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# The Importance of Negotiations In Illinois Environmental Rulemaking and Overview of the Illinois Environmental Regulatory Process

JAMES T. HARRINGTON\*

## INTRODUCTION

The environmental regulatory program of the State of Illinois is comprised of a complex array of various agencies and procedures. This article begins to unravel this complexity by explaining the roles of the various agencies, focusing on the manner in which they implement environmental regulations. These procedures do not always work in an effective and efficient manner due, in part, to breakdowns in communication occurring in the rulemaking process. The latter part of this article advocates an improved system of rulemaking which would facilitate all interested parties' participation, hopefully resulting in a more effective system of environmental regulation in the State of Illinois.

### I. THE ILLINOIS ENVIRONMENTAL PROTECTION ACT AND AGENCIES CREATED THEREUNDER

In 1979, the Illinois General Assembly adopted the Illinois Environmental Protection Act ("Act"),<sup>1</sup> which established a comprehensive scheme for regulation of the environment and for administration of environmental programs in the State of Illinois. The Act created three agencies: the Illinois Environmental Protection Agency ("Agency"); the Illinois Pollution Control Board ("Board"); and the Institute for Environmental Quality ("Institute").<sup>2</sup>

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1. 415 ILCS 5/1 - 5/75 (1992).

2. Some programs relating to human affairs and the environment were left within the purview of pre-existing agencies. For example, the Illinois Department of Public Health continues to have responsibility for private drinking water, well testing, and bathing beach conditions. See KATHLEEN M. CROWLEY, STRUCTURES AND FUNCTIONS OF THE ILLINOIS POLLUTION CONTROL BOARD 1 (1985).

#### A. THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

The Agency is created by section 4 of the Act and is established in the executive branch of the state government under the control of a Director appointed by the Governor with the advice and consent of the Senate.<sup>3</sup> The Agency's duties include the following: gathering information; monitoring the quality of the environment; administering permit and certification systems; answering complaints; preparing recommendations for proceedings on requests for variances; acting as the investigative and enforcement agency for the state; proposing regulations; and serving as the officially designated state agency for purposes of most federal programs.<sup>4</sup> The Agency is headquartered in Springfield, the State's capitol. The agency is the primary permit, enforcement and investigative body of state government.

#### B. THE ILLINOIS CONTROL BOARD

Section 5 of the Act created the Board.<sup>5</sup> The Board is an independent, quasi-judicial, quasi-legislative agency composed of "seven technically qualified members, no more than four of whom may be of the same political party, to be appointed by the Governor with the advice and consent of the Senate."<sup>6</sup> The Governor appoints one member to serve as Chairman. The members are salaried and serve staggered, three year terms. During these terms, members serve on a full-time basis and are subject to the same constraints as the judiciary with respect to outside sources of compensation and contacts with parties concerning the substance of pending matters.<sup>7</sup>

Section 5 of the Act establishes the general powers and duties of the Board.<sup>8</sup> Decisions of the Board, whether regulatory or adjudica-

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3. 415 ILCS 5/4 (1992).

4. See 415 ILCS 5/1 - 5/12 (1992).

5. 415 ILCS 5/5 (1992).

6. 415 ILCS 5/5(a) (1992).

7. See CROWLEY, *supra* note 2, at 1.

8. (b) The Board shall determine, define and implement the environmental control standards applicable in the State of Illinois and may adopt rules and regulations in accordance with Title VII of this Act.

(c) The Board shall have authority to act for the State in regard to the adoption of standards for submission to the United States under any federal law respecting environmental protection. Such standards shall be adopted in accordance with Title VII of the Act and upon adoption shall be forwarded to the Environmental Protection Agency for submission to the United States pursuant to subsections (1) and (m) of Section 4 of this Act. Nothing in this paragraph shall limit the discretion of the Governor to delegate authority

tory in nature, are appealable on the record directly to the Illinois Appellate Court.<sup>9</sup>

### C. INSTITUTE FOR ENVIRONMENTAL QUALITY

At its inception, the duties of the Illinois Environmental Quality Institute were to conduct objective studies of the quality of the environment and the impact of environmental regulation upon the economy of the state.<sup>10</sup> In 1978, the duties of the Institute were transferred to the Illinois Institute of Natural Resources, which has been renamed the Department of Energy and Natural Resources ("DENR").<sup>11</sup> DENR's regulatory interaction with the Board has largely been confined to the preparation and presentation of economic information.<sup>12</sup>

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granted him under any federal law.

(d) The Board shall have authority to conduct hearings upon complaints charging violations of this Act or of regulations thereunder; upon petitions for variances; upon petitions for review of the Agency's denial of a permit in accordance with Title X of this Act; upon petition to remove a seal under Section 34 of this Act; upon other petitions for review of final determinations which are made pursuant to the Act or Board rule and which involve a subject which the Board is authorized to regulate; and such other hearings as may be provided by rule.

(e) In connection with any hearing pursuant to subsections (b) or (d) of this section the Board may subpoena and compel the attendance of witnesses and the production of evidence reasonably necessary to resolution of the matter under consideration. The Board shall issue such subpoenas upon the request of any party to a proceeding under subsection (d) of this Section or upon its own motion.

(f) The Board may prescribe reasonable fees for permits required pursuant to this Act. Such fees in the aggregate may not exceed the total cost to the Agency for its inspection and permit systems. The Board may not prescribe any permit fees which are different in amount from those established by this Act.

#### 415 ILCS 5/5(b)-(f) (1992).

9. [A]ny party adversely affected by a final order or determination of the Board may obtain judicial review, by filing a petition for review within thirty-five days after entry of the order . . . except that review shall be afforded directly in the Appellate Court for the District in which the cause of action arose and not in the Circuit Court.

#### 415 ILCS 5/41(a) (1992).

10. Environmental Protection Act, P.A. 76-2429, § 6, 1970 Ill. Laws 873, 879-880 (repealed 1978).

11. "The Department shall assume the functions of the former Institute for Environmental Quality . . . ." 20 ILCS 1105/1(c) (1992).

12. See CROWLEY, *supra* note 2, at 2.

## D. ATTORNEY GENERAL

With respect to enforcement of the Act, the Illinois Attorney General, a constitutional official elected by the voters, is the attorney for the Agency in all proceedings whether before the Board or in the courts.<sup>13</sup> The Attorney General is also specifically authorized to bring actions under various sections of the Act.<sup>14</sup> The Attorney General has independent authority, regardless of any administrative proceeding, to bring an action to abate air, water, or land pollution.<sup>15</sup>

Thus, either on recommendation of the Agency or on his own motion, it is within the discretion of the Attorney General whether and when to institute prosecutions of alleged violations of the Act and Board regulations in the name of the Agency or the People of the State of Illinois.<sup>16</sup> It is also in the discretion of the Attorney General to determine whether to appeal any adverse determination in the courts.<sup>17</sup>

The Act further provides for citizen's suits. Section 45(b) provides that any person adversely affected in fact by a violation of the Act or Board regulation adopted thereunder may sue for injunctive relief if the Board denied relief.<sup>18</sup> Pursuant to section 31(b) of the Act, citizens may bring an action before the Board seeking administrative relief.<sup>19</sup> The Board must grant a hearing unless the complaint is

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13. See *People ex rel Scott v. Briceland*, 359 N.E.2d 149, 156-157 (Ill. 1976) (noting that the Attorney General is the sole officer authorized to represent the People of Illinois in any litigation in which the People are the real party in interest).

14. See, e.g., 415 ILCS 5/42 (1992). "The State's Attorney of the county in which the violation occurred, or the Attorney General, may, at the request of the Agency or his own motion, institute a civil action for an injunction to restrain violations of this Act." *Id.* at (e).

15. See 415 ILCS 5/43 (1992).

In circumstances of substantial danger to the environment or to the public health of persons or to the welfare of persons where such danger is to the livelihood of such persons, the State's Attorney or Attorney General, upon request of the Agency or on his own motion, may institute a civil action for an immediate injunction to halt any discharge or other activity causing or contributing to the danger or to require such other action as may be necessary.

*Id.* at (a) (emphasis added).

16. *Briceland*, 359 N.E.2d at 156-157 (holding that the Attorney General has the sole authority to represent the people of the State where the State is the real party in interest).

17. *Id.*

18. Any person adversely affected in fact by a violation of this Act or of regulations adopted thereunder may sue for injunctive relief against such violation. However, except as provided in subsection (d), no action shall be

frivolous or duplicitous.<sup>20</sup>

The Board has adopted a comprehensive system of regulations which include regulations pertaining to air pollution,<sup>21</sup> water pollution,<sup>22</sup> solid waste,<sup>23</sup> noise pollution,<sup>24</sup> hazardous waste,<sup>25</sup> underground injection,<sup>26</sup> drinking water,<sup>27</sup> and mine water pollution,<sup>28</sup> as well as the Illinois Contingency Plan<sup>29</sup> and the Board's internal procedures.<sup>30</sup>

In general, these regulations were adopted by the Board after long quasi-legislative hearings in which the Agency and interested parties actively participated. Pursuant to section 41(c) of the Act, "[n]o challenge to the validity of a Board order shall be made in any enforcement proceeding under Title XII of this Act as to any issue that could have been raised in a timely petition for review under this Section."<sup>31</sup> Such petitions must be brought in the Illinois Appellate Courts.

## II. ENVIRONMENTAL REGULATIONS AND RULEMAKING IN ILLINOIS

Pursuant to section 5 of the Illinois Environmental Protection Act, the Board possesses all rulemaking authority in the area of environmental regulation.<sup>32</sup> Pursuant to section 27(a), the Board is allowed to make substantive regulations, and maintains a significant degree of flexibility in this regard. The Board has the power to promulgate these regulations, and:

- (a) Any such regulations may make different provisions as required by circumstances for different contaminant sources

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brought under this Section until 30 days after the plaintiff has been denied relief by the Board in a proceeding brought under subsection (b) of Section 31 of this Act.

415 ILCS 5/45(b) (1992).

19. "Any person may file with the Board a complaint . . . against any person allegedly violating this Act or any rule or regulation thereunder or any permit or term or condition thereof." 415 ILCS 5/31(b) (1992).

20. *Id.*

21. ILL. ADMIN. CODE tit. 35, § 201 (1991).

22. ILL. ADMIN. CODE tit. 35, § 301 (1991).

23. ILL. ADMIN. CODE tit. 35, § 807 (1991).

24. ILL. ADMIN. CODE tit. 35, § 900 (1991).

25. ILL. ADMIN. CODE tit. 35, § 720.101 (1991).

26. ILL. ADMIN. CODE tit. 35, § 730 (1991).

27. ILL. ADMIN. CODE tit. 35, § 601 (1991).

28. ILL. ADMIN. CODE tit. 35, § 401 (1991).

29. ILL. ADMIN. CODE tit. 35, § 724.150-56 (1991).

30. ILL. ADMIN. CODE tit. 35, § 101.100 (1991).

31. 415 ILCS 5/41(c) (1992).

32. 415 ILCS 5/5 (1992).

and for different geographical areas; may apply to sources outside this State causing, contributing to, or threatening environmental damage in Illinois; may make special provision for alert and abatement standards and procedures respecting occurrences or emergencies of pollution or on other short-term conditions constituting an acute danger to health or to the environment; and may include regulations specific to individual persons or sites. In promulgating regulations under this Act, the Board shall take into account the existing physical conditions, the character of the area involved, including the character of surrounding land uses, zoning classifications, the nature of the existing air quality or receiving body of water, as the case may be, and the technical feasibility and economic reasonableness of measuring or reducing the particular type of pollution. The generality of this grant of authority shall only be limited by the specifications of particular classes of regulations elsewhere in this Act.<sup>33</sup>

This process consumes a considerable amount of time, and thus, the Illinois legislature enacted section 28.2 of the Act in an effort to expedite the process.<sup>34</sup> This new section created a special category of rules known as "required rules."<sup>35</sup> Section 28.2(a) defines "required rules" as those which are required to be promulgated in order to meet the requirements of the federal Water Pollution Control Act,<sup>36</sup> Safe Drinking Water Act,<sup>37</sup> Clean Air Act,<sup>38</sup> and the Resource Conservation and Recovery Act.<sup>39</sup> Whenever the Agency proposes a rule that it believes to be required under federal law, it can so certify and expedite the procedures before the Board, including elimination of the economic impact study otherwise required.<sup>40</sup> The Agency maintains that regulations proposed according to federally mandated rules also eliminate the requirement for the Board to consider economic reasonableness and technical feasibility of those rules; although industry and the Board disagree with this interpretation.

In order to meet the deadlines imposed by the Clean Air Act Amendments of 1990 ("CAA"), industry, citizen groups and the

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33. 415 ILCS 5/27(a) (1992).

34. 415 ILCS 5/28.2 (1992).

35. 415 ILCS 5/28.2(a) (1992).

36. 33 U.S.C.A. §§ 1251-1387 (1988).

37. 42 U.S.C.A. §§ 300f-300j (1988).

38. 42 U.S.C.A. §§ 7401-7671q (West Supp. 1991).

39. 42 U.S.C.A. §§ 6903-6934 (West Supp. 1991).

40. 415 ILCS 5/28.2(a) (1992).

Agency worked out an expedited rulemaking procedure for rules required to be adopted under the CAA.<sup>41</sup> These procedures allowed for rules to be implemented in a more orderly and efficient manner.

Once a set of rules has been promulgated by one of the aforementioned methods, they are applicable on all parties within the State of Illinois. There are times when circumstances may be such that compliance with these rules may be unduly burdensome, and relief may be sought.

### III. RELIEF FROM RULES

There are three basic methods of obtaining relief from generally applicable rules: variances; adjusted standards; and site-specific rules.

#### A. VARIANCES

Pursuant to section 35 of the Act, the Board may grant a variance on a specific regulation upon demonstration that compliance with the regulation would impose an arbitrary and unreasonable hardship.<sup>42</sup> In

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41. These procedures provide as follows:

1. The Agency will propose a regulation in proper regulatory form to the PCB together with an explanatory statement, a list or description of the potentially affected parties, and supporting material.
2. The Board will publish the first public notice of the rule together with a schedule for three hearings on the rule.
3. The first hearing on the rule, which hearing will continue from day to day until completed, is dedicated to the Agency's presentation of its proposal and its response to questions.
4. 30 days later, the second hearing, also continued from day to day until completed is principally devoted to allowing affected parties and the public to respond to the rule. The Board has held that the Agency can be required to continue answering questions at this hearing.
5. The third hearing, allowing the Agency to respond to the testimony of other affected parties from the second hearing is only held if the Agency requests it. If the Agency waives the third hearing, the Board has held that there is no basis for holding it.
6. Prior to all hearings, the amendments require the pre-filing of testimony followed by the pre-filing of questions. The Board has held that it will not waive this requirement but it has in the past allowed additional questions or testimony if time allows and no one is prejudiced. (New Source Review)
7. Following receipt of the transcript the Board will allow 14 days for filing the comments. It will then move to a final rule no later than 130 days after receipt of the proposal if no third hearing is held, and no later than 150 days if the third hearing is held.

415 ILCS 5/28.5 (Smith-Hurd Supp. 1993).

42. "The board may grant individual variances beyond the limitations pre-

these instances, industry or an affected party acts as the petitioner and the Agency acts as the respondent. Except in the case of certain federally required rules, a variance petition filed within twenty days of the adoption of the rule will stay its effectiveness until the variance is decided.<sup>43</sup>

#### B. ADJUSTED STANDARDS

Pursuant to section 28.1 of the Act, the Board may grant adjusted standards from a generally applicable rule.<sup>44</sup> An adjusted standard can be indefinite in length as opposed to a variance which is generally limited to no more than five years. The Board may grant an adjusted standard if it determines, upon adequate proof, that:

- (1) factors relating to that petitioner are substantially and significantly different from the factors relied upon by the Board in adopting the general regulation applicable to that petitioner;
- (2) the existence of those factors justifies an adjusted standard;
- (3) the requested standard will not result in environmental or health effects substantially and significantly more adverse than the effects considered by the Board in adopting the rule of general applicability; and
- (4) the adjusted standard is consistent with any applicable federal law.<sup>45</sup>

#### C. SITE-SPECIFIC RULES

Pursuant to its rulemaking authority, the Board may adopt site-specific or industry specific rules as well as general rules. For example, outside the context of general rulemaking, the Board adopted a variety of regulations specific to individual water dischargers. It is presently considering solid waste rules for the Iron and Steel and Foundry Industries in PCB 90-26. These site-specific rulemaking procedures

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scribed in this Act, whenever it is found, upon presentation of adequate proof, that compliance . . . would impose an arbitrary or unreasonable hardship." 415 ILCS 5/35(a) (1992).

43. "If any person files a petition for a variance from a rule or regulation within 20 days after the effective date of such rule or regulation, the operation of such rule shall be stayed as to such person pending the disposition of the petition." 415 ILCS 5/38(b) (1992).

44. 415 ILCS 5/28.1 (1992).

45. 415 ILCS 5/28.1(c1) - (c4) (1992).

require the full panoply of procedures applicable to other rulemaking and must be sustained on the record.<sup>46</sup> The requirements of a record to support the Board's decision requires developing and presenting all necessary evidence on statutory factors.<sup>47</sup>

#### IV. ENFORCEMENT AUTHORITY

##### A. ADMINISTRATIVE AUTHORITY

As set forth above, the Agency is the principal enforcement authority in the State of Illinois. The Agency may not, however, except for certain orders set forth below, commence an action either before the Board or a court without going through the Illinois Attorney General.<sup>48</sup> The Agency's usual procedure is to commence an investigation and grant the parties an opportunity to confer before referring the matter to the Attorney General for enforcement. Pursuant to section 31(d) of the Act, the Agency must give written notice informing a potential respondent that the Agency intends to file a complaint and must provide that person an opportunity to confer with the Agency prior to bringing the complaint.<sup>49</sup> Pursuant to section 31(a), the Agency, through the Attorney General, may bring a complaint before the Board if the matter is not resolved through negotiation.<sup>50</sup> Further, any person may file a complaint before the Board alleging a violation of the Act.<sup>51</sup> The burden is upon the Agency or private party bringing the complaint to prove the violation.<sup>52</sup>

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46. 415 ILCS 5/5(e) (1992).

47. 415 ILCS 5/5(d)-(e) (1992).

48. *People ex rel. Scott v. Briceland*, 359 N.E.2d 149, 158 (Ill. 1976).

49. [T]he agency shall issue and serve upon the person complained against written notice informing such person that the Agency intends to file a formal complaint. Such written notice shall . . . offer the person an opportunity to meet with the appropriate agency personnel in an effort to resolve such conflicts which could lead to the filing of a formal complaint. 415 ILCS 5/31(d) (1992).

50. If such investigation discloses that a violation may exist, the Agency shall issue and serve upon the person complained against a written notice . . . and shall require the person so complained against to answer the charges of such formal complaint before the Board . . . 415 ILCS 5/31(a) (1992).

51. Any person may file with the Board a complaint, . . . against any person allegedly violating this Act or any rule or regulation thereunder or any permit or term or condition therein. 415 ILCS 5/31(b) (1992).

52. "In hearings before the Board . . . the burden shall be on the Agency or other complainant to show either the respondent has caused or threatened to cause air or water pollution or that the respondent has violated or threatens to violate any provision of this Act . . ." 415 ILCS 5/31(c) (1992).

Hearings before the Board are quasi-judicial in nature, although the rules of evidence are slightly relaxed. If the Board finds parties in violation of the Act or any regulation adopted by the Board, it may impose a civil penalty of up to fifty thousand dollars for said violation and, in addition, a civil penalty not to exceed ten thousand dollars for each day during which period the violation continues.<sup>53</sup> Section 42(b) was amended to increase penalties for a violation of the hazardous waste provisions of the Act or Resource Conservation and Recovery Act permit to twenty-five thousand dollars per day.<sup>54</sup> In an action by the States Attorney or the Attorney General to enforce such penalties, they may recover their costs, including reasonable attorneys' fees, expert witnesses' fees and consultants' fees.<sup>55</sup>

Pursuant to section 43 of the Act, the Attorney General or State's Attorney may seek an emergency injunction in the event of "substantial danger to the environment or the public health, the persons or the welfare of persons" to halt any discharge or other activity causing or contributing to the danger.<sup>56</sup> A court may issue an *ex parte* order in such cases.

#### B. CRIMINAL PENALTIES

The Act imposes very significant criminal penalties, particularly with respect to certain hazardous waste activities.<sup>57</sup> "Calculated criminal disposal of hazardous waste" is a Class 2 felony with penalties of up to five hundred thousand dollars per day.<sup>58</sup> "Criminal disposal of hazardous waste" is a Class 3 felony with penalties of up to two hundred and fifty thousand dollars per day;<sup>59</sup> and "unauthorized use of hazardous waste" is a Class 4 felony with up to a one hundred thousand dollars per day penalty.<sup>60</sup> "Reckless disposal of hazardous waste" is also a Class 4 felony, with up to a fifty thousand dollar per day penalty.<sup>61</sup>

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53. 415 ILCS 5/42(a) (1992).

54. 415 ILCS 5/42(b)(3) (1992).

55. "Without limiting any other authority which may exist for the awarding of attorney's fees and costs, the Board or a court of competent jurisdiction may award costs and reasonable attorney's fees, including the reasonable costs of expert witnesses and consultants . . . ." 415 ILCS 5/42(f) (1992).

56. 415 ILCS 5/43(a) (1992).

57. See 415 ILCS 5/44 (1992).

58. 415 ILCS 5/44(b) (1992).

59. 415 ILCS 5/44(c) (1992).

60. 415 ILCS 5/44(d) (1992).

61. 415 ILCS 5/44(f) (1992).

The State has a great deal of discretion in ascribing penalties for violations of the environmental regulations. However, when it comes to implementing these regulations, the State's discretion is somewhat fettered. The various agencies of the State must work very closely with the federal agencies in formulating environmental regulations.

## V. RELATIONSHIP TO FEDERAL LAW

Pursuant to sections 13(c), 13.4, 17.5, and 22.4, the Board may adopt rules which are identical in substance to federal rules for Underground Injection, Public Drinking Waters, Pretreatment and Hazardous Waste without holding merit hearings.<sup>62</sup>

Federal Prevention of Significant Determination, National Emission Standards for Hazardous Air Pollutants and New Source Performance Standards under the Clean Air Act are enforceable directly under section 39.1(b) of the Act.<sup>63</sup> Other federally required rules may be expedited under section 28.2, but others will require the full panoply of formal rulemaking.<sup>64</sup>

The insistence on an adequate record at state law to support "federally required" rules for the Clean Air Act State Implementation Plans and the refusal of the Board to accept USEPA and IEPA assertions as to the content of the record required hereby has caused considerable controversy. Modified rulemaking procedures under the recent amendments of the Act to expedite Clean Air Act Rules are in the preliminary stages of application. Only the Agency's proposal for New Source Rules in Non-Attainment Areas have been through the process so far and there has been considerable disagreement on their exact meaning.<sup>65</sup>

## VI. NEGOTIATED RULEMAKING

### A. PROBLEMS WITH THE CURRENT SYSTEM FOR RULEMAKING

Numerous rulemaking procedures before the Pollution Control Board have taken years to complete. This is in part due to the

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62. *See, e.g.*, 415 ILCS 5/13(c) (1992). "[F]or purposes of implementing a State UIC program, the Board shall adopt regulations which are identical in substance to federal regulations or amendments thereto promulgated by the Administrator of the United States Environmental Protection Agency in accordance with § 1421 of the Safe Drinking Water Act . . ." *Id.*

63. 415 ILCS 5/39.1(b) (1992).

64. *See supra* notes 33-38 and accompanying text for a discussion on the implementation and formulation of the rulemaking process as applied to "required rules."

65. ILL. ADMIN. CODE tit. 35, § 203.127 (1991).

enormously complicated nature of these rules, such as the detailed technical standards for solid waste disposal facilities.<sup>66</sup> It also arises because of the lack of technical resources at the Agency to support the rule with an adequate technical record that will stand up under public scrutiny. A major cause of delay, confusion, and heated dispute is the failure of the parties to work together to understand each others' positions as well as the failure to accommodate as many legitimate concerns as possible. The ultimate goal should be the elimination of many unnecessary disagreements.

#### B. FULL PARTICIPATION IN ENVIRONMENTAL RULEMAKING — A SOLUTION TO THE DILEMMA

It is my major thesis that the most important part of the rulemaking process should occur between all interested and affected parties prior to the proposal and continue outside the formal hearing process as the proposal goes forward. In short, intelligent communication between the Agency, affected parties and the public interest groups is essential to effective and efficient rulemaking in Illinois.

The Clean Air Act Amendments of 1990 provide an excellent example of how and when to identify issues. The Amendments spell out in what areas the state must adopt new rules, regulations and statutes.<sup>67</sup> Industry, the agencies and the public are able to ascertain from the Clean Air Act exactly what is required and when.<sup>68</sup> Those who are interested in effective rulemaking can identify the issues, develop a schedule of required actions, make contact with the other parties, and commence a process of information exchange, regulatory development and issue definition. Knowing when official action needs to take place allows the parties to develop their own schedule for development of proposals and information evolution and exchange.

In the best of circumstances, this will include identification of all affected and interested parties, development of a common understanding of the law and facts pertaining to the requirement, and ultimately, negotiations of an actual regulation or statute for adoption. In other

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66. ILL. ADMIN. CODE tit. 35, § 810 (1991).

67. Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within three years . . . after the promulgation of a national primary ambient air quality standard . . . a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region within such State. 42 U.S.C. § 7410(1) (1988 & Supp. 1991). *See also* 42 U.S.C. § 7401 (1988 & Supp. 1991).

68. 42 U.S.C. § 7401 (1988 & Supp. 1991).

cases, it will allow the areas of disagreement to be limited and defined so that all parties are prepared for meaningful, even if somewhat adversarial, hearings on those disputed portions of the proposal.

This process will eliminate significant wasted effort as the parties correct each others misinformation and will allow a much sharper focus on the real issues. This not only eliminates months of hearing time but also allows the Board to more effectively focus on the real issues and make reasoned decisions based on a more accurate record.

The Clean Air Act of 1990 provides the most startling examples of the success and importance of the negotiation process in the formulation of environmental regulations. The various industry trade groups and the IEPA worked together to develop Public Act 87-1213 which included several important CAA requirements.<sup>69</sup> The permit fees required by the CAA amendments were negotiated and included in the Act; the CAA major source permit program was written into the statute to save months of regulatory activity; and the expedited rulemaking procedures were developed.<sup>70</sup> At the same time, IEPA rules on annual emission reporting<sup>71</sup> and public participation<sup>72</sup> were negotiated and are near the process of final adoption. Rules on PM10 (particulate matter of less than 10 microns in size) were negotiated and presented to the Board. These rules were adopted on an expedited schedule, prior to the implementation of the Section 28(2) expedited rulemaking procedures.<sup>73</sup> Rules on new source construction and major modification in non-attainment areas were negotiated and presented to the Board.<sup>74</sup> Continuing negotiations to deal with new issues continued even while the initial proposals were being debated before the Board.

When the CAA program was first developed by the Agency, it envisioned a reduced or eliminated role for the Board. Industry objected vigorously and offered instead a system of expedited rule-

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69. This Section shall apply solely to the adoption of rules proposed by the Agency required to be developed by the State under the Clean Air Act as amended by the Clean Air Amendments of 1990. 415 ILCS 5/28.5(a) (1992).

70. 415 ILCS 5/28.5(c)-(l) (1992).

71. 16 Ill. Reg. 17195 (1992) (to be codified at ILL. ADMIN. CODE tit. 35, § 254 (proposed Nov. 13, 1992).

72. 16 Ill. Reg. 18202 (1992) (to be codified at ILL. ADMIN. CODE tit. 35, § 252 (proposed Dec. 4, 1992).

73. ILL. ADMIN. CODE tit. 35, § 212 (Order & Opinion in R92-21, 16 Ill. Reg. 18919).

74. ILL. ADMIN. CODE tit. 35, § 203 (Order & Opinion R92-21, 16 Ill. Reg. 18919).

making.<sup>75</sup> Industry objections were not based on a fundamental lack of faith in Agency good will, but upon years of experience that demonstrated the Agency's reluctance to consider other viewpoints and concerns or to reconsider its original ideas; especially when working against the time pressure of the CAA and the USEPA. Industry believed the Board process which required the Agency to develop a record sufficient to support a rule before a neutral third party and to answer questions on that record both insured the Agency's thoroughness of preparation and willingness to negotiate. In the past, the Agency's lack of understanding of the impact or feasibility of its rules contributed to the prolonged process. The shortened process agreed to in Public Act 87-1213 both ensured the Agency's continuous obligation to develop and defend an adequate rule based on an adequate record and the willingness of both the Agency and the regulated to exchange information and work towards an agreed rule.<sup>76</sup>

#### CONCLUSION

In today's environment, the only sure road to rational regulation is through a process of consultation, information exchange and negotiation. Important issues will be left to be fought out before decision making bodies, but those disagreements must be limited, focused and rational. The protracted misunderstandings of the past will not be tolerated by the public or allowed by the pressure of the law. Unilateral regulation by one Agency, such as IEPA will invite government by ukase, and can only be avoided by making the more neutral Board an effective and efficient rulemaking participant.

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75. See *supra* notes 35-40 and accompanying text for an explanation of the expedited rulemaking process.

76. See 415 ILCS 5/28.5 (1992).