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Symposium Luncheon Address

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Luncheon Address

CLAIRE A. MANNING*

Mark Cordes: One of our speakers this afternoon is Michael Maher. He has an extensive environmental practice and is a frequent speaker at not only our own symposia, but at other conferences and symposia throughout the state on matters of environmental law.

Michael J. Maher: Let me just say I do not know what is going to be said about me this afternoon and, therefore, I want to enter a continuing objection now for anything that may be unfavorable. Illinois is an unusual system. There is a unified program in Illinois to the extent that air, land, and water are all regulated by the same agency. It is also unique in that, unlike the federal system, the Illinois General Assembly saw fit to create a system where the police, the prosecuting judge and the appellate court were not all part of the very same agency. The result of the General Assembly's environmental concerns was the creation of this little known, very obscure state agency called the Pollution Control Board that has phenomenal power, a disproportionate amount of authority, and the ability to regulate whole industries out of existence. Do you ever ask yourself, Who decides whether 4.2 pounds per gallon is going to be the appropriate standard, How many people are we going to kill at 4.2 pounds per gallon, or How many industries are we going to put out of business at 4.2 pounds per gallon? Have you ever wondered what your discharge limit or emission standard is? The Illinois Pollution Control Board decides these standards. It is an incredibly difficult job.

Years ago when I was offered an opportunity to work at the Board, I asked the Attorney General's top environmental attorney, "What is the story with this Pollution Control Board?" He said to me, "It is the high ground in terms of seeing the entire interplay at the state-wide system of the regulatory process, enforcement process, and how industry and the regulatory agencies come together." This is the best description I can think of regarding the Board. It is comprised of seven members, three of whom are attorneys. It was a wonderful place to work, and it provided me the opportunity to see the interplay between state and federal regulatory systems. The current chairman of the Illinois Pollution Control Board is Claire Manning. Under her tenure,

* Claire Manning is chair of the Illinois Pollution Control Board, a position she has held since her first appointment in 1993. Ms. Manning served as chief labor relations counsel for Illinois and served three terms as a member of the Illinois State Labor Relations Board. She served as president elect of the National Association of Labor Relations Agencies before moving to the Illinois Pollution Control Board.

I can honestly say, the Board has been streamlined and perhaps brought into the twenty-first century. When I left the Board, the only people using personal computers were the secretaries. I remember wondering whether there was really a full comprehension as to the potential of electronic equipment. The Board has since made leaps and bounds into the twenty-first century, largely under the guidance of the current chairman. So with that, I would like to introduce Claire Manning and thank her for being the luncheon speaker.

Claire Manning: Thank you, Mike, for that nice introduction. It is great to know I am on the high ground, and I hope we stay there for quite a while. I wish to thank Northern Illinois University and Professor Cordes for inviting me to be the luncheon speaker at this symposium. I understand that you had some good speeches this morning and that you will have more this afternoon. While everybody is here to learn about Illinois' environmental laws and processes, as complicated as they sometimes are, what I would really like to do is highlight some of the environmental achievements that Illinois has made and the role that the Board has played and continues to play in the process.

There are seven members of the Board. We are blessed as well with a small staff of very competent individuals, most of whom are lawyers. Each of the Board members has an attorney assistant to help us in the adjudication of our cases. In addition, we have a staff of general employees. While the EPA's role in the environmental arena is to enforce all of the environmental regulations, the Pollution Control Board plays both an adjudicatory role and a quasi-legislative role. We make the rules and adjudicate environmental cases.

The Pollution Control Board also deals with enforcement actions, which are allegations that someone has violated the Environmental Protection Act. Enforcement cases can be brought by individual citizens, but more often they are brought by the State of Illinois through the Attorney General's office. Matt Dun, who is here, is chief of the Bureau of Environmental Enforcement for the Attorney General's office. They do a very nice job of bringing those cases before us for adjudication.

In terms of citizen enforcement actions, we see them in two areas: noise and odor. Both may constitute violations of the clean air provisions of the Environmental Protection Act. In the recent past, we have had cases like the World Music Theatre, where the Board required the World Music Theatre to have certain controls in order to abate their noise, effectively dealing with noise pollution from a citizen's perspective. Currently, we have some odor cases pending before the Board that involve livestock facilities. I expect that the Board will continue to see several of these kinds of citizen enforcement actions. The Board has the authority to determine whether there is a nuisance

in these cases. There might also be an environmental standard that is being violated, but in the odor cases the issue is often whether the odor creates a nuisance pursuant to the Environmental Protection Act. A nuisance odor is, in fact, a violation of our air regulations and would violate the Environmental Protection Act.

To demonstrate the Board's role in rulemaking and to highlight some of the changes that have occurred over the recent years, allow me to go through a brief history of the Board. The Board was created twenty-seven years ago in the early '70s. It was composed of a group of five people who actually set the rules for Illinois, including the original air rules, the original water rules, and the original land rules. The Board, of course, had participation from the Illinois Environmental Protection Agency and many other entities that were interested in these rules; but by and large, the Board was actually the proponent of the rule. The Board would establish a rule and put it out for public comment. As the environmental issues became more complicated, and as people participated more in the environmental process, the paradigm changed considerably in terms of environmental regulation. Now, the development of those environmental regulations is a participatory process, and generally it is the state IEPA that is at the "front end" of that process. The legislature generally establishes a legislative parameter and a framework for a given rule. Then, affected industries negotiate with the Illinois Environmental Protection Agency over particular aspects of the environmental regulation – after which the IEPA comes to the Board and files a proposed rule.

The Board has broad authority to make all kinds of environmental regulations; however, we must be very judicious in our use of that authority. In years past the Board has struck out on its own in various areas of environmental regulation. When the Board has done so without specific legislative authorization, negative consequences have occurred. For example, in the early '70s, under Governor Ogilvie's tenure, the Board passed a statewide leaf-burning ban. A lot of people think that Governor Ogilvie lost his bid for re-election because he had supported a state income tax. In actuality, it was not just the income tax that was a controversial issue during Ogilvie's tenure. The fact that "his" Pollution Control Board passed a statewide leaf-burning ban created a great deal of controversy. As a result, the legislature acted quickly to divest the Board of any jurisdiction it might have in leaf-burning, so the statute now reads that the Illinois Pollution Control Board shall not regulate any sort of leaf-burning throughout the state. Now that our environmental consciousness has been raised over the last twenty years, and much of the public thinks that a leaf-burning ban may be a good idea, there is a legislative proposal each year which would once again allow the Board to regulate leaf-burning. The point I am trying to make, is that the Board does

have a lot of authority; but the Board needs to be very judicious in how it exercises that authority lest it find itself out on a limb and the legislature just chop that limb right off. Thus, we have to work with all of the entities that participate in the environmental process: industry, the Environmental Protection Agency, the Attorney General's office, citizens' groups that support environmental legislation, the legislature, etc. The Board has done that well in the last several years.

One of the things that has remained the same over the years, in terms of Board rulemaking, is that it is very much a public process. But for perhaps the Illinois Commerce Commission, which also has a fairly extensive public process, our rulemaking process allows for more public input than any other sort of state regulatory authority. All of our hearings are open to the public. For every general rulemaking hearing that we have, there are two hearings throughout the state in different locations. The Board actually posts those hearing transcripts on our Web page. We also post the proposed rule, as well as the promulgated rule. I think we are one of the only agencies in the state that actually publishes our part of the Illinois Administrative Code right on our Web page. You can know everything we are doing, and even communicate with us, by simply accessing our Website.

In addition to the technological achievements, the Board has made many administrative achievements in the last several years as well. When I came to the Board, times were very tight fiscally in Illinois. A number of people in state government were looking at all small boards and commissions, one of which was the Pollution Control Board, to see whether they were valuable to state government, and what their value was. There was a lot of talk at that time of merging boards into other agencies, specifically of merging the Pollution Control Board into the Illinois Environmental Protection Agency. A lot of people came forward on behalf of the Pollution Control Board, spoke to people in the Governor's Office, and indicated that the proposed merger was a bad idea because the Board was created to be an independent adjudicatory body which had the final say. Because it was a check and balance on the process, the Board needed to have the independence and the fiscal ability to do its job. That message, over the past several years, came loud and clear to the Governor's Office, such that the Board is, and continues to be, a valuable part of the whole environmental process. The Board provides a workable neutral structure for environmental regulation in the State of Illinois. This structure is positive because everybody is able to participate in it, and the Board makes its decisions with independence and fairness.

While continuing to maintain our independence, we have also been able to more professionally, adequately, and efficiently interface with the rest of state government. What we do is so important and so tied into government,

it is absolutely necessary that we maintain good relations with the Attorney General's office, the IEPA, Central Management Services, the Bureau of the Budget, the Joint Committee on Administrative Rules that passes on our rules, and with the Secretary of State's office. One of my goals when I joined the Board was to establish good relationships with those entities, and I think we have successfully done so.

In keeping with one of Governor Edgars's central themes, we have learned how to do more work with less taxpayer dollars. When I joined the Board, I thought, "Boy, here is a really small Board with a big mission—we can't have much less than what we have, yet be expected to do more!" The Board did not always have the money to do a lot of what it needed to do. In years past, the Board had to stop holding hearings because money would be in short supply at the end of the fiscal year. The Board would have to halt hearings in June and say, "Gee, I'm sorry, can we wait until September to have the hearing? We're going to have more money then because we'll have a new budget." Those kinds of things were really onerous to me—especially because we were charged with getting everything done on time. What we were able to do over the last several years is really decrease the amount of money that we get from the legislature, from what we call GRF or general revenue funding, yet increase our share of funding from permit fees. We get very little taxpayer money now, and the great majority of our funding, probably seventy percent, now comes from Clean Air Act permit fees and various other funds that the IEPA gets through permit fees. We do not deal with the IEPA in terms of our funding, but instead with the Governor's Bureau of the Budget office. Consequently, we have learned to effectively interface with the Governor's Bureau of the Budget office and argue for dollars to aid in Board administration, fund our computer system, and provide resources to do what we need.

When I joined the Board several years ago, it was important for me to ensure that the Board's decision making be independent, professional and supported by the courts. Prior to my tenure, there were many issues that, for whatever reason, were getting to the Governor's office that were controversial environmental issues that did not need to be there and that should have stopped with the decision of the Board. Therefore, it was important to me that our decisions be respected by the appellate courts. I am happy to say that our appellate record over the last several years is very high. Many of the decisions we have reached recently in the adjudicatory areas have been upheld, and the Board is very happy about that because we need a stable system of law with which to deal. Not everybody is going to agree with the Board. More often than not, people disagree with what we do, but we try to

do our best, and have a strong appellate record indicating that we often stand as a final voice in the process.

I am not going to go through all of our regulatory achievements because you have already heard about many of them this morning. The paradigm of the rulemaking process really started changing with the development of our underground storage tank program, addressed by Ms. Harvey this morning. That was one of the first rules in which there was a more participatory process. There was an underground storage tank committee that presented a joint rule proposal, along with the IEPA, to the Board. Then, of course, we did the Site Remediation (Brownfields) rules and the Tiered Approach to Cleanup Objectives (TACO) rules. In all of those rules, there was very heavy participation on the part of industry and the environmental community, prior to the rule being proposed by the IEPA and at the hearings before the Board.

Because of that participation, the Board can sit in judgment of issues of disagreement as opposed to having to review a lot of different issues the parties have already resolved themselves.

Another major rule we recently promulgated is the Emissions Trading Rule, which required industries in the Chicago area to have Clean Air Act permits. Additionally, it required them to reduce their level of emissions. Those industries that could not reduce to a specific level were allowed to buy credits from those who could reduce more than their allotted amount; a very interesting and innovative market-based approach to regulation. Companies basically trade pollution credits. There is legislation now being proposed to do the same with water treatment systems and waste water treatment systems in Illinois municipalities.

The Board also recently promulgated the Great Lakes Initiative rules, which apply to eighteen dischargers into the Lake Michigan basin. In addition, the Board promulgated a fluorescent lightbulb rule, where we declared that fluorescent light bulbs are now a category of universal waste. What happened with the fluorescent light bulb rule shows how effective the Board's role is in the whole environmental process and how the new paradigm works. Industry and the IEPA decided there was a problem with the current rules involving disposal of fluorescent light bulbs, and both organizations wanted legislation established to allow the Board to make a rule to deal with this issue. Legislation passed and the IEPA, working with industry, developed a rule proposal and filed it with the Board. There was one major point of disagreement. That point of contention was whether the IEPA would allow crushing of the light bulbs before being disposed. The industry was very adamant about the need to crush the bulbs, as opposed to disposing of them in a landfill. Interestingly, there was a gentleman who attended our hearing who possessed the technology to deal with the crushed fluorescent light bulbs.

He and his consulting engineer came forward and explained the process to us. The IEPA was impressed, and talked with them further. As a result of those conversations, the IEPA amended their rule proposal. Ultimately, we still had to make a decision as to the extent to allow the crushing and what kind of standard to actually create in this area. But the point is that through such a participatory process we were able to get very close to the issue and promulgate a good rule which incorporated state-of-the-art technology.

We have several other interesting regulatory issues pending. The issue of environmental regulation of large livestock operations is one of the most controversial issues to hit the Board in its entire twenty-five year history. We had five public hearings throughout the State of Illinois on this rule, and every time the Board went to a hearing there were about two-hundred people there – along with news cameras. It really spoke to how visible a Board rulemaking could actually be. It was an interesting rule proposal in that it was proposed, as required by the Livestock Management Facilities Act, by the Department of Agriculture – after negotiations with the Environmental Protection Agency, the Department of Natural Resources and the Department of Public Health. Through this rulemaking the Board developed standards for lagoons based upon proximity to aquiferic material. Further, the Board developed a process whereby livestock operators had to register with the Department of Agriculture. While the Board's role and authority was limited by the Livestock Management Facilities Act, proposed amendments to this Act continue to be debated in Springfield.

Also on the horizon, and one of the important rules the Board is going to be dealing with, is the whole idea of proportionate share liability for environmental contamination and cleanup. Since legislation changed the environment liability scheme from one of joint and several liability to proportionate share, the Board will have to develop a process for adjudicating who is liable, who is not liable, and the extent of liability. The Board is holding those hearings beginning in May of 1998. We have three scheduled. There are many different opinions on how proportionate liability should be administered in this state.

I have gone through just a sample of what the Board has been doing. We have also adjudicated some fairly major cases recently. For example, the Board recently ruled on three landfill enforcement cases centering around landfills owned by one notorious landfill operator. In one of these cases, the Board revoked the landfill's permit to operate. In all three cases, we assessed seven or eight hundred thousand dollars in penalties. In all of them, we found numerous violations of the Act: financial assurance violations, water violations, groundwater violations, operational violations, and even air violations. At least two of the three cases are now on appeal, but based on

well reasoned opinions and the extensive record, I am confident that these decisions will be upheld.

In closing, the Board is here to do the right thing, the fair thing, and to adjudicate matters in a way that makes sense; whether confronted with rulemaking matters where we must work within legislative parameters or adjudicatory cases where we follow and apply the law to a specific set of circumstances. As Mike Maher pointed out in his introduction, the Board is a unique entity in state government. The Board provides a forum for bringing environmental issues forward in a way that makes sense, in a way that considers the law, public policy, and the interests of industry, government and Illinois citizens. I think the Board listens to everyone's concerns, applies the law or develops the regulation, and acts in a way that brings Illinois a cleaner environment and a more stable environmental process. That is the Board's job. I plan to make sure that we continue to do it well. Thank you for the opportunity to address you.