permission, to make oral arguments before the Board after the close of a hearing. In order to encourage individual Board members to make independent study of the transcript and briefs, no provision is made in these rules for recommended findings or conclusions from the hearing officer at this time.

Part IV.

This part prescribes variance procedure, largely by incorporating, to the extent applicable, the procedures for enforcement hearings in Part III. There are, however, significant procedural differences between the two kinds of cases. For example, Rule 401 requires simultaneous filing of a variance petition with the Agency and with the Board in order that the Board may be apprised of the pending petition at the outset of the running of the period during which the Board must decide a variance case.

Although the statute does not require a hearing in every variance case, Rule 405 (b) makes clear that the Board will not grant any variance petition without adequate proof by the petitioner that compliance with the regulation or law from which variance is sought would impose an arbitrary or unreasonable hardship. This means that a hearing will be required in the bulk of variance cases in order to help ascertain the truth of matters alleged in the petition, even if there is no objection filed to the grant of the variance. In some cases, however, affidavits may suffice, and the equivalent of summary judgment may be granted.

Rule 406 provides that a request for a continuance by the petitioner for a variance constitutes a waiver of the right to a decision within 90 days. Rights given by statute, like such constitutional rights as trial by jury, may be waived. We cannot permit a litigant to obtain an automatic variance by delay which he brings about by his own action.

Special porvision is made in Rule 409 regarding petitions for variance from a regulation within 20 days of its effective date in accordance with the statutory provision that the filing of such a petition will stay enforcement of the new regulation during the pendency of the variance petition before the Board.

Part V.

Rule 502 provides for the contents of a petition contesting the denial of a permit by the Environmental Protection Agency and provides that Board proceedings to review such denial shall be conducted in accordance with the rules for enforcement cases in Part III. Rule 503 provides a procedure whereby any person may challenge the Agency's grant of a permit on the ground that the Agency acted in violation of the law or regulations in granting the permit or may seek a cease and desist order against the activity described in the permit on the ground that it would cause a violation of the Act, of the regulations, or of a Board order. These provisions are supported by the statutory right of any person to file a complaint against anyone---including the Agency--allegedly violating or threatening to violate the law or the regulations.

Rule 504 provides a special procedure for the nuclear facilities permits required by Title VIA. of the Environmental Protection Act. The Board has not yet devised a format for the environmental feasibility report required to be filed by the statute and by Rule 504 (3). It is the implication of the proposed rule that this feasibility report will entail something more than the description of the facility and of contaminant emissions and methods for their control which are required by subsections 1 and 2 of the same rule.

Part VI.

Rule 6-1 spells out the Board's present conception of the proper interpretation of the statutory requirement of full financial disclosure by Board members. It is the Board's view that the filing of conflict of interest statements by Board members on their appointment in July 1970, as required by the Governor's Ethics Code, is not sufficient to satisfy the additional requirement of the Environmental Protection Act. Specifically, what is needed in addition is a full statement of income, of gifts and of intangible assets and real property in order that the public may determine for itself whether or not a Board member's outside connections create for him a conflict of interest. The rule provides that such a statement will be made annually and will be available for public inspection at the Department of Personnel.

Rule 602 attempts to limit contacts between Board Members or staff and the public outside of formal Board proceedings. As in the case of judicial proceedings, it is imperative that decisions in cases involving individual pollution sources be based solely upon evidence which is properly a part of the formal record. Somewhat different considerations apply to rule-making proceedings because of the wide ranging nature of the inquiry and because such proceedings are not typically of an adversary nature. Consequently, in rule-making matters, contacts between Board members and others outside the formal record are not forbidden. However, Board members are admonished to make every reasonable effort to make the results of such informal contacts a part of the formal record in order that information on which the Board relies can be subjected to possible rebuttal.

A great many suggestions for amending the proposed rules were made at the public hearings. A number of these suggestions have been adopted, and explanations of those changes can be found in explanatory statements issued by the Board on September 25 and by the Chairman October 8 when the final amendments were made. The suggestions that were not adopted are too numerous to be discussed individually here. Responses to many of them can be found in the hearing transcripts.

One category of criticisms, however, deserves special comment. A witness on behalf of the Illinois Manufacturers Association and the Chicago Association of Commerce and Industry repeatedly argued that the Board cannot prescribe by rule procedures which have not been prescribed by the statute itself. He argued, for example, that theBoard had no authority to permit cross-examination of witnesses by members of the public, to permit intervention, or even to give notice to persons not specified in the statute. This last suggestion shows the weakness of the argument. The position taken equally would mean that the Board lacks power to prescribe discovery, prehearing conferences, rules of evidence, or any of the myriad procedural details that could not be provided by a General Assembly with many other things to do. It would deprive of all significance the explicit statutory authority, in section 26 of the Environmental Protection Act, for the adoption of procedural rules by the Board. The General Assembly's silence on specific issues such as intervention is to be interpreted as leaving the issue to the Board to decide under the general delegation of rule-making authority in section 26. As the Attorney General argued in response to the IMA's position, when the General Assembly wanted to limit an otherwise broad grant of rule-making authority to the Board it said so explicitly, as in section 27, which expressly denied the Board power to establish money charges for the emission of air or water contaminants. The IMA's position is wholly without merit. The provisions of the Rules here in question are supported by the authority of section 26.

I concur:

I dissent:

I, Regina E. Ryan, certify that the Board has approved the above Opinion this 8 day of October, 1970.

Regina E. Ryan
Clerk of the Board